



1 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law I. WORKERS' COMPENSATION SYSTEM A. Nature of System.

2 Witkin Sum. Cal. Law Work Comp § 1

[§ 1] Nature of System.

At common law, when an employee was injured in the course of employment and sued the employer, the employer would escape liability in three situations: (1) Where the employee was guilty of contributory negligence; (2) where the employee had assumed the risk of the employment; and (3) where the injury was due to the negligence of another employee.

Workers' compensation laws abolish these common law defenses and establish an absolute liability on the part of the employer, irrespective of negligence by either party. The statutes "rest on the underlying notion that the common-law remedy by action, with the requirements of proof incident to that remedy, involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and that, whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of modern industry." (*Western Indem. Co. v. Pillsbury* (1915) 170 C. 686, 693, 151 P. 398.) (See *Edson v. Industrial Acc. Com.* (1928) 206 C. 134, 137, 273 P. 572 [Workers' Compensation Act "was enacted to impose a charge on industry for losses caused by industry"]; *Kaiser Co. v. Industrial Acc. Com.* (1944) 65 C.A.2d 218, 220, 150 P.2d 562 [purpose of Act was to discard tort law fault principles]; *Mathews v. Work. Comp. App. Bd.* (1972) 6 C.3d 719, 728, 100 C.R. 301, 493 P.2d 1165 [phrase "irrespective of fault" permits Legislature to grant benefits "unhampered by common law tort concepts of negligence"]; *Williams v. State Comp. Ins. Fund* (1975) 50 C.A.3d 116, 123 C.R. 182, *infra*, §30; *Blew v. Horner* (1986) 187 C.A.3d 1380, 1389, 232 C.R. 660, *infra*, §190; *Hisel v. Los Angeles* (1987) 193 C.A.3d 969, 974, 975, 238 C.R. 678, *infra*, §42, citing the text; 42 *Cal. L. Rev.* 531 [history and comparative law]; 49 *Cal. L. Rev.* 631 [comparative study of different state systems]; 1 *Stanf. L. Rev.* 126 [criticizing limitations of coverage and inadequacy of disability payments in typical compensation acts]; 23 *Stanf. L. Rev.* 276 [European compensation systems].) (On relation of workers' compensation to unemployment benefits, see *infra*, §341; 3 *Summary* (10th), *Agency and Employment*, §452 et seq.)

Another important characteristic of the legislation is the rejection of the restrictive common law rules of *proximate cause*. Nevertheless, the causation aspect of workers' compensation cases still presents difficult problems. (See *Pacific Indem. Co. v. Industrial Acc. Com.* (1948) 86 C.A.2d 726, 728, 195 P.2d 919 [lengthy discussion of causation in relation to workers' compensation system]; 21 *Hastings L. J.* 609 [range of compensable consequences in workers' compensation]; *infra*, §230 et seq.)

There are a number of textbooks and practice works dealing with the subject of workers' compensation practice.

Among them are C.E.B., Workers' Compensation Practice 4th [practice guide for proceedings before Workers' Compensation Appeals Board]; C.E.B., Workers' Damages Practice 2d [third party and subrogation practice outside Workers' Compensation Act]; Cal. Civil Practice, Workers' Compensation [workers' compensation law, practice, procedure, and forms]; Hanna, California Law of Employee Injuries and Workers' Compensation, 2d (revised in 2004; hereafter "Hanna 2d (2004 ed.)") [practice, procedure, and principles under California law]; Herlick, California Workers' Compensation Law, 6th [statutory, regulatory, and case law] (hereafter "Herlick 6th"); 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §1 et seq.

West's Key Number Digest, Workers' Compensation k.1 et seq.

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2 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
B. Constitutional Enabling Provision.
1. Enlargement of Legislative Power.

2 Witkin Sum. Cal. Law Work Comp § 2

[§ 2] Enlargement of Legislative Power.

The Legislature is "vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party." The Legislature may provide for settlement of disputes arising under workers' compensation legislation "by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State." (Cal. Const., Art. XIV, §4, based on former Cal. Const., Art. XX, §21.)

California's Workers' Compensation Act (Act) was enacted pursuant to this authority. (See *infra*, §4.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law I. WORKERS' COMPENSATION SYSTEM B. Constitutional Enabling Provision. 2. No Limitation on Legislative Power.

2 Witkin Sum. Cal. Law Work Comp § 3

[§ 3] No Limitation on Legislative Power.

Earlier cases took the position that provisions of the workers' compensation statutes that were outside the scope of the constitutional enabling provision were invalid. (See, e.g., *Flickenger v. Industrial Acc. Com.* (1919) 181 C. 425, 432, 184 P. 851 [original statutory definition of independent contractor]; *Fidelity & Cas. Co. of New York v. Industrial Acc. Com. of Calif.* (1923) 191 C. 404, 406, 216 P. 578 [same]; *People v. Yosemite Lumber Co.* (1923) 191 C. 267, 270, 216 P. 39 [rehabilitation fund for disabled employees]; *Commercial Cas. Ins. Co. v. Industrial Acc. Com.* (1930) 211 C. 210, 214, 295 P. 11 [earlier statutes providing for subsequent injuries fund]; *People v. Standard Oil Co. of Calif.* (1933) 132 C.A. 563, 564, 23 P.2d 86 [same]; *Glass Containers v. Industrial Acc. Com.* (1953) 121 C.A.2d 656, 657, 264 P.2d 148, *infra*, §168 [legislative attempt to give Commission power to adjudicate or enforce contractual liability arising under insurance policy].)

These decisions struck down provisions of considerable importance, not because the Legislature lacked authority under the police power to regulate the particular subjects, but rather because of the basic assumption that the enabling provision authorized creation of a new type of court and judicial proceeding only with respect to subjects falling within its express terms, and that the provision referred expressly to liability of employers to compensate "their workmen" and "their dependents." Under this theory, the Legislature could not create liability against those dealing with independent contractors, nor could it compel an employer to compensate the employees of some other person.

This view is no longer followed. In *San Francisco v. Work. Comp. App. Bd. (Wiebe)* (1978) 22 C.3d 103, 148 C.R. 626, 583 P.2d 151, *infra*, §241, the employer contended that the 1959 amendment of *Lab.C.* 3212.5, establishing a presumption of compensable injury where law enforcement officers or firefighters suffered heart trouble or pneumonia, exceeded the grant of authority in the enabling provision. Although the court held that the amendment did come within the constitutional language (22 C.3d 116), it also took the opportunity to repudiate the limiting concept:

(a) "To begin with, the employer's claim that the Legislature's authority to enact workers' compensation legislation derives solely from, and is limited by the specific authorizing language of, article XIV section 4 ignores the fundamental proposition that, unlike the federal Constitution, '[t]he Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the [federal] government, or prohibited by the Constitution of the United States.'" (22 C.3d 112.)

(b) "Nothing in article XIV section 4 purports to restrict the Legislature's power to enact legislation in the manner suggested by the employer." (22 C.3d 113.) The initial sentence (see supra, §2) "clearly acknowledges and endorses the Legislature's authority to provide for employer-financed compensation of work-related injuries and illnesses." (22 C.3d 114.) However, "absolutely nothing in this section purports to limit the Legislature's authority to enact additional appropriate legislation for the protection of employees." (22 C.3d 114.) "Moreover, the ballot arguments supporting this constitutional provision when the measure was adopted in 1918 make it clear that the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers' compensation legislation, and not to erect any new restrictions on the exercise of legislative power." (22 C.3d 114.)

(c) "Thus, insofar as the city's constitutional claim rests on the allegedly limited 'authorizing language' of article XIV section 4, the contention is clearly without merit. Even without such specific authorization, the Legislature possesses the authority, under the now firmly established view of the concept of the police power, to adopt appropriate legislative measures for the protection of employees and their dependents." (22 C.3d 114.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
C. Workers' Compensation Act.
1. Original Act and Revisions.

2 Witkin Sum. Cal. Law Work Comp § 4

[§ 4] Original Act and Revisions.

(1) *Original Workmen's Compensation Act.* Statutes were passed in 1913, 1915, and 1917. The "Workmen's Compensation, Insurance and Safety Act of 1917," as amended in subsequent years, was the basis for the present law. (See *Mathews v. Work. Comp. App. Bd.* (1972) 6 C.3d 719, 729, 100 C.R. 301, 493 P.2d 1165 [extensive historical review].)

In 1937, the Act was made a part of the Labor Code (*Lab.C. 3201 et seq.*), as a restatement, not a revision, of existing law, and its provisions are to be so construed. (*Lab.C. 2*; see *State Comp. Ins. Fund v. Matulich* (1942) 55 C.A.2d 528, 529, 131 P.2d 21 [construing ambiguous provisions of Labor Code].)

(2) *Workers' Compensation Act.* As part of the constitutional changes adopted in the election of November 1974, former Art. XX, §21 (*supra*, §2), was amended to substitute *Workers' Compensation* for *Workmen's Compensation*. The Legislature adopted the same policy with respect to the compensation field (see *Lab.C. 3200*; *Unemp.Ins.C. 21*), and amended numerous sections of other codes to reflect that policy (see Stats. 1974, Chap. 1454). (See *Anderson v. Union Oil Co.* (1975) 49 C.A.3d 968, 971, footnote 2, 123 C.R. 191.) In addition, the "Workmen's Compensation Appeals Board" was renamed as the "Workers' Compensation Appeals Board." (*Lab.C. 3200*.)

(3) *Revisions.* The Legislature has made numerous substantive and procedural changes in the Workers' Compensation law, most significantly in 1982 (see 14 *Pacific L. J.* 763), 1989 (see 21 *Pacific L. J.* 571, 853), 1993 (see 25 *Pacific L. J.* 847 et seq.), and 2004 (reform legislation; Stats. 2004, Chap. 34).

The reform legislation of 2004 made the following important changes:

(a) The vocational rehabilitation services program of *Lab.C. 139.5* was made applicable only to injuries occurring before January 1, 2004. (See *infra*, §282.) (On "supplemental job displacement benefit" for injuries occurring on and after January 1, 2004, see *infra*, §283.)

(b) Parties to collective bargaining agreements are authorized to negotiate the delivery of medical benefits and disability compensation to eligible employees (*Lab.C. 3201.5, 3201.7*). (See *infra*, §393.)

(c) Procedures for comprehensive medical-legal evaluations and selection of medical evaluators (*Lab.C. 4060 et*

seq.) were revised. (See *infra*, §§273, 291.)

(d) *Lab.C. 4062.9*, which provided a presumption of correctness of the finding of an employee's predesignated physician, was repealed.

(e) *Lab.C. 4616 et seq.* were added to permit insurers or employers, on or after January 1, 2005, to establish or modify a medical provider network to provide medical treatment to injured employees. The provisions also govern procedures where an injured employee disputes diagnosis or treatment, and establish a system for independent medical review. (See *infra*, §§263, 269.)

(f) *Lab.C. 4600* requirements for treatment by a physician designated by the employee prior to injury, and for a change of physician after 30 days from the report of the injury, were revised to conform to *Lab.C. 4616*. (See *infra*, §269.)

(g) Occupational therapy visits for injuries occurring on or after January 1, 2004, are limited to 24 per industrial injury (*Lab.C. 4604.5*). (See *infra*, §261.)

(h) Temporary disability payments are capped at 2 years from the date of the first payment. Specified injuries are exempt from the cap. (*Lab.C. 4656*.) (See *infra*, §275.)

(i) Computation procedures for permanent disability payments were revised, and provisions added for a 15% decrease in payments for employers bringing employees back to the same or modified work. (*Lab.C. 4658(d)*.) (See *infra*, §275.)

(j) The permanent disability schedule was revised by replacing the standard that considered an employee's "diminished capacity to compete in the labor market" with consideration only of "future earning capacity," and implementing the American Medical Association Guidelines for determining the nature of a physical injury or disfigurement. (*Lab.C. 4660*.) (See *infra*, §288.)

(k) Apportionment statutes (*Lab.C. 4663, 4750, 4750.5*) were repealed, and provisions apportioning all injuries to *actual cause* were added (*Lab.C. 4663*). (See *infra*, §294.)

(l) Penalty provisions for late payments were revised so that the penalty is assessed on the actual late payment rather than on the entire order or award (*Lab.C. 5814*). (See *infra*, §412.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law I. WORKERS' COMPENSATION SYSTEM C. Workers' Compensation Act. 2. Nature and Validity of Act.

2 Witkin Sum. Cal. Law Work Comp § 5

[§ 5] Nature and Validity of Act.

The Workers' Compensation Act can be described generally as a compulsory scheme of employer liability, irrespective of fault, for injuries that arise out of and in the course of employment, are not caused by intentional self-infliction or intoxication, and result in disability or death of an employee. (Cal. Const., Art. XIV, §4; *Lab.C.* 3600; *Sea-Land Service v. Work. Comp. App. Bd.* (1996) 14 C.4th 76, 85, 58 C.R.2d 190, 925 P.2d 1309, *infra*, §143; *Del Taco v. Work. Comp. App. Bd.* (2000) 79 C.A.4th 1437, 1440, 94 C.R.2d 825.) The liability so established is incident to the status of employment and is neither in tort nor in contract. (*Quong Ham Wah Co. v. Industrial Acc. Com. of Calif.* (1920) 184 C. 26, 36, 192 P. 1021; see C.E.B., *Workers' Compensation Practice* 4th, §1.3 et seq.)

Viewed substantively, establishing a workers' compensation claim rests on two main conditions: (a) the existence of an employment relationship covered by the Act (*infra*, §159 et seq.), and (b) a compensable injury, i.e., one occurring in the course of, and arising out of, the employment (*infra*, §193 et seq.).

The cause of action survives the death of the *employer*, and the employer's estate is liable regardless of failure to present the claim to the executor or administrator. (*Lab.C.* 5306.)

It was established at an early date that the Act did not violate the due process or equal protection clauses of the federal Constitution, because (1) there is no vested right in a rule of the common law, and therefore the defenses of contributory negligence, fellow servant rule, and assumption of risk may be abolished; (2) employment is a status that may be subjected to reasonable regulation; (3) the regulation established by the Act is neither arbitrary nor discriminatory, being reasonable in its requirements and in its classification of included and excluded employments. Moreover, objections based on the denial of a trial by jury were groundless in view of the power given the Legislature by the constitutional enabling provision. (*Western Indem. Co. v. Pillsbury* (1915) 170 C. 686, 692, 151 P. 398.) (See *Western Metal Supply Co. v. Pillsbury* (1916) 172 C. 407, 409, 156 P. 491 [Industrial Accident Commission's jurisdiction over fatal injuries sustained]; *Nelson v. Metalclad Insulation Corp.* (1975) 44 C.A.3d 474, 477, 118 C.R. 725 [rejecting federal due process and equal protection claims]; 11 Cal. L. Rev. 320 [cases involving constitutional questions regarding Act]; for early decisions holding specific provisions unconstitutional, see *supra*, §3; on validity of workers' compensation legislation in general, see 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §10 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
C. Workers' Compensation Act.
3. Liberal Construction.
a. In General.

2 Witkin Sum. Cal. Law Work Comp § 6

[§ 6] In General.

(1) *Rule.* The provisions of the Act are to be liberally construed "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (*Lab.C.* 3202.)

(2) *Distinction: Burden of Proof.* *Lab.C.* 3202.5 qualifies the liberal construction requirement by providing that parties and lien claimants must meet the evidentiary burden of proof on all issues by a preponderance of the evidence "in order that all parties are considered equal before the law." The statute defines "preponderance of the evidence" as evidence, that "when weighed with that opposed to it, has more convincing force and the greater probability of truth." (On proof by preponderance of evidence, see 1 *Cal. Evidence (4th)*, *Burden of Proof and Presumptions*, §35.)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
C. Workers' Compensation Act.
3. Liberal Construction.
b. Rule Applied in Favor of Claimant.

2 Witkin Sum. Cal. Law Work Comp § 7

[§ 7] Rule Applied in Favor of Claimant.

The liberal construction rule has been applied in the employee's favor in the following situations:

(1) To sustain jurisdiction or an award. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1945) 26 C.2d 286, 288, 158 P.2d 9; *Flores v. Work. Comp. App. Bd.* (1974) 11 C.3d 171, 176, 113 C.R. 217, 520 P.2d 1033, *infra*, §330; *Judson Steel Corp. v. Work. Comp. App. Bd.* (1978) 22 C.3d 658, 668, 150 C.R. 250, 586 P.2d 564, *infra*, §19; *Johnson v. Work. Comp. App. Bd.* (1984) 37 C.3d 235, 241, 207 C.R. 857, 689 P.2d 1127, *infra*, §439 [award of costs]; *Bethlehem Steel Co. v. Industrial Acc. Com.* (1945) 70 C.A.2d 382, 387, 161 P.2d 59; *Pacific Indem. Co. v. Industrial Acc. Com.* (1948) 86 C.A.2d 726, 729, 195 P.2d 919, *infra*, §230; *Muznik v. Work. Comp. App. Bd.* (1975) 51 C.A.3d 622, 633, 124 C.R. 407, *infra*, §242.)

(2) To annul an order denying an award or penalty. (See *Brown v. Industrial Acc. Com.* (1941) 44 C.A.2d 6, 13, 111 P.2d 931 [theory mentioned in rejecting Commission's findings of fact and annulling order terminating liability]; *Azevedo v. Industrial Acc. Com.* (1966) 243 C.A.2d 370, 374, 52 C.R. 283, *infra*, §43, citing the text; *Davison v. Industrial Acc. Com.* (1966) 241 C.A.2d 15, 18, 50 C.R. 76, *infra*, §412; *Langer v. Work. Comp. App. Bd.* (1968) 258 C.A.2d 400, 407, 65 C.R. 598; *Caldwell v. Work. Comp. App. Bd.* (1969) 268 C.A.2d 912, 915, 74 C.R. 517; *Garzoli v. Work. Comp. App. Bd.* (1970) 2 C.3d 502, 505, 86 C.R. 1, 467 P.2d 833; *Guest v. Work. Comp. App. Bd.* (1970) 2 C.3d 670, 673, 87 C.R. 193, 470 P.2d 1; *Garza v. Work. Comp. App. Bd.* (1970) 3 C.3d 312, 319, 90 C.R. 355, 475 P.2d 451; *Kerley v. Work. Comp. App. Bd.* (1971) 4 C.3d 223, 230, 93 C.R. 192, 481 P.2d 200; *Smith v. Work. Comp. App. Bd.* (1975) 45 C.A.3d 162, 169, 119 C.R. 120, *infra*, §240; *Cooper v. Work. Comp. App. Bd.* (1985) 173 C.A.3d 44, 50, 218 C.R. 783; *Smith v. Work. Comp. App. Bd.* (1987) 191 C.A.3d 127, 134, 236 C.R. 248, *infra*, §226; *Hutchinson v. Work. Comp. App. Bd.* (1989) 209 C.A.3d 372, 376, 257 C.R. 240, *infra*, §264.)

(3) To construe the statute of limitations. (See *Bianco v. Industrial Acc. Com.* (1944) 24 C.2d 584, 587, 150 P.2d 806; *Colonial Ins. Co. v. Industrial Acc. Com.* (1945) 27 C.2d 437, 439, 164 P.2d 490; *Royal Indem. Co. v. Industrial Acc. Com.* (1948) 85 C.A.2d 373, 378, 192 P.2d 811, *infra*, §374; *St. Cyr v. Work. Comp. App. Bd.* (1987) 196 C.A.3d 468, 473, 243 C.R. 1, *infra*, §18.)

(4) To fasten liability on an insurer. (See *Mary Len Mine v. Industrial Acc. Com.* (1944) 64 C.A.2d 153, 160, 148

P.2d 106.)

(5) To reduce an award by 50% for the employee's serious and wilful misconduct in violating express instructions; the alternative would have been to deny compensation entirely on the ground that the employee took himself out of the course of his employment. (*Auto Lite Battery Corp. of Calif. v. Industrial Acc. Com.* (1947) 77 C.A.2d 629, 633, 176 P.2d 62, *infra*, §200.)

(6) To construe other workers' compensation statutes. (See *Griffith v. Work. Comp. App. Bd.* (1989) 209 C.A.3d 1260, 1264, 257 C.R. 813, *infra*, §81 [*Lab.C. 3860(f)*].)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
C. Workers' Compensation Act.
3. Liberal Construction.
c. Rule Invoked To Deny Tort Action.

2 Witkin Sum. Cal. Law Work Comp § 8

[§ 8] Rule Invoked To Deny Tort Action.

An employee may sue the employer on the assumption that the injury did not occur in the course of or arise out of employment (see *infra*, §54). However, the court must follow the statutory mandate and, if the issue is reasonably debatable, hold that the injury is compensable and that workers' compensation provides the sole remedy. (See *Freire v. Matson Navigation Co. (1941) 19 C.2d 8, 10, 118 P.2d 809* [employee arriving to work was hit by vehicle belonging to employer and employer argued that employee was within zone of employment]; *Peterson v. Moran (1952) 111 C.A.2d 766, 768, 245 P.2d 540* ["The wishes or desires of either the employee or employer are a false quantity and are not to be regarded"]; *Scott v. Pacific Coast Borax Co. (1956) 140 C.A.2d 173, 178, 294 P.2d 1039* ["Though it may be more opportunistic for a particular plaintiff to seek to circumscribe the purview of compensation coverage because of his immediate interest and advantage, the courts must be vigilant to preserve the spirit of the act and to prevent a distortion of its purposes"]; *Dixon v. Ford Motor Co. (1975) 53 C.A.3d 499, 502, 125 C.R. 872, infra*, §222; *Eckis v. Sea World Corp. (1976) 64 C.A.3d 1, 6, 134 C.R. 183, infra*, §197; *Mitchell v. Hizer (1977) 73 C.A.3d 499, 140 C.R. 790, infra*, §199; *Gates v. Trans Video Corp. (1979) 93 C.A.3d 196, 202, 155 C.R. 486.*)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
C. Workers' Compensation Act.
4. Prospective Construction.

2 Witkin Sum. Cal. Law Work Comp § 9

[§ 9] Prospective Construction.

Benefits payable on account of an injury are not affected by a subsequent statutory change in amounts of indemnity payable under the Workers' Compensation law and must be continued as authorized, and in the amounts provided for, by the law in effect at the time of the injury. (*Lab.C. 4453.5; Nuelle v. Work. Comp. App. Bd. (1979) 92 C.A.3d 239, 246, 154 C.R. 707, infra, §295; Taylor v. Work. Comp. App. Bd. (1979) 95 C.A.3d 139, 148, 156 C.R. 906, infra, §295.*)

In *Aetna Cas. & Surety Co. v. Industrial Acc. Com. (1947) 30 C.2d 388, 182 P.2d 159*, the employee's injury resulted in both temporary and permanent disability. At the time of the *injury*, *Lab.C. 4661* allowed him to receive only the greater of the two payments; at the time of his *permanent disability*, the amended statute allowed cumulative payments (see *infra, §292*), and the Board awarded the increased amount. *Held*, award annulled.

(a) The award gave retrospective operation to the statute, enlarging the employee's rights and the employer's obligations, for the injury is the basis of any award, and the law in force at the time of the injury is the measure of the right to compensation. (*30 C.2d 392.*)

(b) Statutes are not to be applied retroactively in the absence of a clear legislative intent. (*30 C.2d 393; see 7 Summary (10th), Constitutional Law, §633.*) The contention that this intent should be implied to avoid the injustice of different treatment of workers injured before and after the amendment is unsound, for every prospective change in the law has some similar result, and the employer would be unfairly treated by retroactive application. (*30 C.2d 395.*)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 10

[§ 10] In General.

(1) *Former Organization.* The Act originally created a board of three members, known as the "Industrial Accident Commission," which later became a part of the Department of Industrial Relations. (Former Lab.C. 50 et seq., 111 et seq.; on organization and functions of Department, see 40 *Cal. L. Rev.* 378; 3 *Summary* (10th), *Agency and Employment*, §314 et seq.) In 1945, the membership of the Commission was increased to seven (former Lab.C. 111) and divided into two panels, with headquarters in San Francisco and Los Angeles (former Lab.C. 114). Each panel exercised the jurisdiction of the Commission in one geographical division of the state, although matters could be transferred from one panel to another, or handled by the Commission as a whole. (Former Lab.C. 114, 115.)

(2) *Reorganization.* The 1965 Legislature reorganized the Department, eliminating the Industrial Accident Commission and creating the Division of Industrial Accidents, with the duties of the old Commission divided between the office of the Administrative Director and the Workers' Compensation Appeals Board. (Stats. 1965, Chap. 1513, §214.) The Margolin-Bill Greene Workers' Compensation Reform Act of 1989 redesignated the Division of Industrial Accidents as the Division of Workers' Compensation. (*Lab.C. 110(c)*; see 1 *Herlick* 6th, §1.06 et seq.) (On function of Industrial Medical Council created in 1989 to replace former medical and chiropractic advisory committee, see *Lab.C. 139*; 21 *Pacific L. J.* 856; C.E.B., *Workers' Compensation Practice* 4th, §9.18; on California Code of Regulations governing Workers' Compensation, see 8 *Cal. Code Reg.* §9700 et seq.; for California website for Division of Workers' Compensation, see <http://www.dir.ca.gov/dwc>.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Electronic Adjudication Management System.* In August 2008, the Division of Workers' Compensation initiated the first phase of its paperless, computer-based system for case management known as the Electronic Adjudication Management System (EAMS). The system is designed to permit a workers' compensation claim to progress completely electronically and to be accessible both internally and externally while preserving confidentiality. Thus, all documents will be filed electronically on specified forms.

The first phase was for internal users such as the Division, and Workers' Compensation Appeals Board employees at administration and district offices. External users, including attorneys, who must file forms and documents with district offices and the Board will be integrated into the system over time.

The Division offers training to assist in the transition and use of the new system. Complete information on the goals and developments related to EAMS, including training, is contained in the Division's website, www.dir.ca.gov/dwc/eams. (On regulations supporting EAMS, see 8 *Cal. Code Reg. §10210* et seq., added in 2008.)



11 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
2. Administrative Director.

2 Witkin Sum. Cal. Law Work Comp § 11

[§ 11] Administrative Director.

(1) *In General.* The term "Administrative Director" means the Administrative Director of the Division of Workers' Compensation. (*Lab.C. 110(b)*.) The Director is appointed by the Governor with the advice and consent of the Senate and holds office at the Governor's pleasure. (*Lab.C. 138.1*; see 1 Herlick 6th, §1.06; 1 Hanna 2d (2004 ed.), §1.12.) The Director may appoint a licensed attorney as counsel to the division (*Lab.C. 117*), and may employ necessary assistants, officers, experts, statisticians, actuaries, accountants, workers' compensation administrative law judges, and other employees (*Lab.C. 123*; see *Lab.C. 120* [secretary and assistant secretaries]; *Lab.C. 138* [appointment of deputy to act in Director's absence]).

(2) *Duties and Powers.* In all respects other than the judicial determination of workers' compensation matters, the Division of Workers' Compensation is under the control of the Administrative Director. (*Lab.C. 111(a)*.) Thus, the Director may do "all things necessary or convenient" in the exercise of any power expressly conferred. (*Lab.C. 133*; see *Lab.C. 125 et seq.* [various administrative duties]; *Lab.C. 129.5* [enforcement of administrative penalties]; *Lab.C. 5307.3* [rulemaking authority].)

Specific statutory duties include the following:

(a) Submitting an annual report to the Governor and the Legislature on the activities of the division, including data on penalties imposed on employers and insurers, recommendations for improvements, and the need for legislation to enhance delivery of compensation to injured workers. (*Lab.C. 111(b)*.)

(b) Auditing insurers, self-insured employers, and third-party administrators. (*Lab.C. 129(a)*; see *Lab.C. 3702.6* [audit program for self-insurers].)

(c) Developing a workers' compensation information system. (*Lab.C. 138.6*.) (On restrictions on access to and disclosure of data in system, see *Lab.C. 138.7*.)

(d) Establishing and maintaining a program to "encourage, facilitate, and educate employers to provide early and sustained return to work after occupational injury or illness." (*Lab.C. 139.47*.) (On incentive of 15% reduction in disability payments for employers that bring employees back to work, see *infra*, §278.)

(e) Appointing a properly certified medical director (*Lab.C. 122*), and qualified medical evaluators (*Lab.C. 139.2(b)*).

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12 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
3. Court Administrator.

2 Witkin Sum. Cal. Law Work Comp § 12

[§ 12] Court Administrator.

The position of court administrator was created in 2002 with respect to the workers' compensation adjudicatory process at the trial level. (*Lab.C. 110(f)*.) The court administrator is appointed by the Governor and holds office at the pleasure of the Administrative Director. (*Lab.C. 138.1(b)*.)

Lab.C. 127.5 charges the court administrator with the following:

- (1) To further uniformity and expedited proceedings before workers' compensation administrative law judges.
- (2) To assure that workers' compensation administrative law judges are qualified and adhere to mandated deadlines.
- (3) To manage district office procedural matters at the trial level.

In addition, the court administrator must give the Governor and the Legislature a quarterly report on the frequency and types of issues that are not heard and decided within the periods prescribed in *Lab.C. 5502(a)*, (b) (see *infra*, §396). (*Lab.C. 5502(d)*.) (On additional duties and powers, see *Lab.C. 127* [collection of fees; publications; preparation of office manual]; *Lab.C. 133* [incidental powers]; *Lab.C. 138* [appointment of deputy]; *Lab.C. 5307(c)* [adopting uniform rules for district office procedures regarding trial level proceedings of Board]; *Lab.C. 5500.3* [establish uniform district office procedures and forms].)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
4. Appeals Board.
a. In General.

2 Witkin Sum. Cal. Law Work Comp § 13

[§ 13] In General.

(1) *Composition.* The term "Appeals Board" is used to designate the Workers' Compensation Appeals Board (Board). (*Lab.C. 110(a)*, 3205.5; *8 Cal. Code Reg. §10301*; see C.E.B., 1 Workers' Compensation Practice 4th, §2.1 et seq.; 1 Herlick 6th, §1.07; 1 Hanna 2d (2004 ed.), §1.11.) The Board consists of seven members, called "commissioners," appointed by the Governor with the advice and consent of the Senate, for 6-year terms. (*Lab.C. 110(a)*, 111, 112.) Five members must be experienced attorneys admitted to practice in California; two need not be attorneys. All members are selected "with due consideration of their judicial temperament and abilities." (*Lab.C. 112.*)

The Governor designates one of the members as chairman who holds that office at the Governor's pleasure. (*Lab.C. 113.*) The chairman may appoint a secretary and assistants (*Lab.C. 120*), and may authorize the secretary and any two assistant secretaries to act as deputy Appeals Board members (not more than three at one time, and no deputy's act is valid unless concurred in by a Board member) (*Lab.C. 121*). The chairman may designate in writing another member to serve as acting chairman during the chairman's absence. (*Lab.C. 113.*)

(2) *Procedure and Practice.* The Board has power to make rules of practice and procedure after a public hearing. (*Lab.C. 5307.*) It also has implied power "to do all things necessary or convenient in the exercise" of an express power. (*Lab.C. 133.*) The Board's rules are in Title 8 of the California Code of Regulations, §10300 et seq.

Unless otherwise provided, actions are taken by a majority of the Board. (*Lab.C. 115.*) When reconsideration is sought (*infra*, §418 et seq.), the chairman assigns the case to three members for hearing, consideration, and decision. An order or award made and filed by at least two of those members is considered to be the action of the Board unless reconsideration is had under *Lab.C. 5900* et seq. (*Lab.C. 115.*)

(3) *Records.* The Board's records are open to public inspection during regular office hours. (See *Govt.C. 6252(e)*, *Govt.C. 6253.*)

(4) *Decisions.* En banc decisions of the Board are legal precedent and are binding on Board panels and workers' compensation judges, and thus may be cited in proceedings. (*8 Cal. Code Reg. §10341.*) En banc decisions and significant panel decisions are published on the Workers' Compensation Appeals Board website at

http://www.dir.ca.gov/wcab/wcab_dars.htm. Important Board decisions are also published in the California Compensation Cases Reporter.

SUPPLEMENT: [This section is current through the latest supplement]



14 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
4. Appeals Board.
b. Powers.

2 Witkin Sum. Cal. Law Work Comp § 14

[§ 14] Powers.

(1) *Judicial Powers.* The Board has statewide jurisdiction over industrial injuries and may exercise all judicial powers vested in it under the Labor Code. (*Lab.C. 111(a)*; see C.E.B., 1 Workers' Compensation Practice 4th, §2.2; 1 Herlick 6th, §1.07.)

The Board has original and appellate jurisdiction in compensation cases. The Administrative Director employs workers' compensation administrative law judges ("workers' compensation judges") (*Lab.C. 123, 123.5, 123.6*) to fully decide compensation cases assigned by the Board (*Lab.C. 5310*, *infra*, §395; 8 *Cal. Code Reg. §10348* [authority of workers' compensation judges]; see C.E.B., 1 Workers' Compensation Practice 4th, §2.2). As an appellate body, the Board may reconsider a decision on a proper petition by an aggrieved party. (*Lab.C. 5900 et seq.*; see *infra*, §418 *et seq.*) In its exercise of these powers, the Board is limited by the constitutional enabling provision (*supra*, §3) to the relationship of employer and employee, and may make *awards* only against an employer or the employer's insurer. (*Cal. Const., Art. XIV, §4.*) (On hearing procedures, see *infra*, §394 *et seq.*; on jurisdiction to determine controversies between physician and employer or employer's insurer, see *Lab.C. 5300(b), 5304*, *infra*, §350.)

In addition to its enumerated powers, the Board has broad equitable powers, and may invoke judicially declared equitable doctrines in appropriate cases. (*Kaiser Foundation Hosp. v. Work. Comp. App. Bd. (1978) 83 C.A.3d 413, 418, 148 C.R. 54.*)

(2) *Contempt.* The Board or a Board member may exercise the contempt power to the same extent as a court of record. (*Lab.C. 134; Hustedt v. Work. Comp. App. Bd. (1981) 30 C.3d 329, 346, 178 C.R. 801, 636 P.2d 1139*, *infra*, §353.) (See *Marcus v. Work. Comp. App. Bd. (1973) 35 C.A.3d 598, 604, 111 C.R. 101*, *infra*, §397 [power and procedure where contempt is committed in hearing before workers' compensation judge]; *Crawford v. Work. Comp. App. Bd. (1989) 213 C.A.3d 156, 164, 259 C.R. 414* [contempt sought for violation of rules regarding medical evaluation reports].)

In exercising its contempt power, the Board must follow the applicable provisions of *C.C.P. 1209 et seq.* (see 7 *Cal. Proc. (4th), Trial, §202*). (*Morton v. Work. Comp. App. Bd. (1987) 193 C.A.3d 924, 928, 238 C.R. 651* [proceeding to adjudge petitioner guilty of contempt without hearing violates due process]; *Runnion v. Work. Comp. App. Bd. (1997)*

59 C.A.4th 277, 286, 69 C.R.2d 105 [Board must meet standards set by C.C.P. 1209 et seq.].)

(3) *Miscellaneous Powers*. The Board may also hear matters involving a right or liability incidental to the recovery of compensation. (*Lab.C. 5300(a)*, *infra*, §15.) (See *California v. Work. Comp. App. Bd. (Ellison)* (1996) 44 C.A.4th 128, 133, 140, 51 C.R.2d 606 [imposition of penalty on State for failure to pay industrial disability leave benefit].)

Administrative or quasi-legislative powers of the Board are not limited by the constitutional enabling provision; e.g., *safety orders* may be, and often are, intended for the protection of the general public. (See *Porter v. Montgomery Ward & Co.* (1957) 48 C.2d 846, 849, 313 P.2d 854 [safety order requiring center handrail on stairway in store extended to business invitees; powers of former Industrial Accident Commission]; 6 *Summary* (10th), *Torts*, §876.)

The Board may also accept appointment as a deputy commissioner under, or a delegation of authority to enforce, the United States Longshoremen's and Harbor Workers' Compensation Act (*infra*, §135). (*Lab.C. 128*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Contempt*.

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §189.



15 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
4. Appeals Board.
c. Exclusive Jurisdiction.

2 Witkin Sum. Cal. Law Work Comp § 15

[§ 15] Exclusive Jurisdiction.

Except as otherwise provided in the Workers' Compensation Act, the Board has exclusive jurisdiction over the following matters:

- (1) Recovery of compensation, or issues concerning a right or liability arising out of or incidental to compensation. (*Lab.C. 5300(a).*)
- (2) Enforcement against the employer or an insurer of a liability for compensation imposed in favor of the injured employee, the employee's dependents, or a third person. (*Lab.C. 5300(b).*)
- (3) Determination of distribution of compensation among dependents or other persons. (*Lab.C. 5300(c).*)
- (4) Determination of who are dependents of a deceased employee, or what persons are entitled to benefits under the Workers' Compensation Act. (*Lab.C. 5300(d).*)
- (5) Obtaining an order the Board is authorized to make. (*Lab.C. 5300(e).*)
- (6) Other matters over which jurisdiction is vested in the Division of Workers' Compensation. (*Lab.C. 5300(f).*)

The Board is vested with full authority and jurisdiction to determine all of these matters subject only to court review as specified in the law. (*Lab.C. 5301.*) (See *La Jolla Beach & Tennis Club v. Industrial Indem. Co.* (1994) 9 C.4th 27, 43, 36 C.R.2d 100, 884 P.2d 1048, *infra*, §157 [Board has exclusive jurisdiction to award workers' compensation benefits; superior court has no jurisdiction]; *PM & R Associates v. Work. Comp. App. Bd.* (2000) 80 C.A.4th 357, 361, 94 C.R.2d 887 [Board has jurisdiction to determine whether physician has impermissibly used medical assistants in treating injured worker]; *Hughes v. Argonaut Ins. Co.* (2001) 88 C.A.4th 517, 527, 105 C.R.2d 877 [Board had exclusive jurisdiction over employee's action against insurer for bad faith and related claims after insurer refused reduced share of third-party settlement proceeds to allow for employee's attorneys' fees; relying on *Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 C.4th 800, 102 C.R.2d 562, 14 P.3d 234, *infra*, §106].)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
D. Division of Workers' Compensation.
4. Appeals Board.
d. Limitations on Jurisdiction.

2 *Witkin Sum. Cal. Law Work Comp* § 16

[§ 16] Limitations on Jurisdiction.

Although related to injury and compensation, disputes and issues that are not within the Board's subject matter jurisdiction include the following:

(1) *Bad Faith and Breach of Contract*. The Board has no jurisdiction to hear an employer's bad faith and breach of contract suit against the employer's workers' compensation insurer. In these cases, jurisdiction rests with the court. (*Salimi v. State Comp. Ins. Fund* (1997) 54 C.A.4th 216, 222, 62 C.R.2d 640.)

(2) *Compensation Disputes Involving Native Americans*. The Board has no subject matter jurisdiction over Native Americans for purposes of enforcing California's workers' compensation laws. Although 28 U.S.C., §1360 (4 Cal. Proc. (4th), *Pleading*, §100) grants certain states, including California, jurisdiction over civil disputes involving Native Americans, it does not confer on California the power to enforce its general civil regulatory jurisdiction, such as its workers' compensation law, over that group. Moreover, federally recognized Indian tribes enjoy sovereign immunity from state workers' compensation liability. (*Middletown Rancheria of Pomo Indians v. Work. Comp. App. Bd.* (1998) 60 C.A.4th 1340, 1345, 1352, 71 C.R.2d 105 [injured employee of casino owned and operated by Indian tribe; recourse over dissatisfaction with way injury is handled was before tribal council].)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Compensation Disputes Involving Native Americans*.

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §114 et seq.



17 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
E. Discrimination Against Injured Workers.
1. Nature and Purpose of Statute.

2 *Witkin Sum. Cal. Law Work Comp* § 17

[§ 17] Nature and Purpose of Statute.

It is the declared policy of California that there be no discrimination against workers who are injured in the course and scope of their employment. (*Lab.C. 132a*; see Cal. Civil Practice, 1 Workers' Compensation, §§5:20 et seq.; 5:35; 1 Hanna 2d (2004 ed.), §10.11[1].)

Lab.C. 132a applies to an employer who discharges, or threatens to discharge, or in any manner discriminates against an employee because the employee: (1) has filed or made known an intention to file a compensation claim with the employer or an application for adjudication, (2) has received a rating, award, or settlement, or (3) has testified or indicated an intention to testify in another employee's compensation case. (*Lab.C. 132a(1)*, (3).) The statute is also applicable to an insurer that advises, directs, or threatens its insured employer to coerce the discharge of an employee who exercises workers' compensation rights. (*Lab.C. 132a(2)*, (4).) (See *Crown Appliance v. Work. Comp. App. Bd.* (2004) 115 C.A.4th 620, 624, 9 C.R.3d 415 [discrimination was found on evidence that employer's attitude changed after employee's industrial injury; employer treated employee poorly, openly believed he was faking his disability, excluded him from meetings, and desired to dismiss him once he returned to light duty].)

SUPPLEMENT: [This section is current through the latest supplement]

To establish a prima facie case of discrimination under *Lab.C. 132a*, an employee must demonstrate that he or she suffered a detriment as a result of being singled out by the employer for disadvantageous treatment because of the industrial injury. (*Department of Rehabilitation v. Work. Comp. App. Bd.* (2003) 30 C.4th 1281, 1300, 135 C.R.2d 665, 70 P.3d 1076, text, §276 [employee failed to demonstrate disparate treatment notwithstanding that employer required employee use sick and vacation leave while absent from work seeking treatment of permanent injury].) (See *Andersen v. Work. Comp. App. Bd.* (2007) 149 C.A.4th 1369, 1380, 57 C.R.3d 839 [employee established "disparate and detrimental treatment" in violation of *Lab.C. 132a* where employer city had written policy that required only industrially injured employees to use earned vacation time rather than sick leave to attend medical appointments]; *Arteaga v. Brink's* (2008) 163 C.A.4th 327, 357, 77 C.R.3d 654 [employee failed to establish wrongful termination in retaliation for filing workers' compensation claim where he made retaliation charge for first time while under investigation for theft and was terminated shortly thereafter; temporal proximity of firing to filing for compensation was not sufficient by itself to establish pretext, and employer presented ample evidence of loss of confidence in employee to justify termination].)



18 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law I. WORKERS' COMPENSATION SYSTEM E. Discrimination Against Injured Workers. 2. Sanctions for Violation.

2 Witkin Sum. Cal. Law Work Comp § 18

[§ 18] Sanctions for Violation.

(1) *Reinstatement and Reimbursement.* An employee discharged or discriminated against in violation of *Lab.C. 132a* is entitled to reinstatement and reimbursement for lost wages and work benefits. (*Lab.C. 132a(1), (3).*)

Lab.C. 132a does not define "reinstatement," but it is a common remedy in employment discrimination cases and the Board has broad equitable discretion in fashioning and applying the proper remedy. In *Dyer v. Work. Comp. App. Bd.* (1994) 22 C.A.4th 1376, 28 C.R.2d 30, a probationary, intermittent employee with various state agencies was terminated while undergoing medical treatment for wrist pain. *Held*, when a probationary state employee is rejected on probation partially because of injury-related discrimination, the employee may be reinstated as a probationary rather than a permanent employee. (22 C.A.4th 1384.) Reimbursement is also at the equitable discretion of the Board, but *Lab.C. 132a* limits recovery to wages and benefits lost by the employer's acts. Thus, employees may not recover for periods in which the employee was not ready, willing, and able to work. (22 C.A.4th 1387.)

(2) *Misdemeanor.* An employer or insurer committing a prohibited act under *Lab.C. 132a* is guilty of a misdemeanor. (*Lab.C. 132a(1), (2), (3), (4).*)

(3) *Increased Award.* The aggrieved employee's compensation must be increased by one-half, but in no event more than \$ 10,000, together with costs and expenses not in excess of \$ 250. (*Lab.C. 132a(1).*)

The increased award is a civil administrative remedy; a finding of a misdemeanor violation is not a condition precedent to assertion of the civil remedy, and the award of increased compensation is not equivalent to a finding that the employer is guilty of a misdemeanor. Hence, the rules of administrative procedure in workers' compensation proceedings apply, and neither the workers' compensation judge nor the Board is required to follow the rules of criminal procedure. (*Western Elec. Co. v. Work. Comp. App. Bd.* (1979) 99 C.A.3d 629, 640, 160 C.R. 436.) (On imposition of 10% penalty under *Lab.C. 5814* for delayed payment of increase under *Lab.C. 132a*, see *Burton v. Work. Comp. App. Bd.* (1980) 112 C.A.3d 85, 90, 169 C.R. 72, *infra*, §412.)

(4) *Prejudgment Interest.* In *Currie v. Work. Comp. App. Bd.* (2001) 24 C.4th 1109, 104 C.R.2d 392, 17 P.3d 749, a workers' compensation judge included *prejudgment* interest, payable from the date of accrual of lost wages, in an award of back pay under *Lab.C. 132a* to an employee wrongfully denied reinstatement. On reconsideration, the Board found

that under *Lab.C. 5800* (infra, §403) only *postjudgment* interest was permitted on *Lab.C. 132a* awards. *Held*, reversed.

(a) The subject matter of *Lab.C. 5800* involves awards for compensation or death benefits, and does not include an award of back pay under *Lab.C. 132a*. Under *Lab.C. 3207*, compensation means compensation under Division 4 of the Labor Code, whereas awards under *Lab.C. 132a* for reimbursement of wages and work benefits are in Division 1, and are separate and distinct from the compensation for injuries under Division 4. Thus, *Lab.C. 5800* does not apply. (24 C.4th 1113; relying on *Moorpark v. Superior Court* (1998) 18 C.4th 1143, 77 C.R.2d 445, 959 P.2d 752, infra, §20.)

(b) C.C. 3287 requires prejudgment interest on damages that are certain. The statute has frequently been applied to administrative agencies' retroactive awards of government assistance, wages, or retirement benefits, thus permitting back pay awards to be considered damages for purposes of C.C. 3287. Moreover, awarding prejudgment interest on a back pay award is consistent with the remedial purpose underlying *Lab.C. 132a*. Without it, the back pay remedy may lose a significant portion of its value and the employee might be left less than fully reimbursed. (24 C.4th 1115.)

(5) *Statute of Limitations*. Proceedings for increased compensation, or for reinstatement and reimbursement, may be instituted by filing a petition with the Board not later than 1 year after the prohibited act. (*Lab.C. 132a*.)

In *St. Cyr v. Work. Comp. App. Bd.* (1987) 196 C.A.3d 468, 243 C.R. 1, petitioner, temporarily disabled as the result of a work-related injury, received notice on March 7, 1984, that her employment was terminated "effective March 15, 1984." Her petition, filed on March 15, 1985, was dismissed as untimely. *Held*, order of dismissal annulled. *Lab.C. 132a* provides that proceedings "may not be commenced more than one year from the discriminatory act or date of termination of the employee." (196 C.A.3d 471.) Construing this alternative language liberally in the employee's favor (see supra, §§6, 7), "the claim, filed within one year after the effective date of the termination set forth in the letter, is timely and effectuates the policy opposing all discrimination against workers based solely on their having been injured in the course of employment." (196 C.A.3d 473, citing *Judson Steel Corp. v. Work. Comp. App. Bd.* (1978) 22 C.3d 658, 150 C.R. 250, 586 P.2d 564, infra, §19.)

(6) *Referral of Criminal Violation*. The Board may refer, and an employee may complain of, violations of the criminal misdemeanor provisions to the Division of Labor Standards Enforcement or the office of the public prosecutor. (*Lab.C. 132a*.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
E. Discrimination Against Injured Workers.
3. Scope of Statute.
a. Liberal Construction.

2 *Witkin Sum. Cal. Law Work Comp* § 19

[§ 19] Liberal Construction.

Although *Lab.C. 132a* specifies protected activity (e.g., claiming compensation, receiving a rating, award), the statute also declares a broad policy against discrimination "in any manner," and its provisions are liberally construed to apply in other circumstances where an employee is penalized as a result of an industrial injury.

In *Judson Steel Corp. v. Work. Comp. App. Bd.* (1978) 22 C.3d 658, 150 C.R. 250, 586 P.2d 564, M was injured in January 1974, received medical treatment and compensation benefits, and returned to work in April 1975. The union contract provided for loss of seniority status when an employee had not worked for 12 consecutive months because of illness or injury. The employer, interpreting this language as automatically causing a loss of seniority, laid M off 2 days after his return to work. The union business agent testified that, under an exception in the contract, the 12-month period was normally extended by mutual consent of the union and the employer when the employee's absence was due to an industrial accident. The Board found that the employer made no attempt to extend the period, and that loss of seniority as a result of an industrial injury was a penalty prohibited by *Lab.C. 132a*. Accordingly, it increased M's compensation by one-half (*supra*, §18 and *infra*, §316). *Held*, affirmed.

(a) *Effect of union contract.* The contract, as consistently interpreted by both the union and the employer, authorized a standard procedure of extension of seniority of an employee absent from work because of compensable illness or injury. Hence, the employer's claim that it was compelled to lay off M was not supported by the evidence. (22 C.3d 665.) Moreover, "an employer may not defend a discriminatory employment practice, proscribed by section 132a, on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation laws than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination." (22 C.3d 665, footnote 5.)

(b) *Application of statute.* The Board's position does not compel reinstatement of every employee who sustains injury on the job. However, here it was undisputed that M remained competent to perform his job and that the job was open on his return. "Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (22 C.3d 667.)

(c) *Penal provisions and liberal construction.* The rule of liberal construction for the purpose of extending benefits

(*Lab.C. 3202*) applies to all aspects of the workers' compensation law, including penal provisions. (22 *C.3d* 668.) The interpretation of *Lab.C. 132a* adopted by the Board in this case "will not only encourage compensation for injured workers, but also secure compliance with the workers' compensation laws." (22 *C.3d* 668.) Moreover, the interpretation of an administrative agency charged with enforcement of a statute is entitled to great respect by the courts. (22 *C.3d* 668; see 7 *Summary* (10th), *Constitutional Law*, §127.) (See *Smith v. Work. Comp. App. Bd.* (1984) 152 *C.A.3d* 1104, 1109, 199 *C.R.* 881 [analyzing *Judson Steel*, and observing that "the only reasonable procedure for implementing such a rule is to make it the claimant's burden to show the detriment, the action, and its cause, and the employer's burden to prove an affirmative defense of business realities"].)

In *Santa Barbara v. Work. Comp. App. Bd.* (1980) 109 *C.A.3d* 211, 167 *C.R.* 65, a deputy sheriff was adjudged totally temporarily disabled due to multiple industrial injuries over the course of his employment and was entitled to receive compensation measured by his salary. After notifying the county that his injuries precluded his return to work he was demoted in grade, thus reducing the compensation amount. The workers' compensation judge found that the reduction in status was discriminatory within the meaning of *Lab.C. 132a* and awarded increased benefits. *Held*, affirmed. Although the employer did not violate a specific prohibition under *Lab.C. 132a*, "the action taken against the employee fits comfortably into the preamble on the basis of which *Judson Steel* was decided" and violated the broad policy purpose of the statute. (109 *C.A.3d* 215.)

In *Fortner v. Safeway Stores* (1991) 229 *C.A.3d* 542, 280 *C.R.* 409, plaintiff was suspended from work for wearing open-toed sandals to alleviate her "painful feet" condition. She sued defendant employer, alleging discrimination based on a physical handicap, and argued that *Lab.C. 132a* did not apply because defendant had not established that her condition arose out of and in the course of her employment with defendant. However, though plaintiff's condition had begun when the store had a different owner, it continued and was aggravated after defendant became the owner. The trial judge granted defendant's motion for summary judgment on the ground that *Lab.C. 132a* provided the exclusive remedy. *Held*, affirmed.

(a) "[I]t is not necessary that a cumulative injury originate on the jobsite of the discriminating employer. On the contrary, an employee is entitled to such benefits for a preexisting injury or disability, whether industrially caused or not, when a later injury on the job aggravates that condition." (229 *C.A.3d* 548, 549, citing *Maher v. Work. Comp. App. Bd.* (1983) 33 *C.3d* 729, 190 *C.R.* 904, 661 *P.2d* 1058, *infra*, §243.)

(b) *Lab.C. 132a* contemplates an employer-employee relationship at the time of the discharge, threat of discharge, or other discriminatory action, but the statute's scope is not restricted to injuries arising out of employment with the employer who discriminated. (229 *C.A.3d* 549.)

(c) Plaintiff's allegation that defendants were aware that she could not work because of intolerance for the required closed-toe shoes satisfied the requirement that the employer know an injury is work-related. (229 *C.A.3d* 550.)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
E. Discrimination Against Injured Workers.
3. Scope of Statute.
b. Limitations.

2 Witkin Sum. Cal. Law Work Comp § 20

[§ 20] Limitations.

(1) *Wrongful Discharge*. It was formerly held that *Lab.C. 132a* provided the exclusive remedy and precluded an employee from pursuing Fair Employment and Housing Act (FEHA) and common law wrongful discharge remedies. (See *Portillo v. G.T. Price Products* (1982) 131 C.A.3d 285, 182 C.R. 291; *Pickrel v. General Tel. Co.* (1988) 205 C.A.3d 1058, 1061, 252 C.R. 878 [alleged termination because of physical handicap in violation of *Govt.C. 12940* (see 2 Summary (10th), *Agency and Employment*, §345)]; *Usher v. American Airlines* (1993) 20 C.A.4th 1520, 25 C.R.2d 335 [*Lab.C. 132a* applied to discrimination claim based on disability caused by employment injury, thus barring contract action]; *Angell v. Peterson Tractor* (1994) 21 C.A.4th 981, 996, 26 C.R.2d 541 [although employee stated cause of action under both FEHA and common law, *Lab.C. 132a* provided exclusive remedy]; *Muller v. Automobile Club of Southern Calif.* (1998) 61 C.A.4th 431, 439, 447, footnote 4, 71 C.R.2d 573 [*Lab.C. 132a* barred actions for breach of contract and breach of implied covenant of good faith and fair dealing because these actions sought damages arising out of same alleged discrimination claim based on work-related injury; following *Usher*].)

However, in *Moorpark v. Superior Court* (1998) 18 C.4th 1143, 77 C.R.2d 445, 959 P.2d 752, the court expressly disapproved *Portillo* and related cases, and held that *Lab.C. 132a* does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies. (18 C.4th 1158.) Plaintiff, an administrative secretary for defendant city, was fired following her recovery from knee surgery and release to return to work. The city manager informed plaintiff that her residual disability prevented her from performing her essential job functions. She responded that she could perform her job and wanted to return to work. She was nevertheless refused employment, and her written protest was to no avail. Plaintiff then filed a claim of disability discrimination under FEHA, received a right to sue notice, and sued, alleging, among other claims, discrimination under FEHA and wrongful termination in violation of public policy (common law wrongful discharge). Defendant demurred to all causes of action, arguing that *Lab.C. 132a* provided plaintiff's exclusive remedy. The trial judge ruled that FEHA and common law remedies were not barred. *Held*, affirmed.

(a) The remedies of *Lab.C. 132a* apply only when employers retaliate against employees for pursuing their rights under the workers' compensation law. (18 C.4th 1150.)

(b) *Portillo*, involving a common law wrongful discharge claim, held that where *Lab.C. 132a* applied, it provided

an employee's exclusive remedy. *Pickrel* and *Angell* extended *Portillo* to cases specifically involving discharge and disability discrimination. However, *Portillo* erred. (18 C.4th 1155.)

(c) In reaching its conclusion, the *Portillo* court applied the exclusive remedy provisions that apply to other workers' compensation remedies (*Lab.C. 3600, 3602(a)*; *infra*, §24 et seq.). However, *Lab.C. 132a* is quite different from other workers' compensation remedies in that it addresses a breach of an employee's civil rights and applies regardless of whether that breach causes a medical injury. Thus, there is no compelling reason to treat *Lab.C. 132a* like other workers' compensation remedies. (18 C.4th 1154.) Moreover, the existence of a workers' compensation remedy does not by itself establish that the remedy is exclusive. The scope of exclusivity depends on the terms of the exclusive remedy provisions. *Lab.C. 132a* does not contain an exclusive remedy clause, nor do the general exclusive remedy provisions of the workers' compensation law expressly apply to *Lab.C. 132a*. (18 C.4th 1154.)

One justice concurred and dissented. The justice agreed that plaintiff could pursue a disability discrimination claim under FEHA, but disagreed that plaintiff could maintain a common law action for wrongful discharge in violation of public policy, arguing the adequacy of the statutory remedy. (18 C.4th 1163, 1164.) (See *Fretland v. Humboldt* (1999) 69 C.A.4th 1478, 1483, 82 C.R.2d 359 [*Lab.C. 132a* is not exclusive remedy for FEHA claim for work-related discrimination; following *Moorpark*]; 38 *Santa Clara L. Rev.* 893 [disabling workers' compensation exclusivity; *Moorpark*].)

(2) *Former Employer*. The principal remedies provided by *Lab.C. 132a* are reinstatement and recovery of lost wages and benefits, thus necessarily implying an employer-employee relationship *at the time of discharge or other discriminatory act*. In *Anaheim v. Work. Comp. App. Bd.* (1981) 124 C.A.3d 609, 177 C.R. 441, B was injured while working for the city of Anaheim and, pending adjudication of his claim, began employment with another employer. A representative of the city suggested to the new employer that B would not be satisfactory and that it would be wise to discharge him. B was not discharged, and suffered no other adverse consequences, but nevertheless sought the penalty specified by *Lab.C. 132a* from the city. *Held*, penalty award annulled. The statute repeatedly and consistently refers to *the employer* and *the employee*; thus, its provisions do not apply to discriminatory conduct toward a former employee by a former employer. (124 C.A.3d 614.)

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21 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
E. Discrimination Against Injured Workers.
3. Scope of Statute.
c. Successor and Agency Liability.

2 Witkin Sum. Cal. Law Work Comp § 21

[§ 21] Successor and Agency Liability.

In appropriate circumstances, a successor entity may be liable under *Lab.C. 132a*. In *Superior Care Facilities v. Work. Comp. App. Bd.* (1994) 27 C.A.4th 1015, 32 C.R.2d 918, a former employee of a residential care facility applied for compensation and petitioned for additional benefits for wrongful discharge under *Lab.C. 132a*. In both the application and petition, the employee named the facility licensee, F, as the employer. The applicant prevailed on the *Lab.C. 132a* claim, and F was ordered to reinstate and reimburse the applicant for all wages and benefits. In a petition for reconsideration, F asserted for the first time that F was never the employer. The Board granted reconsideration and joined S, the company then managing the facility. Management at the time of the wrongful discharge was by Y, which ultimately went bankrupt, and management was contracted to S. The Board adopted the workers' compensation judge's report finding both F and S responsible for complying with the reinstatement and back pay order. *Held*, order annulled as to S and remanded for further hearing on S's liability.

(a) *Liability. Anaheim v. Work. Comp. App. Bd.* (1981) 124 C.A.3d 609, 177 C.R. 441, *supra*, §20, differs significantly from this case. There, the issue was whether conduct occurring after a severance of the employer-employee relationship is covered by *Lab.C. 132a*. Here, the issue is whether a stranger to the employment relationship inherited responsibility for its predecessors' conduct by virtue of assuming the management role. (27 C.A.4th 1024.) Cases interpreting orders of back pay and reinstatement under the National Labor Relations Act and Title VII of the Federal Civil Rights Act recognize that in appropriate cases successor liability should be imposed to effectuate policies underlying the Act and Title VII. (27 C.A.4th 1025.) Although the policies controlling the Workers' Compensation Act differ in important respects, the justification for applying successor liability in appropriate cases is the same: "failure to do so would effectively undermine the remedies provided, particularly the remedy of reinstatement." (27 C.A.4th 1027.)

(b) *Establishing appropriate relationship.* Liability under the successor doctrine may only be imposed on proof of a relationship between entities sufficient to warrant treating the successor as an extension of its predecessor. (27 C.A.4th 1027.) Federal courts have not hesitated to bind successor employers where the transfer was nefarious, i.e., to evade judgment, but liability should not be so limited. (27 C.A.4th 1027.) Considering successorship in the labor context, courts have found the following factors to be relevant:

(1) Whether the successor had notice of the charge.

- (2) The ability of the predecessor to provide relief.
- (3) Whether there has been a substantial continuity of business operations.
- (4) Whether the new employer uses the same facilities.
- (5) Use of the same or substantially the same workforce by the successor.
- (6) Use of the same or substantially the same supervisory personnel by the successor.
- (7) Whether the same jobs exist under substantially the same working conditions.
- (8) Use of the same machinery, equipment, and methods of production by the successor.
- (9) Whether the same product is produced. (27 C.A.4th 1028.)

(c) *Distinguishing monetary and reinstatement remedies.* The *notice* requirement is important in assessing a successor's monetary liability because knowledge of potential liability may dictate the terms of purchase. (27 C.A.4th 1028.) However, an order reinstating a qualified worker to a former position under new management ordinarily imposes a minimal burden on the successor. Thus, the distinction between monetary and reinstatement remedies should be considered in implementing *Lab.C. 132a* remedies. (27 C.A.4th 1028.)

(d) *Monetary remedies.* Imposition of monetary remedies on a successor requires proof of the following: (1) there has been a substantial continuity of the former business enterprise, with substantially the same job classifications and work force; (2) the successor took over the enterprise with notice of the *Lab.C. 132a* claim or facts giving rise to the claim; and (3) the successor has been provided with notice of the Board proceedings and afforded an opportunity to contest liability. (27 C.A.4th 1028.)

(e) *Reinstatement remedy.* Because reinstatement does not have the same consequences as monetary remedies, the remedy can be imposed even if the successor was unaware of a possible *Lab.C. 132a* claim at the time of the change in ownership or management. Nevertheless, the first and third factors noted above must be established. (27 C.A.4th 1028.)

(f) *Agency liability.* Under the common law, servants and agents are bound by an injunction to the same extent as the principal. (27 C.A.4th 1015, citing *Ross v. Superior Court* (1977) 19 C.3d 899, 141 C.R. 133, 569 P.2d 727, 2 Summary (10th), *Agency and Employment*, §2.) Viewed as comparable to a mandatory injunction, an order for reinstatement should similarly extend to parties that are either controlled by or in collusion with a principal. (27 C.A.4th 1029.) Federal labor and civil rights decisions support this analysis, and entities not employers *in fact* have been treated as such when their operations are functionally integrated with those of the employer. (27 C.A.4th 1029.) Thus, when it can be demonstrated that a successor is merely an extension of a principal, an order of reinstatement would bind both. (27 C.A.4th 1029.)

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22 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
I. WORKERS' COMPENSATION SYSTEM
E. Discrimination Against Injured Workers.
4. Justification for Not Reinstating Worker.

2 Witkin Sum. Cal. Law Work Comp § 22

[§ 22] Justification for Not Reinstating Worker.

Lab.C. 132a proscribes employer actions that are detrimental to an industrially injured worker, unless these actions were necessitated by the realities of doing business. (*Smith v. Work. Comp. App. Bd.* (1984) 152 C.A.3d 1104, 1109, 199 C.R. 881; see *Judson Steel Corp. v. Work. Comp. App. Bd.* (1978) 22 C.3d 658, 667, 150 C.R. 250, 586 P.2d 564, *supra*, §19 [*Lab.C. 132a* does not compel employer to ignore realities of doing business by reemploying unqualified employees or when positions are no longer available].) To implement this justification, if a worker makes a *prima facie* showing that, as the result of an industrial injury, the employer engaged in detrimental conduct, the burden shifts to the employer to demonstrate that the action was necessary and directly related to business realities. (*Smith v. Work. Comp. App. Bd.*, *supra*, 152 C.A.3d 1109.)

In *Barns v. Work. Comp. App. Bd.* (1989) 216 C.A.3d 524, 266 C.R. 503, B, employed as a "green chain puller" of heavy lumber from a conveyor, injured his finger, and after surgery, physical therapy, and his physician's advice, sought lighter work. The employer rejected the request, alluding to a company policy precluding an injured employee from seeking a new position until he or she was able to return to the one previously occupied. Shortly thereafter the employer terminated B. After his physician certified him to resume work, B sought reinstatement as a green chain puller. The employer refused, and instead hired two less experienced applicants. The workers' compensation judge concluded that the employer had proven the defense of "business necessities," and that the termination was justified because (1) B was unable to return to his preinjury occupation and seemed likely to be permanently precluded from doing so, (2) the employer was paying various fringe benefits and could not be required to continue them, and (3) the employer could not be required to reinstate B after his termination, because the employment relationship had been severed and *Lab.C. 132a* no longer applied. *Held*, order annulled.

(a) *Business realities defense.* B made a *prima facie* showing of detrimental action by the employer, but the employer failed to carry its burden that the action was necessary and directly related to business realities. (216 C.A.3d 531.) The policy forbidding assigning an injured employee to lighter duty was of recent origin and had been applied inconsistently to only two employees. A policy that "has been only whimsically applied cannot support a finding of business necessity for discriminating against an industrially injured worker." (216 C.A.3d 532.) The employer's other explanation for failure to restore B to light duty was a fear of reinjury to the finger, but this concern was completely unsupported by medical evidence. (216 C.A.3d 532.)

(b) *Grounds for termination of employment relationship.* The justifications for discharge were insufficient. (216 C.A.3d 533.) Three interrelated principles emerge from Board decisions concerning the right to discharge, or the duty to reinstate, disabled workers: First, an employer's refusal to reinstate an injured worker to an available position may be justified as a business necessity if it appears that, *at the time reinstatement is sought*, the employer reasonably believes the worker is unable to perform the duties of the position without undue risk of reinjury. Second, business realities may compel the employer to replace the worker and *Lab.C. 132a* is not violated if the unavailability of the position precludes reinstatement. Third, and most significant here, business realities do not necessitate termination of employment unless the employer *reasonably* believes that the worker is *permanently* disabled from performing the job, or will be disabled for such a long time that termination is necessary in light of demonstrated business realities. (216 C.A.3d 534, 535.)

(c) *Premature termination in this case.* Here, the employer permanently severed the employment relationship 5 months before the injury was permanent and stable. "Without a showing by the employer of some compelling business necessity, such precipitous action must be deemed unwarranted. In order to *reasonably* believe that a worker is permanently barred from resuming employment, the employer must have some evidence that the injury itself is sufficiently permanent and stable to permit a prognosis with reasonable medical certainty." (216 C.A.3d 535.) Nor did B's acceptance of rehabilitation services warrant a forfeiture of employment rights. To permit this would subvert the fundamental policy of *Lab.C. 132a* by authorizing discrimination against employees based solely on the exercise of statutory rights under the workers' compensation laws. (216 C.A.3d 537.)

(d) *Failure to rehire after termination.* *Anaheim v. Work. Comp. App. Bd.* (1981) 124 C.A.3d 609, 177 C.R. 441, supra, §20, does not permit rejecting B's application when two puller positions became available. In *Anaheim*, the employment relationship had been lawfully terminated before any of the allegedly discriminatory acts took place. Here the purported termination was itself discriminatory, and cannot provide a basis for immunizing the employer's later discriminatory conduct. The business realities of this situation were that the employer "attempted to bootstrap its way to a justification for actions which were plainly discriminatory and for which no concrete necessity was demonstrated." (216 C.A.3d 539.)

SUPPLEMENT: [This section is current through the latest supplement]

See *San Luis Obispo v. Work. Comp. App. Bd.* (2005) 133 C.A.4th 641, 648, 34 C.R.3d 690 [county demonstrated reasonable business necessity in not reinstating employee mental health therapist whose injuries precluded him from physically dealing with potentially combative persons in homeless outreach program].



23 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law I. WORKERS' COMPENSATION SYSTEM F. Prevention of Fraud and Abuse.

2 Witkin Sum. Cal. Law Work Comp § 23

[§ 23] Prevention of Fraud and Abuse.

(1) *In General.* In order to combat fraud and abuse in the workers' compensation system, a number of interrelated statutes have been enacted to provide for both criminal and civil penalties. (*Lab.C. 3820(a)*; see 25 *Pacific L. J.* 315 [Civil RICO and Antitrust Law: The Uneven Playing Field of the Workers' Compensation Fraud Game]; 25 *Pacific L. J.* 867 et seq. [anti-fraud legislation].)

(2) *Misrepresentation.* *Lab.C. 3820(b)* provides that it is unlawful to:

(a) Wilfully misrepresent a fact to obtain workers' compensation insurance at less than the proper rate. (*Lab.C. 3820(b)(1)*.)

(b) Present a knowingly false or fraudulent written or oral material statement in support of or in opposition to a claim for compensation to obtain or deny compensation as defined in *Lab.C. 3207*. (*Lab.C. 3820(b)(2)*; see *Ins.C. 1871.4(a)* [unlawful conduct].)

(c) Knowingly solicit, receive, offer, pay, or accept consideration as compensation or inducement for soliciting or referring clients or patients to obtain services or benefits under the workers' compensation law. (*Lab.C. 3820(b)(3)*.)

(d) Knowingly operate or participate in a for-profit service that refers or recommends clients or patients to obtain medical or medical-legal services or benefits under the workers' compensation law. (*Lab.C. 3820(b)(4)*.)

(e) Knowingly assist, abet, solicit, or conspire to engage in a unlawful act under *Lab.C. 3820*. (*Lab.C. 3820(b)(5)*.)

Violation of a prohibition under *Lab.C. 3820(b)* is subject to a civil penalty of not less than \$ 4,000 nor more than \$ 10,000, plus an assessment of not more than three times the amount of the medical treatment expenses paid under *Lab.C. 4600* et seq. and medical-legal expenses paid under *Lab.C. 4620* et seq. for each claim for compensation submitted in violation of *Lab.C. 3820*. (*Lab.C. 3820(d)*; see *Lab.C. 3820(e)* [enhanced penalty for prior felony convictions].) (See *Ins.C. 1871.4(a)(4)* [fraudulent statement regarding entitlement to benefits to discourage injured worker from making claim].)

(3) *Consideration for Referral or Settlement of Claim.* It is a felony for a person to offer to a claims adjuster, or for a claims adjuster to accept, consideration for the referral or settlement of a claim. (*Lab.C. 3219(a)*.)

(4) *Unauthorized Compensation for Medical-Legal Expenses.* Persons providing medical-legal evaluations cannot request or accept compensation for medical-legal expenses in addition to the fees authorized by *Lab.C. 5307.6* (infra, §273). A person who does so is subject to discipline under *Lab.C. 139.2(k)* and by the appropriate licensing board. (*Lab.C. 5307.6(d)*.)

(5) *Unlawful Contract for Health Care Services.* A contract for professional services secured by a health care provider in violation of the following statutes is void under *Lab.C. 3219(b)*:

- (a) *P.C. 550 (2 Cal. Crim. Law (3d), Crimes Against Property, §186).*
- (b) *Ins.C. 1871.4 (2 Cal. Crim. Law (3d), Crimes Against Property, §187).*
- (c) *B. & P.C. 650 (2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §315).*
- (d) *B. & P.C. 651 (2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §316).*
- (e) *Lab.C. 3215 (2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §330).*
- (f) *Lab.C. 3219(a) (supra).*

(6) *Employment of Runners, Cappers, and Steerers.* A person who knowingly employs a runner, capper, steerer, or other person to procure clients or patients to perform or obtain services or benefits under the workers' compensation law or to engage in activities prohibited by *P.C. 549* or *550* (see *2 Cal. Crim. Law (3d), Crimes Against Property, §189*) is subject to a civil penalty of not less than \$ 5,000 nor more than \$ 10,000 plus an assessment of not more than three times the amount of each claim for compensation submitted in connection with the violation or pursuant to a contract of insurance. This penalty is assessed against each fraudulent claim and not for each violation. Equitable remedies may also be imposed. (*Ins.C. 1871.7(a), (b)*.) These penalties are intended to be remedial and do not preclude a criminal prosecution for the same conduct. (*Ins.C. 1871.7(c)*; see *Ins.C. 1871.7(d)-(j)* [civil action by district attorney, commissioner, or interested person, including insurer, in name of state for violation of *Ins.C. 1871.7*]; *Ins.C. 1871.7(k)* [employee discriminated against by employer for lawfully furthering action is entitled to be made whole].) An action under *Ins.C. 1871.7* must be brought within 3 years after the discovery of the grounds for commencing the action, and no later than 8 years after the commission of an act constituting a violation. (*Ins.C. 1871.7(l)*.)

(7) *Compensation Denied for Fraud.* A person who has been convicted of workers' compensation fraud under *Ins.C. 1871.4* or *P.C. 550 (2 Cal. Crim. Law (3d), Crimes Against Property, §187)* is ineligible to receive or retain compensation owed or received as a result of that violation. (*Ins.C. 1871.5*; see *Tensfeldt v. Work. Comp. App. Bd.* (1998) 66 C.A.4th 116, 124, 77 C.R.2d 691 [city employee who lied about injuring his knee by falling off truck where actual cause was from participating in after work basketball game was absolutely barred from subsequent claim alleging injury occurred in customary employment recreational activity].)

(8) *Warning To Report Earnings While Receiving Benefits.* *Ins.C. 1871.8* requires an insurer or self-insured employer to provide the following warning notice, in English and Spanish, on or with a temporary disability benefit check: "WARNING: You are required to report to your employer or the insurance company any money that you earned for work during the time covered by this check, and before cashing this check. If you do not follow these rules, you may be in violation of the law and the penalty may be jail or prison, a fine, and loss of benefits."

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Employment of Runners, Cappers, and Steerers.* See *People v. Thompson* (2006) 136 C.A.4th 24, 29, 39, 38 C.R.3d 677 [prosecution under *Ins.C. 1871.7* was not precluded by workers' compensation exclusivity provisions (text, §24 et seq.); court properly imposed penalty for each violation of *P.C. 550*].



24 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

A. In General.

1. Statutory Exclusive Remedy Rules.

2 *Witkin Sum. Cal. Law Work Comp* § 24

[§ 24] Statutory Exclusive Remedy Rules.

(1) *Basis for Exclusivity.* Liability of an employer under the Act arises not because of the employer's act or omission, but out of the relationship that the employee bears to the employment because of and in the course of which the injury arose. As a consequence, once the relationship is established, and subject to statutory and judicial exceptions, the employer is insulated against tort liability, and the Act provides the exclusive compensatory remedy for an employee or the employee's dependents for work-related injury or death. (*Lab.C. 3600*; *Shoemaker v. Myers* (1990) 52 C.3d 1, 13, 276 C.R. 303, 801 P.2d 1054, *infra*, §47; *Fermino v. Fedco* (1994) 7 C.4th 701, 708, 30 C.R.2d 18, 872 P.2d 559, *infra*, §58; *Appl v. Lee Swett Livestock Co.* (1987) 192 C.A.3d 466, 471, 472, 473, 237 C.R. 433; see Cal. Civil Practice, 2 Workers' Compensation, §15:1 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §50 et seq.) (On employment relationship, see *infra*, §159 et seq.; on conditions essential to compensation, see *infra*, §193 et seq.; on statutory exceptions, see *infra*, §25.)

(2) *Exclusive Remedy Against Employer.* Where the conditions of compensation under *Lab.C. 3600* concur, and except as provided by *Lab.C. 3602(b)*, 3706, and 4558, the right to recover compensation for an industrial injury is the sole and exclusive remedy of an employee or the employee's dependents against the employer. The fact that either the employee or the employer occupied a dual capacity prior to, or at the time of, the injury does not permit the employee or his or her dependents to bring an action for damages against the employer. (*Lab.C. 3602(a)*; see *Moise v. Owens* (1950) 96 C.A.2d 617, 618, 216 P.2d 22 [employee's action dismissed due to exclusivity of remedy]; *Walker v. San Francisco* (1950) 97 C.A.2d 901, 904, 219 P.2d 487 [workers' compensation was exclusive remedy for family of fireman killed in collision with municipal railway car while responding to fire]; *Ruiz v. Cabrera* (2002) 98 C.A.4th 1198, 1200, 120 C.R.2d 320 [Farm Labor Contractors Act (FLCA; *Lab.C. 1682* et seq.) does not create implied exception to exclusivity rule; thus, workers' compensation was sole remedy for farm worker injured while passenger in vehicle transporting work crew and provided by farm labor contractor registered under FLCA].) (On dual capacity doctrine, see *infra*, §§62, 63.)

(3) *Exclusive Remedy Against Another Employee.* Except as specified by *Lab.C. 3601*, the Act provides the exclusive remedy for an employee or the employee's dependents for an industrial injury or death caused by another employee acting within the scope of his or her employment, if all other conditions of compensation are met. (*Lab.C. 3601(a)*; see *Benjamin v. Ricks* (1976) 63 C.A.3d 593, 596, 132 C.R. 758 [exclusive remedy provision of *Lab.C. 3601* is constitutional]; *Hendy v. Losse* (1991) 54 C.3d 723, 738, 1 C.R.2d 543, 819 P.2d 1 [professional football team physician

as coemployee of injured player was protected under *Lab.C. 3601* in treating player because physician was acting within scope of his employment and other conditions of compensation were met[.])

West's Key Number Digest, Workers' Compensation k.2084 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Exclusive Remedy Against Another Employee*. See *Jones v. Department of Corrections & Rehabilitation (2007) 152 C.A.4th 1367, 1383, 62 C.R.3d 200* [exclusivity rule applied where correctional officer's assault and battery claim against coemployee was based on altercation over use of wheelbarrow that occurred at worksite during scope of both employees' employment].



25 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

A. In General.

2. Statutory Exceptions.

2 Witkin Sum. Cal. Law Work Comp § 25

[§ 25] Statutory Exceptions.

(1) *Actions Against Employer.* An employee or the employee's dependents may bring an action for damages against the employer in the following instances:

(a) When the employee's injury or death is proximately caused by the employer's wilful physical assault. (*Lab.C. 3602(b)(1)*; see *infra*, §43.)

(b) When the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment. However, liability is limited to the damages proximately caused by the aggravation. (*Lab.C. 3602(b)(2)*; see *infra*, §44.)

(c) When the employee's injury or death is proximately caused by a defective product manufactured by the employer that is later provided for the employee's use by a third person. (*Lab.C. 3602(b)(3)*; see *infra*, §63.)

(d) When the conditions of compensation under *Lab.C. 3600* do not concur. (*Lab.C. 3602(c)*; see *infra*, §54.)

(e) When the employer fails to secure payment of compensation. (*Lab.C. 3706*; see *infra*, §52.)

(f) When the employee's injury or death is proximately caused by the employer's removal of or failure to install a point of operation guard on a power press. (*Lab.C. 4558*; see *infra*, §49 et seq.)

(2) *Action Against Another Employee.* In addition to the right to compensation from the employer, an employee or the employee's dependents may bring an action for damages against another employee when the injury or death is proximately caused by the other employee's (a) wilful and unprovoked physical, aggressive act, or (b) intoxication. (*Lab.C. 3601(a)*; see *infra*, §§67, 68.)

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26 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

A. In General.

3. Pleading To Negate or Uphold Jurisdiction.

2 Witkin Sum. Cal. Law Work Comp § 26

[§ 26] Pleading To Negate or Uphold Jurisdiction.

(1) *Pleading To Negate Compensation Act.* In a tort action where the complaint contains facts indicating coverage by the Act, it is necessary to plead additional facts to negate its application. (See *Singleton v. Bonnesen* (1955) 131 C.A.2d 327, 330, 280 P.2d 481 [action could not be maintained where complaint failed to negate application of Act and specifically alleged facts indicating "a situation falling squarely within the field designed to be encompassed" by the Act]; *Hughes v. Western MacArthur Co.* (1987) 192 C.A.3d 951, 957, 237 C.R. 738 [stating rule but holding complaint sufficient].)

(2) *Pleading Jurisdiction of Board as Affirmative Defense.* The exclusive jurisdiction of the Board may be lost by failure of a defendant in a tort action to plead and prove that the conditions for application of the Act are present. (*Popejoy v. Hannon* (1951) 37 C.2d 159, 173, 231 P.2d 484; see 5 Cal. Proc. (4th), *Pleading*, §1031.)

In *Doney v. Tambouratgis* (1979) 23 C.3d 91, 151 C.R. 347, 587 P.2d 1160, plaintiff, formerly employed as a dancer and cocktail waitress at defendant's establishment, requested to return to work and her regular routine, and defendant agreed. Shortly after closing time, defendant summoned plaintiff to his office, where he assaulted her. Plaintiff sought damages for physical injuries and emotional distress stemming from the assault, with no mention of an employment relationship. Defendant denied the allegations without pleading an affirmative defense. At the conclusion of plaintiff's case, defendant moved for a nonsuit on the ground of exclusive remedy under the Act, and also sought to raise the issue by motions for new trial and judgment notwithstanding the verdict. The motions were denied and judgment was entered on a jury verdict for compensatory and punitive damages. *Held*, affirmed.

(a) *General requirement of pleading and proof.* The defendant has the burden of pleading and proving, as an affirmative defense, the existence of the conditions of compensation. (23 C.3d 97, citing *Popejoy*, *supra*, and the text.) The exception to this rule, where the complaint affirmatively alleges facts indicating coverage of the Act and not negating its application (see *Singleton*, *supra*), was inapplicable here. (23 C.3d 97.)

(b) *No improper "conferral" of subject matter jurisdiction.* Subject matter jurisdiction cannot be conferred by consent (23 C.3d 98; see 2 Cal. Proc. (4th), *Jurisdiction*, §12 et seq.), but this was not done here. "The trial court clearly had subject matter jurisdiction over such an action unless and until it was properly demonstrated that the case was one 'covered by the statute' due to the presence therein of the conditions of compensation set forth in section 3600 of the

Labor Code. ... [S]uch a demonstration may occur in one of two ways--i.e., either by the plaintiff through alleging facts indicating coverage under the act in his pleadings, or by the defendant through setting up the affirmative defense of coverage in responsive pleadings and proceeding to prove the existence of the requisite conditions. When, as in this case, no such demonstration has been made in either fashion, the court properly proceeds to exercise its existing jurisdiction to enforce the common law remedy." (23 C.3d 98.)

Dorado v. Knudsen Corp. (1980) 103 C.A.3d 605, 163 C.R. 477, follows *Doney*, but in a more involved factual setting. Plaintiff sued defendant, alleging that he was employed by T, and in the course of his employment was injured while handling defendant's crates, which were in a dangerous and unsafe condition. Defendant did not plead the affirmative defense of the exclusive compensation remedy, but, 11 months after filing its answer, raised that defense by motion for summary judgment. Defendant's supporting papers showed that T was a limited partnership with defendant as the general and managing partner, and that, because the partnership had no entity separate from that of the partners, defendant was plaintiff's employer. *Held*, summary judgment for defendant reversed. In the absence of a proper pleading of the affirmative defense, summary judgment was improper. At the trial, defendant should be allowed to amend to raise the defense. Plaintiff will then be entitled to assert the "dual capacity doctrine" (see *infra*, §§62, 63.) and to offer evidence that the injury occurred not because of defendant's acts as a partner of T, but rather because of defendant's acts as seller of defective crates to T. (103 C.A.3d 611, 614.) (See *Green v. Oceanside* (1987) 194 C.A.3d 212, 223, 239 C.R. 470 [defendant's failure to plead exclusive remedy bar precludes consideration of issue]; *Lucich v. Oakland* (1993) 19 C.A.4th 494, 498, 499, 23 C.R.2d 450 [defendant's claim on appeal, following adverse jury verdict, that exclusivity principle precluded trial court jurisdiction came "far too late"; following *Doney*]; *Gibbs v. American Airlines* (1999) 74 C.A.4th 1, 14, 87 C.R.2d 554 [on demurrer to tort action, defendant employer need not plead and prove that it has workers' compensation insurance to invoke jurisdiction where plaintiff alleges facts that bring case within exclusive province of workers' compensation law and nothing in pleadings or at trial negates its application; insurance is presumed where complaint alleges work-related injury; following *Doney*].)

(3) *Exceptions to Requirement of Pleading Jurisdiction of Board*. In *Rowland v. Sonoma* (1990) 220 C.A.3d 331, 269 C.R. 426, plaintiff, a county jail inmate, was injured while being driven in a county-owned station wagon. He sued the county, and the county sought summary judgment on the ground of immunity from liability for injuries to prisoners under *Govt.C. 844.6* (5 *Summary* (10th), *Torts*, §292 et seq.). The trial court granted summary judgment for defendant. However, plaintiff's declarations raised the issue whether he was working for the county at the time of his injury, and therefore was subject to the exclusive compensation remedy. Unable to determine from the record whether plaintiff was an employee as a matter of law, the Court of Appeal reversed and remanded to the trial court with directions to determine this jurisdictional issue.

(a) The exclusive compensation remedy is jurisdictional, and the parties cannot waive it and confer jurisdiction on the civil courts by stipulation or estoppel. (220 C.A.3d 333, 334.)

(b) *Popejoy* and *Doney* involve unique situations, but the opinions recognize two exceptions to the duty to affirmatively plead the compensation remedy as an affirmative defense:

(1) Where the complaint directly or indirectly alleges facts indicating an employment relationship. In that case, the trial court's jurisdiction is limited to a determination of the jurisdictional issue. (220 C.A.3d 335.)

(2) When postpleading motions indicate that the conditions of compensation might exist. "Indeed, it is rare that a lack of subject matter jurisdiction will be disclosed by plaintiff's complaint. Evidence disclosed from declarations, admissions, or deposition testimony in support of or in reply to a motion for summary judgment may be stronger than bare pleadings in the complaint to notify the parties and the court of the possible exclusive remedy of workers' compensation." (220 C.A.3d 335.)

(c) "Although lack of subject matter jurisdiction can be attacked at any time, counsel for the parties have the duty to raise this fundamental objection at an early time. This saves the unnecessary expense of a trial and its preparation; it

promotes judicial economy and determines at the beginning of the process whether a matter properly belongs in the civil court." (220 C.A.3d 335.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Pleading Jurisdiction of Board as Affirmative Defense.*

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1105.

Subject matter jurisdiction cannot be conferred by consent:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §13 et seq.



27 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

1. Claims for Emotional Distress.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 27

[§ 27] In General.

(1)*Employee Claims.* Employee claims for intentional and negligent infliction of emotional distress are within the exclusive remedy provisions, even though no physical injury or disability is alleged. (*Livitsanos v. Superior Court* (1992) 2 C.4th 744, 749, 7 C.R.2d 808, 828 P.2d 1195 [disapproving *Renteria v. Orange* (1978) 82 C.A.3d 833, 147 C.R. 447]; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 157, 233 C.R. 308, 729 P.2d 743 [claim based on conduct normally occurring in workplace, i.e., demotions, promotions, criticism of work practices, is within exclusive jurisdiction of Workers' Compensation Appeals Board; thus, exclusivity was defense to claim of intentional infliction of emotional distress]; *Valenzuela v. California* (1987) 194 C.A.3d 916, 923, 924, 240 C.R. 45 [claim for intentional infliction of emotional distress arising from harassment; applying reasoning of *Cole v. Fair Oaks Fire Protection Dist.*]; *Horn v. Bradco Int., Ltd.* (1991) 232 C.A.3d 653, 660, 283 C.R. 721 [declining to follow *Renteria*].) (On conduct outside compensation bargain as basis of liability, see *infra*, §56 et seq.)

In *Livitsanos*, plaintiff alleged that defendant employer and defendant company owner had engaged in a campaign of harassment resulting in plaintiff's wrongful termination. The trial court sustained defendants' demurrer to the claims for intentional and negligent infliction of emotional distress and the Court of Appeal denied mandamus. *Held*, reversed and remanded to the Court of Appeal.

(a) *Renteria v. Orange, supra*, involving a suit over alleged employer harassment designed to discriminate against plaintiff's Hispanic heritage, held that a cause of action for intentional infliction of emotional distress is outside the scope of the workers' compensation scheme where the injury is purely "emotional." (2 C.4th 750.)

(b) The *Renteria* analysis was flawed. The proposition that intentional or egregious employer conduct is necessarily outside the scope of the workers' compensation scheme is erroneous. As pointed out in *Cole* and in *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054, even intentional misconduct may constitute a "normal part of the employment relationship." (2 C.4th 752.) Moreover, *Renteria* erred in suggesting that emotional injury that results in an industrial disability is not compensable under the Act. If the basic conditions of compensation are otherwise satisfied, and the employer's conduct neither contravenes fundamental public policy nor exceeds the risks inherent in the employment relationship, an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of the Act. (2 C.4th 744.)

(c) The conclusion that emotional injury lies within the scope of the Act does not complete the analysis; injury must also result in an industrial *disability* compensable under the Act. And the existence of a noncompensable injury does not by itself abrogate the exclusive remedy provisions. The work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals. (2 C.4th 754, 755.) "In sum, where the employee suffers annoyance or upset on account of the employer's conduct but is not disabled, does not require medical care, and the employer's conduct neither contravenes fundamental public policy nor exceeds the inherent risks of the employment, the injury will simply not have resulted in any occupational impairment compensable under the workers' compensation law or remediable by way of a civil action." (2 C.4th 755.)

(d) Here, however, plaintiff contended that defendants' misconduct exceeded the normal risks of the employment relationship; that defendants engaged in a campaign of outrageous and harassing conduct, which included falsely accusing plaintiff of embezzlement and sabotage, that he was compelled to sell his independent distribution company and forced to sign a \$ 100,000 promissory note for a debt owed under threat of retaliation if he refused. The circumstances of the discharge were further complicated by the fact that plaintiff apparently occupied a dual status in his relationship with defendants: as employee, and as independent distributor of the company's product. (2 C.4th 756.) The Court of Appeal, in summarily denying plaintiff's petition for mandamus, did not consider this important issue, and it is one that should be addressed in a written opinion by that court. (2 C.4th 756.)

In *Huffman v. Interstate Brands Corp.* (2004) 121 C.A.4th 679, 17 C.R.3d 397, plaintiff was demoted to a division sales manager position in which he was required to load and deliver bakery products to stores. Plaintiff had previously injured his knees, for which he received compensation, and while in his demoted position, had bilateral knee replacement surgery. Plaintiff brought actions for age discrimination under the Fair Employment and Housing Act, and wrongful demotion in violation of public policy. A jury awarded economic damages and noneconomic damages attributable to emotional distress arising from the post-demotion injury to plaintiff's knees. *Held*, reversed.

(a) Although plaintiff's unlawful demotion claim was exempt from the workers' compensation exclusivity rule (see *infra*, §107), his emotional distress claim attributed to his post-demotion knee injury was not, and evidence of that injury should have been excluded. (121 C.A.4th 692.) However, the exclusivity rule would not apply to plaintiff's emotional distress claim if the employer's unlawful action had been a substantial factor in the subsequent injury. (121 C.A.4th 696.)

(b) Had plaintiff "alleged a disability discrimination or failure to accommodate claim, there is no doubt that his emotional distress damages arising from his [knee injuries] would have been exempt from the exclusive remedy provisions. In such a case ... the unlawful demotion to a position in which the employer knew the employee could not perform because of a physical disability would be a substantial factor in subsequent workplace injury." Instead, the injury to plaintiff's knees arose from the physical demands of the job to which all division sales managers are subject. The alleged age discrimination plaintiff may have suffered from the demotion was separate and distinct from his subsequent industrial injury. (121 C.A.4th 698.)

(2) *Nonemployee Claims.* A spouse does not have a claim for emotional distress suffered from witnessing the other spouse's job-related death. (*Williams v. Schwartz* (1976) 61 C.A.3d 628, 633, 131 C.R. 200 [wife witnessed husband's death and recovered death benefits under Act].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Employee Claims.* See *Jones v. Department of Corrections & Rehabilitation* (2007) 152 C.A.4th 1367, 1382, 62 C.R.3d 200 [correctional officer failed to establish discriminatory acts by employer or coemployees for emotional distress claim, and claim was independently barred by exclusivity rule even if conduct was intentional, unfair, or outrageous]. (2) *Nonemployee Claims.* See 8 A.L.R.6th 399 [vicarious or imputed liability for intentional infliction of emotional distress--nonemployee plaintiffs].



28 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

1. Claims for Emotional Distress.

b. Wrongful Termination.

2 Witkin Sum. Cal. Law Work Comp § 28

[§ 28] Wrongful Termination.

Emotional distress caused by the termination of employment is an injury arising within the course and scope of employment, and is compensable under the Act. Hence, the exclusivity provisions apply. (*Pichon v. Pacific Gas & Elec. Co.* (1989) 212 C.A.3d 488, 496, 260 C.R. 677, citing and discussing *Traub v. Board of Retirement* (1983) 34 C.3d 793, 195 C.R. 681, 670 P.2d 335, *infra*, §256.) (See *Robomatic v. Vetco Offshore* (1990) 225 C.A.3d 270, 272, 275 C.R. 70 [plaintiff was employee rather than independent contractor and sole remedy for emotional distress ensuing from dismissal was under Act; citing *Pichon*]; 39 *Hastings L. J.* 1229 [Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?].)

In *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054, *infra*, §47, the court criticized a dictum in *Georgia-Pac. Corp. v. Work. Comp. App. Bd.* (1983) 144 C.A.3d 72, 75, 192 C.R. 643, to the effect that injuries from termination of employment do not constitute injuries "arising out of and in the course of employment." The dictum "is not supported by logic or precedent." (52 C.3d 18, citing and discussing *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27, and *Traub*.) The opinion adds:

"Our determination that injuries arising from termination of employment ordinarily arise out of and occur in the course of the employment within the meaning of *Labor Code section 3600* avoids the evidentiary nightmare that might result from application of the *Georgia-Pacific* dictum requiring differentiation between injuries, especially psychological injuries, caused by conduct leading up to the termination and injuries caused by the termination itself. ... Accordingly, we conclude that both the act of termination and the acts leading up to termination necessarily arise out of and occur during and in the course of the employment." (52 C.3d 19, 20.) (See *Davaris v. Cubaleski* (1993) 12 C.A.4th 1583, 1589, 16 C.R.2d 330 [employer's demurrer was properly sustained where employee alleged that her termination resulted from taking leave from work for hysterectomy; there is no public policy of encouraging proper medical care]; 19 *Pepperdine L. Rev.* 310 [*Shoemaker*].) (On nonpreemption where action is based on wrongful termination in violation of public policy, see *infra*, §57.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Miklosy v. Regents of Univ. of Calif.* (2008) 44 C.4th 876, 903, 80 C.R.3d 690, 188 P.3d 629 [claim for intentional infliction of emotional distress arising from termination allegedly in retaliation for whistleblowing was barred by

workers' compensation exclusive remedy provisions; following *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054, text, p. 571].



29 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

1. Claims for Emotional Distress.

c. Constructive Discharge.

2 *Witkin Sum. Cal. Law Work Comp* § 29

[§ 29] Constructive Discharge.

Injuries resulting from the nonconsensual termination of employment are included within the scope of workers' compensation because the act of termination and the acts leading up to the termination necessarily arise out of and in the course of employment. (*Shoemaker v. Myers* (1990) 52 C.3d 1, 17, 276 C.R. 303, 801 P.2d 1054, *infra*, §47.)

In *Wong v. State Comp. Ins. Fund* (1993) 12 C.A.4th 686, 16 C.R.2d 1, an employer sued its workers' compensation insurer for refusal to defend a civil action brought by an employee alleging physical and emotional injury resulting from intolerable working conditions. Employee plaintiff in the underlying action claimed that defendant employer's failure to give him promised auditing hours, the unacceptable rate of pay, cramped office space, poor lighting, leaking roof, and office remodeling amounted to a constructive discharge. *Held*, the action was barred by the exclusive remedy provisions.

(a) Where an employer's alleged misconduct involves actions that are a normal part of the employment relationship, the employee cannot avoid the exclusive remedy provisions by claiming that the employer's conduct was outrageous, or intended to cause emotional distress resulting in disability. (12 C.A.4th 694, 695; citing *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27.)

(b) A claim for infliction of emotional distress falls within the exclusivity provisions, even if no physical disability results, so long as the conditions of compensation are satisfied, and the employer does not contravene public policy or exceed the risks inherent in the employment relationship. (12 C.A.4th 695; citing *Livitsanos v. Superior Court* (1992) 2 C.4th 744, 754, 7 C.R.2d 808, 828 P.2d 1195, *supra*, §27.)

(c) An employee who can demonstrate that the employer breached the implied promise not to discharge the employee without good cause by providing intolerable working conditions that foreseeably and proximately caused the employee to resign can prevail in an action for wrongful constructive discharge. However, damages resulting from the employer's conduct during employment and the termination of the employment are within the exclusive remedy provisions of the workers' compensation law. (12 C.A.4th 695; following *Panopulos v. Westinghouse Elec. Corp.* (1989) 216 C.A.3d 660, 264 C.R. 810, 2 *Summary* (10th), *Agency and Employment*, §224.)

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30 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

2. Noncompensable Injury.

2 Witkin Sum. Cal. Law Work Comp § 30

[§ 30] Noncompensable Injury.

The fact that an injury is not compensable under the Act does not in itself justify a departure from the exclusive remedy rule. Thus, in *Williams v. State Comp. Ins. Fund* (1975) 50 C.A.3d 116, 123 C.R. 182, a husband and wife sued to recover damages for injury to the husband's genitals. Affirming a demurrer, the court said:

"Plaintiff is correct in arguing that the statutory emphasis on occupational disability as a rating factor denigrates the compensability of nonoccupational handicaps. Decisions in other states hold that the workers' compensation law provides the exclusive remedy for industrial injury even though the resulting disability--for example, sexual impotence--is noncompensable. ... The theory underlying the out-of-state decisions is that the workers' compensation plan imposes reciprocal concessions upon employer and employee alike, withdrawing from each certain rights and defenses available at common law; the employer assumes liability without fault, receiving relief from some elements of damage available at common law; the employee gains relatively unconditional protection for impairment of his earning capacity, surrendering his common law right to elements of damage unrelated to earning capacity; the work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals; a failure of the compensation law to include some element of damage recoverable at common law is a legislative and not a judicial problem." (50 C.A.3d 122.)

In *Salin v. Pacific Gas & Elec. Co.* (1982) 136 C.A.3d 185, 185 C.R. 899, plaintiff employee sued defendant for the wrongful death of his two daughters. The complaint alleged that defendant knowingly kept plaintiff on assigned duties involving such extreme stress that he reached the point of insanity, and shot and killed his daughters while attempting to kill himself. His theory was that the conditions of compensation did not exist with regard to the death of the daughters. Held, judgment on the pleadings for defendant affirmed.

(a) Plaintiff's theory that he stood in the position of a nonemployee third party is answered by *Lab.C. 3600*: Liability for compensation by an employer to an employee is in lieu of any other liability "to any person"; i.e., where there is a work-related injury or death, third parties who have suffered damages cannot sue the employer. (136 C.A.3d 191.) For example, a wife cannot sue for loss of consortium arising from her employee-husband's work-related injury (136 C.A.3d 192; citing *Williams v. State Comp. Ins. Fund, supra*). Likewise, a wife cannot recover damages for emotional distress suffered from observing her employee-husband's work-related death (136 C.A.3d 192, citing

Williams v. Schwartz (1976) 61 C.A.3d 628, 633, 131 C.R. 200, supra, §27.)

(b) Therefore, if plaintiff's daughters had survived the injuries, they would have had no cause of action against defendant; and the wrongful death statute was intended to give an action to the representative of a person killed only if the deceased could have maintained an action had he or she survived. (136 C.A.3d 192.) Hence, plaintiff, who stands in the shoes of the daughters, has no cause of action for wrongful death. (136 C.A.3d 193.)

In *Seide v. Bethlehem Steel Corp.* (1985) 169 C.A.3d 985, 215 C.R. 629, plaintiff was a *nondependent* parent of a dockworker and was not entitled to death benefits under either the Longshoremen's and Harbor Workers' Compensation Act (infra, §135 et seq.) or the California Act. She argued that the lack of a compensation remedy entitled her to bring a tort action for wrongful death against defendant employer. *Held*, the action could not be maintained. "Plaintiff attempts to distinguish her case by arguing that the courts have only applied *Labor Code section 3601*'s exclusiveness of remedy provision where an employee or dependent has been compensated under *Labor Code section 3600*. This distinction does not change the result. Nothing in the workers' compensation law requires a compensable injury before *Labor Code section 3601* applies. ... We decline to carve out an exception for a nondependent parent, who is ineligible for compensation under workers' compensation, to allow her to maintain a tort action against an employer when an employee, who suffers a noncompensable injury during the course of employment, cannot." (169 C.A.3d 991; following *Williams v. State Compensation Ins. Fund*, supra.)

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31 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

3. Wrongful Refusal To Pay Compensation Award.

2 *Witkin Sum. Cal. Law Work Comp* § 31

[§ 31] Wrongful Refusal To Pay Compensation Award.

An employee has no separate action against an employer's insurer for wrongful refusal to pay a compensation award. *Lab.C. 3850* protects insurers as well as employers, and *Lab.C. 5814*, providing penalties for unreasonable refusal, is the employee's sole remedy in the absence of outrageous conduct. (*Droz v. Pacific Nat. Ins. Co. (1982) 138 C.A.3d 181, 184, 188 C.R. 10.*) (See *Depew v. Hartford Acc. & Indem. Co. (1982) 135 C.A.3d 574, 577, 185 C.R. 472* [delay in payment does not amount to outrageous conduct]; *Cervantes v. Great Amer. Ins. Co. (1983) 140 C.A.3d 763, 772, 773, 189 C.R. 761* [reviewing decisions and rejecting policy arguments for change in rule]; *Santiago v. Employee Benefits Services (1985) 168 C.A.3d 898, 902, 904, 214 C.R. 679* [protection extended to attorney for self-insured employer and claims administrator]; C.E.B., *Workers' Damages Practice* 2d, §6.8; *8 A.L.R.4th 902* [discussing conflicting cases from other jurisdictions].)

In *Stoddard v. Western Employers Ins. Co. (1988) 200 C.A.3d 165, 245 C.R. 820*, plaintiff employee made an impressive showing of outrageous conduct on the part of the employers' insurers in refusing to pay benefits. The court affirmed a judgment for defendants on demurrer "reluctantly," following the established precedents. (*200 C.A.3d 171, 172.*)

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32 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

4. Employer's Wilful Misconduct.

2 Witkin Sum. Cal. Law Work Comp § 32

[§ 32] Employer's Wilful Misconduct.

The Act authorizes an award of additional compensation where the injury is caused by the employer's serious and wilful misconduct (*infra*, §316 et seq.). This precludes a tort action for either compensatory or exemplary damages. (See *Law v. Dartt* (1952) 109 C.A.2d 508, 509, 240 P.2d 1013 ["student trainee" permitted to work on machine without proper instruction].)

In *Sasser v. Miles & Sons Trucking Service* (1953) 119 C.A.2d 239, 259 P.2d 488, plaintiff alleged that defendant employer, a public utility hauler, compelled him to drive a defective tractor for 38 hours without rest, and that because of the defect and his fatigue the tractor ran off the road, injuring him and causing the loss of his job. He waived compensatory damages but sought exemplary damages under *Pub.Util.C. 2106* (public utility's liability for violations). *Held*, no cause of action was stated. Compensatory damages were of course excluded by the compensation provisions of the Act, and exemplary damages cannot be awarded in the absence of a right to compensatory damages. (119 C.A.2d 241; 6 Summary (10th), Torts, §1607.) (See *Nelson v. Metalclad Insulation Corp.* (1975) 44 C.A.3d 474, 476, 118 C.R. 725 [rejecting contention that action was proper under *Lab.C. 3706* because employer was not insured against wilful misconduct].)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

5. Employer's Fraud.

2 Witkin Sum. Cal. Law Work Comp § 33

[§ 33] Employer's Fraud.

(1) *Misrepresentation of Dangerous Materials and Safety.* The employee cannot sue the employer in deceit for a fraudulent representation that dangerous materials were safe to use. (*Buttner v. American Bell Tel. Co. (1940) 41 C.A.2d 581, 583, 107 P.2d 439; Wright v. FMC Corp. (1978) 81 C.A.3d 777, 779, 146 C.R. 740; United States Borax & Chemical Corp. v. Superior Court (1985) 167 C.A.3d 406, 410, 213 C.R. 155; see Gunnell v. Metrocolor Laboratories (2001) 92 C.A.4th 710, 719, 112 C.R.2d 195* [employer's concealment of hazardous nature of cleaning substances used by employees and failure to provide adequate protective gear and proper training were within exclusive remedy provision; following *Johns-Manville Products Corp. v. Superior Court (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948, infra, §44*]; 46 A.L.R.3d 1285 [workers' compensation as exclusive remedy against employer for fraud].)

In *Spratley v. Winchell Donut House (1987) 188 C.A.3d 1408, 234 C.R. 121*, plaintiff sued in tort alleging that she was induced to enter employment as a baker in defendant's shop on false representations that defendant would make the workplace safe by locks and security provided by sheriff's deputies, and that she suffered injuries when an intruder entered and assaulted her. *Held*, demurrer sustained, on the authority of *Wright v. FMC Corp.*, *Buttner v. American Bell Tel. Co.*, and *United States Borax & Chemical Corp. v. Superior Court*. "*Were we to hold this complaint states a claim in tort, an employee who is injured and suffers emotional distress due to an unknown or concealed hazard in the workplace could avoid the workers' compensation bar simply by alleging the employer misrepresented or fraudulently concealed the hazard during the hiring process. Such a result, as well, would invite a multiplicity of claims, focus attention on the knowledge of employer and employee and undermine the underlying premise on which the workers' compensation system is based.*" (188 C.A.3d 1416.) Moreover, plaintiff could not avoid the exclusive remedy provision by recharacterizing defendant's alleged fraud as a tortious breach of the covenant of good faith and fair dealing. (188 C.A.3d 1417.)

(2) *Distinctions.* There are two distinctions regarding the employer's fraud: (a) An action may be based on the employer's extrinsic fraud. (See *infra, §64.*) (b) An employee may sue where the injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment. (See *infra, §§44, 45.*)

SUPPLEMENT: [This section is current through the latest supplement]



34 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

6. Failure To Render Medical Care.

2 Witkin Sum. Cal. Law Work Comp § 34

[§ 34] Failure To Render Medical Care.

The employee has no separate action against the employer for injuries suffered from failure to render medical care. In *Noe v. Travelers Ins. Co.* (1959) 172 C.A.2d 731, 342 P.2d 976, plaintiff employee alleged that she injured her back; that defendant, employer's insurer, undertook to provide medical treatment; that its physician recommended and requested authorization for surgery, but, despite repeated requests, defendant did not give its approval until 14 months later; and that, as a result, plaintiff's injury became permanent. In one count, she charged negligence and in another, wilful failure to perform. *Held*, no cause of action was stated.

(a) The Commission had exclusive jurisdiction over the controversy, and the Act provided adequate remedies for the worker, i.e., the worker could have obtained medical care at the employer's expense, or the Commission could have ordered surgery at the employer's expense. (172 C.A.2d 734; see *infra*, §259 et seq.) Thus, a worker cannot ignore the statutory remedy, suffer the injurious consequences of refused or delayed medical treatment, and then sue the employer for tort damages. (172 C.A.2d 735.)

(b) "[I]f delay in medical service attributable to a carrier could give rise to independent third party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. In the practical operation of the plan, minor delays in getting medical service, such as for a few days or even a few hours, caused by a carrier, could become the bases of independent suits, and these could be many and manifold indeed. The uniform and exclusive application of the law would become honeycombed with independent and conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified." (172 C.A.2d 737.) (See *Deauville v. Hall* (1961) 188 C.A.2d 535, 10 C.R. 511, *infra*, §62; *Everfield v. State Comp. Ins. Fund* (1981) 115 C.A.3d 15, 20, 171 C.R. 164 [plaintiff alleged delay in making compensation payments; following *Noe*]; C.E.B., Workers' Damages Practice 2d, §6.10.)

In *Roberts v. Pup 'N' Taco Driveup* (1984) 160 C.A.3d 278, 206 C.R. 533, plaintiff alleged that her son, employed by defendant, was shot in a robbery; that defendant's employees negligently failed to summon medical assistance in a timely manner; and that as a proximate result of the negligence, her son died. The specific negligence set forth was the hiring of employee L, an illegal alien, who merely informed the manager at home, and did not call the authorities for fear of deportation. *Held*, no cause of action was stated for the employer's misconduct. There was no allegation of deliberate action with intent to injure; the allegation that the employer failed to reasonably foresee the risk of hiring an

illegal alien was at most a pleading of negligence rather than of an intentional tort. (*160 C.A.3d 283, 284.*)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

7. Insurer's Negligent Safety Inspection.

2 Witkin Sum. Cal. Law Work Comp § 35

[§ 35] Insurer's Negligent Safety Inspection.

The exclusive remedy provisions, including *Lab.C. 3852*, bar tort actions against the employer, and *Lab.C. 3850* defines employer to include "insurer." In *State Comp. Ins. Fund v. Superior Court* (1965) 237 C.A.2d 416, 46 C.R. 891, a lumber company was insured by petitioner. An employee, B, injured by falling lumber, received medical expenses and a compensation award, but sued petitioner, alleging that petitioner had negligently failed to inspect or negligently inspected the premises, as required by its policy, and that this requirement was for the benefit of employees as well as employers. *Held*, prohibition granted; exclusive jurisdiction of the claim was in the Commission.

(a) Defining "employer" to include "insurer" expresses a basic policy of the Act, which covers the subjects of safety and insurance. The process of insuring is an integral and essential part of the system, without which it could not operate successfully. (237 C.A.2d 421.) Even if an insurance company steps beyond its position of insurer and directs the manner in which injuries are to be treated, it does not become a third person who can be sued; such a conclusion would subject the system to partial disintegration. (237 C.A.2d 423.)

(b) The duty to provide safe working conditions is imposed on the employer, but results in a burden on the insurer when it is negligently performed. "When the insurer, therefore, assumes a contracted-for duty to inspect is it really stepping from its role as insurer? We do not think so. We think it is performing a service which is inextricably interwoven with its status as insurer, one which it, with its greater resources, can better perform than can most employers, directly. Performance of the inspection service unquestionably benefits the employer. Admittedly, since the cost of inspection is reflected in the premium charged, and since the service performed, by lessening the risk of injuries, will lessen compensation payments, the insurer does not act altruistically. But it is workmen as a class--the *uninjured* workmen injuries to whom are *prevented* by safety measures--who are the principal beneficiaries." (237 C.A.2d 424, 425.)

(c) To accept B's contention would require insurers either to strike the inspection provision from their policies or substantially raise their premiums. (237 C.A.2d 425.) Hence, "when an insurer assumes by contract the duty to inspect, it acts as an insurer and the Industrial Accident Commission has the exclusive jurisdiction to determine controversies between the employee and the insurer relating to the latter's performance of that obligation." (237 C.A.2d 425.) (See *Williams v. State Comp. Ins. Fund* (1975) 50 C.A.3d 116, 120, 123 C.R. 812 [following *State Comp. Ins. Fund v. Superior Court*]; 6 Santa Clara Lawyer 224 [concluding that *State Comp. Ins. Fund v. Superior Court* provides workers'

compensation insurers with invulnerability in undertakings not directly involving insurance process].)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

8. Insurer's Negligent Investigation.

2 Witkin Sum. Cal. Law Work Comp § 36

[§ 36] Insurer's Negligent Investigation.

An insurer does not lose its normal immunity from suit when it negligently fails to control the scope and manner of a nonmedical investigation of a claim. In *Unruh v. Truck Ins. Exchange* (1972) 7 C.3d 616, 102 C.R. 815, 498 P.2d 1063, plaintiff injured her back in 1960 and received a continuing compensation award. In 1964, according to her complaint, defendant insurer conducted an investigation of her activities; B, defendant's adjuster, befriended her and induced her to go to Disneyland with him; he had her cross a rope bridge and a barrel bridge, and violently shook them; M, another of defendant's employees, filmed the proceedings; the films were exhibited at a compensation hearing; and, on learning of the deception and exhibition of the films, plaintiff suffered a mental and physical breakdown. She sought \$ 500,000 general damages, special damages for medical expense and past and future wage loss, and \$ 2 million in punitive damages. *Held*, judgment for insurer on demurrer affirmed. The agents B and M were persons other than the employer and therefore liable in tort. (7 C.3d 625.) The insurer, however, was not liable for negligent failure to control them:

(a) The investigation of claims is an important function of the insurer, which has the resources to detect fraud or gross exaggeration; and the detection of bad claims benefits the entire compensation system. Hence, the nature of the insurer's role is not changed merely by reason of negligence in performance of this function. Moreover, although the allegations dealt with deceit of B, the gravamen was not fraud, but negligence. (7 C.3d 627, 628, 629; distinguishing fraud in *Ramey v. General Petroleum Corp.* (1959) 173 C.A.2d 386, 343 P.2d 787, *infra*, §64.)

(b) Negligent investigation may have a harmful effect on the employee, but this can be treated by the Board as a compensable aggravation of the original injury, thus giving effective relief within the compensation scheme. (7 C.3d 628.) (See 5 Southwestern U. L. Rev. 118 [discussing *Unruh v. Truck Ins. Exchange*].)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

9. Insurer's Negligent Spoliation of Evidence.

2 Witkin Sum. Cal. Law Work Comp § 37

[§ 37] Insurer's Negligent Spoliation of Evidence.

When an employee's allegations in a suit against an insurer for spoliation of evidence relevant to a third-party lawsuit fall within the ambit of work-related concerns, the exclusivity provisions bar the suit against the insurer. In *Continental Cas. Co. v. Superior Court* (1987) 190 C.A.3d 156, 235 C.R. 260, an employee was injured on the job when the bottom rung of a ladder collapsed. He brought this action against defendant insurer, alleging that defendant had failed to take steps to preserve the ladder for use as evidence in a potential third-party product liability suit, and that this conduct constituted negligent spoliation of evidence (see 5 *Summary* (10th), *Torts*, §754). *Held*, the exclusive remedy provision was a bar.

(a) In overruling defendant's demurrer, the trial judge ruled that the insurer's alleged liability turns not on its role as the employer's surrogate with the right to invoke the exclusivity defense, but rather on its separate role as one who negligently prepared or prosecuted the third-party lawsuit so as to impede plaintiff's recovery of damages. (190 C.A.3d 159.) However, under the reasoning of *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27, and *Johns-Manville Products Corp. v. Superior Court* (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948, *infra*, §44, the processing of a third-party claim is a normal incident for the compensation insurer in any industrial injury situation where a third party is partly responsible, the transaction is work-related, and the activity is part of the processing of the benefits claim. (190 C.A.3d 161.)

(b) Plaintiff's allegations fall within the scope of work-related concerns. The bulk of damages are work-related physical injuries; the insurer has not been accused of intentional or outrageous behavior; the processing of the third-party action is a normal part of the handling of the compensation claim; therefore no independent action against the insurer is justified. (190 C.A.3d 162.) (See *Coca-Cola Bottling Co. of Los Angeles v. Superior Court* (1991) 233 C.A.3d 1273, 1294, 286 C.R. 855, *infra*, §55 [criticizing *Continental*]; *Gomez v. Acquistapace* (1996) 50 C.A.4th 740, 57 C.R.2d 821, *infra*, §55 [action by deceased employee's spouse for employer's negligent spoliation of evidence was not barred by exclusivity rule; distinguishing *Continental* and following *Coca-Cola Bottling Co.*].) (On actionable spoliation of evidence when conditions of compensation are not met, see *infra*, §55.)

SUPPLEMENT: [This section is current through the latest supplement]



38 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

10. Acts of Independent Claims Administrator.

2 Witkin Sum. Cal. Law Work Comp § 38

[§ 38] Acts of Independent Claims Administrator.

Lab.C. 3602, 5300, and 5814 create a statutory scheme that preempts private causes of action by injured employees against independent insurance claims administrators and adjusters (hired by their self-insured employers) that unreasonably delay or refuse to pay compensation benefits.

In *Marsh & McLennan v. Superior Court* (1989) 49 C.3d 1, 259 C.R. 733, 774 P.2d 762, plaintiff received workers' compensation death benefits for her husband who had worked for the San Francisco Newspaper Agency. The agency utilized a self-insured workers' compensation program with defendant Marsh & McLennan as its independent claims administrator. Defendant paid benefits for over a year and then discontinued. Plaintiff, without seeking her Board remedy, sued defendant for fraud, intentional infliction of emotional distress, and breach of fiduciary duty. The trial judge allowed the three causes of action. *Held*, mandamus granted to compel sustaining of defendant's demurrer.

(a) The exception to the Board's jurisdiction in *Unruh v. Truck Ins. Exchange* (1972) 7 C.3d 616, 102 C.R. 815, 498 P.2d 1063, *supra*, §36, was based on outrageous conduct of an insurer's private investigator. Subsequent Court of Appeal decisions have held the Board's jurisdiction exclusive in cases of delays in payment, whether intentional or negligent. (49 C.3d 7, citing *Everfield v. State Comp. Ins. Fund* (1981) 115 C.A.3d 15, 171 C.R. 164, *Fremont Indem. Co. v. Superior Court* (1982) 133 C.A.3d 879, 184 C.R. 184, and other cases.)

(b) Plaintiff's action is based on *Dill v. Claims Administration Services* (1986) 178 C.A.3d 1184, 224 C.R. 273, holding that an independent claims administrator retained by the self-insured employer was a person other than an employer under *Lab.C. 3850* and *3852*, and could be sued. (49 C.3d 7.)

(c) The *Dill* holding is wrong and its reasoning is rejected. (49 C.3d 7.) The court there focused solely on *Lab.C. 3850* and *3852*; but the exclusive remedy doctrine stems also from *Lab.C. 5300* and *5814*, referring to "recovery of compensation" and "payment of compensation." "These latter terms imply that the workers' compensation system encompasses all disputes over coverage and payment, whether they result from actions taken by the employer, by the employer's insurance carrier or, as occurred in this case, by an independent claims administrator hired by the employer to handle the worker's claim. Accepting the *Dill* court's distinction would vitiate the very purpose of the exclusive remedy provisions of the Act." (49 C.3d 8.)

(d) The *Dill* court failed to appreciate the deterrent effect of *Lab.C. 5814*, providing a penalty for unreasonable delay in payment. (49 C.3d 8.) In addition, the court incorrectly equated private investigators and independent claims administrators: claims administrators undertake all of the workers' compensation tasks, e.g., reviewing claims, processing forms, and disbursing payments. (49 C.3d 8.)

(e) A number of Court of Appeal decisions are contrary to *Dill*: *Denning v. Esis Corp.* (1983) 139 C.A.3d 946, 189 C.R. 118; *Santiago v. Employee Benefits Services* (1985) 168 C.A.3d 898, 214 C.R. 679; *Schlick v. Comco Management* (1987) 196 C.A.3d 974, 980, 242 C.R. 241; *Mottola v. R.L. Kautz & Co.* (1988) 199 C.A.3d 98, 107, 244 C.R. 737; *Hernandez v. General Adjustment Bureau* (1988) 199 C.A.3d 999, 1005, 245 C.R. 288; *Phillips v. Crawford & Co.* (1988) 202 C.A.3d 383, 387, 248 C.R. 371. (49 C.3d 9.) "We thus ... reject the holding of *Dill*." (49 C.3d 10.)

One justice dissented. (49 C.3d 11.) (See *Mitchell v. Scott Wetzel Services* (1991) 227 C.A.3d 1474, 1478, 278 C.R. 474 [although self-insured employer's claims administrator's alleged conduct was "reprehensible" (e.g., denied medical treatment, denied and delayed rehabilitation payments, late temporary disability payments), that conduct essentially involved payment and enforcement of benefits and their incidental rights--all within Board's exclusive jurisdiction; following *Marsh & McLennan*].)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

11. Involuntary Manslaughter.

2 Witkin Sum. Cal. Law Work Comp § 39

[§ 39] Involuntary Manslaughter.

Conduct of an employer constituting involuntary manslaughter falls within the exclusivity rule. In *Vuillemainroy v. American Rock & Asphalt* (1999) 70 C.A.4th 1280, 83 C.R.2d 269, the family of an employee killed when the brakes failed on a heavily loaded truck he was driving sued defendant employer on several theories including involuntary manslaughter. The trial court granted summary judgment for defendant, finding that workers' compensation provided the exclusive remedy. *Held*, affirmed. The exclusivity rule applies even where the employer's misconduct is serious, wilful, or intentional. In those cases, *Lab.C. 4553* (infra, §§316, 317) dictates that the employee's recovery is increased by one-half. (70 C.A.4th 1284.) Moreover, *Fermino v. Fedco* (1994) 7 C.4th 701, 30 C.R.2d 18, 872 P.2d 559, infra, §58, permitting an action for false imprisonment and relied on by plaintiffs here, does not extend equally to every tortious employer act constituting criminal conduct, including manslaughter, but is restricted to "those classes of intentional employer crimes against the employee's person by means of violence and coercion." (70 C.A.4th 1285.) Here, no intentional crimes committed by means of violence and coercion were alleged. Thus, *Fermino* "cannot reasonably be read to create an exception to the workers' compensation scheme broad enough to encompass the alleged criminal negligence at issue here." (70 C.A.4th 1286.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

12. Criminal Assault by Third Party.

2 Witkin Sum. Cal. Law Work Comp § 40

[§ 40] Criminal Assault by Third Party.

An assault on an employee by a third person does not give rise to a tort action against the employer. (*Halliman v. Los Angeles Unified School Dist.* (1984) 163 C.A.3d 46, 51, 209 C.R. 175 [school teacher acting within scope of his employment was injured when student intentionally threw rock at him].) (See *Arendell v. Auto Parts Club* (1994) 29 C.A.4th 1261, 1266, 35 C.R.2d 83 [exclusive remedy provisions precluded tort action for employer's negligent or reckless failure to provide adequate premises security].)

The exclusivity provisions have also precluded the parent of a subsidiary corporation from being vicariously liable under the alter ego doctrine for damages suffered by employees of the corporation in the course of their employment where the subsidiary satisfied its obligation in securing payment of workers' compensation benefits. In *Doney v. TRW* (1995) 33 C.A.4th 245, 39 C.R.2d 292, plaintiffs were the heirs of employees killed by a third party's murderous rampage in the offices of defendant's subsidiary, E. Plaintiffs sued both E and defendant for wrongful death, alleging negligence and premises liability. Plaintiff's primary theory was that defendant was liable as the alter ego of E. Defendants were granted summary judgment based on the exclusive remedy provisions of the Act. *Held*, affirmed. Liability is disallowed for many of the same reasons that the hirer of an independent contractor cannot be held vicariously liable to an independent contractor's employees under the equitable doctrine of peculiar risk (*infra*, §41). (33 C.A.4th 250, citing *Privette v. Superior Court* (1993) 5 C.4th 689, 699, 702, 21 C.R.2d 72, 854 P.2d 721, 6 Summary (10th), *Torts*, §1245.) Allowing recovery under a theory of vicarious liability would produce the anomalous result that a nonnegligent person's (defendant's) liability for an injury would be greater than that of the person (E) whose negligence actually caused the injury. (33 C.A.4th 251.) Further, permitting employees of the subsidiary to recover from the corporate owner would give the employees an unwarranted windfall by exempting a single class of employees--those who work for corporations--from the statutorily mandated limits of workers' compensation. (33 C.A.4th 252.) Finally, because of the unavailability of equitable indemnity (*Lab.C. 3864*, *infra*, §102), application of the alter ego doctrine would place an "onerous burden on someone who is fault-free." (33 C.A.4th 252.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

13. Peculiar Risk Doctrine Is Unavailable.

2 Witkin Sum. Cal. Law Work Comp § 41

[§ 41] Peculiar Risk Doctrine Is Unavailable.

Work-related injuries received by an employee of an independent contractor while performing inherently dangerous work are subject to the exclusive remedy rule. Thus, the peculiar risk doctrine, imposing liability on the person who hires an independent contractor for the negligent performance of the contractor, does not apply against the person who hired the contractor but did not cause the injuries to the contractor's employee. (*Privette v. Superior Court* (1993) 5 C.4th 689, 695, 702, 21 C.R.2d 72, 854 P.2d 721; 6 Summary (10th), Torts, §1245.) (See *Toland v. Sunland Housing Group* (1998) 18 C.4th 253, 267, 74 C.R.2d 878, 955 P.2d 504 [*Privette* bars workers' recovery against hiring person irrespective of whether recovery is sought under §413 or §416 of Rest.2d, Torts (6 Summary (10th), Torts, §1242 et seq.)]; *Redfeather v. Chevron USA* (1997) 57 C.A.4th 702, 705, 67 C.R.2d 159 [*Privette* applies even when there is express indemnity agreement between parties]; *Grahn v. Tosco Corp.* (1997) 58 C.A.4th 1373, 1389, 68 C.R.2d 806 [*Privette* is limited to cases of peculiar risk seeking to impose liability on hirers of independent contractors vicariously under rubric of nondelegable duty; it does not impair right of injured employee to sue hirer for actions not based on vicarious liability]; *Zamudio v. San Francisco* (1999) 70 C.A.4th 445, 450, 82 C.R.2d 664 [fact that subcontractor employer was immune from suit under workers' compensation law did not afford basis for vicarious liability against owner of property and construction manager, both uninvolved parties; following *Privette* and *Toland*]; *Lopez v. C.G.M. Dev.* (2002) 101 C.A.4th 430, 437, 124 C.R.2d 227 [workers' compensation was exclusive remedy and peculiar risk doctrine was not available for injured employee of subcontractor in suit against hirer even though subcontractor did not have workers' compensation insurance].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bell v. Greg Agee Const.* (2004) 125 C.A.4th 453, 466, 23 C.R.3d 33 [workers' compensation was exclusive remedy and injured construction worker of uninsured subcontractor could not sue general contractor under peculiar risk doctrine; following *Lopez v. C.G.M. Dev.* (2002) 101 C.A.4th 430, 124 C.R.2d 227, text, p. 584].



42 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

II. EXCLUSIVE REMEDY

B. Consequences of Exclusive Remedy Rules.

14. Other Consequences.

2 Witkin Sum. Cal. Law Work Comp § 42

[§ 42] Other Consequences.

The following further illustrate the general consequences of the exclusive remedy rules:

(1) *Loss of Consortium*. A spouse has no right of action against the other spouse's employer for loss of consortium. (See *Gillespie v. Northridge Hosp. Foundation* (1971) 20 C.A.3d 867, 870, 98 C.R. 134 [employee's remedy under Act bars collateral actions by nonemployees for their personal damages flowing from employee's injury or death]; *Casaccia v. Green Valley Disposal Co.* (1976) 62 C.A.3d 610, 612, 133 C.R. 295 [denial of claim for loss of consortium affirmed, following *Gillespie* and *Williams v. State Comp. Ins. Fund* (1975) 50 C.A.3d 116, 123 C.R. 182, *supra*, §30]; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 162, 233 C.R. 308, 729 P.2d 743; 10 U.S.F. L. Rev. 252 [advocating contrary view].)

(2) *Unlawful Employment*. The workers' compensation remedy is exclusive even where the employment is unlawful. (*Leong v. Postal Tel.-Cable Co.* (1944) 66 C.A.2d 849, 153 P.2d 204; see *infra*, §174.)

(3) *Malpractice*. The employee has no separate action against the employer or insurer for aggravation of the injury by malpractice. (*Hazelwerdt v. Industrial Indem. Exchange* (1958) 157 C.A.2d 759, 321 P.2d 831, *infra*, §62; *Deauville v. Hall* (1961) 188 C.A.2d 535, 10 C.R. 511, *infra*, §62; *Nation v. Certaineed Corp.* (1978) 84 C.A.3d 813, 816, 817, 149 C.R. 62 [employer was not under legal duty to ascertain whether physician was competent and carried malpractice insurance].)

(4) *Indemnity*. The general right of indemnity by an employee against the employer under *Lab.C. 2802* (see *Summary* (10th), *Agency and Employment*, §122 et seq.) does not apply where the loss constitutes an injury compensable under the Act. (*Roberts v. U.S.O. Camp Shows* (1949) 91 C.A.2d 884, 886, 205 P.2d 1116.)

(5) *Small Claims Court Action for Witness Fees*. A small claims court has no jurisdiction over a claim of a medical witness for fees for testimony in a workers' compensation proceeding, or over a claim by an attorney against the physician for alleged loss of fees in the proceeding. The Board has exclusive jurisdiction, and the proper procedure is to file lien claims under *Lab.C. 4903(a), (b)* (*infra*, §405). (*Work. Comp. App. Bd. v. Small Claims Court* (1973) 35 C.A.3d 643, 646, 111 C.R. 6.)

(6) *Action by Nondependent Heirs.* In *Hisel v. Los Angeles* (1987) 193 C.A.3d 969, 238 C.R. 678, plaintiffs, the widow and four adult children of decedent public employee, brought an action for wrongful death against defendant public employer. They alleged that each was self-supporting and not entitled to compensation because they were not dependent on decedent (see, *infra*, §312 et seq.); and they argued that the 1982 amendments to *Lab.C.* 3601 and 3602 (*supra*, §24) permitted an inference of legislative intent to allow suits by nondependent heirs because *Lab.C.* 3602(a) does not mention that class in discussing the exclusive remedy rule. (193 C.A.3d 977.) *Held*, the action was barred.

After a comprehensive review of the legislative and judicial background, the court said: "The exclusive liability rule itself had been a basic precept of workers' compensation law in this state for more than 70 years when the 1982 amendments were enacted. Exceptions to that rule always had been specific, and had been strictly construed by reviewing courts. The substantive changes in these key provisions effected by the 1982 amendments were fully discussed in the contemporaneous legislative materials, and there is no mention of the expansion of civil liability urged here." (193 C.A.3d 979.)

(7) *Retained Control by Hirer of Contractor.* Work-related injuries received by an employee of an independent contractor hired by another are generally subject to the exclusivity rule with compensation being the responsibility of the contractor, even where the hirer retains control of a portion of the work. However, the hirer "is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker v. Department of Trans.* (2002) 27 C.4th 198, 202, 115 C.R.2d 853, 38 P.3d 1081, 6 Summary (10th), *Torts*, §1241 [summary judgment for defendant was proper where plaintiff spouse of deceased employee failed to raise triable issue that defendant actually exercised retained control so as to affirmatively contribute to employee's death].) (See *McKown v. Wal-Mart Stores* (2002) 27 C.4th 219, 225, 115 C.R.2d 868, 38 P.3d 1094, 6 Summary (10th), *Torts*, §1241 [hirer furnishing defective forklift used by employee of independent contractor was negligent by providing unsafe equipment and thus liable to employee; applying "affirmative contribution" test of *Hooker*]; *Lopez v. C.G.M. Dev.* (2002) 101 C.A.4th 430, 445, 124 C.R.2d 227 [workers' compensation was exclusive remedy for injured employee of subcontractor where hirer neither retained control over work conditions nor affirmatively contributed by act or omission to employee's injuries; following *Hooker*].)

(8) *Mandatory Medical Tests and Employer's Failure To Discover, Diagnose, or Inform Employee of Medical Problem.* In *Weber v. United Parcel Service* (2003) 107 C.A.4th 801, 132 C.R.2d 412, defendant employer was required under 8 Cal. Code Reg. §5097 to administer regular hearing tests to W, an aircraft mechanic, and other employees due to inherent health hazards arising from the work. Defendant contracted with T to administer the tests, which revealed that W was gradually losing hearing in his left ear. However, defendant failed to have the tests analyzed further. Defendant also failed to notify W of the findings or their medical significance. Subsequently, H replaced T in administering the tests and notified W by letter that he should seek further medical evaluation in light of the earlier findings. W was diagnosed with a benign brain tumor and underwent surgery. W sued defendant, alleging that defendant's negligence in discovering, diagnosing, or informing W of a significant hearing abnormality, which was symptomatic of a growing brain tumor, caused a delay in treatment of a preexisting condition that resulted in permanent disability and injury. Defendant successfully demurred on the ground that workers' compensation was W's sole remedy. *Held*, affirmed. Defendant provided the hearing examinations for W's benefit and in accordance with company policy and 8 Cal. Code Reg. §5097. Therefore, the alleged negligent administration of the test and the resulting injury "grew out of and were incidental to" W's employment. Thus, the aggravation of the brain tumor caused by defendant's failure to detect or notify W of a standard threshold shift in his hearing, arose out of and in the course of W's employment, and "his exclusive remedy for his employer's alleged negligence lies under the Act." (107 C.A.4th 808, 809.)

SUPPLEMENT: [This section is current through the latest supplement]

(9) *(New) Physician's Services Used Solely for Workers' Compensation Claims.* In *Perrillo v. Picco & Presley* (2007) 157 C.A.4th 914, 70 C.R.3d 29, employees from various employers simultaneously filed individual workers' compensation claims and a civil action against B alleging injuries sustained while working at a petroleum reserve operated by B. Different attorneys from defendant law firm represented the employees in both actions. The employees

retained plaintiff, a psychologist, as an expert. He wanted payment in advance, but the civil action attorneys agreed to pay him from the recovery in their action. Plaintiff evaluated the employees, prepared his reports in compliance with workers' compensation requirements, and filed his bills in the workers' compensation cases. The evaluations were never used in the civil action. The employers' insurers paid some of the bills. When the civil action settled, the attorneys refused to pay plaintiff, asserting that the exclusive remedy doctrine barred payment out of the settlement. Plaintiff then withdrew his remaining bills from the workers' compensation cases and filed an action against the attorneys seeking payment for his services. Before trial, most of the workers' compensation cases settled, but plaintiff refused to accept payment on his workers' compensation liens. The jury found in plaintiff's favor. *Held*, judgment reversed; because plaintiff's work was compensable through the workers' compensation system, he had no right to payment in the civil action.

(a) Although plaintiff asserts that when he was initially contacted he told the attorneys in the civil action that he was not interested in "doing" workers' compensation, his services ultimately fell squarely into that category. Plaintiff's medical reports, itemized bills, and workers' compensation liens were prepared in compliance with workers' compensation requirements and on workers' compensation forms. Those documents were sent to the insurers and the Board, and plaintiff accepted payments from some insurers. That plaintiff declined to accept additional payments from the insurers when the workers' compensation cases settled "is of no avail to him." (157 C.A.4th 932.)

(b) A physician may recover in both a workers' compensation case and a related civil action for services rendered separately in the two forums. "But when a physician's work culminates in documents that are submitted in support of a workers' compensation case, he or she must look exclusively to that forum for payment." Plaintiff's conduct conferred exclusive jurisdiction on the Board to determine what he was owed, and he limited his recovery to payment from the employers in the workers' compensation cases. "Any agreement to the contrary is void and unenforceable." (157 C.A.4th 937.)



43 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

a. Physical Assault.

2 *Witkin Sum. Cal. Law Work Comp* § 43

[§ 43] Physical Assault.

(1) *Earlier Conflict.* Prior to 1982, a conflict existed among California Courts of Appeal about whether an employee who is assaulted by an employer in the course of employment could elect to sue for an intentional wrong or whether workers' compensation provided the exclusive remedy. (See *Conway v. Globin* (1951) 105 C.A.2d 495, 497, 233 P.2d 612 [allowed recovery in tort]; *Carter v. Superior Court* (1956) 142 C.A.2d 350, 354, 298 P.2d 598 [employee could elect remedy under Act or at law; citing *Conway*]; *Azevedo v. Industrial Acc. Com.* (1966) 243 C.A.2d 370, 376, 52 C.R. 283 [Board had exclusive jurisdiction]; *Azevedo v. Abel* (1968) 264 C.A.2d 451, 459, 469, 70 C.R. 710 [same]; *Magliulo v. Superior Court* (1975) 47 C.A.3d 760, 769, 777, 121 C.R. 621 [permitting and advocating cumulative remedies; approving and following *Conway* and *Carter*]; *Meyer v. Graphic Arts Int. Union* (1979) 88 C.A.3d 176, 178, 151 C.R. 597 [extending *Magliulo* rule to recognize cause of action against employer for assault by employer's agent acting within scope of authority]; *Johns-Manville Products Corp. v. Superior Court* (1980) 27 C.3d 465, 477, footnote 11, 165 C.R. 858, 612 P.2d 948 [noting that unresolved conflict and inconsistency was subject of critical comment]; 15 U.S.F. L. Rev. 651 [recommending legislation to permit tort action].)

(2) *Statutory Authorization.* The 1982 Legislature, in its restatement of the exclusive remedy rule and exceptions (see *supra*, §§24, 25), authorized a tort action. Thus, an employee or the employee's dependents in the event of the employee's death, may sue the employer for damages when the employee's injury or death is proximately caused by a wilful physical assault by the employer. (*Lab.C. 3602(b)(1)*.) (See *Soares v. Oakland* (1992) 9 C.A.4th 1822, 1828, 12 C.R.2d 405, *infra*, §67 [wilful employer assaults under *Lab.C. 3602(b)(1)* include only those batteries specifically intended to injure]; *Herrick v. Quality Hotels, Inns & Resorts* (1993) 19 C.A.4th 1608, 1617, 24 C.R.2d 203 [former security guard's complaint for intentional infliction of emotional injury was not barred by exclusivity rule and fell under *Lab.C. 3602(b)(1)*; security director threatened guard with gun at time of termination, and threat constituted wilful physical assault with intent to cause injury; citing *Soares*]; *Fretland v. Humboldt* (1999) 69 C.A.4th 1478, 1486, 82 C.R.2d 359 [exception to exclusivity rule for assault by employer does not apply where employer's liability is vicarious unless employer ratifies employee's misconduct]; *Gunnell v. Metrocolor Laboratories* (2001) 92 C.A.4th 710, 726, 112 C.R.2d 195 [employer's concealment of hazardous nature of cleaning substances and failure to provide adequate protective gear and proper training for employees constituted neither battery nor wilful physical assault, and thus did not provide exception to exclusivity rule under *Lab.C. 3602(b)(1)*].)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

b. Fraudulent Concealment Aggravating Disease or Injury.

1. In General.

2 Witkin Sum. Cal. Law Work Comp § 44

[§ 44] In General.

(1) *Origin of Doctrine.* The doctrine permitting an employee to sue an employer in cases where an injury or disease is aggravated by the employer's fraudulent concealment of the injury or disease and its connection to the employment derives from *Johns-Manville Products Corp. v. Superior Court* (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948. Plaintiff had worked at defendant's asbestos plant for 29 years and had developed lung cancer or other asbestos-related illnesses. Plaintiff alleged that defendant fraudulently concealed from him, and from physicians retained to treat him, as well as from the state, that he was suffering from a disease caused by the ingestion of asbestos, thus preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions. *Held*, these allegations were sufficient to state a cause of action for *aggravation* of the disease, as distinct from the hazards of the employment that caused plaintiff to contract the disease. (27 C.3d 477.) (For discussion of *Johns-Manville Products Corp.*, see 69 Cal. L. Rev. 1230; 33 Hastings L. J. 263, 1227; 8 Pepperdine L. Rev. 591; 21 Santa Clara L. Rev. 543; 14 U.C. Davis L. Rev. 767; 15 U.S.F. L. Rev. 667; see also 9 A.L.R.4th 778 [employer's tort liability to worker for concealing workplace hazard or nature or extent of injury].)

(2) *Codification of Doctrine.* The 1982 Legislature, in its restatement of the exclusive remedy rule and exceptions, codified the *Johns-Manville* doctrine in Lab.C. 3602(b)(2) as follows:

(a) The action may be brought where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment.

(b) The employer's liability is limited to damages proximately caused by the aggravation.

(c) The burden of proof on apportionment of damages between the injury and any subsequent aggravation is on the employer. (See *Foster v. Xerox Corp.* (1985) 40 C.3d 306, 219 C.R. 485, 707 P.2d 858, *infra*, §45; *Davis v. Lockheed Corp.* (1993) 13 C.A.4th 519, 523, 17 C.R.2d 233 [Lab.C. 3602(b)(2) was inapplicable as matter of law where, at time employee returned to work after treatment for asbestos-related illness, employer did not know of connection between employee's illness and his asbestos exposure, while employee had known of risk for years]; C.E.B., Workers' Damages Practice 2d, §§4.43, 4.44.)

(3) *Recovery of Punitive Damages*. The statute refers only to "damages proximately caused by the aggravation." However, *Johns-Manville* expressly recognized that *punitive damages* are recoverable, and the language of the statute does not indicate a contrary legislative intent. The reference to damages "proximately caused" is a limitation on the apportionment of damages between the initial injury and the aggravation, not on the types of damages recoverable. (*McDonald v. Superior Court* (1986) 180 C.A.3d 297, 302, 225 C.R. 394.)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

b. Fraudulent Concealment Aggravating Disease or Injury.

2. What Constitutes Fraudulent Concealment.

2 Witkin Sum. Cal. Law Work Comp § 45

[§ 45] What Constitutes Fraudulent Concealment.

For purposes of *Lab.C. 3602(b)(2)*, fraudulent concealment occurs when an employer fails to disclose to an employee that the employee has contracted an industrial injury or disease when the employer has actual knowledge of the condition and its connection to the employment; an affirmative misrepresentation is not required as a basis for a cause of action. In *Foster v. Xerox Corp. (1985) 40 C.3d 306, 219 C.R. 485, 707 P.2d 858*, the complaint alleged the following: Plaintiff was employed by defendant for 11 years as a service technician to maintain and repair equipment manufactured by defendant; the machinery incorporated a drum containing a large amount of arsenic; defendant did not warn plaintiff of its presence or safeguard him from its effects; plaintiff suffered symptoms, which he reported to his supervisor in 1978 and 1981, and defendant knew they were caused by the arsenic, but failed to warn plaintiff that the disease was aggravated with the passage of time, and fraudulently concealed from him that his condition was caused by the employment; plaintiff's symptoms became so severe in December 1982, that he was forced to terminate his employment, and at that time, his physician told him that he was suffering from arsenic poisoning caused by his work and aggravated by his continued exposure to the arsenic used in the drums. Defendant demurred to the complaint on the ground that "fraudulent concealment" requires an *affirmative misrepresentation*, and none was alleged. *Held*, judgment on demurrer reversed.

(a) The term "fraudulent concealment" in *Lab.C. 3602(b)(2)* has the same meaning as the general meaning found in fraud statutes and cases, i.e., a failure to disclose facts if the party with knowledge has a duty to disclose. (*40 C.3d 309*; see 5 *Summary* (10th), *Torts*, §§793, 798.)

(b) *Johns-Manville Products Corp. v. Superior Court (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948*, supra, §44, does not support a different interpretation. Although the complaint in that case alleged that affirmative misrepresentations had been made, the court did not rely on this factor; the opinion referred to the allegations of *concealment* as justifying the action. (*40 C.3d 311*.)

(c) The complaint did lack the necessary specific allegation that defendant knew that plaintiff had contracted arsenic poisoning. "There is no allegation that the supervisors to whom these symptoms were reported were aware of their significance, or that they reported plaintiff's condition to a physician or other official employed by defendant who

recognized that plaintiff was suffering from arsenic poisoning caused by this employment." (40 C.3d 312.) Nevertheless, "the complaint does allege *in general terms* that defendant knew that plaintiff's physical problems were caused by the arsenic," and that his injuries were aggravated by continued exposure to it. Under the rule of liberal construction of pleadings, "[t]hese allegations fairly apprise defendant of the basis of plaintiff's action." (40 C.3d 312.)

The following cases are instructive:

Santiago v. Firestone Tire & Rubber Co. (1990) 224 C.A.3d 1318, 1331, 1334, 274 C.R. 576 [trial judge's instruction that plaintiffs had burden of proving employer's "actual knowledge" was correct, under reasoning of *Foster*].

Hughes Aircraft Co. v. Superior Court (1996) 44 C.A.4th 1790, 1795, 1797, 52 C.R.2d 514 [no evidence that employer had actual knowledge of injuries before being told by plaintiffs; employer's prior knowledge of unsafe work environment and potential risks was insufficient to establish liability under *Lab.C. 3602(b)(2)*].

Ashdown v. Ameron Int. Corp. (2000) 83 C.A.4th 868, 879, 100 C.R.2d 20, *infra*, §63 [summary judgment for defendant where decedent was employed by defendant from 1964 to 1966 but did not learn of asbestos-related disease until 1994 diagnosis; thus, *Lab.C. 3602(b)(2)* was inapplicable because there was no evidence that defendant ever knew decedent had asbestos-related disease].

Palestini v. General Dynamics Corp. (2002) 99 C.A.4th 80, 86, 120 C.R.2d 741 [plaintiff sufficiently alleged in general terms that through his reports to supervisors defendant knew of plaintiff's skin rashes, that defendant concealed knowledge of causal relationship between exposure to carcinogenic chemicals and those rashes, that concealment aggravated plaintiff's injury, and that defendant repeatedly told plaintiff that worksite chemicals were safe; following *Foster*].

Jensen v. Amgen (2003) 105 C.A.4th 1322, 1326, 129 C.R.2d 899 [summary judgment for defendant employer based on exclusivity rule was proper where plaintiff presented no evidence that defendant had actual knowledge of plaintiff's injuries before she did, or that defendant concealed connection between plaintiff's symptoms and employment].

SUPPLEMENT: [This section is current through the latest supplement]



46 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

c. Fair Employment and Housing Act.

2 *Witkin Sum. Cal. Law Work Comp* § 46

[§ 46] Fair Employment and Housing Act.

In *Jones v. Los Angeles Community College Dist.* (1988) 198 C.A.3d 794, 244 C.R. 37, plaintiff employee sued defendant employer seeking damages for racial discrimination in employment in violation of the Fair Employment and Housing Act (FEHA). The trial court ruled that under *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27, the Workers' Compensation Act provided the exclusive remedy. *Held*, reversed.

(a) In *Cole*, only common law causes of action were considered; left open was whether the exclusive remedy provisions bar causes of action created by statute. (198 C.A.3d 806.) Thus, this case presents issues of legislative policy and intent not addressed in *Cole* or in any other *California* case. (198 C.A.3d 807.)

(b) Cases from Michigan and Washington are on point and persuasive. Essentially, they reason that civil rights and workers' compensation acts address different evils. The workers' compensation act guards against an injured worker being turned away empty-handed and unrecompensed as a result of common law tort doctrines; the civil rights acts address the prejudices and biases one race, sex, or religion bears against another. Whatever may have been the legislative intent in enacting the exclusive remedy provision of the workers' compensation act, if the Legislature intended enacting civil rights legislation that workers discharged in violation of that legislation could recover for resulting physical, mental, or emotional injury that intention would necessarily supersede or modify the scope of other legislation that otherwise would defeat the intent to permit that recovery. (198 C.A.3d 808.)

(c) "In the context of the facts of this case, where plaintiff claims that he was forced to suffer racial insults of a coworker and in retaliation for complaining of such treatment was monitored in his work and given more onerous tasks while the White coworker simply stayed away from work, and where he ultimately suffered a knee injury which apparently caused him to become disabled, the application of the exclusivity provision of the Labor Code would in effect result in no recognition of or compensation for the humiliation and other injuries which Jones suffered before his knee injury. A failure to recognize a cause of action under such circumstances also furthers a policy in *favor* of discrimination in the workplace. Because two separate wrongs are involved, there are no election of remedies or double recovery problems." (198 C.A.3d 809.) (See *Flait v. North Amer. Watch Corp.* (1992) 3 C.A.4th 467, 480, 4 C.R.2d 522 [claim of emotional distress arising from violation of FEHA is not barred by workers' compensation law]; *B & E Convalescent Center v. State Comp. Ins. Fund* (1992) 8 C.A.4th 78, 92, 9 C.R.2d 894 [same]; *Accardi v. Superior Court*

(1993) 17 C.A.4th 341, 347, 21 C.R.2d 292 [FEHA claim alleging sexual harassment is not preempted by workers' compensation act]; *Bagatti v. Department of Rehabilitation* (2002) 97 C.A.4th 344, 363, 118 C.R.2d 443 [FEHA claim alleging failure to reasonably accommodate disability is not barred by workers' compensation act].)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

d. Whistleblower Protection Statute.

2 *Witkin Sum. Cal. Law Work Comp* § 47

[§ 47] Whistleblower Protection Statute.

In *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054, plaintiff, a former investigator for the Department of Health Services, sued for damages arising from wrongful termination. The complaint alleged several causes of action, including one for violation of the whistleblower protection statute (*Govt.C. 19683*). The trial judge gave judgment for defendant on demurrer, and the Court of Appeal affirmed. *Held*, reversed.

(a) A determination whether a cause of action is barred by the exclusive remedy provisions must take into account the facts alleged (i.e., of physical injury) and their relation to the scope and purposes of the workers' compensation statutory scheme. (52 C.3d 13.)

(b) "Nonconsensual termination of an employment relationship is indistinguishable from the kinds of actions enumerated in *Cole* and must therefore also be considered a normal and inherent part of employment." (52 C.3d 18, citing *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27.) However, though both termination and the acts leading up to termination necessarily arise out of and occur during and in the course of the employment, not all causes of action arising from a discharge are barred. "Where the injury is a result of conduct, whether in the form of discharge or otherwise, not seen as reasonably coming within the compensation bargain, a separate civil action may lie." (52 C.3d 20.)

(c) *Govt.C. 19683* provides a civil action for damages that a whistleblower may incur from official retaliatory acts. (52 C.3d 20.) To the extent that *Govt.C. 19683* and the workers' compensation law apply to the facts of the case, the purposes they serve must be examined to determine which controls. (52 C.3d 21.) The purpose of the workers' compensation law is to provide a comprehensive scheme of compensation for all employees, while the purpose of *Govt.C. 19683* is to provide redress for a certain limited class of employees. (52 C.3d 21.) *Govt.C. 19683* is clearly the more specific statute, and therefore controlling. (52 C.3d 22.)

(d) If the Legislature had considered workers' compensation benefits and civil service remedies adequate, it would not have been necessary to add the whistleblower statute. Hence, *Govt.C. 19683* "defines the protected activity as a specific statutory exception to the provisions of the workers' compensation law; such conduct lies well outside the compensation bargain." (52 C.3d 23.) (See 20 A.L.R.5th 677 [workers' compensation act preemption of claims filed

under "whistleblower" statutes].)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
A. Actions Against Employer.
1. Statutory Causes of Action.
e. Products Liability.

2 *Witkin Sum. Cal. Law Work Comp* § 48

[§ 48] Products Liability.

(1) *Former Basis of Recovery.* Prior to 1983, the judicially developed dual capacity doctrine (infra, §62) provided a liberal exception to workers' compensation exclusivity, and was applied in a number of situations to permit recovery in tort by employees who were injured while using products manufactured by their employers for sale to the general public. (See *Douglas v. E. & J. Gallo Winery* (1977) 69 C.A.3d 103, 110, 137 C.R. 797 [plaintiff employees, suffering personal injuries when scaffolding collapsed, were permitted to bring strict products liability actions against defendant employer as manufacturer of scaffolding]; *Moreno v. Leslie's Pool Mart* (1980) 110 C.A.3d 179, 182, 167 C.R. 747 [plaintiff employee of defendant L was permitted to maintain action when he was injured while disposing of leaking bottles of unlabeled chemicals manufactured by division of L doing business under separate trade name]; *Bell v. Industrial Vangas* (1981) 30 C.3d 268, 179 C.R. 30, 637 P.2d 266 [plaintiff salesman injured in fire that occurred when he delivered flammable gas to customer, was permitted to sue employer manufacturer].)

Cases denying recovery under the doctrine include the following:

Shook v. Jacuzzi (1976) 59 C.A.3d 978, 981, 129 C.R. 496 [machine that caused injury was manufactured by employer for own use].

Bibby v. Central Industrial Engineering Co. (1984) 153 C.A.3d 871, 875, 877, 200 C.R. 412 [*Douglas* test: no action on products liability unless particular item was manufactured product available for sale to public].

Horney v. Guy F. Atkinson Co. (1983) 140 C.A.3d 923, 928, 190 C.R. 18 [defendant was member of joint venture with plaintiff's employer, acting on behalf of joint venture, and not in independent capacity, and allegedly defective equipment was not manufactured for sale to public].

Nicewarner v. Kaiser Steel Corp. (1983) 143 C.A.3d 31, 40, 191 C.R. 522 [no proof that design defect leading to injury posed risk to public].

Bonus-Bilt v. United Growers, Ltd. (1982) 136 C.A.3d 429, 440, 186 C.R. 357 [employer merely obtained design changes in standard products purchased for his own use and not for sale].

Franco v. United Wholesale Lumber Co. (1983) 148 C.A.3d 981, 983, 196 C.R. 430 [injury to rip saw operator was inherent risk of job and not caused by conduct of employer acting in some other capacity].

The 1982 Legislature revised *Lab.C. 3602* and eliminated the dual capacity doctrine as a basis for tort actions against employers. (*Lab.C. 3602(a)*, *supra*, §20.)

(2) *Statutory Provisions.* As part of the 1982 revision, *Lab.C. 3602(b)(3)* was added (see *supra*, §24) to permit an action against the employer where injury or death is caused by a defective product that was manufactured by the employer, transferred for value to an independent third person, and then provided for the employee's use by a third person. (See *Behrens v. Fayette Mfg. Co. (1992) 4 C.A.4th 1567, 1574, 7 C.R.2d 264* [turbine that had been sold to customer was not provided for employee's use within meaning of statute where employee was injured while attempting to secure its blades before repairing it]; C.E.B., *Workers' Damages Practices* 2d, §§4.57, 458; *14 Pacific L. J. 764*.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

f. Failure To Provide Guard on Power Press.

1. In General.

2 Witkin Sum. Cal. Law Work Comp § 49

[§ 49] In General.

(1) *Statutory Authority.* *Lab.C. 4558* authorizes an action for damages against the employer when the injury or death is caused by the employer's failure to provide a guard on a power press. (*Lab.C. 4558(b)*.) (See Cal. Civil Practice, 2 Workers' Compensation, §15:14; C.E.B., Workers' Damages Practice 2d, §4.53.) (On elements of cause of action, see *infra*, §50.)

(2) *Cumulative Remedy.* In *Burnelle v. Continental Can Co.* (1987) 193 C.A.3d 315, 238 C.R. 253, plaintiff, injured while operating a machine, first filed an application with the Board for adjudication of the claim, and then filed a complaint for personal injuries against defendant employer under *Lab.C. 4558*. The Board awarded compensation, and defendant employer moved for judgment on the pleadings in the personal injury action on the ground that the final judgment in the workers' compensation proceeding was *res judicata*, i.e., a merger and bar to the personal injury action. The trial judge granted the motion. *Held*, reversed; *Lab.C. 3600(b)* authorizes cumulative remedies. The words "the compensation," as used in that section, include: "(1) those sums received by the employee prior to a final adjudication of his workers' compensation claim, and (2) those sums received by the employee in the form of an award following a final adjudication of the employee's workers' compensation claim." (193 C.A.3d 320.) Thus, where the employee has received a compensation award and then sues under *Lab.C. 4558*, the employer is entitled to a setoff of sums paid pursuant to the award. By providing for a setoff, "the Legislature intended the actions at law specifically permitted by section 4558 to be cumulative to the employee's workers' compensation remedy and not subject to merger and bar under the doctrine of *res judicata*." (193 C.A.3d 320.)

(3) *Contribution and Indemnity.* Generally, no defendant in an action under *Lab.C. 4558* has a right of action for contribution or indemnity against the employer. However, a defendant may seek contribution after the employee obtains a judgment against the employer and the employer fails to discharge the employer's comparative share of the judgment. (*Lab.C. 4558(d)*.)

In *E.W. Bliss Co. v. Superior Court* (1989) 210 C.A.3d 1254, 258 C.R. 783, the court declared that the "plain, clear and unambiguous language" of *Lab.C. 4558(d)* denies a right of contribution against the employer "unless, and until after, the employee secures a judgment against the employer, and the employer fails to pay its comparative share of the

judgment." (210 C.A.3d 1259.) The court gives this illustration of a proper claim: "For example, suppose a court enters a judgment in an action by the employee, based on a jury verdict that the employee's injuries are attributable 20 percent to the employee's negligence and 80 percent to the negligence of the employer and a codefendant. In such a case, pursuant to section 4558, subdivision (d), if the employer fails to pay his pro rata share of the judgment, i.e., 40 percent of plaintiff's damages, then the codefendant is entitled to seek contribution against the employer for recovery of that portion of the judgment which represented the employer's unpaid share under the noticed motion procedure set forth in section 878 of the Code of Civil Procedure." (210 C.A.3d 1259.)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- A. Actions Against Employer.
 - 1. Statutory Causes of Action.
 - f. Failure To Provide Guard on Power Press.
 - 2. Elements of Cause of Action.

2 Witkin Sum. Cal. Law Work Comp § 50

[§ 50] Elements of Cause of Action.

To state a cause of action under *Lab.C. 4558*, the plaintiff must show that (1) the injury or death is proximately caused by the employer's knowing removal of or knowing failure to install a point of operation guard on a power press, and (2) the removal or failure to install was specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death. (*Lab.C. 4558(b)*.)

As used in *Lab.C. 4558*, the element of knowledge means actual awareness by the employer, rather than constructive knowledge, that a point of operation guard has either been provided for or is required to prevent serious injury or death. Moreover, "knowledge" refers to knowledge at the time of the removal or replacement. (*Saldana v. Globe-Weis Systems Co. (1991) 233 C.A.3d 1505, 1516, 1519, 285 C.R. 385* [statute is inapplicable to employer who does not know of danger at time of replacement with another guard and *later* is negligent in failing to maintain replacement guard].)

The power press exception exists only where all the elements of *Lab.C. 4558* are established. Thus, individual causes of action against an employer that do not meet the requirements of *Lab.C. 4558* cannot be "bootstrapped onto a civil action for damage which is properly brought under section 4558." (*Award Metals v. Superior Court (1991) 228 C.A.3d 1128, 1134, 279 C.R. 459* [plaintiff employee improperly joined causes of action for negligence, strict liability, and intentional tort in an action under *Lab.C. 4558*].)

For liability, there must be proof that the manufacturer (1) designed, installed, required, or otherwise provided by specification for attachment of the guards, and (2) conveyed knowledge of the same to the employer. Proof that the manufacturer conveyed this information to the employer may come from any source. (*Lab.C. 4558(c)*.) (See *Swanson v. Matthews Products (1985) 175 C.A.3d 901, 906, 221 C.R. 84* [evidence was insufficient to establish employer's knowledge].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Mora v. Hollywood Bed & Spring (2008) 164 C.A.4th 1061, 1068, 79 C.R.3d 640* [employee failed to establish liability where there was no evidence that manufacturer informed defendant employer that power press was required to

have point of operation guard or that employer "specifically authorized" failure to install guard or modify machine for safety].



51 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- A. Actions Against Employer.
 - 1. Statutory Causes of Action.
 - f. Failure To Provide Guard on Power Press.
 - 3. Definitions.

2 Witkin Sum. Cal. Law Work Comp § 51

[§ 51] Definitions.

Lab.C. 4558(a) defines the following significant terms:

(1) *Employer* means a named identifiable person who is, prior to the time of the injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees. (*Lab.C. 4558(a)(1).*)

(2) *Failure to install* means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press. (*Lab.C. 4558(a)(2).*)

An *employer-manufacturer* has failed to install a point of operation guard either provided or required by the manufacturer, if either (a) the employer's design of the power press called for a guard which was removed or never installed, or (b) a guard was required to protect the employee against a known risk of serious injury but was intentionally omitted by the employer from the design, fabrication, or assembly of the press. (*Flowmaster v. Superior Court* (1993) 16 C.A.4th 1019, 1031, 20 C.R.2d 666 [employer and manufacturer were same entity].) (See *Aguilera v. Henry Soss & Co.* (1996) 42 C.A.4th 1724, 1730, 50 C.R.2d 477 [summary judgment for employer was proper absent showing that manufacturer designed press for, or required attachment of, point of operation guard].)

(3) *Manufacturer* means the designer, fabricator, or assembler of the press. (*Lab.C. 4558(a)(3).*) (See *Jones v. Keppeler* (1991) 228 C.A.3d 705, 710, 279 C.R. 168 [court refused to interpret "manufacturer" as including any party who subsequently modified power press operating control and mounted warning signs on its operation].)

An employer who designs, manufactures, and installs its own power presses is not excluded from the definition of a "manufacturer" under *Lab.C. 4558(a)*. By manufacturing large power tools for the use of its employees, an employer creates an "extra" employer status or a relationship that subjects it to potential liability as a third-party tortfeasor. (*Flowmaster v. Superior Court, supra*, 16 C.A.4th 1019.)

(4) *Power press* means a material-forming machine that utilizes a die designed for use in the manufacture of other

products. (*Lab.C. 4558(a)(4).*) (See *Ceja v. J.R. Wood* (1987) 196 C.A.3d 1372, 1377, 242 C.R. 531 [rejecting plaintiff's contention that saw blade is "die" where plaintiff injured his hand in using circular saw equipped with spring-loaded blade guard that had been tied back; "[q]uite simply, a small hand-held circular saw is not a power press"]; *Graham v. Hopkins* (1993) 13 C.A.4th 1483, 1489, 17 C.R.2d 82 [molding machine with five cutting heads did not utilize "die," and was therefore not power press; cutting heads did not determine shape of product formed and therefore did not constitute "die"]; *McCoy v. Zahniser Graphics* (1995) 39 C.A.4th 107, 111, 45 C.R.2d 871 [printing press is not machine that *forms* materials to be used in manufacture of other products and thus is not power press]; *Rosales v. Depuy Ace Med. Co.* (2000) 22 C.4th 279, 282, 92 C.R.2d 465, 991 P.2d 1256 [V-notching tool on lathe was sharp edge cutting tool rather than mirror image pressing or stamping "die" and thus lathe was not power press; following *Graham*]; *Islas v. D & G Mfg. Co.* (2004) 120 C.A.4th 571, 579, 15 C.R.3d 559 [determination of whether machine parts constitute "die" is question for jury; following *Rosales*].)

(5) *Removal* means physical removal of a point of operation guard that is either (a) installed by the manufacturer or (b) installed by the employer pursuant to the manufacturer's requirements or instructions. (*Lab.C. 4558(a)(5).*)

(6) *Specifically authorized* means an affirmative instruction issued by the employer prior to the injury or death. It does not mean a subsequent acquiescence in, or ratification of, the removal. (*Lab.C. 4558(a)(6).*)

In *Watters Associates v. Superior Court* (1990) 218 C.A.3d 1322, 267 C.R. 696, plaintiff employee sued the employers who allegedly removed the point of operation guard, and also named as defendants the operators of the temporary employment agency that assigned him to the employment. The complaint relied on a general agency allegation to make the agency operators responsible for the employer's removal of the guard. *Held*, no cause of action was stated against the agency operators. *Lab.C. 4558* applies only where the removal or failure to install a guard is "specifically authorized" by the employer. "The statute clearly and succinctly states that subsequent acquiescence or ratification is not enough. It follows a fortiori that imputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or failure to install a guard may be sued at law under section 4558." (218 C.A.3d 1325.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

g. Uninsured Employer.

1. Cumulative Remedies Are Authorized.

2 *Witkin Sum. Cal. Law Work Comp* § 52

[§ 52] Cumulative Remedies Are Authorized.

(1) *Employees Generally.* If an employer fails to secure the payment of compensation, an injured employee or the employee's dependents may sue the employer for damages (*Lab.C. 3706*) and also may proceed before the Board for compensation (*Lab.C. 3715(a)*). (See *Aetna Cas. & Surety Co. v. Aceves* (1991) 233 C.A.3d 544, 558, 284 C.R. 477 [*Lab.C. 3706* and *3715* explicitly permit cumulative remedies]; *Le Parc Community Assn. v. Work. Comp. App. Bd.* (2003) 110 C.A.4th 1161, 1171, 2 C.R.3d 408 [employee's voluntary dismissal, following settlement, of negligence action against uninsured employer under *Lab.C. 3706* did not bar litigation of employee's related workers' compensation claim; claim under *Lab.C. 3706* and workers' compensation claim involve different primary rights and Legislature expressly authorized cumulative remedies for injured employee of uninsured employer]; on inapplicability, in *Lab.C. 3706* action, of 10% penalty under *Lab.C. 4554*, see *Leung v. Chinese Six Cos.* (1992) 2 C.A.4th 801, 3 C.R.2d 593, *infra*, §151.) However, an employee having a claim for *occupational disease or cumulative injury* may not sue an illegally uninsured employer as in other types of injuries, but must proceed through the Board. (*Lab.C. 3716(b)*; see 13 *Pacific L. J.* 801.)

(2) *Domestic Employees.* Domestic employees, as defined by *Lab.C. 3351(d)*, are expressly excluded from *Lab.C. 3715(a)*. (*Lab.C. 3715(a)*.) However, *Lab.C. 3715(b)* permits cumulative remedies for the following domestic employees: (a) household domestic servants employed more than 52 hours per week; (b) part-time gardeners who regularly work more than 44 hours per month; and (c) casual employees who work at least 10 days and receive at least \$ 100 total.

(3) *Prevention of Double Recovery.* Where an employee or the employee's dependent has obtained a judgment against the employer, double recovery is prevented by (a) allowing compensation awarded, paid, or secured by the employer to be credited against the judgment (*Lab.C. 3709*); (b) creating a first lien against the judgment, or the proceeds of a settlement before or after judgment, in the amount of compensation paid from the Uninsured Employers Fund (*Lab.C. 3709*); (c) relieving the employer and the Uninsured Employers Fund from the obligation to pay further compensation to the extent that the judgment has been satisfied (*Lab.C. 3709.5*); and (d) requiring the Board to allow the amount recovered either by settlement or after judgment to serve as a credit to the employer and the Uninsured Employers Fund against their liability for compensation (*Lab.C. 3709.5*).

(4) *Dual Employment and One Uninsured Employer.* In *Strickland v. Foster* (1985) 165 C.A.3d 114, 211 C.R. 305, defendant, in the business of furnishing trucks and drivers to others, furnished a truck driven by S to L Trucking Co. L Trucking Co. exercised such a degree of control over the truck and driver as to become a special employer (see *infra*, §161 et seq.). S died as a result of a work injury, and plaintiff obtained a death benefit award, jointly and severally, against the two employers. However, because defendant was uninsured, plaintiff also brought this wrongful death action against him. *Held*, the action was maintainable. The argument that one insured employer is sufficient to make the exclusive remedy applicable is contrary to (a) the policy that requires each employer to carry insurance, and (b) the plain language of *Lab.C. 3706*. "If any employer" fails to insure, the employee may apply for compensation and, in addition, "may bring an action at law against such employer for damages, as if this division did not apply." (165 C.A.3d 117, 119.)

In *Hernandez v. Chavez Roofing* (1991) 235 C.A.3d 1092, 286 C.R. 919, plaintiffs brought a wrongful death action against the decedent's employer, an unlicensed and uninsured subcontractor. The trial judge granted defendant summary judgment on the ground that plaintiffs' exclusive remedy was under the workers' compensation insurance of the insured general contractor. *Held*, reversed; plaintiffs were entitled to bring the action under *Lab.C. 3706*.

(a) Defendant attempted to distinguish *Strickland v. Foster* on the ground that *Strickland* did not involve *Lab.C. 2750.5* (*infra*, §190), which has been interpreted as meaning that both an unlicensed subcontractor and its employees are the employees of the general contractor for workers' compensation purposes. Defendant argued that both it and the decedent were employees of the general contractor; hence, the case was governed by *Lab.C. 3601*, which makes workers' compensation the exclusive remedy for injury or death to an employee caused by another employee. This argument is unpersuasive. In effect, defendant is arguing that a violation of the law requiring a contractor's license can protect an employer from the consequences of a violation of the law requiring workers' compensation. "Under this approach more culpability means less liability. The uninsured employer who has a contractor's license could be sued in state court, but the uninsured employer who also has no contractor's license could not be sued in state court. Such a holding would do violence to the letter and spirit of laws governing both contractor's licensing and workers' compensation." (235 C.A.3d 1095.)

(b) *Lab.C. 2750.5* can create a dual employment relationship where a worker may be an employee of both a general contractor and a subcontractor. And each employer must purchase a workers' compensation policy as the price for immunity from tort liability. Because defendant chose not to pay that price, it should not be immune from liability. (235 C.A.3d 1095.) (See *Huffman v. Poway* (2000) 84 C.A.4th 975, 982, 101 C.R.2d 325 [injured actor's tort claim against private entity coproducer of play in which actor was injured was not barred by exclusivity provisions where coproducer did not have compensation insurance, could not claim coverage under city's self-insurance program, and thus was uninsured employer].)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

1. Statutory Causes of Action.

g. Uninsured Employer.

2. Special Rules Governing Action.

2 Witkin Sum. Cal. Law Work Comp § 53

[§ 53] Special Rules Governing Action.

(1) *Pleading and Proof.* An employee suing in tort must plead and prove the jurisdictional fact of failure of the employer to insure. (*Coleman v. Silverberg Plumbing Co.* (1968) 263 C.A.2d 74, 79, 69 C.R. 158 [insufficient showing, nonsuit affirmed]; *Campos Food Fair v. Superior Court* (1987) 193 C.A.3d 965, 968, 238 C.R. 685.) However, the action may be brought against an uninsured employer even though the employer has voluntarily met the requirements of compensation in the particular case by furnishing all necessary medical treatment and paying wages during the period of disability. (*Coffin v. Bloodworth* (1938) 28 C.A.2d 522, 523, 82 P.2d 953.) (On commencement and prosecution of action, see Cal. Civil Practice, 2 Workers' Compensation, §§15:8, 15:18 et seq.; on providing Uninsured Employers Fund with a copy of the complaint by personal service or certified mail, see *Lab.C.* 3708.5.)

The doctrine of collateral estoppel applies in workers' compensation proceedings (see *infra*, §417) and has been asserted by an employer to prove coverage. In *Rymer v. Hagler* (1989) 211 C.A.3d 1171, 260 C.R. 76, plaintiff employee filed an application with the Board in 1981 for adjudication of claim, and later sued the employer for failure to provide insurance coverage when plaintiff was injured. In 1986, plaintiff moved in the Board proceeding to exclude F (an insurance company) as a party on the ground that it was not the workers' compensation insurer for defendant at the time of plaintiff's injuries. The workers' compensation judge denied the motion, finding that F either had provided coverage or was estopped to deny it by its admission of coverage. Plaintiff did not challenge the order, but when it became final petitioned for voluntary dismissal; the petition was granted, and the claim was dismissed. In 1987, defendant sought a judgment on the pleadings in the superior court action, on the ground that the workers' compensation judge's ruling that the employer did have insurance coverage was binding on plaintiff in the tort action, and therefore the action could not be maintained on the theory that defendant was an uninsured employer. *Held*, order granting judgment on the pleading affirmed.

(a) The workers' compensation judge's determination was a final adjudication on the issue of coverage even though the compensation proceeding was dismissed. Under the analysis in the *Rest.2d, Judgments*, §13, "final judgment" is defined less strictly for purposes of "issue preclusion" (collateral estoppel) than for purposes of merger or bar (*res judicata*). *Sandoval v. Superior Court* (1983) 140 C.A.3d 932, 190 C.R. 29, 7 Cal. Proc. (4th), *Judgment*, §312, following the Restatement analysis, holds that a prior adjudication of an issue may have conclusive effect when an

appeal is settled favorably as to the plaintiff and then dismissed. (211 C.A.3d 1181.)

(b) Plaintiff contended that *Lab.C. 3700*, strictly construed, requires that an employer have an actual written insurance policy in effect, and that coverage by estoppel, i.e., by operation of law, is not a sufficient basis for invoking the exclusive remedy rule. This contention is not supported by reasoning or policy: "If a rule were adopted eliminating coverage by operation of law as a source of compensation, the purposes of the Act would be frustrated. Technical barriers to coverage caused by administrative or clerical errors would serve to deny employees a quick and efficient forum for seeking compensation and eliminate the exclusivity feature so important to the purposes of the Act." (211 C.A.3d 1184.)

(2) *Special Advantages*. The employee plaintiff has special advantages not available in an ordinary tort action:

(a) *Available Defenses*. The employer, except employers of household employees as defined, is deprived of the defenses of contributory negligence, assumption of risk, and fellow servant rule. (*Lab.C. 3708*.) In *Logan v. Masters* (1981) 120 C.A.3d 145, 174 C.R. 465, defendant employer argued that the judicial abolition of the contributory negligence defense and substitution of the doctrine of comparative negligence by *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, 6 Summary (10th), *Torts*, §1329, should make comparative negligence relevant in an action under *Lab.C. 3708*. But the court held that *Lab.C. 3708* was unaffected by *Li*. "Were defendant's argument to prevail, uninsured employers would have a potential advantage over insured employers, a result clearly contrary to the Legislature's intent." (120 C.A.3d 148.)

(b) *Burden of Proof*. It is presumed that the injury was due to the employer's negligence and the burden of proof on this issue is shifted to the defendant. (*Lab.C. 3708*; see *Chakmakjian v. Lowe* (1949) 33 C.2d 308, 311, 201 P.2d 801 [defendant merely relied on plaintiff's testimony and failed to rebut presumption].) This rebuttable presumption merely operates as evidence; it does not dispense with the necessity of pleading negligence in a proper manner. (*Graybiel v. Consolidated Assn.* (1936) 16 C.A.2d 20, 25, 60 P.2d 164; but cf. *Goss v. Fano* (1952) 114 C.A.2d 819, 823, 251 P.2d 337 [general finding stated in statutory language was upheld].) Moreover, the presumption may be overcome by a showing of no negligence. (See *Hall v. Burton* (1962) 201 C.A.2d 72, 79, 82, 19 C.R. 797 [substantial evidence was presented to support trial court's finding of no negligence].) Nor does *Lab.C. 3708* provide a presumption that an injury occurred in the course of employment; thus, an employee plaintiff retains that burden of proof. (*Huang v. L.A. Haute* (2003) 106 C.A.4th 284, 289, 130 C.R.2d 619.)

(c) *Attachment*. The plaintiff may attach the property of the employer in an amount fixed by the court. (*Lab.C. 3707*.)

(d) *Fees and Penalty*. The judgment includes reasonable attorneys' fees fixed by the court (*Lab.C. 3709*), and, where the employer's failure was wilful, a 10% penalty (*Lab.C. 4554*).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Pleading and Proof*. *Sandoval* case:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §369.



54 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- A. Actions Against Employer.
- 2. Conditions of Compensation Not Met.
 - a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 54

[§ 54] In General.

The exclusive remedy rule is applicable only when the injury meets the conditions of compensation under *Lab.C.* 3600 (infra, §193). (*Lab.C.* 3602(c).) Thus, an employee may bring a tort action against the employer when the injury did not *arise out of or occur in the course of* the employment (infra, §§194 et seq., 230 et seq.), but some basis of tort liability is shown (e.g., breach of duty to an invitee). (See *Robbins v. Yellow Cab Co. (1948) 85 C.A.2d 811, 813, 193 P.2d 956* [employee picking up paycheck after normal shift hours]; *Seymour v. Setzer Forest Products (1954) 124 C.A.2d 608, 611, 268 P.2d 1084* [decendent was killed while visiting in lumber plant prior to his shift and was thus "at a place and doing something not reasonably contemplated by his employment"]; *82 Am.Jur.2d (2003 ed.), Workers' Compensation* §53.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- A. Actions Against Employer.
 - 2. Conditions of Compensation Not Met.
 - b. Spoliation of Evidence.

2 *Witkin Sum. Cal. Law Work Comp* § 55

[§ 55] Spoliation of Evidence.

In *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 C.A.3d 1273, 286 C.R. 855, plaintiff, a mechanic employed by C, was injured in 1985 when the truck he was driving in the course and scope of his employment crashed. In 1986, plaintiff sued the truck's manufacturer, F, for negligence and product liability, and C filed a complaint in intervention. Following the accident, C took custody of the truck and preserved and maintained it. After discovering in 1989 that many important components of the truck were missing, plaintiff added a cause of action against C for spoliation of evidence. *Held*, the action was not barred.

(a) Plaintiff did not allege a compensable injury, i.e., an injury that caused disability or necessitated medical treatment, but instead asserted that C's tortious conduct after the accident caused irreparable disruption of his third-party action against F for strict liability, negligence, and breach of warranties. (233 C.A.3d 1285.)

(b) *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27, *Hart v. National Mortg. & Land Co.* (1987) 189 C.A.3d 1420, 235 C.R. 68, *infra*, §56, and *Robomatic v. Vetco Offshore* (1990) 225 C.A.3d 270, 275 C.R. 70, holding that a former employee's action for infliction of emotional distress was barred by the exclusivity provision, were "influenced by the unarticulated but clearly implicit presumption that the injury complained of by the employee in each case was an injury to the employee's *person*, not his or her *property*." (233 C.A.3d 1288.) The necessity that the injury, to be subject to the exclusive remedy provisions of the Act, must be an injury to the *person*, was noted with approval in *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054. (233 C.A.3d 1289; see *supra*, §47.)

(c) In *Pichon v. Pacific Gas & Elec. Co.* (1989) 212 C.A.3d 488, 260 C.R. 677, *supra*, §28, the employee's compensable injury and his noncompensable injury arose from the same set of facts, i.e., the termination of employment. In the present case the compensable injury occurred at the time of the accident, but the noncompensable injury did not occur until several years later when various parts of the vehicle disappeared. (233 C.A.3d 1291.)

(d) "[A] cause of action by an employee against his or her employer for the negligent spoliation of evidence needed by the employee in his or her civil action against third parties is *not* barred as a matter of law by the exclusive remedy provisions of the Act, even though the missing evidence was also related to the employee's personal injuries, insofar as

such evidence may establish the cause of the occurrence resulting in the injuries and the extent of such injuries, which injuries *were* covered by the exclusive remedy provisions." (233 C.A.3d 1292.)

In *Gomez v. Acquistapace* (1996) 50 C.A.4th 740, 57 C.R.2d 821, the employee choked to death at work when his clothing became tangled in a powered posthole digger. Defendant employer destroyed the posthole digger a few days later. Plaintiff, employee's widow, sued defendant for negligent and intentional spoliation of evidence, alleging that defendant's destruction of the posthole digger prevented plaintiff from recovering in an action against the machine's manufacturer. The trial judge granted defendant summary judgment on the negligent spoliation action on the ground that the action was barred by the exclusivity rule. *Held*, reversed.

(a) The injury plaintiff suffered when the posthole digger was destroyed is not an injury within the meaning of the workers' compensation scheme. The workers' compensation system applies only to injuries that cause disability, death, or require medical treatment, and applies to property damage only under extremely limited circumstances. Losing the opportunity to prevail in a third-party action against the manufacturer of the posthole digger is an injury to plaintiff's property interests, and the exclusive remedy rule is inapplicable because the damage is not an "injury" within the meaning of *Lab.C. 3208* (see *infra*, §§236, 265). Moreover, other essential conditions of compensation under *Lab.C. 3600* did not exist. Plaintiff's action for negligent spoliation accrued when defendant destroyed the posthole digger. At that time, decedent was no longer an employee and, thus, no longer subject to the compensation provisions. (50 C.A.4th 748, 749, following *Coca-Cola Bottling Co.*) *Continental Cas. Co. v. Superior Court* (1987) 190 C.A.3d 156, 235 C.R. 260, *supra*, §37, relied on by defendant, is distinguishable because it involved negligent claims handling by a compensation insurer. In addition, *Continental* did not consider whether the loss of a prospective third-party action qualifies as an injury under *Lab.C. 3600*. (50 C.A.4th 750.)

(b) Employer conduct is considered outside the scope of the workers' compensation scheme when the employer steps outside of its proper role, or engages in conduct unrelated to the employment relationship, that is not a normal incident of employment, or that violates a fundamental public policy. (50 C.A.4th 751, citing *Fermino v. Fedco* (1994) 7 C.A.4th 701, 30 C.R.2d 18, 872 P.2d 559, *infra*, §58.) California has a fundamental public policy to protect the integrity of civil litigation by encouraging the preservation and disclosure of evidence. Moreover, because the average worker has no reason to expect that his or her employer will destroy evidence of the cause of an industrial injury, spoliation is not a normal incident of employment. (50 C.A.4th 751.) (On when workers' compensation remedy may bar action for spoliation of evidence, see *supra*, §37.)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

3. Conduct Outside Compensation Bargain.

a. Basis for Liability.

2 *Witkin Sum. Cal. Law Work Comp* § 56

[§ 56] Basis for Liability.

Workers' compensation provides the exclusive remedy when misconduct attributed to the employer involves actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations involving grievances. Thus, e.g., an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions by characterizing the employer's decisions as unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 160, 233 C.R. 308, 729 P.2d 743.) (See *Jones v. Los Angeles Community College Dist.* (1988) 198 C.A.3d 794, 806, 244 C.R. 37 [*Cole* holding does not apply to causes of action created by statute]; *Shoemaker v. Myers* (1990) 52 C.3d 1, 20, 276 C.R. 303, 801 P.2d 1054, supra, §47; *Accardi v. Superior Court* (1993) 17 C.A.4th 341, 351, 21 C.R.2d 292 [*Cole* holding does not apply to claims based on discriminatory conduct].)

In considering claims for intentional infliction of emotional distress and battery, *Hart v. National Mortg. & Land Co.* (1987) 189 C.A.3d 1420, 235 C.R. 68, distinguished *Cole* and looked to the employer's *conduct* rather than state of mind, and concluded that the employer's campaign of harassment had a questionable relationship to employment and was not a risk, incident, or normal part of the employee's employment. (189 C.A.3d 1429.) (See *Gantt v. Sentry Ins.* (1992) 1 C.4th 1083, 1097, 4 C.R.2d 874, 1100, 824 P.2d 680, 3 Summary (10th), *Agency and Employment*, §246 [when employer's decision to terminate employee results from animus that violates fundamental state policy it involves misconduct that cannot be considered a normal part of employment relationship].)

Cole and *Johns-Manville Products Corp. v. Superior Court* (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948, supra, §44, recognized that an employee may recover in tort for intentional misconduct causing disability when the employer's conduct has a questionable relationship to employment or for conduct where the employer or insurer has stepped out of its proper role. (*Fermino v. Fedco* (1994) 7 C.4th 701, 713, 30 C.R.2d 18, 872 P.2d 559, infra, §58.)

Cole and *Johns-Manville* contemplated a tripartite system for classifying injuries arising in the course of employment: First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal workers' compensation rate. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly, or recklessly harm an employee and these are subject to extra compensation under *Lab.C.* 4553 (infra, §§316, 317). Third, there are certain types of intentional employer conduct that bring the employer "beyond

the boundaries of the compensation bargain," for which a civil action may be brought. (*Fermino v. Fedco, supra.*)

An inquiry into an employer's motivation is "undertaken not to determine whether the employer intentionally or knowingly injured the employee, but rather to ascertain whether the employer's conduct violated public policy and therefore fell outside the compensation bargain." (*Fermino v. Fedco, supra*, 7 C.4th 715.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

3. Conduct Outside Compensation Bargain.

b. Wrongful Termination in Violation of Public Policy.

2 Witkin Sum. Cal. Law Work Comp § 57

[§ 57] Wrongful Termination in Violation of Public Policy.

A claim for wrongful termination in violation of public policy, first recognized in *Tameny v. Atlantic Richfield Co.* (1980) 27 C.3d 167, 164 C.R. 839, 610 P.2d 1330, 3 Summary (10th), *Agency and Employment*, §242, is not preempted by the workers' compensation act. (*Shoemaker v. Myers* (1992) 2 C.A.4th 1407, 1417, 4 C.R.2d 203, on remand following *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054, *supra*, §47 [plaintiff subjected to harassment and termination following his investigation and report of illegal practices in family planning health care centers]; *Gantt v. Sentry Ins.* (1992) 1 C.4th 1083, 1097, 4 C.R.2d 874, 824 P.2d 680, 3 Summary (10th), *Agency and Employment*, §246; see *B & E Convalescent Center v. State Comp. Ins. Fund* (1992) 8 C.A.4th 78, 92, 9 C.R.2d 894 [following *Shoemaker*]; *Leibert v. Transworld Systems* (1995) 32 C.A.4th 1693, 1706, 39 C.R.2d 65 [emotional distress claim premised on wrongful termination in violation of public policy (sexual orientation) lies outside exclusive remedy provisions]; *Phillips v. Gemini Moving Specialists* (1998) 63 C.A.4th 563, 577, 74 C.R.2d 29 [emotional distress claim premised on wrongful termination in violation of public policy should have been allowed]; *Kovatch v. California Cas. Management Co.* (1998) 65 C.A.4th 1256, 77 C.R.2d 217 [same]; *Cabesuela v. Browning-Ferris Industries of Calif.* (1998) 68 C.A.4th 101, 112, 80 C.R.2d 60 [same].)

Because a viable *Tameny* claim requires employer conduct implicating a substantial public interest, the claim lies outside the compensation bargain underlying workers' compensation. Under that bargain, the employee gives up potentially substantial tort damages in exchange for relatively swift and certain payment of benefits without having to prove fault. "But where an employer's conduct implicates considerations of substantial public policy, interests beyond those of the employer and employee are involved. These interests are not protected by workers' compensation law and therefore must be accommodated outside the compensation bargain." (*Shoemaker v. Myers*, *supra*, 2 C.A.4th 1418.)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

3. Conduct Outside Compensation Bargain.

c. False Imprisonment.

2 Witkin Sum. Cal. Law Work Comp § 58

[§ 58] False Imprisonment.

Whether an employer has falsely imprisoned an employee for the alleged purposes of an internal investigation is a factual question. However, once a false imprisonment is established, the action is not considered a normal aspect of the employment relationship, however legitimate its initial justification. Thus, a false imprisonment committed by an employer against an employee is always outside the scope of the compensation bargain, and is actionable. In *Fermino v. Fedco* (1994) 7 C.4th 701, 30 C.R.2d 18, 872 P.2d 559, plaintiff sued her employer for false imprisonment after being taken to a windowless room where managers and security agents interrogated her for over an hour, alleging that she had stolen sale proceeds. Plaintiff was repeatedly threatened, verbally abused, and physically prevented from leaving. When plaintiff became hysterical, her interrogators admitted that there were no witnesses, that they believed her to be innocent, and then released her. The trial judge sustained defendant's demurrer, concluding that plaintiff's claim was barred by the exclusive remedy provisions, and the Court of Appeal affirmed. *Held*, reversed.

(a) *Cole decision*. In viewing defendant's actions as proper and merely a form of employee interrogation that was as normal "as demotions, promotions, criticism of work practices," the Court of Appeal misapplied the doctrine that has emerged from *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, *supra*, §27, and related cases. (7 C.4th 708.)

(b) *Nature of false imprisonment*. False imprisonment is the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short. (7 C.4th 715; see 5 *Summary* (10th), *Torts*, §426 et seq.) The only mental state required to prove false imprisonment is the intent to confine or create a similar intrusion. Hence, the intent need not be an intention or motive to cause harm, and may often arise from initially legitimate motives. (7 C.4th 716.)

(c) *Unreasonable employer conduct*. Although all reasonable attempts to investigate employee theft, including employee interrogation, are a normal part of the employment relationship, the issue here is whether an employer's actions that go "beyond the bounds of reasonable interrogation and detention, and constitute false imprisonment, are entitled to the same protections of the exclusivity rule as would a reasonable detention. ... [A]ctions by employers that have no proper place in the employment relationship may not be made into a 'normal' part of the employment relationship merely by means of artful terminology. Indeed, virtually any action by an employer can be characterized as

a 'normal part of employment' if raised to the proper level of abstraction." (7 C.4th 717.) What matters is whether the conduct itself, concretely, is within the compensation bargain. Thus, the question becomes whether false imprisonment is the sort of employer conduct that can ever be viewed as a normal aspect of the employment relationship. (7 C.4th 718.)

(d) *Statutory exclusions are not exhaustive.* The Legislature's exclusion of false imprisonment from the exceptions in *Lab.C. 3602* does not express an intent to bar actions for that conduct. (7 C.4th 719.) The 1982 amendments to *Lab.C. 3602* are not exhaustive of exceptions to the exclusivity rule as witnessed by the recognition of an exception for injuries stemming from wrongful discharges violating public policy (see *supra*, §57). (7 C.4th 720.)

(e) *No "reasonable" false imprisonment.* False imprisonment is, by definition, an unreasonable and criminal confinement. (7 C.4th 721.) It is like assault, which was considered beyond the compensation bargain by most California courts even before *Lab.C. 3602(b)(1)* recognized its exceptional status. Indeed, "the law of false imprisonment protects 'interests in personality closely akin to those protected by the law of assault and battery.' " (7 C.4th 721.) "When an employer forcibly and criminally deprives an employee of her liberty, even as a means to otherwise legitimate ends, it steps outside its 'proper role,' whether it uses assault and battery to enforce that false imprisonment, or employs some other coercive stratagem." (7 C.4th 721, 722.) (See *Vuillemainroy v. American Rock & Asphalt* (1999) 70 C.A.4th 1280, 1283, 83 C.R.2d 269, *supra*, §39 [*Fermino* is restricted to intentional employer crimes against employee's person by means of violence and coercion; thus, exclusivity rule barred action against employer alleging involuntary manslaughter]; 22 *Pepperdine L. Rev.* 1358 [*Fermino*].)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- A. Actions Against Employer.
- 3. Conduct Outside Compensation Bargain.
- d. Discrimination in Workplace.

2 *Witkin Sum. Cal. Law Work Comp* § 59

[§ 59] Discrimination in Workplace.

Discriminatory conduct is outside the normal employment environment. Thus, in *Accardi v. Superior Court* (1993) 17 C.A.4th 341, 21 C.R.2d 292, plaintiff employee sought damages for intentional infliction of emotional distress based on alleged continuing episodes of sexual discrimination and harassment that took place over a period of 11 years. *Held*, the cause of action was not barred by the exclusive remedy provisions of the Act.

(a) While some kinds of employer misconduct, such as that involving promotions, demotions, and criticism of work practice, are a normal part of the employment environment and are therefore subject to the exclusive remedy provisions, discriminatory conduct is outside the normal employment environment. (17 C.A.4th 351, 352, citing *Lab.C. 3601(a)* and *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743.)

(b) The Legislature did not intend to allow the exclusivity rule to be used to deflect a claim of discriminatory practices. (17 C.A.4th 351, citing *Flait v. North Amer. Watch Corp.* (1992) 3 C.A.4th 467, 4 C.R.2d 522, and *Goldman v. Wilsey Foods* (1989) 216 C.A.3d 1085, 1095, 1096, 265 C.R. 294.)

(c) Unlike the plaintiff in *Davaris v. Cubaleski* (1993) 12 C.A.4th 1583, 16 C.R.2d 330, who failed to allege a cognizable public policy that was violated by her termination, the plaintiff here alleged a pattern of continuing violations of the state's policy against sexual discrimination. (17 C.A.4th 352.) (See *Fretland v. Humboldt* (1999) 69 C.A.4th 1478, 1491, 82 C.R.2d 359 [plaintiff's emotional distress claims were not barred to extent they sought damages for alleged work-related injury discrimination, hence summary judgment was improper; following *Moorpark v. Superior Court* (1998) 18 C.4th 1143, 77 C.R.2d 445, 959 P.2d 752, *supra*, §20]; *Murray v. Oceanside Unified School Dist.* (2000) 79 C.A.4th 1338, 1362, 95 C.R.2d 28 [emotional distress claim for pattern of continuing discrimination based on sexual orientation was not barred; following *Accardi*]; 51 A.L.R.5th 163 [workers' compensation precluding suits for sexual harassment in workplace].) (On workers' compensation exclusivity as bar to claims for intentional and negligent infliction of emotional distress, see *supra*, §27 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

3. Conduct Outside Compensation Bargain.

e. Defamation.

2 *Witkin Sum. Cal. Law Work Comp* § 60

[§ 60] Defamation.

Employee suits for defamation have been permitted. In *Howland v. Balma* (1983) 143 C.A.3d 899, 192 C.R. 286, plaintiff, a former deputy sheriff, brought an action for slander against defendant sheriff, alleging that defendant told a newspaper reporter that plaintiff had used unnecessary force in an arrest, and had been permanently taken off patrol duty. Prior to filing the complaint, plaintiff had applied for workers' compensation for asserted internal and psychological injuries; this proceeding was concluded by a compromise and release agreement under which plaintiff received \$ 1,000 back pay, and a disability retirement pension. *Held*, summary judgment for defendant reversed. All the cases involving slander actions against employers have held that the exclusive remedy provision of the Act does not apply. (143 C.A.3d 902, 903.) Damage to reputation is the gist of the action, and the harm suffered is not the type of physical injury contemplated by the workers' compensation acts. (143 C.A.3d 904.) Nor was the release a bar, for it recited the intention of the parties to settle claims for any and all "industrial injuries," and was clearly directed at those over which the Board had exclusive jurisdiction. Nothing on the face of the agreement demonstrated any intention to settle a claim arising out of injury to reputation. (143 C.A.3d 905.) (See *Davaris v. Cubaleski* (1993) 12 C.A.4th 1583, 1591, 16 C.R.2d 330 [defamatory statements made to damage employee's reputation are neither "normal part of the employment relationship" nor risk of employment within exclusivity provision of workers' compensation act; citing *Howland*]; C.E.B., *Workers' Damages Practice* 2d, §4.48.)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

3. Conduct Outside Compensation Bargain.

f. Invasion of Privacy.

2 *Witkin Sum. Cal. Law Work Comp* § 61

[§ 61] Invasion of Privacy.

In *Operating Engineers Local 3 v. Johnson* (2003) 110 C.A.4th 180, 1 C.R.3d 552, employee V brought an action for invasion of privacy alleging that defendant employer J announced in a managerial meeting, and in the presence of other employees with no interest in the matter, that V would be reprimanded, and then directed V to write her own letter of reprimand. J subsequently distributed to a larger number of employees the minutes of the meeting in which the disciplinary action was reported in bold print. The jury awarded V damages for invasion of her constitutionally protected right of privacy. *Held*, the claim was not barred by the Workers' Compensation Act exclusivity provisions. Although a claim for invasion of privacy involves harm constituting a personal injury, and thus is a harm normally within the conditions of compensation, the invasion by definition goes beyond acceptable employer conduct. "While defendants' conduct was not criminal ... the conduct violated a right conferred by the California Constitution and thus was contrary to a fundamental public policy. The violation of such a clearly articulated public policy reinforces the basis for holding defendants' conduct to exceed what may be considered normal employer behavior within the compensation bargain." (110 C.A.4th 190.)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
A. Actions Against Employer.
4. Employer in Dual Capacity.
a. Nature of Doctrine.

2 *Witkin Sum. Cal. Law Work Comp* § 62

[§ 62] Nature of Doctrine.

(1) *Origin and Scope*. The source of the dual capacity doctrine in California was *Duprey v. Shane* (1952) 39 C.2d 781, 249 P.2d 8. Plaintiff nurse, employed by defendant physician, was injured while working with a patient (compensable injury), and the injury was aggravated by negligent treatment of the physician (tort of malpractice). *Held*, she could sue her employer for malpractice. If the employer had sent or permitted plaintiff to go to a third-party physician, she would clearly have been entitled to sue, and the fact that the employer treated plaintiff himself did not call for a different result. Defendant had a dual relationship with plaintiff of employer-employee and physician-patient; and, in the latter relationship, the employer-physician was a "person other than the employer" under *Lab.C.* 3852 (*infra*, §69). (32 C.2d 790.)

Duprey represented a unique situation in which the employer was also a physician. Subsequent attempts to extend its holding have been unsuccessful. For example, in *Hazelwerdt v. Industrial Indem. Exchange* (1958) 157 C.A.2d 759, 321 P.2d 831, plaintiff was awarded a 100% disability rating with an order that defendant insurance company furnish treatment for his lifetime as needed. He brought this action alleging a conspiracy of the company and its physician to minimize his injury and refuse necessary treatment, as a result of which he suffered more serious injury, disability, and pain. His theory was that the company became a third person (i.e., a person other than the employer or insurer) when it conspired with the physician to deprive him of care to which he was entitled. *Held*, theory rejected. The cause of action is not the conspiracy, but the wrong resulting in damage. (See 5 *Summary* (10th), *Torts*, §45 et seq.; 4 *Cal. Proc.* (4th), *Pleading*, §559.) That wrong, a breach of duty by the employer and his insurer, was redressable exclusively before the *Commission*. (157 C.A.2d 763.)

A number of other decisions are illustrative. (See *Deauville v. Hall* (1961) 188 C.A.2d 535, 546, 10 C.R. 511 [no cause of action for negligence where coemployee rendered first aid; employer did not become third party liable in tort]; *Dixon v. Ford Motor Co.* (1975) 53 C.A.3d 499, 506, 507, 125 C.R. 872 [quoting the text, and applying *Deauville* holding to case of allegedly negligent first-aid treatment from company nurse and orderly]; *Royster v. Montanez* (1982) 134 C.A.3d 362, 372, 184 C.R. 560 [no cause of action where plaintiff employee injured herself from faulty soil at employer's mobilehome residence when she went there on work-related errand; doctrine is inapplicable to failure to provide safe workplace]; *Blew v. Horner* (1986) 187 C.A.3d 1380, 1390, 232 C.R. 660 [plaintiff employee was injured while working on project owned by partnership that included defendant employer; *Royster* followed]; *Jones v. Kaiser*

Industries Corp. (1987) 43 C.3d 552, 561, 237 C.R. 568, 737 P.2d 771 [action by surviving spouse of police officer killed in automobile collision while on duty was barred by exclusive remedy provisions; dual capacity doctrine was inapplicable where city streets were considered usual workplace for police; following *Royster*]; but see *Miller v. King* (1993) 19 C.A.4th 1732, 1734, 24 C.R.2d 284 [dual capacity doctrine did not bar premises liability action by waitress injured in slip and fall at restaurant owned by corporation where property owners owned shares in corporation; citing *Blew*.])

(2) *Action Against Physician's Employer.* The doctrine was applied in *D'Angona v. Los Angeles* (1980) 27 C.3d 661, 166 C.R. 177, 613 P.2d 238, where plaintiff, a physical therapist employed by defendant's county hospital, contracted a disease in the course of her employment, and was treated by physicians employed by the county hospital. She received an award including compensation for disability resulting from aggravation of the disease by assertedly negligent treatment. She then filed a tort action against defendant county, seeking damages for aggravation. *Held*, the action could be maintained under the dual capacity doctrine of *Duprey*.

(a) *Lab.C.* 3852 states an exception to the exclusive remedy rule by allowing an action against a person "other than the employer." Thus, the injured employee may sue an independent physician or hospital for damages arising from negligent treatment aggravating an industrial injury. (27 C.3d 664.)

(b) In *Duprey*, the employer personally bore both relationships and personally treated the plaintiff. Here, the county-employer is being sued for the negligence of physicians employed by the hospital, but this factual distinction is not determinative. The test of dual capacity is whether the nonemployer aspect of the employer's activity generates a different set of obligations by the employer, and that is the case here. "[I]n treating plaintiff's injuries the hospital did not act in its capacity as employer but as a hospital, and since it assumed the obligations of a hospital to a patient it should be liable in that capacity rather than as an employer for the aggravation of plaintiff's injury." (27 C.3d 667.) Double recovery by plaintiff should be avoided by giving defendant county a set-off of the amount of the compensation award reflecting benefits given for aggravation. (27 C.3d 668.)

(3) *Effect of Legislative Curtailment.* Although the 1982 Legislature revised *Lab.C.* 3602 and severely curtailed the doctrine (see *infra*, §63), actions like *Duprey v. Shane* and *D'Angona v. Los Angeles* survive. (See *Sturtevant v. Monterey* (1991) 228 C.A.3d 758, 764, 279 C.R. 161, *infra*, §63; 73 A.L.R.4th 115 [dual capacity doctrine as basis for medical malpractice action against employer's medical personnel].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Origin and Scope.* *Cross-Reference:* 4 *Cal. Proc.* (5th), *Pleading*, §600.



63 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
A. Actions Against Employer.
4. Employer in Dual Capacity.
b. Legislative Curtailment.

2 *Witkin Sum. Cal. Law Work Comp* § 63

[§ 63] Legislative Curtailment.

(1) *Statutory Provisions.* The 1982 Legislature revised *Lab.C. 3602* and eliminated the dual capacity doctrine as a basis for a tort action against employers except in limited circumstances. Under *Lab.C. 3602(a)* (*supra*, §24), the fact that either the employee or the employer also occupied another or dual capacity before or at the time of the employee's industrial injury does not permit the employee to bring a tort action against the employer. (See C.E.B., *Workers' Damages Practice* 2d, §4.58.) A narrow exception was made for certain product liability suits. (*Lab.C. 3602(b)(3)*, *supra*, §63; see *Perry v. Heavenly Valley* (1985) 163 C.A.3d 495, 501, footnote 3, 209 C.R. 771 [quoting explanation of purpose by state senator in Senate Journal]; 14 *Pacific L. J.* 764.)

In *Ashdown v. Ameron Int. Corp.* (2000) 83 C.A.4th 868, 100 C.R.2d 20, plaintiffs, decedent's family, sued for wrongful death based on decedent's exposure to asbestos during his employment as a pipe inspector and tester for defendant's predecessor companies from 1964 to 1966. Decedent was diagnosed with mesothelioma in February 1994, and died in April 1994. The trial judge found that the action was barred by the 1982 amendment to *Lab.C. 3602*. Plaintiffs argued that their action accrued at the time of decedent's exposure to asbestos, thus bringing their action within the dual capacity exception that was in effect prior to the 1982 amendments. *Held*, affirmed. The appropriate date for determining when plaintiffs' action accrued for purposes of establishing the applicability of the 1982 amendments is the date when decedent was first diagnosed with mesothelioma, or when he otherwise first discovered that he had the disease. Plaintiffs can rely on the former dual capacity doctrine only if decedent learned of his illness prior to 1982. Decedent first visited a physician in 1993, and first learned of the illness when diagnosed in 1994. Both dates are well after the effective date of the 1982 amendments. (83 C.A.4th 874; citing the text.)

(2) *Dual Capacity After Injury.* In *Sturtevant v. Monterey* (1991) 228 C.A.3d 758, 765, 279 C.R. 161, plaintiff sustained a wrist injury while working at defendants' medical center and alleged that defendants committed medical malpractice in treating her injury. Defendants argued that the amendments to *Lab.C. 3602* had, in effect, overruled *Duprey v. Shane* (1952) 39 C.2d 781, 249 P.2d 8, *supra*, §62, and *D'Angona v. Los Angeles* (1980) 27 C.3d 661, 166 C.R. 177, 613 P.2d 238, *supra*, §62. The trial judge entered summary judgment for defendants. *Held*, reversed.

(a) As amended, *Lab.C. 3602(a)* prohibits dual capacity tort actions against an employer where either employer or employee occupied another or dual capacity at or prior to the injury. "This language is clear and unambiguous. It

obviously applies to a line of dual capacity cases in which an employer manufactures a product sold to the public that injures an employee." (228 C.A.3d 764.)

(b) At the time of the injury, defendants' sole relationship to plaintiff was that of employer to employee; but when plaintiff was admitted as a patient, defendants assumed added duties. Because defendants' dual capacity did not exist at or before plaintiff's injury but only *after* her injury, the specific limitation on the scope of the dual capacity doctrine in *Lab.C. 3602(a)* does not apply, and, under *Duprey* and *D'Angona*, plaintiff properly may sue defendants for their alleged malpractice. (228 C.A.3d 765.)

(3) *Illustrations.* The following decisions are illustrative:

(a) *Dual capacity doctrine applicable.* See *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 C.A.3d 1273, 1294, 286 C.R. 855, *supra*, §55 [employer's second capacity as voluntary caretaker of evidence arose after employee's injury]; *Weinstein v. St. Mary's Med. Center* (1997) 58 C.A.4th 1223, 1231, 1235, 68 C.R.2d 461 [dual capacity doctrine was applicable where hospital employee slipped and fell on watery substance while at hospital for treatment for prior work-related injury; following *Sturtevant* and *D'Angona*].

(b) *Dual capacity doctrine not applicable.* See *Hendy v. Losse* (1991) 54 C.3d 723, 738, 1 C.R.2d 543, 819 P.2d 1 [dual capacity doctrine was inapplicable where professional football team physician, as coemployee of injured player, was protected under *Lab.C. 3601* (*supra*, §24) in treating player]; *Lake v. Lakewood Chiropractic Center* (1993) 20 C.A.4th 47, 53, 24 C.R.2d 358 [medical malpractice suit was barred by exclusive remedy provisions of *Lab.C. 3602(a)* because injuries were received during normal working hours from employer's free chiropractic care available to all employees; distinguishing *Sturtevant*]; *Alander v. VacaValley Hosp.* (1996) 49 C.A.4th 1298, 1304, 57 C.R.2d 40 [workers' compensation was exclusive remedy; dual capacity exception was not applicable where hospital employee was injured during treatment provided by hospital employer under its protocol for employee exposure to blood or bodily fluids; treatment was self-imposed obligation of employer and part of employee health benefit].

SUPPLEMENT: [This section is current through the latest supplement]



64 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

5. Other Authorized Actions.

a. Employer's Extrinsic Fraud.

2 *Witkin Sum. Cal. Law Work Comp* § 64

[§ 64] Employer's Extrinsic Fraud.

Fraudulent representations by an employer, which result in the employee's loss of a right of action against a third-party tortfeasor, are actionable. In *Ramey v. General Petroleum Corp.* (1959) 173 C.A.2d 386, 343 P.2d 787, plaintiff alleged that he was employed by G, and was injured in a drilling operation due to the negligence of an employee of P; but defendant G, conspiring with defendant P, the third-party tortfeasor's employer, concealed the facts of plaintiff's right of action against the third party by falsely representing that G was solely to blame, and that plaintiff's sole rights were under the Act; that plaintiff was in doubt whether he was entitled to redress from G or P and joined them in this action, nearly 5 years after the injury. *Held*, a cause of action was stated.

(a) It was permissible to plead inconsistent causes of action on the theory that G's fraud caused plaintiff to lose his action against P, or that a conspiracy of G and P tolled the statute as to P. (173 C.A.2d 397; see 4 *Cal. Proc.* (4th), *Pleading*, §363; 5 *Cal. Proc.* (4th), *Pleading*, §886.) This fraud tolled the statute of limitations on the cause of action against P. (173 C.A.2d 394, 403; see 3 *Cal. Proc.* (4th), *Actions*, §693 et seq.)

(b) "[W]e think the workmen's compensation act should not be available as a defense in a fraud action instituted by an employee against his employer under the peculiar circumstances alleged herein, to wit: where the fraud consists of misrepresentations by the employer to the employee which induced the employee to fail to discover that his personal injuries were sustained by reason of the wrongful conduct of a third party against whom the employee had recourse, and where the fraud further consists of misrepresentations by the employer to the employee to the effect that he did not have to sue until he no longer needed medical care, and to the effect that he had only one claim which was for medical expenses which he would incur in the future." Also, "we do not believe that an injury caused by the employer's fraud arises out of the employment nor is it proximately caused by the employment as those terms are used in the statute." (173 C.A.2d 402, 403.) (See *Piscitelli v. Friedenbergh* (2001) 87 C.A.4th 953, 986, 105 C.R.2d 88 [employer's intentional misrepresentations to employee broker about investments that caused loss of account and subsequent depression were actionable]; *Lenk v. Total-Western* (2001) 89 C.A.4th 959, 970, 108 C.R.2d 34 [exclusive remedy rule did not bar employee's emotional distress claim where, to entice employee from former job, employer misrepresented company's financial stability, relocation plans, and employee's prospects for promotion].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-References: 4 *Cal. Proc. (5th), Pleading*, §402; 5 *Cal. Proc. (5th), Pleading*, §932; 3 *Cal. Proc. (5th), Actions*, §770 et seq.



65 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

5. Other Authorized Actions.

b. Fetal Injury in Workplace.

2 *Witkin Sum. Cal. Law Work Comp* § 65

[§ 65] Fetal Injury in Workplace.

(1) *Former View.* Relying primarily on the derivative injury doctrine, the former view held that claims for injuries to an employee's unborn child were barred by the exclusive remedy provisions. In *Bell v. Macy's Calif.* (1989) 212 C.A.3d 1442, 261 C.R. 447, a nurse provided by defendant employer misdiagnosed plaintiff B's abdominal pain and delayed calling for an ambulance. At the hospital, B was found to have a ruptured uterus and the baby, delivered by Cesarean section, suffered consequential injuries including brain damage. The baby died 2 years later. Along with actions brought by the parents, the baby's guardian ad litem brought a survivor's action. The appellate court concluded that the derivative injury rule barred the child's tort claims because the prenatal injury was a collateral consequence of the mother's treatment: Because the injury was a direct result of the employer's work-related negligence towards the employee mother, the child's injury derived from that treatment and was within the conditions of compensation of the workers' compensation law. (212 C.A.3d 1453.) (For cases in other states holding workers' compensation to be exclusive remedy for injury or death to employee's unborn child, see 55 A.L.R.4th 792.)

(2) *Action Permitted.* The former view was overruled by *Snyder v. Michael's Stores* (1997) 16 C.4th 991, 68 C.R.2d 476, 945 P.2d 781. Plaintiff minor alleged that she received injuries *in utero* when her mother breathed toxic amounts of carbon monoxide while working in defendant's store, thus permanently damaging plaintiff's brain and nervous system and resulting in cerebral palsy and other disabling conditions. The trial judge, following *Bell*, granted defendant's demurrer on the ground that the action was barred by the exclusive remedy provisions of the Act. *Held*, reversed.

(a) *Statutory considerations.* A fetus is deemed an existing person so far as necessary for the child's interests in the event of the child's subsequent birth. (C.C. 43.1, 5 *Summary* (10th), *Torts*, §728.) *Lab.C.* 3600(a) sets forth the conditions for compensation under the workers' compensation system and provides that liability against an employer exists, without regard to fault, for an injury sustained by an employee arising out of and in the course of employment. *Lab.C.* 3602 provides that, when the conditions of *Lab.C.* 3600 are met, workers' compensation is the sole and exclusive remedy of the employee or the employee's dependents. Here, plaintiff's action is for her own injuries, not those of her mother. Thus, the question becomes whether plaintiff's fetal injuries in the mother's workplace are remediable solely, if at all, through the workers' compensation system. (16 C.4th 996.)

(b) *Derivative injury doctrine.* A fundamental condition of compensation under *Lab.C.* 3600 and, hence, a

fundamental premise of the Act's exclusive remedy provisions, is that the compensation sought is for an injury to *an employee*. (16 C.4th 996.) However, California cases have held workers' compensation proceedings to be the exclusive remedy for certain third-party claims deemed collateral to or derivative of the employee's injury. (16 C.4th 997.) In relying on the doctrine, *Bell* misapplied the rule the decisions drew from the statutory language. In barring certain third-party civil actions, the derivative injury cases do not depart from the language of *Lab.C. 3600* but merely apply that language to actions that are *necessarily dependent* on the existence of an employee injury. (16 C.4th 998.)

(c) *Derivative injury rule is inapplicable*. "[T]he derivative injury doctrine does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses." (16 C.4th 1000.) Thus, the demurrer here should have been sustained only if the complaint showed either that plaintiff was seeking damages for her mother's work-related injuries or that plaintiff's claim necessarily depended on her mother's injuries. (16 C.4th 1000.) This conclusion accords with the view of every other court that has considered the question, with the exception of *Bell*. (16 C.4th 1001.)

(d) *Fetus was not employee*. Although courts have liberally extended the statutory definition of employee beyond traditional contracts of hire, a claimant must still satisfy the basic statutory requirements of being in service of or rendering service for another. (16 C.4th 1003.) A fetus is not under the employer's control merely because the mother is, and hence is not subject to special risks of the workplace. (16 C.4th 1003, citing *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 100 C.R. 377, 494 P.2d 1, *infra*, §175.) Here, there simply was no employment relationship between plaintiff and defendant, inchoate or otherwise. (16 C.4th 1004.)

(e) *Common law rights of action are not conceded*. Neither statutes nor case law remotely suggest that third parties injured due to a business' negligence, logically and legally independent of an employee's injuries, have conceded their common law rights of action as part of the compensation bargain. A business must bear the costs of accidents caused by its negligent activities. When the injured person is not an employee, and the person's claim does not derive from an employee's injury, the costs are assessed and recovered through the civil justice system. Third parties to whom businesses may be civilly liable include the conceived but unborn child of a nonemployee. Nothing in *Lab.C. 3600* et seq., or in any other statutory source defendant cites, suggests a legislative intent that prenatal injuries to the children of employees be any different. (16 C.4th 1005.)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

A. Actions Against Employer.

5. Other Authorized Actions.

c. Excluded Employment.

2 *Witkin Sum. Cal. Law Work Comp* § 66

[§ 66] Excluded Employment.

An employee may bring a tort action against the employer when the employment is not covered by the Act. (See *Mantonya v. Bratlie* (1948) 33 C.2d 120, 123, 199 P.2d 677; *Devens v. Goldberg* (1948) 33 C.2d 173, 176, 199 P.2d 943; on excluded employments, see *infra*, §189 et seq.; *Lab.C.* 3351 et seq., 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §53.)

An employee subject to the Act, but whose employer was *uninsured*, has still more advantages in a tort action. (See *supra*, §43.) Consequently, the distinction between the action by an excluded employee and the action against an uninsured employer should be kept in mind in connection with the pleadings and trial. (See *Mantonya v. Bratlie*, *supra* [action by employee not within Act; reversible error to give instructions on presumption of employer's negligence, etc.].)

In *Devens v. Goldberg*, *supra*, the complaint was based on failure to insure and was not amended when the Commission ruled that plaintiff was working in an excluded employment. It was held, however, that the case was *tried* on the proper theory and therefore the form of the pleading did not in fact mislead the defendant. The court, after noting the *difference* between the two kinds of actions, described their *similarities* as follows: "The same facts relating to negligence will support a recovery in each, and the parties and their relationship are identical. Although the remedies are somewhat different, the obligation sought to be enforced is the same." (33 C.2d 177.)

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67 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
B. Action Against Other Employee.
1. Wilful Act or Intoxication.

2 *Witkin Sum. Cal. Law Work Comp* § 67

[§ 67] Wilful Act or Intoxication.

Two kinds of acts or conduct will support a tort action, in addition to a claim for compensation, against a coemployee for injury or death proximately caused: (a) a wilful and unprovoked physical act of aggression, or (b) intoxication. (*Lab.C. 3601(a)(1)*, (a)(2); see *Young v. Libbey-Owens Ford Co.* (1985) 168 C.A.3d 1037, 214 C.R. 400, *infra*, §416 [recovery in tort for assault by fellow employee may be allowed even though compensation award has been made and satisfied]; 1 Herlick 6th, §12.22.)

The culpable employee will be liable to the employer only where the injured employee or decedent employee's dependents obtain a recovery under *Lab.C. 3601(a)*. (*Lab.C. 3601(c)*.) However, in no event will the employer be liable for the damages awarded, even by agreement with the offending employee. (*Lab.C. 3601(b)*.)

An unprovoked physical act of aggression is *wilful* for purposes of *Lab.C. 3601(a)(1)* only when the act is deliberately intended to injure. In *Torres v. Parkhouse Tire Service* (2001) 26 C.4th 995, 111 C.R.2d 564, 30 P.3d 57, T suffered a back injury when another employee grabbed T's back support belt as T was on his knees working on a tire, lifted T off the ground several times, then dropped T on his knees. In approving the trial court's instruction that *Lab.C. 3601(a)(1)* required plaintiffs to prove that the coemployee had an intent to injure, the court construed the statute's "unprovoked physical act of aggression" language to mean unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury. Because "threat" is commonly understood as an expression of an intention to inflict injury, damage, harm, or loss on another, the statute's language logically contemplates intended injurious conduct. "By adding the term 'willful,' the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm." (26 C.4th 1005.) (See *Iverson v. Atlas Pac. Engineering* (1983) 143 C.A.3d 219, 225, 191 C.R. 696 [first court to address statute's phrase and suggesting that *Lab.C. 3601(a)(1)* did not require intentional act to injure]; *Soares v. Oakland* (1992) 9 C.A.4th 1822, 1829, 12 C.R.2d 405 [statute covers only those batteries that are intended to injure; disagreeing with *Iverson*]; 57 A.L.R.4th 888 [wilful, wanton, or reckless conduct of coemployee as ground of liability].)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
B. Action Against Other Employee.
2. Employee Outside Scope of Employment.

2 Witkin Sum. Cal. Law Work Comp § 68

[§ 68] Employee Outside Scope of Employment.

Lab.C. 3601 makes the compensation claim the exclusive remedy against another employee "acting within the scope of his or her employment." Normally, this would preclude an action for negligence for injuries occurring on the job. However, in *Saala v. McFarland* (1965) 63 C.2d 124, 45 C.R. 144, 403 P.2d 400, the court distinguished "scope of employment" from "in the course of employment" and "arising out of employment," and opened up a new field of actions between employees.

The employer maintained a parking lot for the convenience of employees. At the end of their shift, when in the parking lot, plaintiff employee was struck by defendant employee's car. Under the employer-controlled premises exception to the going and coming rule (*infra*, §201 et seq.), the injuries were in the course of employment and arose out of it for purposes of compensation, and plaintiff received compensation. In a subsequent action for damages, summary judgment was for defendant on the theory that *Lab.C. 3601* was a bar. *Held*, reversed. Although the two phrases have been used interchangeably at times, scope of employment is narrower. Conduct is within the scope of employment only if the employee is actuated by an intent to serve the employer. In removing her car from the lot at the end of her shift, defendant was not still serving her employer. (63 C.2d 129.) Thus, with the immunity of *Lab.C. 3601* eliminated, defendant became a person "other than the employer" under *Lab.C. 3852*, and subject to suit. (See *McIvor v. Savage* (1963) 220 C.A.2d 128, 33 C.R. 740 [reaching similar conclusion and cited with approval in *Saala* opinion]; 6 Santa Clara Lawyer 100 [negligent coemployee's personal liability defined; *Saala*]; 57 A.L.R.4th 888 [wilful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law]; C.E.B., Workers' Damages Practice 2d, §5.9; 1 Herlick 6th, §12.22.)

Saala and *McIvor* were discussed and held inapplicable in *Vellis v. Albertson* (1968) 267 C.A.2d 285, 289, 72 C.R. 841, and *Brittell v. Young* (1979) 90 C.A.3d 400, 404, 407, 153 C.R. 387. In each case, the facts supported the inference that the coemployee was acting within the scope of employment. (See *Campbell v. Harris-Seybold Press Co.* (1977) 73 C.A.3d 786, 790, 141 C.R. 55 [special employee of plaintiff's employer, while acting in scope of employment, was protected from suit; protection gained by coemployee status was not imputed to special employee's regular employer]; *Hendy v. Losse* (1991) 54 C.3d 723, 738, 1 C.R.2d 543, 819 P.2d 1 [professional football team physician as coemployee of injured player was protected under *Lab.C. 3601* in treating player because physician was acting within scope of his employment and other conditions of compensation were met]; *Oliva v. Heath* (1995) 35 C.A.4th 926, 933, 41 C.R.2d 613 [because pranks and practical jokes were condoned and encouraged by employer, they were within coworkers']

scope of employment; thus, exclusive remedy for worker injured from prank was workers' compensation].)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 69

[§ 69] In General.

(1) *Nature of Action.* If injury or death occurs in the course of and arises out of the employment, the employee or the employee's dependents may receive compensation or death benefits from the employer even though the cause is the wrongful act of a third party. However, a right of action for damages also arises against the third-party tortfeasor. (*Lab.C. 3852; Lamoreux v. San Diego & Arizona Eastern Ry. Co. (1957) 48 C.2d 617, 625, 311 P.2d 1*; see *18 Hastings L. J. 710* [workers' compensation and third-party suits]; *21 Hastings L. J. 661* [same]; C.E.B., *Workers' Damages Practice* 2d, §3.2 et seq.; Cal. Civil Practice, 2 *Workers' Compensation*, §16:1 et seq.; *76 A.L.R.4th* 365 [third-party liability of corporate officer to injured worker]; *40 A.L.R.5th* 1 [employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person]; *82 Am.Jur.2d (2003 ed.)*, *Workers' Compensation* §84 et seq.; *1 Herlick 6th*, §12.01 et seq.)

(2) *Both Employee and Employer May Sue.* The employee (or the employee's successors) or the employer may bring the action, the employee for damages, the employer for reimbursement of compensation or other payments made or which the employer is obligated to pay. (*Lab.C. 3852; Ferrario v. Conyes (1937) 19 C.A.2d 58, 61, 64 P.2d 975* [in employee's action, it was prejudicial error for defendant's counsel to refer to fact that plaintiff is paid, or entitled to obtain, compensation from employer].)

In *Garofalo v. Princess Cruises (2000) 85 C.A.4th 1060, 102 C.R.2d 754*, G suffered injuries that aggravated her preexisting respiratory ailments, for which she was found 100% disabled and her employer was required to provide lifetime medical care. On a subsequent ocean cruise, G sustained smoke inhalation injury in the course of a shipboard fire. G sued the cruise ship company, P, for those injuries, and the employer intervened as a plaintiff under *Lab.C. 3852* and *3853* seeking costs of additional medical care it had provided to G. G later died from medical conditions allegedly aggravated by the fire. G's family sued P for wrongful death, and G's husband dismissed the prior personal injury action, leaving G's employer as the sole plaintiff in that action. The trial court granted P's motion for summary judgment, concluding that the Death on the High Seas Act (DOHSA) preempted the employer's subrogation action. *Held*, affirmed. The DOHSA preempts state wrongful death and survival claims when the death-causing incident occurs on the high seas. Because the employer stood in G's shoes and had no greater recovery than G, and G had no remedy except under DOHSA, neither did the employer. California's workers' compensation subrogation and intervention provisions do not provide the substantive law governing a claim against a third-party tortfeasor; they are procedural only. "*Lab.C. 3852* does not guarantee that an employer has a right to recover under the substantive law governing the

action." (85 C.A.4th 1075.) Moreover, when a high seas injury is a cause, but not the sole cause, of death, DOHSA provides the exclusive remedy as to the high seas tortfeasor. Thus, the employer's only cause of action was under DOHSA. (85 C.A.4th 1079.)

(3) *Notice and Consolidation.* An employer or employee that sues independently of the other must promptly give the other a copy of the complaint, either by personal service or certified mail. (*Lab.C.* 3853; see *O'Dell v. Freightliner Corp.* (1992) 10 C.A.4th 645, 656, 12 C.R.2d 774 [where employee failed to provide employer with timely statutory notice, equity required that he notify employer of impending settlement with third-party tortfeasor].) Also, either may join as a plaintiff in the other's action, or, if both sue independently, the actions must be consolidated. (*Lab.C.* 3853; *Mar v. Sakti Int. Corp.* (1992) 9 C.A.4th 1780, 1785, 12 C.R.2d 388 [intervention under *Lab.C.* 3853 is timely at any time before trial on facts]; *Lohnes v. Astron Computer Products* (2001) 94 C.A.4th 1150, 1153, 115 C.R.2d 34 [proper procedure for intervention of insurer requires leave of court under *C.C.P.* 387 (see 4 Cal. Proc. (4th), *Pleading*, §201)].) (See C.E.B., *Workers' Damages Practice* 2d, §§3.30, 3.31.)

(4) *Release and Settlement.* An employer may not give a valid release or settlement of a claim without the employee's consent (*Lab.C.* 3859), but an employee may release a third-party tortfeasor unilaterally (see *infra*, §70). A release or settlement is not binding without notice to both employer and employee, an opportunity for the employer to recover compensation liability and special damages, and an opportunity for the employee to recover all damages suffered. (*Lab.C.* 3860(a).) (See *O'Dell v. Freightliner Corp.*, *supra*, 10 C.A.4th 658 [where employee settled with third-party tortfeasor and dismissed his action, employer's only remedy was to challenge employee's failure to notify employer of settlement or to seek credit against future compensation benefits employer might be required to pay].) (On credit on employee's award, see *infra*, §73.)

(5) *Survival.* *Lab.C.* 3851 states that the death of the "employee or of any other person" does not abate the right of action. Hence, (a) the employee's action survives, as an ordinary action by an injured party against a tortfeasor, and (b) the employer's separate cause of action for reimbursement also survives. (*Los Angeles v. Howard* (1947) 80 C.A.2d 728, 730, 182 P.2d 278.)

(6) *Tortfeasor Must Be Distinct.* The "third party tortfeasor" must be a distinct third person or entity; no action will lie against the employer on the theory that some separate function results in a different entity. Thus, in *Walker v. San Francisco* (1950) 97 C.A.2d 901, 219 P.2d 487, the complaint alleged that decedent, a San Francisco fireman, was injured by the negligence of a San Francisco municipal railway motorman. Plaintiff contended that the fire department, a governmental activity, and the railway, a proprietary activity, were so separate as to constitute the railway department a third-party tortfeasor. *Held*, the two functions were performed by a single entity--the city and county of San Francisco--and the Act furnished the exclusive remedy. (97 C.A.2d 903.) (See *Colombo v. California* (1991) 3 C.A.4th 594, 598, 5 C.R.2d 567 [Highway Patrol officer could not bring action against state on theory that his injury was caused by third-party tortfeasor, i.e., Department of Transportation].)

(7) *Corporate Parent May Be Tortfeasor.* The parent of a California corporation may be a third-party tortfeasor as to an employee of the California corporation. (See *Gigax v. Ralston Purina Co.* (1982) 136 C.A.3d 591, 603, 606, 186 C.R. 395 [reversing summary judgment in favor of parent corporation].) However, the relationship of parent-subsidiary does not relieve a subsidiary's employee of proving negligence by the parent, including the threshold element of duty. To be liable, the parent corporation's acts of negligence must be separate from those of the California corporation, and the parent must have assumed an independent duty to provide a safe working environment at the subsidiary's workplace. (*Waste Management v. Superior Court* (2004) 119 C.A.4th 105, 110, 13 C.R.3d 910 [decedent's family recovered workers' compensation benefits from California employer and were unable to show independent basis for parent corporation's tort liability; distinguishing *Gigax*].)

(8) *Apportionment.* If the heirs of an employee sue under the wrongful death provisions (*C.C.P.* 377.60 et seq.; 6 Summary (10th), *Torts*, §§1389, 1394, 1397) and the employer sues under *Lab.C.* 3852, their respective rights against the third person are determined by the court. (*Lab.C.* 3852; see *Eli v. Travelers Indem. Co.* (1987) 190 C.A.3d 901, 905,

235 C.R. 704 [court is required to ascertain damages to which each claimant is entitled and then to apportion total award accordingly].)

(9) *Insurer's Indemnity*. An insurer that has made a payment into the Subsequent Injuries Fund under *Lab.C. 4706.5* (infra, §298) may seek indemnity from the third-party tortfeasor. (*Associated Indem. Corp. v. Pacific Southwest Airlines* (1982) 128 C.A.3d 898, 907, 180 C.R. 685; *Travelers Ins. Co. v. Sierra Pac. Airlines* (1983) 149 C.A.3d 1144, 1155, 197 C.R. 416 [scheme created by *Lab.C. 3852* is to hold third-party tortfeasor liable for all consequences of acts; thus, amount employer or insurer is obligated to pay, including payments made to state under *Lab.C. 4706.5(a)*, is inclusive of overall scheme]; *Fremont Comp. Ins. Co. v. Sierra Pine, Ltd.* (2004) 121 C.A.4th 389, 397, 17 C.R.3d 80 [insurer had standing under *Lab.C. 3852* to bring action against third-party tortfeasor to recoup death benefits paid even though decedent's spouse had no standing to bring action for wrongful death].)

(10) *Limits On Employer's Recovery*. Neither general negligence principles nor *Lab.C. 3852* allows an employer to recover damages for increased workers' compensation insurance premiums and lost profits incurred as a result of negligent injury to its employees. (*Fischl v. Paller & Goldstein* (1991) 231 C.A.3d 1299, 1302, 1304, 282 C.R. 802.)

West's Key Number Digest, Workers' Compensation k.2158 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Notice and Consolidation*. See *McKinnon v. Otis Elevator Co.* (2007) 149 C.A.4th 1125, 1131, 57 C.R.3d 723 [letter to employee from employer's attorney that advised of employer's subrogation complaint against third party but did not provide employee with copy of complaint was ineffective notice and constituted noncompliance with *Lab.C. 3853*]. *Cross-Reference:* 4 *Cal. Proc.* (5th), *Pleading*, §220.

(4) *Release and Settlement*. See *McKinnon v. Otis Elevator Co.*, *supra*, 149 C.A.4th 1137 [consent requirements were not met where letter to employee from employer's attorney merely advised of pending settlement with third-party tortfeasor and asked for consent, which was not given; thus, settlement did not bar action by employee against settling third party].



70 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
2. Employee's Unilateral Release.
a. Statutory Authorization.

2 *Witkin Sum. Cal. Law Work Comp* § 70

[§ 70] Statutory Authorization.

(1) *In General.* After the decision in *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641 (infra, §92), which bars a contributorily negligent employer from participating in the recovery from a third-party tortfeasor, the employer still retained a veto power over the employee's settlement because of the joint consent requirement. (See 17 U.C.L.A. L. Rev. 651.) A 1971 amendment to *Lab.C.* 3859 solved this problem by allowing an employee to settle and release claims against a third party *without the consent of the employer*. However, the settlement is subject to the employer's right under *Lab.C.* 3852 to recover compensation paid. (*Lab.C.* 3859(b).)

In *Van Nuis v. Los Angeles Soap Co.* (1973) 36 C.A.3d 222, 111 C.R. 398, plaintiff employee sued defendants as third party tortfeasors and the employer's insurer filed a notice of lien and complaint in intervention. Defendants answered the complaint in intervention alleging contributory negligence of plaintiff and his employer under the *Witt v. Jackson* rule. Plaintiff settled his claim without the employer's consent, and the intervener, after unsuccessfully seeking relief in the trial court, appealed from the judgment and contended that, although the amendment gave a plaintiff employee the right to settle without the employer's consent, the employer could still claim reimbursement out of the settlement proceeds under *Lab.C.* 3860 (supra, §69). *Held*, judgment affirmed.

(a) *Lab.C.* 3860 is expressly subject to *Lab.C.* 3859. Hence, an employee may settle a claim against a third party tortfeasor without the employer's consent and the settlement is not subject to a lien based on the employer's claim for reimbursement of compensation payments under pleadings as in this case. Rather, the employer must assert that claim in an action against the third party. (36 C.A.3d 231.)

(b) When an action terminates in settlement, there is ordinarily no judicial determination of any issues, such as that of the employer's concurrent negligence. Thus, there is no basis on which to allow the lien. "It follows that there is no constitutional infirmity in allowing the employer to claim a lien on a judgment, while denying him that right in the event of a settlement such as this one." (36 C.A.3d 231.) (See *Soliz v. Spielman* (1974) 44 C.A.3d 70, 72, 118 C.R. 127, infra, §72 [unilateral release in malpractice action against employee's attorneys]; 1 Herlick 6th, §12.12.)

(2) *Settlement Covering Employer's Claim.* In *Marrujo v. Hunt* (1977) 71 C.A.3d 972, 138 C.R. 220, an employee's heirs settled their malpractice action against three of four defendants without the consent of the employer's insurer,

which had filed a lien for death benefits paid to the heirs. The agreement indemnified the settling defendants from the nonnegligent employer's lien. The case went to trial against the remaining defendant, who obtained a defense verdict. On the employer's motion, the trial court ordered the lien paid from the settlement. *Held*, affirmed. The statute permits an employee to settle a claim apart from the employer's lien claim, but here the settlement also covered the employer's claim. (71 C.A.3d 978.) Because the third-party defendants had not claimed that the employer was negligent, there was no issue left unresolved by the settlement. (71 C.A.3d 979, distinguishing *Van Nuis*, *supra*.)

(3) *Settlement Including Benefits and Witt v. Jackson Defense Asserted. In Ellis v. Wells Mfg. (1989) 216 C.A.3d 312, 264 C.R. 648*, plaintiff, a bakery employee, fell into a donut fryer and sustained serious injuries. She received workers' compensation benefits from State Fund, and sued defendant, the manufacturer of the fryer. Defendant's answer included a *Witt v. Jackson* defense. Plaintiff and defendant entered into a settlement under which plaintiff would hold defendant harmless from lien claims by State Fund. State Fund filed its claim and moved to impose a lien on the settlement. The trial court granted the motion, ruling that the entire amount of the settlement was subject to the lien. *Held*, order reversed.

(a) In *Van Nuis v. Los Angeles Soap Co.*, the settlement excluded the benefits and a *Witt v. Jackson* defense was alleged; in *Marrujo v. Hunt*, the settlement included the benefits, but no *Witt v. Jackson* defense was set up. This case presents a third situation: the settlement included the benefits and a *Witt v. Jackson* defense was asserted. (216 C.A.3d 317.)

(b) "The fact that the settlement included benefits should not operate to bar Ellis from an opportunity to litigate the *Witt v. Jackson* issue. The reason is obvious: to permit a lien here would enable State Fund to recover the full amount of benefits paid regardless of whether the employer was negligent. This would obviate the policy, so clearly expressed in *Witt*, preventing the employer from receiving a double recovery." (216 C.A.3d 317.)

(c) The fact that the settlement included benefits paid does not jeopardize the employer's right to obtain reimbursement. By providing that plaintiff would hold defendant harmless against claims by State Fund, the settlement requires plaintiff to defend State Fund's action to recover benefits and, if the employer is not negligent, plaintiff must pay State Fund out of the settlement proceedings. (216 C.A.3d 317.)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
2. Employee's Unilateral Release.
b. Notice.

2 Witkin Sum. Cal. Law Work Comp § 71

[§ 71] Notice.

Although *Lab.C. 3859(b)* (supra, §70) allows independent settlements, it does not allow the employee to settle a claim with a third-party defendant without notifying the employer as required by *Lab.C. 3860(a)*. (*American Home Assur. Co. v. Hagadorn* (1996) 48 C.A.4th 1898, 1908, 56 C.R.2d 536 [employer's insurer's action against injured employee alleging that employee breached statutory duty to notify insurer of settlement, thus preventing insurer from intervening].)

The burden of failure to comply with the Labor Code's notice and consent statutes is on the employee, not a third-party defendant, where the employee is the only party to the settlement with knowledge of the employer's claim for reimbursement and has express and timely notice of the obligation to inform the employer of a settlement. (*Board of Administration of the Public Employees' Retirement System v. Glover* (1983) 34 C.3d 906, 916, 196 C.R. 330, 671 P.2d 834.)

In *Insurance Co. of North America v. T.L.C. Lines* (1996) 50 C.A.4th 90, 57 C.R.2d 542, G, an employee injured in an automobile accident, settled with defendant third-party tortfeasor without the consent of G's employer or plaintiff insurer. The settlement released defendant and defendant's insurer from all claims arising out of the accident. After the settlement, G sought and received from plaintiff workers' compensation benefits for the same injuries. Plaintiff received a credit equal to the settlement sum for amounts paid to G and sued defendant under *Lab.C. 3852* to recover additionally paid out benefits. The trial judge ruled for defendant, finding that defendant had entered into the settlement in good faith having no knowledge or notice of a potential workers' compensation claim, and that plaintiff had received full benefit of the settlement by setting it off against benefits paid. *Held*, affirmed. *Glover* stands for the general proposition that an employer not given notice of a nonsegregated settlement may sue the settling third-party alleged tortfeasor *if and only if* the third party knew or should have known of the existence of or potential for a compensation claim and failed to notify the employer. Otherwise, the good faith settlement and release will protect the third party from further liability and the employer must recover from the employee. (50 C.A.4th 101.)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
- 3. Action or Settlement by Employee Alone.
- a. Employer's Lien on Employee's Judgment.

2 Witkin Sum. Cal. Law Work Comp § 72

[§ 72] Employer's Lien on Employee's Judgment.

(1) *In General.* If the employee alone prosecutes the action, the employer is entitled to a *first lien* on the judgment, to cover expenditures for compensation and special damages under *Lab.C. 3852*, such as salary, wages, or pension payments made. (*Lab.C. 3856(b)*; see *Lab.C. 3857* [further lien for subsequent expenditures]; *Dighton v. Martin* (1935) 4 C.A.2d 401, 405, 41 P.2d 197; *Chase v. Southern Pac. Co.* (1935) 6 C.A.2d 273, 275, 43 P.2d 1108; *Harvey v. Boysen* (1975) 50 C.A.3d 756, 761, 123 C.R. 740; *Abdala v. Aziz* (1992) 3 C.A.4th 369, 378, 4 C.R.2d 130 [lien may be asserted any time before satisfaction of judgment or consummation of settlement]; *Manthey v. San Luis Rey Downs Enterprises* (1993) 16 C.A.4th 782, 788, 20 C.R.2d 265, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §90 [*Lab.C. 3856(b)* requires in unambiguous language that workers' compensation lien be satisfied out of judgment instead of being deducted from jury verdict prior to entry of judgment]; but see *Soliz v. Spielman* (1974) 44 C.A.3d 70, 72, 118 C.R. 127 [insurer's lien is not permitted in employee's attorney malpractice suit; employee has no duty to sue third party for benefit of employer and cannot be held liable because attorneys fail to file action, nor do employee's attorneys owe duty to employer; employer may sue negligent third party in its own name]; see also C.E.B., *Workers' Damages Practice* 2d, §7.46; Cal. Civil Practice, 2 *Workers' Compensation*, §§16:8, 16:48; 1 Herlick 6th, §12.06; on comparative negligence of employer as bar, see *infra*, §93.)

The employer may enforce this lien against the third party, or, if the latter has already paid the employee, in the manner provided for enforcement of money judgments generally. (*Lab.C. 3862*; on enforcement of money judgments, see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §44 et seq.)

(2) *Assignment of Lien.* The employer's lien is assignable. (*Hone v. Climatrol Industries* (1976) 59 C.A.3d 513, 523, 130 C.R. 770, *infra*, §97; *Quinn v. Warnes* (1983) 144 C.A.3d 309, 315, 192 C.R. 660, citing the text; see *Raisola v. Flower Street Ltd.* (1988) 205 C.A.3d 1004, 1008, 252 C.R. 726 [intervening compensation insurer assigned lien to tortfeasor]; *Engle v. Endlich* (1992) 9 C.A.4th 1152, 1163, 12 C.R.2d 145 [employer's lien may be assigned to plaintiff employee, but that does not preclude offset of benefits against damages in amount proportionate to employer's negligence (see *infra*, §93)].)

(3) *Effect of Witt v. Jackson Defense.* Under *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, *infra*, §92, a defendant may assert the employer's contributory negligence as a defense to the employer's attempt to seek

reimbursement for benefits paid. If so, and the employee settles with third parties, the mere filing of a lien by the employer is insufficient to protect a claim of reimbursement. On notice of the claim, the employer must file a complaint in intervention to protect its rights. (*Aetna Cas. & Surety Co. v. Superior Court* (1993) 20 C.A.4th 1502, 1507, 1509, 25 C.R.2d 301, citing *O'Dell v. Freightliner Corp.* (1992) 10 C.A.4th 645, 656, 12 C.R.2d 774, supra, §69.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Manthey case:*

6 Cal.Proc. (5th), *Proceedings Without Trial*, §104.

Enforcement of money judgments:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §53 et seq.



73 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
- 3. Action or Settlement by Employee Alone.
- b. Employer's Credit on Employee's Award.
- 1. In General.

2 Witkin Sum. Cal. Law Work Comp § 73

[§ 73] In General.

(1) *Statutory Authorization.* If the employee brings an action at law and also applies for compensation, there is a possibility of double recovery. This is prevented by giving the employer a *credit*, on the employer's liability for compensation, of the amount of any recovery by judgment against or settlement with the third party that has not been applied to expenses or attorneys' fees (*infra*, §§76, 77) or to reimburse the employer. (*Lab.C. 3861*; see *San Bernardino v. Industrial Acc. Com.* (1933) 217 C. 618, 625, 20 P.2d 673 [settlement without action being filed]; *Southern Calif. Edison Co. v. Work. Comp. App. Bd.* (1997) 58 C.A.4th 766, 772, 68 C.R.2d 265 [concurrently negligent employer cannot include settlement from third party as part of employer's previous payments to employee in calculating employer's credit against its percent of liability; following *Associated Const. & Engineering Co. v. Work. Comp. App. Bd.* (1978) 22 C.3d 829, 150 C.R. 888, 587 P.2d 684, *infra*, §93]; *Bailey v. Reliance Ins. Co.* (2000) 79 C.A.4th 449, 458, 94 C.R.2d 149 [workers' compensation judges and Workers' Compensation Appeals Board are empowered to reallocate settlement proceeds where employee may have colluded with third party to make bad faith allocation to defeat employer's future credit rights; C.C.P. 877.6 (determination of good faith settlement; 5 *Summary* (10th), *Torts*, §§83, 87) was not proper mechanism]; C.E.B., *Workers' Damages Practice* 2d, §8.1 et seq.; *Cal. Civil Practice*, 2 *Workers' Compensation*, §§17:1 et seq., 17:12 et seq.; 1 *Herlick* 6th, §12.08.)

(2) *Credit for Subsequent Injury Judgment.* If an employee is injured through the fault of a third party after suffering an industrial injury, the employer is entitled to a credit to the extent that the industrial injury is exacerbated by the new injury. (*Hodge v. Work. Comp. App. Bd.* (1981) 123 C.A.3d 501, 514, 515, 176 C.R. 675; see *Abdala v. Aziz* (1992) 3 C.A.4th 369, 375, 4 C.R.2d 130 [employer is entitled to credit where subsequent injury increases liability for compensation, regardless of whether subsequent injury is industrial or nonindustrial].)

(3) *Distinction: No Credit for Payments Under Uninsured Motorist Statute.* Payments made to an employee under the uninsured motorist coverage in the employee's or the employer's auto insurance may be reduced by the amount of workers' compensation benefits that are also payable to the employee. (See 2 *Summary* (10th), *Insurance*, §§187, 212.) Hence, the employer or the employer's insurer may not receive credit for damages or medical payments under an uninsured motorist provision. These payments are not a recovery against a third-party tortfeasor. (*Fireman's Fund Indem. Co. v. Industrial Acc. Com.* (1964) 226 C.A.2d 676, 678, 38 C.R. 336.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
- 3. Action or Settlement by Employee Alone.
- b. Employer's Credit on Employee's Award.
- 2. No Credit in MICRA Action.

2 Witkin Sum. Cal. Law Work Comp § 74

[§ 74] No Credit in MICRA Action.

An employer may be precluded under C.C. 3333.1 of the Medical Injury Compensation Reform Act (MICRA; see 6 *Summary* (10th), *Torts*, §940) from receiving a credit when the employee has demonstrably had a recovery reduced to reflect collateral source (e.g., workers' compensation) contributions, either by trial or settlement. In *Graham v. Work. Comp. App. Bd.* (1989) 210 C.A.3d 499, 258 C.R. 376, plaintiff, a county transit district (District) bus driver, was injured in a bus accident and received benefits. He then sued M for medical malpractice alleging improper medical treatment for the injuries. The action was settled for \$ 150,000 under a stipulation that the amount covered only general damages for pain and suffering, and that all special damages (medical expenses and disability) would be covered by the workers' compensation award. The District petitioned for credit in the amount of the settlement against its liability for future workers' compensation payments to plaintiff. The Board allowed the credit, and plaintiff petitioned for review, contending that C.C. 3333.1 overrides the right to credit when an employee settles his malpractice action and the settlement excludes workers' compensation benefits. *Held*, order annulled.

(a) *Abrogation of collateral source rule in MICRA cases.* Under the traditional collateral source rule, a jury may not consider the plaintiff's entitlement to benefits such as medical insurance or disability payments when it calculates the plaintiff's damages in a tort action. C.C. 3333.1 abrogated the rule for MICRA actions, allowing the jury to consider collateral source benefits and thereby authorizing a lower verdict. (See 6 *Summary* (10th), *Torts*, §956.) But C.C. 3333.1(b) provides that the source of the collateral benefits cannot recover any amount against the plaintiff, and is not subrogated to the rights of the plaintiff against a defendant. (210 C.A.3d 504.) The District, however, argued that the statute merely precludes it from obtaining reimbursement from a plaintiff, and does not restrict its right under *Lab.C.* 3861 to obtain *credit* for future benefits. (210 C.A.3d 505.)

(b) *Analogous statutory conflict on reimbursement.*

(1) *Miller v. Sciaroni* (1985) 172 C.A.3d 306, 218 C.R. 219, 6 *Summary* (10th), *Torts*, §957, dealing with an employer's claim for reimbursement under *Lab.C.* 3852 (supra, §69), held that where *Lab.C.* 3852 and C.C. 3333.1 are in conflict, the latter must prevail. C.C. 3333.1 "is directed towards reducing defendant's medical malpractice insurance costs by: (1) encouraging lower awards to plaintiffs by admitting evidence of benefits received (subd. (a)); and (2)

prohibiting third party insurers from subrogating plaintiff's rights as to benefits received, thus reallocating certain costs from defendant's insurer to other insurance carriers (subd. (b))." (210 C.A.3d 505, 506.)

(2) In *Fein v. Permanente Med. Group* (1985) 38 C.3d 137, 211 C.R. 368, 695 P.2d 665, 6 Summary (10th), *Torts*, §957, the court observed that, although C.C. 3333.1(a) does not specify how the jury should use the evidence of collateral source benefits, "the Legislature apparently assumed that in most cases the jury would set plaintiff's damages at a lower level because of its awareness of plaintiff's 'net' collateral source benefits." And C.C. 3333.1(b) "provides that whenever such collateral source evidence is introduced, the source of those benefits is precluded from obtaining subrogation either from the plaintiff or from the medical malpractice defendant." (210 C.A.3d 504.)

(3) "If we construe the statute as the Transit District urges, and allow the employer credit from an already reduced recovery, the injured employee, not the medical malpractice defendant or the employer, would bear the cost of the medical malpractice to the extent of the workers' compensation benefits. In effect, the higher the workers' compensation benefits to which the employee is entitled, the lower his overall recovery." (210 C.A.3d 506.) This construction of the credit provisions is inconsistent with Cal. Const., Art. XIV, §4, which declares protection of injured employees through a comprehensive workers' compensation scheme to be the public policy of the State, and with Lab.C. 2302, which requires the workers' compensation statutes to be liberally construed. "The Legislature clearly intended a different result in enacting MICRA. Thus, the sensible interpretation of *Civil Code* 3333.1 is that it includes the employer's credit remedies as well as its reimbursement remedies." (210 C.A.3d 506.)

(c) *Application of C.C. 3333.1 to settled cases.* The District argues that the language of C.C. 3333.1 deals with a *trial* and cannot be applied where the action was *settled*. However, *Barme v. Wood* (1984) 37 C.3d 174, 207 C.R. 816, 689 P.2d 446, 6 Summary (10th), *Torts*, §957, held that the damage-reducing effect of the section comes into play even if the procedures set forth in the statute are not followed; and to interpret the section to require a trial would force plaintiffs to try their cases unless medical malpractice defendants agreed to settle for sums sufficient to cover employers' costs. (210 C.A.3d 508.) Hence, to harmonize C.C. 3333.1 with the Labor Code credit provisions, C.C. 3333.1 must be interpreted "as impliedly creating an exception to the credit provisions whenever an injured party has demonstrably had his recovery reduced to reflect collateral source contributions. A more restrictive construction would shift a portion of the costs of medical malpractice to the injured party, contrary to the purposes of both MICRA and the workers' compensation statutes." Here, the parties in the underlying medical malpractice case made an adequate factual record that plaintiff's settlement was reduced to exclude a recovery for collateral source benefits. (210 C.A.3d 508.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
 - 3. Action or Settlement by Employee Alone.
 - b. Employer's Credit on Employee's Award.
 - 3. Credit on Award After Judgment.

2 Witkin Sum. Cal. Law Work Comp § 75

[§ 75] Credit on Award After Judgment.

In *Sanstad v. Industrial Acc. Com.* (1959) 171 C.A.2d 32, 339 P.2d 943, the employee, injured by a third-party tortfeasor, brought an action. The employer's insurer intervened, and the parties stipulated for a \$ 5,000 judgment in two parts: One for the insurer who had voluntarily paid \$ 1,380.10 in compensation but agreed to a lesser amount as full repayment, and one for the employee, representing the balance. Approximately 5 months later, the insurer filed an application for adjustment and it was found that the employee's injuries had caused permanent disability in the accrued sum of \$ 3,870. The Commission awarded the insurer a subrogation credit of \$ 3,619.90; i.e., the \$ 5,000 judgment less the \$ 1,380.10 compensation taken into account at the time of that judgment. The employee contended (1) that the prior superior court judgment in the third-party tortfeasor action was conclusive on the insurer's right to subrogation, and (2) that having accepted the benefits of that judgment it was estopped to claim further recoupment. *Held*, the credit was properly awarded.

(a) The superior court judgment was not conclusive on that issue. The effect of *Lab.C. 3861* and *3858* "is to vest in the commission and to continue in the commission, exclusive jurisdiction to determine compensation, even though the third party action is brought before the jurisdiction of the commission has been invoked. Of course if the action is begun after the jurisdiction of the commission has been invoked the decisions of the commission bind the court and the court may give relief to the employer, based on the commission's award insofar as the commission has determined compensation." (171 C.A.2d 39.) In addition, "[a]fter satisfaction of the judgment the commission ... may perfect the right of the employer to recoupment not theretofore accorded to him." (171 C.A.2d 40.)

(b) There was no estoppel. The insurer did not represent or promise, in the third-party action, that its subrogation claim under the Labor Code was waived or would not be enforced through further proceedings before the *Commission*. (171 C.A.2d 40.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

3. Action or Settlement by Employee Alone.

c. Employee's Expenses and Attorneys' Fees.

1. Nature of Problem and Former Law.

2 *Witkin Sum. Cal. Law Work Comp* § 76

[§ 76] Nature of Problem and Former Law.

The employer or the employer's insurer may permit the employee to bring the action alone at the employee's expense and then, by asserting a lien on the judgment (*supra*, §73), seek the benefits of the suit without assisting in its prosecution. (See *Dodds v. Stellar* (1947) 30 C.2d 496, 504, 183 P.2d 658.) This "free ride" of the employer was the subject of considerable criticism and litigation. (See 21 *Hastings L. J.* 718; 12 Santa Clara Lawyer 18.) Amendments to *Lab.C.* 3856 and 3860 provided for sharing expenses, but the sharing provisions were repealed in 1959, and three Court of Appeal decisions held that the effect was to render the employee's share, rather than the employer's share, liable for legal services rendered by the employee's attorney on behalf of the employer. (See *Johnson v. L.D.S. Trucking Co.* (1967) 254 C.A.2d 496, 499, 62 C.R. 501; *Moreno v. Venturini* (1969) 1 C.A.3d 286, 290, 81 C.R. 551; *Fuchs v. Western Oil Fields Supply* (1972) 25 C.A.3d 728, 736, 102 C.R. 74.)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
 - 3. Action or Settlement by Employee Alone.
 - c. Employee's Expenses and Attorneys' Fees.
 - 2. Apportionment of Fee.

2 Witkin Sum. Cal. Law Work Comp § 77

[§ 77] Apportionment of Fee.

Quinn v. California (1975) 15 C.3d 162, 124 C.R. 1, 539 P.2d 761 disapproved *Johnson v. L.D.S. Trucking Co.* (1967) 254 C.A.2d 496, 499, 62 C.R. 501; *Moreno v. Venturini* (1969) 1 C.A.3d 286, 290, 81 C.R. 551; and *Fuchs v. Western Oil Fields Supply* (1972) 25 C.A.3d 728, 736, 102 C.R. 74, supra, §76, and held that *Lab.C.* 3856 and 3860 require equitable allocation of attorneys' fees.

In *Quinn*, the injured employee received workers' compensation and sued the state as a third-party tortfeasor. His employer's compensation insurer filed a lien but did not otherwise participate. After judgment for the employee, defendant's liability insurer (which was also the employer's compensation insurer) sent plaintiff a check, deducting the full amount of its compensation payments. The employee's subsequent motion for apportionment of his attorney's fee between himself and his employer was denied. *Held*, reversed and remanded for apportionment.

(a) *Equitable basis for apportionment.* Apportionment of fees between active and passive beneficiaries in cases of a common recovery has long been recognized (see 7 Cal. Proc. (4th), *Judgment*, §215 et seq.) and might be ordered here without regard to statute. (15 C.3d 167, 168.)

(b) *Legislative intent.* The 1949 version of *Lab.C.* 3856 clearly required apportionment. The purpose of the 1959 amendments was only to ensure payment of fees before payment of the employer's compensation claim, and *Lab.C.* 3856(b) continues to require apportionment of the employee's attorney's fee when the attorney obtains a recovery. "Both the directive to assess a *reasonable* fee and the mandate to consider the *benefit* to both active and passive beneficiaries of the recovery call for apportionment." (15 C.3d 169, 170.) Moreover, *Lab.C.* 3201 (supra, §4 et seq.) requires a construction to secure maximum benefits to the employee, and a contrary construction might conflict with *Lab.C.* 3751, providing that the employee cannot be required to contribute to cost of compensation benefits. (15 C.3d 170, 171.) Finally, the legislative history of the statute supports the construction that apportionment is required (15 C.3d 171), and legislative silence in face of the contrary construction by several Courts of Appeal does not dictate a different conclusion (15 C.3d 175). The provisions of *Lab.C.* 3860, governing settlements, are subject to the same considerations. (15 C.3d 176, footnote 20.)

(c) *No double recovery by employee.* The employer's argument that apportionment will give the employee a double recovery ignores the fact that the employee is obligated to pay the fee to be apportioned. Apportionment only requires the employer to pay additional *attorneys' fees*, not additional compensation. Thus, while the employee's *tort* recovery is increased by apportionment of the fee, there is no increase in *compensation* benefits. (15 C.3d 174.)

The following cases have applied the *Quinn* holding:

Hone v. Climatrol Industries (1976) 59 C.A.3d 513, 530, 130 C.R. 770, *infra*, §97 [third party, on becoming assignor of insurer's rights, was subject to same obligation as insurer].

Kaplan v. Industrial Indem. Co. (1978) 79 C.A.3d 700, 706, 708, 145 C.R. 219, *infra*, §89 [mere filing of lien claim or complaint in intervention does not defeat plaintiff's right to reimbursement of portion of plaintiff attorney's fee].

Kaiser Foundation Hosp. v. Work. Comp. App. Bd. (1978) 83 C.A.3d 413, 418, 148 C.R. 54 [Board has power to apportion fee]; *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1979) 91 C.A.3d 493, 497, 154 C.R. 760 [same]; *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1979) 91 C.A.3d 501, 504, 154 C.R. 765 [same].

Raisola v. Flower Street Ltd. (1988) 205 C.A.3d 1004, 1008, 252 C.R. 726 [remand to determine whether intervenor's attorneys actively participated].

Hartwig v. Zacky Farms (1992) 2 C.A.4th 1550, 1556, 3 C.R.2d 828 [lienholder's conclusory assertions, establishing only that its attorney "tagged along" with plaintiff, were insufficient to prove active participation].

Kindt v. Otis Elevator Co. (1995) 32 C.A.4th 452, 459, 38 C.R.2d 121 [following *Hartwig* and *Walsh v. Woods* (1986) 187 C.A.3d 1273, 232 C.R. 629 (*Walsh II*), *infra*, §87].

SUPPLEMENT: [This section is current through the latest supplement]

Equitable basis for apportionment:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §249 et seq.



78 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
 - 3. Action or Settlement by Employee Alone.
- c. Employee's Expenses and Attorneys' Fees.
 - 3. Procedure for Apportionment.

2 Witkin Sum. Cal. Law Work Comp § 78

[§ 78] Procedure for Apportionment.

After a judgment has been rendered, the apportionment of attorneys' fees required by *Quinn v. California* (1975) 15 C.3d 162, 124 C.R. 1, 539 P.2d 761, supra, §77, should be requested by a motion for apportionment. The trial judge must first determine the reasonable fee for the total services rendered to both the employer and the employee. The judge should then make a reasonable apportionment of that fee between the parties benefited by the recovery, considering whether a claim under *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, infra, §92, had to be defended on behalf of the employer, as well as the monetary value of the recovery to each party. Once the total fee allowable has been apportioned, the judge should deduct the employer's part of the fee from the amount paid to the employer to satisfy its lien, and pay the balance to the employee and the employee's attorney. (15 C.3d 175.)

The *total fee* must first be determined and the allocation then made. It is error to consider the fee chargeable to the claimant and the worker separately. (*Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1979) 91 C.A.3d 501, 505, 154 C.R. 765.) A claimant to a portion of the recovery is entitled to a notice of the proposed apportionment and must be given an opportunity to object. (*Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1979) 91 C.A.3d 507, 511, 154 C.R. 768.) Also, until the amount of a claimed lien has been determined, an apportionment of the fee is premature. (*Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1979) 91 C.A.3d 513, 515, 154 C.R. 771.) (On apportionment where recovery is obtained by settlement, see infra, §89.)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
 - 3. Action or Settlement by Employee Alone.
 - c. Employee's Expenses and Attorneys' Fees.
 - 4. Priority of Attorney's Claim.
 - aa. In General.

2 Witkin Sum. Cal. Law Work Comp § 79

[§ 79] In General.

Lab.C. 3856 and *3860* establish rules of priority, "the first priority being the employee's attorney's right to a reasonable fee, the second complete satisfaction of the employer's lien claim, and the residue going to the employee." (*Fuchs v. Western Oil Fields Supply* (1972) 25 C.A.3d 728, 737, 102 C.R. 74; see C.E.B., *Workers' Damages Practice* 2d, §3.16.) These rules apply, when the employee alone proceeds against a third party, as follows:

(1) *After Judgment.* Before the employer's lien is allowed, the court must order payment of the reasonable litigation expenses and reasonable attorneys' fees based solely on the services rendered by the employee's attorney in effecting recovery for both the employee and the employer. (*Lab.C. 3856(b)*; see *Lab.C. 3856(d)* [amount fixed by court].)

(2) *After Settlement.* The employee's attorney is allowed reasonable expenses incurred in effecting a settlement, including costs of the action, together with reasonable attorneys' fees, prior to the reimbursement of the employer. (*Lab.C. 3860(c)*.) If an action is settled or the settlement requires court approval, the court fixes the amount; otherwise the Board does. (*Lab.C. 3860(f)*.)

(3) *Distinction: Where Attorney's Participation Is Unnecessary.* The employee's attorney is not entitled to priority where participation is unnecessary. Thus, in *Eldridge v. Truck Ins. Exchange* (1967) 253 C.A.2d 365, 61 C.R. 347, plaintiff employee, injured in the course of his employment by a negligent third-party automobile driver, received \$ 16,000 in compensation from his employer's insurer. Plaintiff then sued the third-party tortfeasor, and the insurer intervened to assert its lien privilege. Counsel for plaintiff and the insurer both participated fully in the pretrial and trial proceedings. Defendant's liability insurance was only \$ 10,000, he was concededly judgment-proof, and all parties stipulated to judgment against him for \$ 10,000. The judge then allowed plaintiff's attorney a fee of \$ 3,000 with priority over the insurer's lien. *Held*, reversed. Under *Lab.C. 3856(c)*, the employee's attorney is entitled to fees for services rendered in effecting a recovery. However, no recovery was effected; the stipulated judgment was for less than the employer's lien. (253 C.A.2d 367.) The beneficiary of the judgment was the employer's insurer, in having part of its lien satisfied; but it was represented by its own counsel, and could not be charged with the fee of the employee's attorney. (253 C.A.2d 368.)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
- 3. Action or Settlement by Employee Alone.
- c. Employee's Expenses and Attorneys' Fees.
 - 4. Priority of Attorney's Claim.
 - bb. After Judgment.

2 Witkin Sum. Cal. Law Work Comp § 80

[§ 80] After Judgment.

In *Crampton v. Takegoshi* (1993) 17 C.A.4th 308, 21 C.R.2d 284, plaintiff was injured in a vehicular accident while driving a company truck, and sued the driver of the other vehicle. Plaintiff's employer intervened to recover benefits paid. The case was submitted to judicial arbitration by stipulation of the parties. Plaintiff rejected the arbitrator's award in his favor, a portion of which was allocated to the intervening employer, and elected a trial de novo. The employer subsequently sold its lien to defendant and its complaint in intervention was dismissed. The jury returned a verdict for plaintiff, awarding him less than the amount of workers' compensation benefits he had received, so that he received no recovery. Plaintiff then filed a memorandum of costs seeking to recover ordinary costs as the prevailing party under C.C.P. 1032 et seq. and litigation expenses and attorneys' fees under Lab.C. 3856(b). Held, plaintiff was entitled to recover his costs, litigation expenses, and attorneys' fees despite C.C.P. 1141.21, which provides that if the judgment on trial de novo is not more favorable than the arbitration award, the party electing the trial de novo may not recover costs.

(a) Under Lab.C. 3856(b), an employee who creates a common fund for the employee and the employer by suing a third party is entitled to litigation expenses and attorneys' fees. Even though the employer received no recovery, having sold the lien to defendant, plaintiff had still produced a common fund. The assignee held a lien for a substantial amount and plaintiff's efforts enabled the assignee to satisfy a good portion of the claim. (17 C.A.4th 318.)

(b) What is measured in applying C.C.P. 1141.21 is the total award in the arbitration proceeding as against the total judgment in the third-party proceeding. It was irrelevant that the arbitration award was reduced by an amount allocated to the employer as reimbursement for disability payments and medical expenses, and that plaintiff's recovery was reduced to nothing by the employer's lien for benefits paid. The statute in question deals with the allocation of costs between the parties. Because the employer was not a party to the trial, its assigned lien was not a factor in determining whether the damages awarded to plaintiff on the trial de novo were more favorable or not. (17 C.A.4th 320.)

In *Phelps v. Stostad* (1997) 16 C.4th 23, 65 C.R.2d 360, 939 P.2d 760, plaintiff sued defendant driver based on injuries received when defendant's vehicle crashed into the building where plaintiff worked. Plaintiff's employer intervened to recoup benefits paid. A judicial arbitration resulted in awards to both plaintiff and the employer. Plaintiff

rejected the award and sought a trial de novo. Before the trial and in exchange for a settlement, plaintiff's employer assigned to defendant the employer's right to reimbursement of benefits paid. The jury awarded plaintiff less than the original arbitration award. Defendant then sought reimbursement from the award. Plaintiff countered by asserting that his litigation costs and attorneys' fees took priority under *Lab.C. 3856*. Following dicta in *Crampton, supra*, the trial judge ruled that because plaintiff's trial de novo judgment was less favorable than the arbitration award, *C.C.P. 1141.21(a)(ii)* (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §579) precluded an award of litigation expenses and attorneys' fees under *Lab.C. 3856*. *Held*, reversed.

(a) *C.C.P. 1141.21*. As part of the judicial arbitration system, *C.C.P. 1141.21* was enacted to encourage parties to accept reasonable arbitration awards and to discourage trials de novo. Thus, if a party elects a trial de novo and fails to obtain a more favorable judgment, that party must pay the opposing party's costs for the trial de novo and is also precluded from recovering costs. (16 *C.4th* 29.)

(b) *Lab.C. 3856*. *Lab.C. 3856* is part of the workers' compensation system and governs the allocation between the employee and the employer of a judgment obtained against a negligent third party. Its rule of giving priority to a claim for litigation expenses and attorneys' fees was created for cases like this, where the amount of the judgment is insufficient to pay reasonable litigation expenses and attorneys' fees and also to fully reimburse the employer. (16 *C.4th* 31.)

(c) *Interplay of statutes*. *C.C.P. 1141.21* and *Lab.C. 3856* address totally unrelated subjects and apply to different sets of relationships. *C.C.P. 1141.21* governs the allocation of costs between opposing parties. *Lab.C. 3856* governs the distribution of a judgment between an injured employee and the employer. Unlike litigation adversaries governed by *C.C.P. 1141.21*, the injured employee and the employer governed by *Lab.C. 3856* do not have opposing interests. By their terms, there is no conflict between the statutes. Hence, interpreting *C.C.P. 1141.21(a)(ii)* to preclude the payment of litigation expenses and attorneys' fees from the judgment would "nullify the priority specifically granted to those expenses and would produce an unintended windfall for the employer." (16 *C.4th* 31, 32.) This was not the Legislature's intent. (16 *C.4th* 32, 33.) Accordingly, when a party is precluded by *C.C.P. 1141.21(a)(ii)* from recovering costs, the proceeds of the judgment obtained in the trial de novo are subject to allocation under *Lab.C. 3856*, including use for payment of reasonable litigation expenses and attorneys' fees. (16 *C.4th* 34; disapproving dictum to the contrary in *Crampton*.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §626.



81 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
- 3. Action or Settlement by Employee Alone.
- c. Employee's Expenses and Attorneys' Fees.
- 4. Priority of Attorney's Claim.
- cc. After Settlement.

2 Witkin Sum. Cal. Law Work Comp § 81

[§ 81] After Settlement.

In *Griffith v. Work. Comp. App. Bd.* (1989) 209 C.A.3d 1260, 1263, 257 C.R. 813, plaintiff received \$ 18,340 in workers' compensation benefits and then settled a third-party action for \$ 15,000. After deducting attorneys' fees and costs, plaintiff's net recovery in the civil action was \$ 9,237. The employer's insurer petitioned for a credit of \$ 9,200 or other proper amount. The workers' compensation judge granted a credit of \$ 15,000, concluding that unless the employee's attorney gets Board or court approval for his fees and costs, these amounts cannot be deducted from the credit. The Board agreed. *Held*, order annulled.

(a) Construed liberally in favor of extending benefits to the injured worker (see supra, §§6, 7), *Lab.C. 3860(f)* does not specify the time in which the Board must rule on the amount of attorneys' fees and expenses and does not require the applicant to raise the issue in any specified way. (209 C.A.3d 1263, 1264.)

(b) The insurer's petition for credit placed the proper amount of the credit in issue, and the parties' stipulation provided a specific breakdown of the settlement proceeds. Hence, the workers' compensation judge should have deducted the stipulated amount of fees and costs, leaving a credit of \$ 9,237. (209 C.A.3d 1264.)

In *Luque v. Herrera* (2000) 81 C.A.4th 558, 96 C.R.2d 853, an employee injured in an automobile accident sued the driver and filed a claim for benefits. The employer sued the driver for recovery of the compensation benefits paid. The cases were consolidated, the employee's attorney obtained a settlement from the driver's insurer, and the trial court granted the employee's motion for attorneys' fees. Employer's attorney argued that employee's attorney was not entitled to a fee because the employer's reimbursement claim exceeded the settlement fund amount, and employer's attorney actively participated in the case. *Held*, award of attorneys' fees was proper.

(a) The allocation of attorneys' fees and costs from a settlement fund is governed by *Lab.C. 3860*. Where settlement is effected solely through the efforts of the employee's attorney, *Lab.C. 3860(c)* directs that the attorney's fee for securing the settlement be deducted from the settlement fund. (81 C.A.4th 561.)

(b) Although the employer's attorney participated in the litigation, that participation did not result in the creation of the settlement. *Summers v. Newman* (1999) 20 C.4th 1021, 86 C.R.2d 303, 978 P.2d 1225, *infra*, §88, is distinguishable. *Summers* involved *Lab.C. 3860(e)*, where all attorneys actively effected a settlement. Neither *Summers* nor *Lab.C. 3860* can reasonably be interpreted to mean that the employee's attorney is not entitled to a fee where the employer's claim exceeds the amount of the settlement fund. (81 C.A.4th 562.) (See *Hughes v. Argonaut Ins. Co.* (2001) 88 C.A.4th 517, 525, 105 C.R.2d 877 [where employee settled with third party without filing suit, Appeals Board, not superior court, had jurisdiction to decide dispute over allocation of attorneys' fees incurred in reaching settlement, including employee's subsequent suit against insurer for bad faith and related claims after insurer refused reduced share of settlement proceeds]; *Manriquez v. Adams* (2003) 108 C.A.4th 340, 346, 133 C.R.2d 449 [trial court erred by including employer's lien amount in tripartite global settlement for purposes of calculating attorneys' fees; remanded to recalculate based on actual settlement amount, and to determine extent of parties' attorneys' participation].)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

a. Action or Settlement by Employer Alone.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 82

[§ 82] In General.

The employer may sue alone and recover on both the employer's and the employee's cause of action. (*Lab.C. 3852, 3854*; see *State Comp. Ins. Fund v. Matulich* (1942) 55 C.A.2d 528, 529, 131 P.2d 21 [suit by employer's insurer; construing statutes]; C.E.B., *Workers' Damages Practice* 2d, §7.26 et seq.; 1 Herlick 6th, §12.09; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §93.) The employer may offer evidence of the amount paid or obligated to pay by reason of the injury or death of the employee, and the expenditures or liability are considered as proximately resulting from the injury or death. (*Lab.C. 3854*.) (On requirement of proof of causation, see *infra*, §91.)

An independent action by the employer may also provide a full remedy for the employer when a lien or intervention fails to do so. In *Pacific Employers Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co.* (1956) 143 C.A.2d 646, 299 P.2d 928, an employee was killed as a result of negligence of defendant tortfeasor. In a wrongful death action by the heirs, a judgment was obtained against defendant, and plaintiff, the employer's insurer, was given a lien for death benefits paid. In the present action, plaintiff was held entitled to recover the amount of hospital and medical bills, and burial expenses. These were not recoverable by the heirs in the prior action, hence, plaintiff did not lose the right to recover them by the partial recoupment in the wrongful death suit. (143 C.A.2d 648.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
 - 4. Action, Settlement, or Joinder by Employer.
 - a. Action or Settlement by Employer Alone.
 - 2. Statute of Limitations.

2 Witkin Sum. Cal. Law Work Comp § 83

[§ 83] Statute of Limitations.

Third-party actions brought by either the employer or the employee are governed by the 1-year statute of limitations (*C.C.P.* 340); i.e., the provisions governing tort actions for personal injuries prevails over the general provisions on statutory liabilities (*C.C.P.* 338). (*Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.* (1953) 41 C.2d 785, 264 P.2d 5; *Liberty Mut. Ins. Co. v. Fabian* (1964) 228 C.A.2d 427, 431, 39 C.R. 570; see 3 Cal. Proc. (4th), Actions, §521.)

This rule was reaffirmed in *San Diego v. Sanfax Corp.* (1977) 19 C.3d 862, 140 C.R. 638, 568 P.2d 363. In reaching its conclusion, the court reviewed the procedure in third-party actions and offered practical suggestions to the parties.

(a) Employer and employee third-party actions are interchangeable. (1) *Lab.C.* 3856 and 3860, taken together with the notice, intervention, and consolidation provisions of *Lab.C.* 3853, attempt to ensure that there is but one total action, with the defendant put to a defense only once. (19 C.3d 873.) (2) The general tort law "works in parallel" with these procedures. "Substantively, as well as procedurally, employer and employee actions are interchangeable: regardless of who brings an action, it is essentially the same lawsuit." (19 C.3d 874.) This congruence is largely the result of *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, *infra*, §92. (19 C.3d 874.)

(b) The rejection by *Aetna* and *Fabian* of the contention that the employer's action should be governed by the 3-year limitation for an action on a "liability created by statute" (*C.C.P.* 338(1)) is in accord with the views of most courts in other jurisdictions; i.e., when choosing between statutes of limitation governing "tort" and "statutory" actions, they have generally held that the "tort" limit governs an employer's action. (19 C.3d 876.) This view is also consistent with the approach of California contract cases. If a contract is the source of the substantive rights or duties, the "contract" statute of limitations applies even if the Legislature has modified the remedies that a court would ordinarily afford in a contract action. (19 C.3d 878.)

(c) The 1-year statute runs from the date of the employee's injury. This point, one of first impression in California, arose as follows: (1) Two county employees brought actions against defendant tortfeasor, and settled without the county's consent. (2) The county had denied workers' compensation responsibility as to employee L, and that

responsibility was established only by summary judgment in its favor in L's tort action against defendant tortfeasor and the county. (3) The county delayed its action against defendant tortfeasor until more than 2 years after the injury, on the theory that the statute did not begin to run until the date on which it became obligated to pay compensation to L or the date the employees settled their claims. (19 C.3d 870, 879.) In rejecting this contention, the court reasoned as follows:

(1) Although the authorities in other jurisdictions are divided, those that support the accrual date of the time when the employer is required to pay benefits characterize the employer's action as one for "indemnity." (19 C.3d 880.) However, *Lab.C. 3852* does not refer to the employer's right as one of indemnity, and the main purpose of the statute is to reduce the likelihood that a third party will be forced to defend more than one action. To accept the county's view would defeat this purpose. "At least in cases in which an employer disputes its workers compensation responsibility, the possibility would arise that an employer could bring suit against a third party after the conclusion of the employees' action, and perhaps even after the third party had defeated the employee's claim." (19 C.3d 881.)

(2) The theory that the statute should not begin to run until the employee settles a claim finds superficial support in the language of *Lab.C. 3859*; but a review of the history of that statute and its judicial and legislative treatment (see *supra*, §70) compels the opposite conclusion, for the county's construction would restore the inequity that the amendment was designed to remove. "If an employer need not file an action against a third party until after the third party settles with the employee, the employer is again in a position to take advantage of the third party's aversion to uncertainty and delay, and could conceivably put the third party in a situation in which it insists that the employee obtain the employer's consent, or alternatively agrees to a settlement with the employer not fully reflective of the merits of the employer's claim." (19 C.3d 883.)

(3) The contention that denial of a later accrual date leaves that employer without a remedy during the statutory period is unsound. (a) If the employer acknowledges a workers' compensation responsibility at the time of the injury, the employer can immediately sue the third-party tortfeasor. (b) If the employer does not volunteer benefits, and the employee delays initiation of Board proceedings, as here, the employer can protect itself from a last-minute claim by filing a third-party suit anticipatorily; then, if the employee fails to seek benefits, the suit can be dropped. (c) If the employer decides to contest the employee's claim, the employer's interests may still be protected by intervention in the employee's action (see *infra*, §86). (19 C.3d 884, 885.) "The triangular character of the litigation, which is the source of the employer's difficulties, is also a source of assistance: so long as the employee files suit against the third party, the employer need not fear the statute of limitations, since an employer can intervene in an employee action, even after the statute of limitations has run." (19 C.3d 885, citing *Harrison v. Englebrick* (1967) 254 C.A.2d 871, 62 C.R. 831, 3 Cal. Proc. (4th), Actions, §662.) (See 91 A.L.R.3d 844 [statute of limitations and action by subrogated insurer against third-party tortfeasor].)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 3 Cal. Proc. (5th), Actions, §562 et seq.*Harrison case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §735.



84 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

a. Action or Settlement by Employer Alone.

3. Reimbursement.

2 Witkin Sum. Cal. Law Work Comp § 84

[§ 84] Reimbursement.

On receiving judgment, the employer is entitled to reasonable litigation expenses, attorneys' fees (based solely on the services rendered in effecting recovery for the benefit of both employer and employee), reimbursement for expenditures for compensation, and special damages under *Lab.C. 3852*. The excess is then paid to the employee or other entitled party. (*Lab.C. 3856(a)*; see *Lab.C. 3856(d)* [amount fixed by court].)

When an employer *settles* with a third party, the employee must be given notice and an opportunity to recover all damages suffered and to determine expenses and attorneys' fees. (*Lab.C. 3860(a)*; see *Roski v. Superior Court* (1971) 17 C.A.3d 841, 846, 95 C.R. 312 [failure to give notice may prevent setting up settlement as bar to employee's action, but does not prevent employer's voluntary dismissal of action under *C.C.P. 581(1)*].) The amount received is subject to the employer's claim for reimbursement for compensation, expenses and attorney's fees, and special damages. (*Lab.C. 3860(b)*, (d).) If an action is settled or the settlement requires court approval, the court fixes the amount; otherwise the Board does. (*Lab.C. 3860(f)*.)

After settlement by or judgment in favor of the employer alone, the employer's attorneys' fees are deducted from the recovery *before* deduction of compensation awarded: i.e., they are borne in part by the employee. (See *Lab.C. 3856(a)*, *3860(d)*; for similar rules on action or settlement by employee, see *supra*, §76 et seq.; for general discussion and criticism of distribution of attorneys' fees in third-party actions, see 21 *Hastings L. J.* 717.)

In *Gapusan v. Jay* (1998) 66 C.A.4th 734, 78 C.R.2d 250, two police officers were injured in a collision with a drunk driver. The officers sued the drunk driver for personal injury, the officers' wives joined the action seeking damages for loss of consortium, and the city intervened seeking reimbursement for compensation benefits paid. Defendant settled for \$ 200,000, the policy limit. The trial judge ruled to apportion the funds equitably, awarding the city \$ 100,000 and \$ 50,000 to each couple. *Held*, reversed and remanded for new evidentiary hearing and redistribution of settlement proceeds.

(a) *Labor Code 3860*. The court erred in equitably apportioning the settlement proceeds. *Lab.C. 3860(b)* gives the employer's reimbursement claim priority after payment of litigation costs and attorneys' fees when appropriate.

However, in this case the city is not entitled to the entire \$ 200,000, and its reimbursement rights are subject to other considerations. (66 C.A.4th 740, 742.)

(b) *Loss of consortium.* Nothing in *Lab.C. 3860* deprives an employee's spouse of a recovery for separate loss of consortium when, as here, there is an unallocated settlement with the third-party tortfeasor. (66 C.A.4th 742.) The primary purpose of employer reimbursement is to prevent an employee's double recovery. However, a spouse's retention of settlement funds for loss of consortium damages, for which an employer has no liability, does not violate the rule. Thus, an employer has no subrogation rights to the spouse's claim. (66 C.A.4th 742.) When a settlement satisfies both the employee's claims and independent claims, such as here, the trial judge must first ascertain the damages to which each plaintiff is entitled and then apportion the settlement. (66 C.A.4th 743.)

(c) *Litigation expenses and attorneys' fees.* On remand, the court must also determine whether attorneys' fees and other litigation costs should be deducted from the settlement proceeds before the city is reimbursed. (66 C.A.4th 744.) Under *Lab.C. 3860*, the trial judge must set reasonable attorneys' fees and costs based on efforts that created a common fund. When settlement is effected solely through the efforts of the employee's attorney, the employer's reimbursement rights are subject to reasonable fees and expenses for "services in securing and effecting settlement for the benefit of both the employer and the employee." (66 C.A.4th 744.) The same standard applies when settlement is achieved solely through the efforts of the employer's attorney. (66 C.A.4th 745.) The common fund doctrine (see 7 Cal. Proc. (4th), *Judgment*, §215 et seq.) is inapplicable when there are no passive beneficiaries and both parties' attorneys actively participated in effecting the settlement. Active participation is a matter of proof for the trial judge and must be decided on remand. (66 C.A.4th 746.)

SUPPLEMENT: [This section is current through the latest supplement]
Common fund doctrine:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §249 et seq. *Correction:* Page 643, line 9 of section, *Roski case* bracket statement should read "failure to give notice may prevent setting up settlement as bar to employee's action, but did not prevent employer's voluntary dismissal of action under former C.C.P. 581(1) (now C.C.P. 581(b)(1))".



85 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

b. Action by Both Parties.

1. Action by Employer: Intervention by Employee.

2 Witkin Sum. Cal. Law Work Comp § 85

[§ 85] Action by Employer: Intervention by Employee.

(1) *Timeliness of Intervention.* In *State Comp. Ins. Fund v. Matulich* (1942) 55 C.A.2d 528, 131 P.2d 21, the employer's insurer brought the action. After the 1-year period had run, the employee was allowed to intervene under *Lab.C.* 3853, which permits joinder at any time before trial. The employee's complaint in intervention did not introduce a new cause of action, for the employer's suit embraces both causes of action. (55 C.A.2d 530.)

In *Jordan v. Superior Court* (1981) 116 C.A.3d 202, 172 C.R. 30, the insurer filed a complaint within the 1-year period (see *supra*, §83), and the employee filed a complaint in intervention after the period had run. Under *Matulich*, and *Harrison v. Englebrick* (1967) 254 C.A.2d 871, 62 C.R. 831, 3 Cal. Proc. (4th), Actions, §662, this was proper; but defendant contended that *Lab.C.* 3853 should allow an employee to intervene after the 1-year period only if the employee has *an interest* in the litigation, and here the insurer was suing only to recover compensation benefits already paid to the employee. *Held*, intervention was authorized. The Legislature, in enacting *Lab.C.* 3853, did not distinguish between an employer action in which the employee's general damages are pleaded and one in which they are not; both types of actions are within the language of the statute. (116 C.A.3d 210.) (See *Buell v. CBS* (1982) 136 C.A.3d 823, 826, 186 C.R. 455 [action by employer's insurer, intervention by employee whose complaint against third-party tortfeasor had been dismissed for failure to serve; *Jordan* reasoning and result followed]; *Home Ins. Co. v. Southern Calif. Rapid Transit Dist.* (1987) 196 C.A.3d 522, 525, 241 C.R. 858 [in action against government entity tortfeasor, employee filed timely claim but failed to intervene within limitations period; intervention was authorized under *Jordan* and no reason found to differentiate actions against government entities].) (See *Bishop v. Silva* (1991) 234 C.A.3d 1317, 285 C.R. 910, *infra*, §86 [criticizing *Buell*]; *Fairmont Ins. Co. v. Frank* (1996) 42 C.A.4th 457, 460, 49 C.R.2d 670 [following *Bishop*; action by employer's insurer; employee was not permitted to intervene after his action was dismissed for failure to prosecute].)

(2) *Dismissal of Complaint in Intervention for Lack of Prosecution.* In *State Comp. Ins. Fund v. Selma Trailer & Mfg. Co.* (1989) 210 C.A.3d 740, 258 C.R. 545, the employee's complaint in intervention was filed 3 weeks short of 4 years after the accident, and service was not made until a few days short of the mandatory 3-year service requirement. Further delays occurred, and the trial judge dismissed under the discretionary dismissal statute (3-year delay in trial; *C.C.P.* 583.410, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §425), even though less than 3 years had elapsed from

the filing of the complaint in intervention. *Held*, affirmed. Although *Lab.C. 3853* allows filing "at any time before the trial on the facts," the intervenor is obligated to pursue a claim diligently from the beginning. Hence, it is appropriate that the time start running for both the complaint and complaint-in-intervention from the date the complaint is filed. (210 C.A.3d 740, 754, following reasoning of *San Diego v. Sanfax Corp.* (1977) 19 C.3d 862, 140 C.R. 638, 568 P.2d 363, *supra*, §83.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Timeliness of Intervention.Harrison case:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §735.

(2) *Dismissal of Complaint in Intervention for Lack of Prosecution.*

Cross-Reference: 6 Cal. Proc. (5th), Proceedings Without Trial, §438.



86 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

b. Action by Both Parties.

2. Action by Employee: Joinder or Intervention by Employer.

2 *Witkin Sum. Cal. Law Work Comp* § 86

[§ 86] Action by Employee: Joinder or Intervention by Employer.

(1) *Timeliness of Intervention.* The 5-year statutory period within which an action must be brought to trial runs against an intervening employer from the date of filing of the original complaint, not the date of filing of the complaint in intervention. (*Johnson v. Santos* (1983) 148 C.A.3d 566, 571, 196 C.R. 145 [plaintiff employee's election to arbitrate, which did not toll statute for plaintiff, did toll it for intervening employer who was forced into arbitration; see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §§394, 398].) (See *Mar v. Sakti Int. Corp.* (1992) 9 C.A.4th 1780, 1785, 12 C.R.2d 388 [employer was entitled to intervene in employee's action under *Lab.C.* 3853 at any time before trial].)

In *Bishop v. Silva* (1991) 234 C.A.3d 1317, 285 C.R. 910, plaintiff employee sued an alleged third-party tortfeasor, the employer's insurer intervened approximately 4 months later, and plaintiff's action was dismissed for failure to effect service within 3 years (*C.C.P.* 583.210, 583.250). Shortly before expiration of the 3-year period beginning on the date of the insurer's intervention, plaintiff moved to intervene in the insurer's action in intervention, claiming that he still had time to effect timely service. The trial judge denied the motion. *Held*, affirmed; the time limits governing plaintiff's service must still be calculated from the date that his original complaint was filed.

(a) *Buell v. CBS* (1982) 136 C.A.3d 823, 826, 186 C.R. 455, which upheld the employee's right to intervene under virtually identical circumstances, is not persuasive. Although *Buell* may have been sound reasoning at the time, the Legislature has since adopted a rigid scheme, setting forth very limited exceptions to the time requirements for service and entirely excluding the plaintiff's diligence from the equation. Hence, *Buell* must be examined in light of the Legislature's dual intentions, i.e., to create a right to intervene under *Lab.C.* 3853 and simultaneously to impose a stiff penalty on those who fail to effect timely service. (234 C.A.3d 1325.)

(b) "[W]e cannot believe the Legislature intended to reward an employer or employee whose action is subject to mandatory dismissal for failure to effect timely service by permitting him to intervene back into the very litigation he set in motion—at a time well after the statute of limitations has expired. We see no end to this procedural game, sometimes referred to as 'leapfrog.' ... We envision the employer intervening into the employee's suit, the dismissed employee intervening back into the employer's suit, the dismissed employer reintervening back into the employee's suit, and so on. We do not believe this scenario carries out the Legislature's intent in enacting either the service statutes" or

Lab.C. 3853. (234 C.A.3d 1327.)

In *Taito v. Owens Corning* (1992) 7 C.A.4th 798, 9 C.R.2d 687, plaintiff employee filed an action on July 10, 1989, against Corning, John Doe and Does I to X, alleging that on January 28, 1989, while acting during the course and scope of his employment, he had been assaulted by John Doe. On May 29, 1990, the complaint was served on Apex, named as Doe I, but it was not amended to name Apex in place of Doe I until September 13, 1990. The trial judge then dismissed the complaint as to Apex because it had not been named and served within the 1-year statute of limitations for personal injuries (C.C.P. 340(3)). On September 25, 1990, CNA, the compensation insurer, filed a complaint in intervention seeking reimbursement for benefits paid to plaintiff. Plaintiff then filed a petition to intervene, which was granted; but the trial judge subsequently granted Apex's motion to dismiss plaintiff's complaint in intervention. *Held*, affirmed.

"[W]here the employee or the employer sues a third party for the employee's personal injuries which were sustained in the course and scope of employment and neither party files and serves a complaint or complaint in intervention naming a Doe defendant within the one-year statute of limitations for personal injuries or is able to relate an amended complaint identifying a Doe defendant back to a timely filed original complaint, neither party may thereafter prosecute the action against a defendant who was not sued within the statute of limitations." (7 C.A.4th 803.)

(2) *Segregation of Damages*. If the employer joins or intervenes in the employee's action, separate judgments may be rendered in favor of each for the amounts due. The proper procedure is to require a segregation of the items of damage to prevent double recovery against the tortfeasor. Thus, in *Fernandez v. Consolidated Fisheries* (1953) 117 C.A.2d 254, 255 P.2d 863, plaintiff employee sued defendant tortfeasor, and the employer intervened. The jury, without instructions to segregate, brought in a verdict against defendant of \$ 50,000 for plaintiff and \$ 8,813.87 for the intervening employer (the amount paid as compensation). *Held*, this was error, for the \$ 50,000 could possibly have covered some items included in the \$ 8,813.87 verdict. However, because the maximum possible duplication was \$ 8,813.87 and plaintiff stipulated to reduce the judgment to that amount, the judgment was so modified and affirmed. (117 C.A.2d 267.) (See *Demkowski v. Lee* (1991) 233 C.A.3d 1251, 1259, 284 C.R. 919 [noting that trial judge should instruct jury on segregation of damages and suggesting alternative instructions].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Timeliness of Intervention*.

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §413.



87 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

b. Action by Both Parties.

3. Action by Employer and Employee: Reimbursement.

2 Witkin Sum. Cal. Law Work Comp § 87

[§ 87] Action by Employer and Employee: Reimbursement.

When both employer and employee prosecute the action to judgment, the court first orders payment of expenses and attorneys' fees to the party entitled, and then applies an amount sufficient to reimburse the employer for compensation expenditures and special damages. (*Lab.C. 3856(c)*.) The statute provides for fixing and allocating fees by the court as follows: (1) Where the parties are represented by the *same attorney*, based solely on the services rendered for the benefit of both parties. (2) Where they are represented by *separate attorneys*, based solely on the service rendered by the attorney in effecting recovery for the benefit of the party represented. (*Lab.C. 3856(c)*.) In the latter case, the attorneys may propose to the court the amount and division of the fees and expenses. (*Lab.C. 3856(d)*.) (See *21 Hastings L. J. 717* [attorneys' fees in third-party actions].)

If the employee can prove that the recovery was solely the result of the efforts of employee's counsel, the employee is entitled to an award of reasonable fees based on the benefit thus conferred on an intervening employer. (*Walsh v. Woods* (1982) 133 C.A.3d 764, 767, 184 C.R. 267, citing *Kaplan v. Industrial Indem. Co.* (1978) 79 C.A.3d 700, 145 C.R. 219, *infra*, §89.)

In *Walsh v. Woods* (1986) 187 C.A.3d 1273, 232 C.R. 629 (*Walsh II*), following remand in *Walsh v. Woods*, *supra*, the trial judge denied apportionment, finding that although plaintiff's counsel had been primarily responsible for the recovery, intervenor's counsel had also actively participated in the lawsuit, albeit minimally. *Held*, order affirmed.

(a) *Lab.C. 3856* applies the common fund doctrine to third-party actions, but *Lab.C. 3856(c)* "recognizes that the common fund doctrine has no application when there are no passive beneficiaries." (187 C.A.3d 1277.) When there are two attorneys involved rendering services on behalf of their respective clients, the employer and the employee, the amount of the award to each attorney will be based on the attorney's efforts for that attorney's client, and the fee will come out of that client's recovery. (187 C.A.3d 1277, 1278.)

(b) However, mere employment of separate counsel is not enough to defeat the common fund doctrine. *Lab.C. 3856(c)* applies only when "the attorneys of both parties are active in creating the common fund." (187 C.A.3d 1278, quoting *Kaplan*.)

(c) "[T]he pivotal issue of active participation by separate counsel is a question of fact for the trial court alone. The trial court having found on the evidence before it that intervenor's counsel actively participated in the underlying litigation, plaintiff is not entitled to an apportionment of attorney fees notwithstanding his counsel's comparatively greater degree of active participation." (187 C.A.3d 1279.) (See *Kavanaugh v. Sunnyvale* (1991) 233 C.A.3d 903, 915, 284 C.R. 698 [where both parties employ attorneys, and both attorneys participate in prosecution of litigation, there is no passive beneficiary; following *Walsh II*]; *Kindt v. Otis Elevator Co.* (1995) 32 C.A.4th 452, 460, 38 C.R.2d 121 [employee is entitled to attorneys' fees unless there has been active participation by intervenor; following *Walsh II* and *Hartwig v. Zacky Farms* (1992) 2 C.A.4th 1550, 3 C.R.2d 828, supra, §77].)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

c. Settlement by Both Parties: Reimbursement.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 88

[§ 88] In General.

When a settlement is effected by an attorney or by separate attorneys representing both parties, there must be deducted, prior to reimbursement for compensation and any special damages, "the reasonable expenses incurred by both the employer and the employee on behalf of either," including costs of suit and reasonable attorneys' fees "based upon the respective services rendered in securing and effecting settlement for the benefit of the party represented," or, if the same attorney represented both, "based on the services rendered for the benefit of both." (*Lab.C. 3860(e)*.) If there are separate attorneys they may propose to the court or Board the amount and division of expenses and fees. (*Lab.C. 3860(f)*.) (See *21 Hastings L. J. 717* [attorneys' fees in third-party actions].)

Under *Lab.C. 3860(e)*, the employer's attorneys' fees and pro rata share of other litigation costs are to be deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for its workers' compensation expenses. In *Summers v. Newman* (1999) 20 C.4th 1021, 86 C.R.2d 303, 978 P.2d 1225, the employer intervened in an employee's third-party tort action. The employer and the employee were separately represented by attorneys who actively participated in achieving a settlement, and the trial court permitted the employer to recover its attorneys' fees and costs from the settlement proceeds paid to the employee, rather than from the employer's recovery of reimbursable workers' compensation costs. *Held*, reversed.

(a) Under *Lab.C. 3860*, where the settlement results from the efforts of attorneys who separately represent the employer and the employee, the reasonable value of the services of the employee's attorney is determined by reference to the actual benefit that the settlement confers on the attorney's own client, the employee. The same is true for the employer's attorney. The reasonable value of the attorney's services is determined by reference to the benefit conferred on the client, the employer, without regard to any incidental benefit conferred on the employee. (20 C.4th 1028.)

(b) Although *Lab.C. 3860(e)* does not expressly state whether the employer's fees and costs are to be deducted from the employer's recovery of compensation expenses, an analogous provision in *Lab.C. 3856* was construed in *Quinn v. California* (1975) 15 C.3d 162, 124 C.R. 1, 539 P.2d 761, *supra*, §77, to require the employer to bear its fair share of litigation expenses. This construction is consistent with the historical equity practice of apportioning attorneys' fees among those who are the beneficiaries of funds created by the activities of similarly situated litigants, and also with the

statute's wording and legislative history. (20 C.4th 1030.)

In *Draper v. Aceto* (2001) 26 C.4th 1086, 113 C.R.2d 61, 33 P.3d 479, plaintiff received a compensable injury in an auto accident for which she received benefits, and then brought a personal injury action against defendants, driver, and the owner of the other vehicle. The employer brought a separate action seeking reimbursement for benefits paid, and both plaintiff and employer accepted defendants' offer to settle for the insurance policy limit. Because the employer's reimbursable costs exceeded the settlement amount, plaintiff recovered nothing from the settlement but nevertheless sought attorneys' fees and costs. The court denied plaintiff's motion. *Held*, affirmed. Under *Lab.C. 3860*, when attorneys separately representing the employer and the employee are active in procuring a settlement, each attorney's fee is calculated by reference to the benefit achieved for the attorney's client, and this amount is paid from the client's share of the recovery. If the employee recovers nothing because the settlement proceeds are less than the employer's reimbursable compensation costs, then the employee's attorney recovers no fee. (26 C.4th 1094.)

Two justices dissented, arguing that the result defeats the priority given by *Lab.C. 3860(e)* to the payment of an employee's attorneys' fees when attorneys for both the employer and the employee actively participate in obtaining a recovery. (26 C.4th 1097.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

- C. Action Against Third-Party Tortfeasor.
 - 4. Action, Settlement, or Joinder by Employer.
 - c. Settlement by Both Parties: Reimbursement.
 - 2. Apportionment.

2 Witkin Sum. Cal. Law Work Comp § 89

[§ 89] Apportionment.

The rule of *Quinn v. California* (1975) 15 C.3d 162, 124 C.R. 1, 539 P.2d 761, supra, §77, requiring apportionment of the plaintiff's attorneys' fees even when a judgment was obtained exclusively by the efforts of the plaintiff's attorney, was applied to settlements in *Kaplan v. Industrial Indem. Co.* (1978) 79 C.A.3d 700, 708, 145 C.R. 219. Attorney K represented employee G in a third-party action. The insurer retained its own counsel, who prepared a petition for leave to intervene in G's action and filed a complaint in intervention. The case was settled, and K sued for declaratory relief against the insurer, claiming an award of fees based on the full amount of the settlement, rather than the amount recovered by G. He offered to prove that the insurer did not participate in the litigation or negotiations for settlement. The offer was rejected and judgment was given for the insurer. *Held*, reversed with directions to determine a proper apportionment.

(a) *Lab.C. 3856* and *3860*, properly construed, require apportionment "even where both employee and employer retain separate attorneys so long as the resulting fund is produced through the efforts of only one of them." (79 C.A.3d 709.)

(b) The filing of a lien claim, as in *Quinn*, or a complaint in intervention, as here, is a "miniscule" effort and not active steps "in the sense that matters, namely in contributing to the creation of the fund out of which the insurer will be reimbursed; they simply assure that in the event the fund materializes, the insurer will share in it." (79 C.A.3d 709.) A contrary construction would permit defeat of the equitable principles incorporated in *Lab.C. 3856* and *3860*, by payment of a nominal fee to separate counsel. (79 C.A.3d 710.)

(c) *Lab.C. 3856* and *3860* do not permit the court to "weigh the respective contributions of each counsel so long as both have been active in the creation of the fund out of which fees are awarded." (79 C.A.3d 710.) The matter must be remanded to determine whether the insurer's counsel was "active" and, if not, what is a reasonable fee for the employee's counsel. (79 C.A.3d 713.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

4. Action, Settlement, or Joinder by Employer.

c. Settlement by Both Parties: Reimbursement.

3. Allocation on Recovery From Fewer Than All Defendants.

2 Witkin Sum. Cal. Law Work Comp § 90

[§ 90] Allocation on Recovery From Fewer Than All Defendants.

In *Correll v. Clark Equipment Co. (1978) 76 C.A.3d 548, 143 C.R. 269*, the employer's insurer intervened in the wrongful death action by the deceased employee's family against two defendants. As a result of the joint efforts of counsel for plaintiffs and the insurer, a settlement was reached with one defendant. The case went to trial against the second defendant, and a defense verdict was returned. Because the lien exceeded the amount of the prior settlement, the entire fund was ordered paid to the insurer. *Held*, reversed with directions to deduct plaintiffs' reasonable expenses and fees chargeable to the claim that was settled. (a) Under *Lab.C. 3860(e)*, the expenses and fees of both parties securing the settlement must be paid before the lien is satisfied. (*76 C.A.3d 557.*) (b) *Lab.C. 3860(f)* requires the trial court to set these amounts even though plaintiffs' counsel did not attempt to segregate them. (*76 C.A.3d 557, 558.*) (c) One method, although not binding on the trial court, would be to value the unliquidated claim against the second defendant by plaintiffs' lowest settlement offer before trial, and apportion expenses and fees based on the ratio that amount and the amount of the settlement bear to the total of the two figures. (*76 C.A.3d 558, 559.*)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
4. Action, Settlement, or Joinder by Employer.
d. Proof of Causation.

2 Witkin Sum. Cal. Law Work Comp § 91

[§ 91] Proof of Causation.

An employer seeking reimbursement from a third-party tortfeasor for compensation payments bears the burden of establishing that the defendant's negligence is the proximate cause of an employee's injuries and the resulting tort damages. The defendant must be permitted to present evidence to the contrary whether the claim is asserted by an employee for the employee's own injury, or by an employer (or insurer) for reimbursement. (*Breese v. Price* (1981) 29 C.3d 923, 930, 176 C.R. 791, 633 P.2d 987.)

In *Breese*, plaintiff B, driving a car within the scope of his employment, collided with a car driven by defendant P. B sought compensation and also sued P. A compensation referee found no disability and no need for medical treatment, and awarded B only \$ 125 to cover "medical-legal" expenses. Nevertheless, B negotiated a settlement with A, the employer's insurer, for \$ 10,885 (including medical expenses of \$ 735), and the Board, with no explanation, approved the settlement. In the tort action, A intervened, seeking reimbursement from P for the full amount of the settlement. B and P settled their litigation, and the trial judge then entered judgment in favor of A for full reimbursement. *Held*, reversed.

(a) *Construction of Lab.C. 3852.* Lab.C. 3852 provides that an employer "who pays" compensation may recover the amount "paid." However, this language means only that the employer's action, like that of the employee, is limited to recovery for damages proximately caused by the injury. It is essentially the same lawsuit, and Lab.C. 3852 "does not enlarge the tort remedy of a compensation carrier beyond that of the injured employee." (29 C.3d 928.)

(b) *Construction of Lab.C. 3854.* Lab.C. 3854 superficially lends support to A's claim by providing that "evidence" of the amount paid "is admissible," and that the payment must be considered as proximately resulting from the injury. However, this does not mean that proximate cause is conclusively established by the Board proceeding, so as to impose absolute liability on the third-party tortfeasor for expenses of the employer "without the traditional nexus between those expenses and the tortfeasor's conduct." (29 C.3d 928, 929.) The statute "reasonably can be read as a legislative direction (1) that the intervening act of an employer's payment to the employee of compensation shall not be construed as breaking the chain of causation which is essential to a plaintiff's recovery under traditional negligence principles; and (2) that the employer is entitled to full reimbursement provided defendant's tort liability, in an amount equal to or in excess of the employer's expenditures, is otherwise established." (29 C.3d 929.) This interpretation is consistent with the

statutory purpose of authorizing the employer's suit against third-party tortfeasors--recognition of the principles of equitable subrogation. (29 C.3d 929.)

SUPPLEMENT: [This section is current through the latest supplement]



92 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 92

[§ 92] In General.

(1) *Rule of Witt v. Jackson*. *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, held that an employer's concurrent negligence barred the employer from recovering compensation payments from a third-party tortfeasor. W and G, city police officers, were in a police car driven by W. The car was struck by defendant's negligently driven car. W and G received workers' compensation for their injuries. Then they sued defendant, the third-party tortfeasor; and the city, their employer, intervened to recover the compensation payments. *Held*, the contributory negligence of W, its employee, was a bar to recovery by the city. *Witt* adopted the minority rule that denied recovery on the ground that a recovery would allow the employer to profit by the employer's own wrong. (57 C.2d 71.) However, to avoid double recovery by the injured employee, the employee's damages are reduced by the amount of compensation benefits received. (57 C.2d 73.)

A number of cases have invoked the rule. (See *Chick v. Superior Court* (1962) 209 C.A.2d 201, 203, 25 C.R. 725 [holding rule applicable to case arising before joint tortfeasor statute]; *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 C.2d 452, 455, 72 C.R. 217, 445 P.2d 881, citing the text [ambiguous verdict construed]; *Slayton v. Wright* (1969) 271 C.A.2d 219, 229, 76 C.R. 494 [deduction of the amount of *future* compensation benefits from judgment denied]; *Corley v. Work. Comp. App. Bd.* (1971) 22 C.A.3d 447, 454, 99 C.R. 242 [analysis of *Witt* and problems raised by it]; C.E.B., *Workers' Damages Practice* 2d, §7.9; 1 *Herlick* 6th, §12.16.)

(2) *Conflicting Policies*. The opinion in *Witt* concluded that (a) the negligent employer should not benefit from its concurrent negligence, and (b) the injured employee should not obtain a double recovery from a negligent third party. (*Witt v. Jackson*, *supra*, 57 C.2d 73.) In some cases, however, because the issues of tort and compensation liability must be settled in different forums, it is not possible to fully effect both policies, and different results have been reached by the Courts of Appeal depending on which policy was viewed as paramount. (See *infra*, §98 et seq.; *Roe v. Work. Comp. App. Bd.* (1974) 12 C.3d 884, 889, 117 C.R. 683, 528 P.2d 771, *infra*, §99 [policy against employer benefiting from its concurrent negligence was held paramount].)

In *Levels v. Growers Ammonia Supply Co.* (1975) 48 C.A.3d 443, 121 C.R. 779, the third party stipulated to judgment of \$ 60,000. He paid \$ 43,000 immediately, but placed the balance in trust pending determination of the issue of the intervening employer's concurrent negligence in the trial of the injured party's cause of action. The trial court

found that the employer had been negligent, and ordered the remaining funds paid. *Held*, affirmed. By intervening, the employer subjected itself to the jurisdiction of the court to determine its right to reimbursement, which required a showing of no concurrent negligence. (48 C.A.3d 449.) Moreover, the policy of preventing a negligent employer from benefiting from its own wrong prevails over the policy against an employee's double recovery. (48 C.A.3d 550.)

(3) *Where Employee's Damages Exceed Statutory Limit.* In *Young v. Berry Equipment Rentals* (1976) 55 C.A.3d 35, 127 C.R. 200, an injured employee sued the owner of a vehicle that had caused his injuries. His total damages were \$ 21,866.64, but his recovery was limited by *Veh.C. 17151(a)* to \$ 15,000. The trial judge deducted \$ 6,866.64, which the employee had received in compensation benefits, from the \$ 15,000. *Held*, reversed. "The computation utilized by the trial judge was manifestly unfair. Appellant suffered damages in the sum of \$ 21,866.64. We see no logic or fairness in reducing appellant's recovery below the statutory liability as long as he does not receive a double recovery contrary to *Witt v. Jackson*. To permit such a procedure would be to deprive appellant of his right to full compensation for his injuries and would give respondent an unjustified windfall." (55 C.A.3d 42.)

(4) *Rule Not Applicable.* The rule of *Witt v. Jackson* has no application where there is no proof of an employer's concurrent negligence. (*De Cruz v. Reid* (1968) 69 C.2d 217, 223, 70 C.R. 550, 444 P.2d 342, *infra*, §100; *State Comp. Ins. Fund v. Operated Equipment Co.* (1968) 265 C.A.2d 759, 762, 71 C.R. 531; *Kuhlmann v. Pascal & Ludwig* (1970) 5 C.A.3d 144, 151, 85 C.R. 199.) Settlement by an employer is not an admission of negligence and therefore cannot be relied on to defeat an employer's reimbursement. (*Correll v. Clark Equipment Co.* (1978) 76 C.A.3d 548, 555, 143 C.R. 269.)

An employer that is not concurrently negligent is entitled to reimbursement of the amount paid in compensation benefits, to the extent that the third-party tortfeasor is proportionately responsible; negligence of the employee cannot be imputed to the nonnegligent employer so as to deny it complete reimbursement. Otherwise, the damages assessed against the third-party tortfeasor would be reduced twice: The third-party tortfeasor defendant would first reduce the total damage award by the comparative fault of the plaintiff employee; then, by imputing the employee's negligence to the employer, he would gain a further unwarranted reduction. (*Kemerer v. Challenge Milk Co.* (1980) 105 C.A.3d 334, 338, 164 C.R. 397; *Jarvis v. Southern Pac. Trans. Co.* (1983) 142 C.A.3d 246, 257, 258, 191 C.R. 29 [following *Kemerer*].)

The rule has also been held inapplicable to compensation payments to be made in the future; only the Board, not the court, has jurisdiction to make the rating. (*Castro v. Fowler Equipment Co.* (1965) 233 C.A.2d 416, 421, 43 C.R. 589; *Slayton v. Wright* (1969) 271 C.A.2d 219, 231, 76 C.R. 494; *Gastelum v. Torrance* (1969) 2 C.A.3d 582, 583, 82 C.R. 732; *Patterson v. Sharp* (1970) 10 C.A.3d 990, 996, 89 C.R. 396.)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

b. Comparative Fault.

1. Comparative Negligence Doctrine Extended.

2 *Witkin Sum. Cal. Law Work Comp* § 93

[§ 93] Comparative Negligence Doctrine Extended.

Associated Const. & Engineering Co. v. Work. Comp. App. Bd. (1978) 22 C.3d 829, 150 C.R. 888, 587 P.2d 684, determined that the rule against a concurrently negligent employer's recovery in an employee's third-party tort action as developed in *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, supra, §92, and *Roe v. Work. Comp. App. Bd.* (1974) 12 C.3d 884, 889, 117 C.R. 683, 528 P.2d 771, infra, §99 (denying a credit to the negligent employer where the employee settles the third-party action), had to be accommodated to the judicially created comparative negligence doctrine (see 6 *Summary* (10th), *Torts*, §1327 et seq.). Thus, a concurrently negligent employer may receive either credit or reimbursement for the amount by which the employer's compensation liability exceeds the employer's proportional share of the injured employee's recovery. (22 C.3d 842.)

In *Associated Const.*, C, employed by A, was injured in the course of his employment. A paid benefits of \$ 6,144.87 for temporary disability and also provided medical treatment. C sued an alleged third-party tortfeasor, and the case was settled for \$ 60,000, of which C received \$ 40,000. Subsequently C sought permanent disability benefits, and was awarded \$ 8,085, of which \$ 2,270 had already been advanced by A. The latter then claimed a credit under *Lab.C. 3861*, against the net recovery in the third-party settlement, on the liability for compensation. The Board ruled that A's concurrent negligence was a bar. *Held*, award annulled.

(a) When the issue of the employer's concurrent negligence arises in an action, the third-party tortfeasor may plead the employer's negligence as a partial defense (*Witt*) and the trier of fact should determine the employer's degree of fault. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability--up to the amount of compensation benefits assessed against the employer; correspondingly, the employer should be denied any claim of reimbursement or any lien to the extent that the employer's contribution would then fall short of the employer's percentage share of responsibility for the employee's total recovery. (22 C.3d 842.)

(b) When the issue arises as a credit claim based on a settlement, the board must determine the appropriate contribution of the employer, because the employee's recovery does not represent a judicial determination of tort damages. "Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The Board must then deny the employer credit until the ratio of his contribution to the

employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong." (22 C.3d 843, adding in footnote 10 illustration of how rule might work.) (See *Bonner v. Work. Comp. App. Bd.* (1990) 225 C.A.3d 1023, 1033, 275 C.R. 337 [when issue of employer's concurrent negligence arises in context of claim for credit based on employee's settlement with third party, Board must determine appropriate contribution of employer, because employee's settlement does not represent judicial determination of tort damages]; *Southern Calif. Edison Co. v. Work. Comp. App. Bd.* (1997) 58 C.A.4th 766, 772, 68 C.R.2d 265 [concurrently negligent employer cannot include settlement from third party as part of employer's previous payments to employee in calculating employer's credit against its percent of liability].)

The *Witt* doctrine requires reduction of an employer's claim for reimbursement from a third party even though the action is based on strict liability. (*Anderson-Cottonwood Disposal Service v. Work. Comp. App. Bd.* (1982) 135 C.A.3d 326, 331, 185 C.R. 336.) The doctrine was also held applicable, so as to give the third-party tortfeasor a credit for workers' compensation benefits made, where the liability of the third party was based on reckless disregard for the safety of the plaintiff. (*Fuller v. Capitol Sky Park* (1975) 46 C.A.3d 727, 732, 120 C.R. 131.) (See C.E.B., Workers' Damages Practice 2d, §3.4.)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

b. Comparative Fault.

2. Effect of Employee's Negligence.

2 Witkin Sum. Cal. Law Work Comp § 94

[§ 94] Effect of Employee's Negligence.

In *Associated Const. & Engineering Co. v. Work. Comp. App. Bd.* (1978) 22 C.3d 829, 842, 150 C.R. 888, 587 P.2d 684, supra, §93, the employee's injury had been caused solely by the concurrent negligence of his employer and the third party, and the court expressly reserved decision on the issue of the effect of an employee's negligence. (22 C.3d 842, footnote 9.)

The issue was decided in *Rodgers v. Work. Comp. App. Bd.* (1984) 36 C.3d 330, 204 C.R. 403, 682 P.2d 1068. R, a truck driver employed by T, was injured in a fall from a loading dock owned by S. R applied for compensation and also sued S. T furnished temporary disability benefits to R and then intervened, seeking reimbursement from S for those benefits. The jury found damages of \$ 25,500 for R; that S, R, and T were all partially responsible for the injury, with fault determined as 70% S, 25% R and 5% T. After deductions for attorneys' fees and other expenses and the statutory credit, R's net recovery was \$ 7,734.28. In the subsequent compensation proceeding, R was given a permanent disability rating of 201/4%, with benefits of \$ 5,022.50. Under *Associated Const.*, T was entitled to the full statutory credit once it had paid R some threshold amount in benefits. T contended that it was eligible for the credit when it paid benefits equal to its own proportional share of the employee's total civil damages (5% of \$ 25,000); R contended that T would not be eligible until T paid benefits equal to the proportion of the civil damages attributable to *both* the employer and the employee (30% of \$ 25,000). The Board upheld T's position, and entered its order that, after payment of \$ 1,275, T would be entitled to a credit of \$ 7,734.28. *Held*, affirmed.

(a) Although *Associated Const.* did not determine the effect of an employee's fault, the reasoning of the case supports the Board's conclusion that the employee's negligence should not be imputed to the employer. The underlying principles were that the employer should not profit from the employer's own wrong, and that the employer and third person should share the burden of the employee's recovery as joint tortfeasors. "Those principles would not be furthered by denying the employer its statutory credit until it has paid additional benefits equal to the proportion of tort damages attributable to the employee's fault; even if the employer were an ordinary tortfeasor, it would not be liable for *that* portion of the employee's tort damages." (36 C.3d 337.)

(b) The fundamental purpose of the "threshold" approach of *Associated Const.* "was simply to ensure that the

employer did not obtain the benefits of the credit until it had paid compensation equal to its theoretical tort liability." (36 C.3d 338.) Allowing the concurrently negligent employer a credit limited in this fashion is rational if nonnegligent employers are to be given credit; each profits, if at all, only to the extent that it committed no wrong. "Since a totally nonnegligent employer would not have its credit right withheld until it had paid benefits in an amount equal to its negligent employee's share of the tort damages, there is no rational ground for placing this additional burden on a concurrently negligent employer." (36 C.3d 338.)

(c) The contrary rule urged by R would have the anomalous effect of rewarding employee negligence by increasing an employee's recovery when the employee's fault increases. "Not only would this unfairly penalize employers, but it would undercut the deterrence rationale of the comparative negligence system by permitting a negligent employee to recapture the portion of his tort damages which he was denied in the civil action because of his own responsibility for his injuries." (36 C.3d 339.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
5. Employer's Contributory Negligence.
c. Employer Is Party.

2 Witkin Sum. Cal. Law Work Comp § 95

[§ 95] Employer Is Party.

(1) *Action or Intervention by Employer.* When an employer who brings an action or intervenes in an employee's action is found to have been negligent, the employer's right to reimbursement is reduced in accordance with comparative fault principles. (See *Aceves v. Regal Pale Brewing Co.* (1979) 24 C.3d 502, 512, 156 C.R. 41, 595 P.2d 619 [method of computation]; C.E.B., *Workers' Damages Practice* 2d, §7.10; 1 Herlick 6th, §12.16.)

(2) *Employer Brought in by Cross-Complaint.* A conflict exists whether an employer who is not a party to a third-party action and has not intervened may be compelled to participate through a cross-complaint by the third-party defendant in order to establish employer negligence. The court in *Sacramento v. Superior Court (Smith)* (1962) 205 C.A.2d 398, 23 C.R. 43, granted mandamus to compel the trial judge to allow joinder of the employer, finding that the substantive rule of *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, supra, §92, was controlling, and that determination of the issue by cross-complaint was as proper procedurally as bringing a new action. (205 C.A.2d 405.) (See *Del Monte Corp. v. Superior Court* (1982) 127 C.A.3d 1049, 1055, 179 C.R. 855 [rule that employer may be brought into third-party action by cross-complaint applies even where employer has not sought reimbursement].)

However, *C.J.L. Const. v. Universal Plumbing* (1993) 18 C.A.4th 376, 22 C.R.2d 360, disagreed with *Sacramento v. Superior Court (Smith)* and *Del Monte Corp. v. Superior Court*. In a tort action by plaintiff employee against his employer and two third parties, the trial judge granted the employer's motion for judgment on the pleadings as to a cross-complaint brought by one of the third parties. The cross-complaint sought an offset in the amount of workers' compensation benefits paid by the employer's insurer to plaintiff based on defendant employer's negligence. The right to an offset was claimed in the third party's answer as an affirmative defense and in its cross-complaint as a cause of action for declaratory relief. *Held*, judgment affirmed.

(a) The issue of employer negligence can be raised as an affirmative defense by third parties (see *infra*, §96). Thus, a third-party defendant does not need to sue the employer to prove the employer's negligence. Through discovery, the third party may develop and prove at trial facts in the possession of the employer. Moreover, the third party can subpoena the employer to testify at trial and to produce personal records (*C.C.P.* 1985 et seq.). (18 C.A.4th 391, 392.)

(b) Where an issue can be raised by an affirmative defense, the trial judge has discretion to dismiss a declaratory

relief cross-complaint raising the same issue. (18 C.A.4th 391.)

(c) One important purpose of the workers' compensation law is to insulate employers from third-party tort actions. *Sacramento v. Superior Court (Smith)* and *Del Monte Corp.* were decided before workers' compensation costs became an important economic issue in California and before numerous Supreme Court cases emphasizing the importance of the exclusive remedy rule were decided. To allow third parties to join employers in employee third-party tort actions "unnecessarily imposes unwarranted costs on California businesses and insurers." (18 C.A.4th 392.)

Difko Administration v. Superior Court (1994) 24 C.A.4th 126, 29 C.R.2d 291, followed *C.J.L. Const.*, and rejected *Del Monte*, to the extent *Del Monte* allowed a third-party defendant to join an employer as a cross-defendant to claim a setoff where the employer had neither sought reimbursement nor participated in the litigation. Under circumstances factually analogous to *C.J.L. Const.*, defendants' cross-complaints contained a cause of action directed solely at the employer seeking a setoff against any judgment against cross-complainants in the amount of workers' compensation benefits paid to plaintiff injured employee. The employer moved to dismiss on the ground that defendants' claims of employer negligence and their concomitant right to a setoff could not be alleged by a cross-complaint but could only be raised as an affirmative defense in its answer to the employee's complaint. The trial judge denied the motion. *Held*, this was error.

(a) *Declaratory relief cross-complaint.* The use of a declaratory relief cross-complaint to bring an employer into an action when the employer has not intervened to seek reimbursement is flawed, in that the third-party defendant seeks a reduction in any judgment awarded to the *plaintiff*. Thus, the employer is not the party affected, and has no rights to be established. (24 C.A.4th 132, 133.)

(b) *Employer protection.* More importantly, the workers' compensation system, in its relationship to general tort law, is designed to afford injured workers a speedy and secure remedy. The employer is generally insulated from an employee's tort suit and the attendant litigation expenses. (24 C.A.4th 133.) Thus, an employer who is in effect a disinterested party should not be forced to incur litigation expenses resulting from being joined as a party by means of a cross-complaint. (24 C.A.4th 133.)

(c) *Permissible methods to establish offset.* A third-party defendant wishing to establish an offset under *Witt v. Jackson*, based on the employer's concurrent negligence, may do so only by the following methods:

(1) As an affirmative defense, in all cases in which the employer does not seek reimbursement for benefits by an independent action against the third-party defendant.

(2) By joining in an employee's action as a party plaintiff.

(3) By filing in the employee's action a complaint in intervention.

(4) By applying for a first lien against the employee's recovery. (24 C.A.4th 134.)

SUPPLEMENT: [This section is current through the latest supplement]



96 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
5. Employer's Contributory Negligence.
d. Affirmative Defense.

2 *Witkin Sum. Cal. Law Work Comp* § 96

[§ 96] Affirmative Defense.

A third-party defendant may assert by answer in an employee's action an affirmative defense of the employer's contributory negligence, and hence, a claim for an offset for concurrent negligence, without making the employer a party. (*Tate v. Superior Court* (1963) 213 C.A.2d 238, 247, 28 C.R. 548; see *Vegetable Oil Products Co. v. Superior Court* (1963) 213 C.A.2d 252, 256, 28 C.R. 555 [leave to amend answer to include affirmative defense]; *Castro v. Fowler Equipment Co.* (1965) 233 C.A.2d 416, 423, 43 C.R. 589 ["appellant can raise his right to a reduction in any feasible way that would permit the amount to be ascertained"]; *Benwell v. Dean* (1967) 249 C.A.2d 345, 361, 57 C.R. 394 [answer]; *Garrett v. Shenson Meat Co.* (1970) 5 C.A.3d 69, 73, 85 C.R. 65 [same]; *Serrano v. Work. Comp. App. Bd.* (1971) 16 C.A.3d 787, 790, 94 C.R. 511 [employer and insurer are in privity with employee to extent that compensation benefits have been paid].) (For discussion of joinder of nonparty employer by third-party defendant, see *supra*, §95.)

The employer, however, must be given an opportunity to intervene and defend against the charge of negligence. Thus, in *Brandon v. Santa Rita Technology* (1972) 25 C.A.3d 838, 102 C.R. 225, defendants did not raise the issue in their answer, but at trial, were granted leave to amend to do so. During the trial, the employer's insurer learned of the amendment and sought a continuance to allow it to intervene. The judge denied the request, tried the issue, and found the employer negligent. *Held*, the procedure was a denial of due process.

(a) The insurer acted reasonably in not attempting intervention at the outset, because the contributory negligence issue had not been pleaded and the insurer's interests were sufficiently protected by the plaintiff-employee. When the amendment was allowed, the interests of employee and employer were in conflict, and the insurer should have been allowed to intervene and contest the issue. (25 C.A.3d 846.)

(b) "[I]f the issue of an employer's negligence is to be raised as a defense ... such defense must be asserted in a pleading filed and served upon the employer (or the lien claimant representing him) in a timely manner so as to afford him a reasonable opportunity to be heard. Anything less constitutes a denial of due process in that it would deprive the employer of a substantial right to protect his interest in defending against a charge of negligence and thus effectively prevent him (or his lien claimant) from successfully asserting his claim for reimbursement." (25 C.A.3d 846.)

If the employer is not a party, and the defendant raises the right to an offset of benefits as an affirmative defense, the appropriate procedure is for the trier of fact to determine the employer's degree of fault, and then for the trial judge, on motion, to determine the amount of the offset. (*Engle v. Endlich* (1992) 9 C.A.4th 1152, 1166, 12 C.R.2d 145.)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

e. Employee May Not Raise Issue.

2 *Witkin Sum. Cal. Law Work Comp* § 97

[§ 97] Employee May Not Raise Issue.

In *Gilford v. State Comp. Ins. Fund* (1974) 41 C.A.3d 828, 116 C.R. 615, the employee joined his employer as a defendant, alleging concurrent negligence. The employer demurred on the grounds that the *Witt* issue (*Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, *supra*, §92) was an affirmative defense of the third party, and that the complaint was an improper attempt by an employee to sue his employer, contrary to the statute. The trial court sustained the demurrer and entered judgment for the employer. *Held*, affirmed. The evident purpose of the joinder was to defeat the employer's lien and possibly effect a double recovery as to future compensation benefits to be awarded by the Board. (41 C.A.3d 832.) To allow this, however, would deprive the employer of its statutory options for seeking subrogation (*supra*, §72 et seq.), and would defeat the Board's exclusive jurisdiction where the dispute is only between the employee and employer, not the third party. (41 C.A.3d 834.)

In *Hone v. Climatrol Industries* (1976) 59 C.A.3d 513, 130 C.R. 770, the employer's insurer filed a lien in the employee's action against the third party, and was subsequently granted leave to file a complaint in intervention. The insurer then settled with the third party, to whom the insurer assigned the lien claim, and dismissed its complaint without prejudice. Evidence of the employer's negligence was excluded at the trial; and, after judgment for the employee, the third party was allowed to reduce the judgment by the amount of the lien despite a prior finding of the employer's wilful misconduct by the Board. *Held*, affirmed.

(a) *Roe v. Work. Comp. App. Bd.* (1974) 12 C.3d 884, 117 C.R. 683, 528 P.2d 771, *infra*, §99, is inapplicable. *Roe* permits an employee to contest an employer's claim for credit against future payments before the Board, when the issue of its negligence has not been resolved in a third-party action. Here, the issue of future payments had been resolved by the Board before the third-party action, and the only issue is credit for *past* payments. (59 C.A.3d 525, 526.)

(b) When the complaint in intervention was dismissed without prejudice, the case reverted to its original posture with only the employer's lien filed. An employee may not assert the employer's negligence in these cases. (59 C.A.3d 527.)

(c) The prior finding of the Board is not *res judicata*. The issues decided by the Board were not the same. Had the issue of the employer's negligence been litigated, the third party would have been entitled to the credit which the

employee now seeks to defeat. (59 C.A.3d 529, 530.)

However, if the third party settles with a provision that full payment awaits resolution of the issue, the employee is allowed to pursue it. (*Levels v. Growers Ammonia Supply Co.* (1975) 48 C.A.3d 443, 550, 121 C.R. 779, supra, §92.) In addition, because the issue also affects the employee's right to future compensation (see infra, §§98, 99), an injured employee has standing to appeal from a judgment that includes a finding that the employer was not negligent. (*Short v. State Comp. Ins. Fund* (1975) 52 C.A.3d 104, 107, 125 C.R. 15.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

f. Subsequent Proceeding Before Board.

1. Where Employer's Negligence Is Judicially Determined.

2 Witkin Sum. Cal. Law Work Comp § 98

[§ 98] Where Employer's Negligence Is Judicially Determined.

In *Nelsen v. Work. Comp. App. Bd.* (1970) 11 C.A.3d 472, 89 C.R. 638, the employee brought an action against the third-party tortfeasor, the insurer claimed a lien for compensation, and the employer's concurrent negligence was determined by the judgment. The employee recovered damages from the third party, and then, in a subsequent proceeding before the Board, sought an award of compensation. To prevent double recovery by the employee, the Board, despite the employer's negligence, gave a credit on the award. *Held*, order annulled. "If the *court* cannot allow a lien where the employer was concurrently negligent, logic dictates that the *board* cannot allow a credit where the employer's negligence has been previously determined in the employee's third party action. In a later workmen's compensation proceeding wherein the employee seeks benefits which no board award had theretofore obligated the employer to pay, the employee may therefore assert the employer's adjudicated negligence 'defensively' against the employer's claim of credit, and the employer is collaterally estopped by the determination made against him on that issue in the third party action." (11 C.A.3d 479.) (See *Serrano v. Work. Comp. App. Bd.* (1971) 16 C.A.3d 787, 791, 94 C.R. 511 [following *Nelsen*]; *Maillet v. Work. Comp. App. Bd.* (1972) 23 C.A.3d 107, 110, 99 C.R. 925 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

f. Subsequent Proceeding Before Board.

2. Where Employer's Negligence Is Not Judicially Determined.

2 *Witkin Sum. Cal. Law Work Comp* § 99

[§ 99] Where Employer's Negligence Is Not Judicially Determined.

(1) *Board's Jurisdiction Denied.* In *Corley v. Work. Comp. App. Bd.* (1971) 22 C.A.3d 447, 99 C.R. 242, the situation was basically similar to *Nelsen v. Work. Comp. App. Bd.* (1970) 11 C.A.3d 472, 89 C.R. 638, *supra*, §98: a third-party action by the employee with the employer's insurer intervening, a settlement of the employee's suit, and a subsequent application for a compensation award. Here, however, the issue of the employer's concurrent negligence was *not determined in the civil action*. The insurer claimed a credit for the amount of the employee's recovery. To defeat the credit, the employee offered evidence of the employer's concurrent negligence. The Board concluded that it had no jurisdiction to try the issue and granted the credit. *Held*, decision affirmed. The court refused to follow *Nelsen* and *Serrano v. Work. Comp. App. Bd.* (1971) 16 C.A.3d 787, 790, 94 C.R. 511, *supra*, §98, reasoning that denial of the credit would give the employee a double recovery (22 C.A.3d 456), and that to introduce the issue of the employer's negligence in a Board proceeding would change its fundamental nature and raise serious questions of jurisdiction (22 C.A.3d 458, 459).

(2) *Board's Jurisdiction Affirmed.* The power and duty of the Board to determine the issue of an employer's concurrent negligence when it is left unresolved in the third-party action was affirmed in *Roe v. Work. Comp. App. Bd.* (1974) 12 C.3d 884, 117 C.R. 683, 528 P.2d 771. The employer elected not to intervene in the third-party action, and the action was settled without reference to the employer's possible concurrent negligence. The employee then sought permanent disability benefits, and tendered the concurrent negligence issue to the referee to defeat a credit in the amount of the settlement against the benefits awarded. The referee refused to entertain the issue, and the Board denied reconsideration. *Held*, award annulled and case remanded.

(a) *Reconciliation of policies in Witt v. Jackson.* The policy against an employer benefiting from its own negligence, relied on in *Nelsen*, outweighs the policy against an employee's double recovery, relied on in *Corley*. The latter policy primarily protects the negligent third party, and a negligent employer may not legitimately object to a double recovery at the third party's expense, particularly when it avoids resolution of that issue in the tort action. (12 C.3d 889.)

(b) *Negligence defeats right to credit.* *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, *supra*, §92,

holds that the substantive right to be relieved from "further compensation" up to the amount of the third-party damage award under *Lab.C. 3858* is qualified by C.C. 3517, which provides that no one may take advantage of his or her own wrong. That right is merely implemented by the procedural provisions of *Lab.C. 3861*, which designates the Board as the proper forum to determine an employer's untried claim for reimbursement or credit. Thus, the Board erred in concluding that *Lab.C. 3861* gives an employer an unconditional right to a credit without regard to its negligence. (12 C.3d 890.)

(c) *Board must determine unresolved issue.* To preclude the Board from resolving the untried issue of the employer's concurrent negligence will engender undesirable gamesmanship, because a negligent employer may "stand aside from the third party lawsuit, then capitalize on the third party's damage payment in the form of a credit from the appeals board." (12 C.3d 890.) Construed in light of *Witt*, *Lab.C. 3861* is a delegation of procedural authority to the Board to resolve the negligence issue when the court does not, and nothing in former Cal. Const., Art. XX, §21 (now Cal. Const., Art XIV, §4), supports the Board's refusal to do so. It "does not inject fault into the adjudication of disability benefits; neither does it frustrate the injured workmen's need for immediate sustenance." (12 C.3d 891.) The asserted lack of the Board's experience in determining negligence is of little weight in light of the fact that it must already determine issues of serious and wilful misconduct which may be more complex and difficult. (12 C.3d 892.) To the extent that *Corley* is inconsistent with this conclusion, it is disapproved. (12 C.3d 892.) (See *Gregory v. Work. Comp. App. Bd.* (1974) 12 C.3d 899, 902, 117 C.R. 694, 528 P.2d 782 [wrongful death action settled for three times maximum death benefits without determination of employer's concurrent negligence; *Roe* followed]; *Hone v. Climatrol Industries* (1976) 59 C.A.3d 513, 526, 130 C.R. 770, supra, §97 [*Roe* distinguished]; 27 *Hastings L. J.* 637 [*Roe* criticized]; C.E.B., *Workers' Damages Practice*, 2d, §8.14.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

g. Distinction: Employer's Waiver of Subrogation.

2 Witkin Sum. Cal. Law Work Comp § 100

[§ 100] Distinction: Employer's Waiver of Subrogation.

In *De Cruz v. Reid* (1968) 69 C.2d 217, 70 C.R. 550, 444 P.2d 342, decedent was employed by K Ranch. Defendants D and his employee R contracted with decedent's employer to haul fertilizer to the ranch. Decedent was assisting in unloading when R accelerated the truck and decedent fell off and was run over by the trailer wheels. Plaintiff dependents filed a claim with the Board for death benefits and a compromise and release was approved for \$ 18,000. As part consideration, the employer and its insurer waived rights to subrogation. Plaintiffs then filed this action for wrongful death against D and R as third-party tortfeasors, alleging negligent maintenance of the truck and negligent failure to furnish decedent with a safe place to work. The verdict was for \$ 40,000. On appeal, defendants contended that if an employer is not entitled to recoup compensation or death benefits for any reason, the third-party tortfeasor is only liable for the excess over the amount of the compensation or death benefits (here \$ 40,000 less \$ 18,000). *Held*, judgment affirmed.

(a) There was no evidence of concurrent negligence of the employer, hence the rule of *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, *supra*, §92, did not apply. (69 C.2d 223.)

(b) Defendants' theory that the employer's waiver of reimbursement (subrogation) must inure to their benefit is untenable. The recovery by the employee or dependents is from a collateral source, and does not reduce the damages recoverable against a third party. (69 C.2d 223.)

(c) *Witt v. Jackson* did not abrogate the collateral source rule or make a sweeping interdict against double recovery; it held only that a negligent employer should not profit by his own wrong, and only to that extent did it limit the collateral source rule. (69 C.2d 225.)

(d) "To summarize, since in the instant case defendants failed to prove the concurrent negligence of decedent's employer, our decision in *Witt* did not require that plaintiffs' damages be reduced by the amount of the death benefits received. Since the employer was not negligent, the death benefits paid did not constitute an impermissible double recovery but rather a payment for plaintiffs' loss from a source wholly independent of the wrongdoer. Accordingly, the court below did not err in excluding the proffered evidence of the proceeds of plaintiffs' compromise settlement." (69 C.2d 226.) (See *Curtis v. California* (1982) 128 C.A.3d 668, 681, 683, 685, 180 C.R. 843 [following *De Cruz*]; C.E.B.,

Workers' Damages Practice 2d, §3.39.) (On collateral source rule, see 6 *Summary* (10th), *Torts*, §1631 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

h. Determination Without Employer.

2 Witkin Sum. Cal. Law Work Comp § 101

[§ 101] Determination Without Employer.

In *Carden v. Otto* (1974) 37 C.A.3d 887, 112 C.R. 749, plaintiff employee filed an action against defendant third-party tortfeasor. The employer did not intervene, but filed a lien claim. Defendant answered, pleading the *Witt v. Jackson* defense (*Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, supra, §92). The employer's counsel asked plaintiff's counsel for notification of the trial, but no notice was received. At the trial, with no representation of the employer, the only evidence was selected portions of plaintiff's deposition, and plaintiff's counsel expressed the opinion that the evidence showed negligence of the employer. The judge so found, and defendant then stipulated to a judgment of \$ 35,000, which also recited that the employer was negligent and the lien was disallowed. *Held*, the employer was entitled to have the judgment set aside.

(a) The judgment was not binding on the employer on the issue of contributory negligence. The employer was neither a party nor in privity with the employee-party. (37 C.A.3d 892, 893.) Suggestions in *Tate v. Superior Court* (1963) 213 C.A.2d 238, 247, 28 C.R. 548, and *Benwell v. Dean* (1967) 249 C.A.2d 345, 361, 57 C.R. 394, supra, §96, and in *Nelsen v. Work. Comp. App. Bd.* (1970) 11 C.A.3d 472, 89 C.R. 638, supra, §98, that the employee represents the employer in this situation, are unsupported by authority. (37 C.A.3d 894.)

(b) The more difficult problem was the statute of limitations. The 1-year period on the employer's independent action had run at the time of trial, and consequently the employer's lien claim, though not precluded by res judicata, was barred by limitations. (37 C.A.3d 895.) *Van Nuis v. Los Angeles Soap Co.* (1973) 36 C.A.3d 222, 111 C.R. 398, supra, §70, offers the appropriate solution: The employer should have been given notice of the time of trial to enable him to intervene, and the stipulated judgment, designed to dispose of the employer's rights as well as the employee's, should have been set aside at the employer's request. (37 C.A.3d 897.)

(c) Setting aside the judgment would expose the defendant to possible liability to the employer. Hence, the proper procedure is to restore the status quo existing at the time of the purported settlement. "In that posture the employer can then intervene and the parties may again effect a settlement under the principles enunciated in *Van Nuis* ... , leaving the employer the right to proceed independently or the entire matter can be litigated." (37 C.A.3d 897.) (See C.E.B., *Workers' Damages Practice* 2d, §§3.40, 7.14, 7.43.)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

C. Action Against Third-Party Tortfeasor.

5. Employer's Contributory Negligence.

i. No Right of Contribution Against Employer.

2 Witkin Sum. Cal. Law Work Comp § 102

[§ 102] No Right of Contribution Against Employer.

In *E.B. Wills Co. v. Superior Court* (1976) 56 C.A.3d 650, 128 C.R. 541, plaintiff B, employee of W, was injured in the course of his employment and sued third parties for negligence. The third parties did not seek reduction of compensation under *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, supra, §92, but instead filed a cross-complaint against W, alleging that W's negligence was a contributing cause of B's injury, and sought contribution in direct proportion to the relative amount of negligence. *Held*, no cause of action was stated. The court analyzed the theory of the cross-complaint as follows:

(a) The contribution statute (*C.C.P. 875 et seq.*, 5 *Summary* (10th), *Torts*, §§105, 106) was inapplicable, for the right is enforceable only after one tortfeasor has discharged a joint judgment or paid more than a pro rata share; and then contribution is prorated according to the number of judgment debtors, not in proportion to the negligence of each tortfeasor. (56 C.A.3d 653.)

(b) The cross-complaint sought to invoke the theory of *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226, 6 *Summary* (10th), *Torts*, §1329, introducing the doctrine of comparative negligence, i.e., they contended that *Li* created a nonstatutory equitable right of contribution in favor of a joint wrongdoer. (56 C.A.3d 653.) However, *Lab.C. 3864*, enacted in 1959, abrogated the previously established rule that a negligent employer was required to indemnify the third-party tortfeasor when the employer's negligence was active and the third party's negligence was passive. Under the statute, there is no implied indemnity; only an express contract will support the right. (56 C.A.3d 654.)

(c) *Lab.C. 3864*, embracing the exclusive remedy concept of the workers' compensation law, indicates the proper decision in the instant case. "Clearly, if the section precludes a third party tortfeasor from seeking indemnification from an injured employee's employer even though the employer's negligence was active and the third party's passive, a fortiori, the statute also precludes a third party wrongdoer from seeking contribution from the employer under the comparative negligence doctrine. If we were to hold that the comparative negligence doctrine makes it possible for a third party wrongdoer to seek contribution from an injured plaintiff's employer in proportion to the employer's relative amount of negligence, as real parties maintain, we not only would restore the pre-1959 dual insurance burden the Legislature sought to eliminate but we would increase, substantially, the perimeters of that burden; the third party could

obtain contribution from the employer even when the third party was actively negligent. We do not believe that the *Li* court intended to thwart the statutory scheme established by section 3864 or to usurp the legislative function in a specialized field when it directed trial judges of this state to adopt the procedures needed to implement its decision." (56 C.A.3d 655.)

The following cases are also instructive:

Gonzales v. R.J. Novick Const. Co. (1978) 20 C.3d 798, 807, 144 C.R. 408, 575 P.2d 1190 [approving reasoning of *Wills* on purpose of *Lab.C. 3864*].

Associated Const. & Engineering Co. v. Work. Comp. App. Bd. (1978) 22 C.3d 829, 842, 843, footnote 9, 150 C.R. 888, 587 P.2d 684, supra, §93 [except where there is express contract, negligent third party's right of indemnity is limited to amount of employer's compensation payments].

Alameda Tank Co. v. Starkist Foods (1980) 103 C.A.3d 428, 431, 432, 162 C.R. 924 [rejecting constitutional challenge to *Lab.C. 3864*].

Watters Associates v. Superior Court (1991) 227 C.A.3d 1341, 1345, 278 C.R. 417 [temporary employer treated as third party was barred by *Lab.C. 3864* from cross-complaining against general employer (employment agency) for indemnity absent written agreement].

Up-Right v. Van Erickson (1992) 5 C.A.4th 579, 583, 7 C.R.2d 34 [*Lab.C. 3864* was applicable even where employer engaged in criminal conduct by violating child labor laws].

Hansen Mechanical v. Superior Court (1995) 40 C.A.4th 722, 731, 47 C.R.2d 47 [executed written agreement under *Lab.C. 3864* means agreement signed by all parties before injury occurs].

California v. Superior Court (Glovsky) (1997) 60 C.A.4th 659, 664, 71 C.R.2d 256 [*Lab.C. 3864* barred third-party litigant from cross-complaining for indemnity and contribution against plaintiff's employer].

SUPPLEMENT: [This section is current through the latest supplement]



103 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
C. Action Against Third-Party Tortfeasor.
6. Lien of Public Employees' Retirement System.

2 *Witkin Sum. Cal. Law Work Comp* § 103

[§ 103] Lien of Public Employees' Retirement System.

Under *Govt.C. 20252* (formerly *Govt.C. 21451*, containing identical language), the Public Employees' Retirement System has a lien on a tort judgment obtained by an employee, for benefits paid as disability retirement. The validity of these provisions was upheld in *Bilyeu v. State Employees' Retirement System* (1962) 58 C.2d 618, 25 C.R. 562, 375 P.2d 442, despite the following curious facts: Plaintiff, a state highway patrolman injured in the line of duty, sued and recovered judgment of \$ 62,271.11 from the third-party tortfeasor. He also received workers' compensation benefits and a disability retirement. The trial court allowed the lien of the workers' compensation insurer in the amount of \$ 17,670.51, and the retirement system claimed a lien in the amount of \$ 52,476.06, the actuarial equivalent of the benefits it was obligated to pay. *Held*, the retirement system's claim was in accord with the legislative intent. (58 C.2d 625.)

A concurring opinion points out that the two liens would consume the entire judgment, leaving the plaintiff without benefit from the effort involved in his suit and without compensation for his pain and suffering. "In the future, there will be no inducement for state employees in the position of plaintiff to file such actions." (58 C.2d 629.)

In *McQuillan v. Southern Pac. Co.* (1974) 40 C.A.3d 802, 115 C.R. 418, the survivors of a deceased public employee obtained a wrongful death judgment against defendant railroad after the jury found both it and the public employer negligent. The trial judge denied the retirement system reimbursement under the statute, and denied the railroad a deduction in the amount of the benefits paid by the system. *Held*, affirmed.

(a) The express statutory provisions authorize reimbursement only when "injury or death is the proximate consequence of the act of a person other than his employer," and must be construed to deny reimbursement when the employer's act proximately causes the injury or death. (40 C.A.3d 806.)

(b) "[T]he contributions by the State to the retirement fund were not contributions made by it as a tortfeasor but resulted from a contractual and statutory obligation completely outside the notions of tort liability. Rather, they fall within the ambit of the cases that hold pension and insurance payments to be collateral sources which are not intended to benefit a tortfeasor and which do not reduce his liability." (40 C.A.3d 808.)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

D. Other Permissible Actions.

1. Action Against Physician for Malpractice.

2 Witkin Sum. Cal. Law Work Comp § 104

[§ 104] Action Against Physician for Malpractice.

(1) *Remedy Against Employer Distinguished.* If an employee's disability is increased by the negligence of a physician, an additional award of compensation may be obtained from the Board, for the physician's negligence is one of the foreseeable consequences of the original industrial injury. This is the sole remedy against the *employer or insurer*. (*Fitzpatrick v. Fidelity & Cas. Co.* (1936) 7 C.2d 230, 232, 60 P.2d 276; *Hazelwerdt v. Industrial Indem. Exchange* (1958) 157 C.A.2d 759, 761, 321 P.2d 831; *Wickham v. North Amer. Rockwell Corp.* (1970) 8 C.A.3d 467, 473, 87 C.R. 563; *Deauville v. Hall* (1961) 188 C.A.2d 535, 543, 10 C.R. 511; see 16 A.L.R.3d 564 [physician supplied by employer]; 28 A.L.R.3d 1066 [right to maintain malpractice action in addition to award]; 1 Herlick 6th, §12.21.)

The power of the Board, however, is limited to adjusting rights between employer and employee, and it has no jurisdiction over a physician who is not an employer. The negligence of the physician is that of a third-party tortfeasor. Thus, the employee has an independent cause of action for malpractice, and the court is the only forum having jurisdiction. (See *Duprey v. Shane* (1952) 39 C.2d 781, 790, 249 P.2d 8; *Smith v. Coleman* (1941) 46 C.A.2d 507, 116 P.2d 133; *Hoffman v. Rogers* (1972) 22 C.A.3d 655, 661, 99 C.R. 455; *Lab.C.* 3852 [allowing action against "any person other than the employer"].)

The distinct character of the action is illustrated by *Smith v. Coleman, supra*. The employee, after completion of treatment and return to work, executed a *release* (under *Lab.C.* 5000 et seq.) of the employer, the insurer, and all physicians acting in their behalf, from all claims based on the specific industrial injury. *Held*, this was not a defense to the physicians in the malpractice action, for the cause of action was not based on the industrial injury, but on an independent tort committed subsequent to the injury. (46 C.A.2d 513.)

(2) *Employer's Lien on Recovery.* Because the employer is liable for the increased disability and additional medical treatment caused by the negligent physician, a separate judgment against the physician for the full measure of damages caused by the negligence would constitute double recovery to the employee. Accordingly, the employer is entitled to a lien, as in other actions against third-party tortfeasors (*supra*, §72). Therefore, the elements of the compensation award must be analyzed, because the employer's reimbursement "is limited to the amount that he is required to pay because of the malpractice." (*Heaton v. Kerlan* (1946) 27 C.2d 716, 721, 723, 166 P.2d 857.)

West's Key Number Digest, Workers' Compensation k.2253, 3354

SUPPLEMENT: [This section is current through the latest supplement]



105 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
D. Other Permissible Actions.
2. Action Against Insurer for Intentional Tort.

2 *Witkin Sum. Cal. Law Work Comp* § 105

[§ 105] Action Against Insurer for Intentional Tort.

In *Unruh v. Truck Ins. Exchange* (1972) 7 C.3d 616, 102 C.R. 815, 498 P.2d 1063, supra, §36, additional counts in the complaint against defendant insurer alleged the intentional torts of assault and battery and infliction of emotional distress. *Held*, these causes of action could be the basis of a recovery. When an insurer, through its agents or employees, "intentionally embarks upon a deceitful course of conduct in its investigations which causes injury to the subject of the investigation," the objects of the compensation law are frustrated. Permitting the employee to sue for these intentional torts "will subserve these objectives but at the same time will not discourage the insurer from fulfilling its proper role in the compensation scheme." (7 C.3d 630.) (See 1 *Pepperdine L. Rev.* 54 [remedy for intentional torts of workers' compensation insurer; *Unruh*]; Cal. Civil Practice, 2 Workers' Compensation, §15:29; C.E.B., Workers' Damages Practice 2d, §6.4.)

Unruh was distinguished in *Everfield v. State Comp. Ins. Fund* (1981) 115 C.A.3d 15, 171 C.R. 164, where plaintiff alleged delay in compensation payments, reduction of amounts payable, and intentional disregard of the Board's subpoena duces tecum. *Held*, "[t]hese three acts in themselves are not fraudulent, deceitful, outrageous, perfidious or so extreme or abnormal as to fit in the class of misconduct considered in *Unruh*." (115 C.A.3d 19.) (See *Ricard v. Pacific Indem. Co.* (1982) 132 C.A.3d 886, 893, 183 C.R. 502 [distinguishing *Unruh*; "the carrier's conduct, on its face, appears to be nothing more than the rejection of what it considers to be an improper claim, accompanied by what might be characterized as negligent delay"]; *Teague v. Home Ins. Co.* (1985) 168 C.A.3d 1148, 1152, 214 C.R. 773 [insurer's investigators engaged in commonplace surveillance; *Unruh* was inapplicable]; *Stoddard v. Western Employers Ins. Co.* (1988) 200 C.A.3d 165, 170, 171, 245 C.R. 820, supra, §31 [discussing *Unruh* and criticizing refusal to extend its holding to cover outrageous conduct].)

The *Unruh* court, dealing with an insurer, did not consider the question whether the holding might apply to a self-insured employer. In *Gallo Glass Co. v. Superior Court* (1983) 148 C.A.3d 485, 196 C.R. 23, the court held that it does not. (a) The dual capacity doctrine (supra, §§62, 63) is inapplicable; a self-insured employer necessarily acts in the capacity of an employer. (148 C.A.3d 489, citing *Williams v. International Paper Co.* (1982) 129 C.A.3d 810, 815, 181 C.R. 342.) (b) *Lab.C.* 3211, defining "insurer" to include a self-insured employer, merely makes legislation regarding insurers applicable to self-insured employers; it does not make *Lab.C.* 3600 and 3601, granting immunity from tort actions, inapplicable to them. (148 C.A.3d 489.) (c) This holding does not deny equal protection: "It is rational to grant employers, who must directly or indirectly pay the cost of workers' compensation, greater immunity from civil liability

than insurers, who act voluntarily for profit." (148 C.A.3d 489.)

In *Chase Chemical Co. v. Hartford Acc. & Indem. Co.* (1984) 159 C.A.3d 229, 205 C.R. 469, plaintiffs B and S brought a negligence and products liability action against third-party tortfeasors U and C for personal injuries sustained while using a machine. C filed a cross-complaint for indemnity and offset of workers' compensation benefits against D, plaintiffs' employer, and H, D's workers' compensation insurer. The trial court sustained H's demurrer on the ground that C could not sue the employer directly without a written agreement to indemnify (*Lab.C. 3864*), and therefore it could not sue the employer's insurer. *Held*, reversed.

Under *Unruh v. Truck Ins. Exchange*, "an insurer who, with a duty to disclose, fraudulently conceals from an employee the existence of an injury and its cause forfeits its 'alter ego' status and may be sued at law by that employee or by a third party defendant because 'such conduct goes beyond the normal role of an insurer in a compensation scheme intended to protect the worker.' " Moreover, "a third party may bring an action for comparative indemnity against such insurer in the absence of a written indemnity agreement since section 3864 would not shield that insurer who steps outside its statutorily protected employer status by such conduct." (159 C.A.3d 239.)

Claims for malicious prosecution also may be pursued. In *Mosby v. Liberty Mut. Ins. Co.* (2003) 110 C.A.4th 995, 2 C.R.3d 286, employee M sought workers' compensation benefits when merchandise he was moving with a forklift fell and struck him, causing neck and back injury. The insurer, L, initiated an investigation, and eventually presented a case for fraud to the district attorney, who issued a complaint on which M was arrested. The charges were later dismissed, and M and his wife brought an action for malicious prosecution against the employer and L. The trial court sustained defendants' demurrers on the ground that the exclusivity provisions of the Workers' Compensation Act precluded both actions. *Held*, affirmed as to the employer, and reversed as to L. A malicious prosecution action seeks to vindicate an interest in being free from unjustifiable and unreasonable litigation, an interest that is distinct from those interests protected in the workers' compensation bargain. Moreover, "the alleged acts or motives in the malicious prosecution action here can hardly be said to be encompassed within the risks of the compensation bargain. Reporting alleged workers' compensation fraud is not an activity at all intrinsic to the claims handling process." (110 C.A.4th 1004; following *Unruh*, and *Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 C.4th 800, 102 C.R.2d 562, 14 P.3d 234, *infra*, §106.)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS

D. Other Permissible Actions.

3. Cartwright Act, RICO, Tortious Interference, and Unfair Competition Claims.

2 Witkin Sum. Cal. Law Work Comp § 106

[§ 106] Cartwright Act, RICO, Tortious Interference, and Unfair Competition Claims.

In *Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 C.4th 800, 102 C.R.2d 562, 14 P.3d 234, a group of medical providers sued a group of workers' compensation insurers alleging that defendants conspired to put plaintiffs out of business by intentionally mishandling lien claims before the Board. Plaintiffs sought only to recover the damage to their businesses, and alleged causes of action for abuse of process, fraud, violations of the Cartwright Act (B. & P.C. 16700 et seq.) and Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C., §1962(c)), as well as claims for tortious interference and unfair competition. The trial court sustained defendants' demurrers on the ground that the essence of the complaints involved delay or refusal to pay medical liens and that Board jurisdiction was exclusive. *Held*, abuse of process and fraud claims were barred on exclusivity grounds, but the Cartwright Act and RICO claims were not; tortious interference and unlawful competition claims were not barred to the extent they were predicated on defendants' conspiratorial acts.

(a) *Plaintiffs' injury*. Claims for injuries that are collateral to or derivative of a compensable workplace injury are generally subject to the workers' compensation exclusivity rule. Here, plaintiffs sought recovery of economic damages to their businesses resulting from the mishandling of their lien claims to recover compensation for medical services provided to injured workers. Thus, the injury underlying all of plaintiffs' causes of action was collateral to or derivative of a compensable workplace injury and falls within the scope of the exclusivity rule. (24 C.4th 812.)

(b) *Unruh exception*. The exclusivity rule does not bar certain causes of action that fit within the narrow exception established in *Unruh v. Truck Ins. Exchange* (1972) 7 C.3d 616, 102 C.R. 815, 498 P.2d 1063, *supra*, §105. The exception focuses on the acts or motives underlying the cause of action and considers whether these factors constitute a risk reasonably encompassed within the compensation bargain. If they do not, the exclusivity rule does not govern because the malfeasor is no longer acting as an employer as understood under the exclusivity provisions. The critical issue is whether the act can ever be viewed as a normal aspect of the employer relationship or claims process. As to motive, the exception is limited to cases where the conduct violates public policy, thus falling outside the compensation bargain. (24 C.4th 819.)

(c) *Abuse of process and fraud claims*. Plaintiffs' abuse of process and fraud claims alleged a pattern or practice of delaying or denying payments in bad faith. For abuse of process, plaintiffs alleged that defendants misused the claims process by making frivolous objections, filing sham petitions and documents, issuing unnecessary subpoenas, and

improperly threatening to depose plaintiffs' physicians. Similarly, the fraud claim alleged that defendants made false statements in processing plaintiffs' lien claims. However, these alleged acts are closely connected to a normal insurer activity, i.e., the processing and payment of medical lien claims, and were therefore encompassed within the compensation bargain and barred by the exclusivity rule. (24 C.4th 823.)

(d) *Cartwright and RICO claims.* Acts that give rise to a Cartwright claim involve unlawful trusts. Plaintiffs alleged that defendants combined capital, skill, and acts to drive plaintiffs out of business and as part of this effort, not only mishandled lien claims filed against each defendant, but exerted a concerted effort to interject themselves into lien claims they did not insure by encouraging other insurers to deny claims, distributed hit lists of medical providers, and exchanged delay strategies. By thus conspiring to influence the processing of uninsured claims, each defendant stepped outside its proper role as an insurer and lost the protection of the exclusivity rule. Moreover, the necessary motive element in a Cartwright action (i.e., to restrain trade) violates a fundamental public policy and is thus not encompassed in the compensation bargain. Therefore, the Cartwright claims were not barred. (24 C.4th 825.) Similarly, the pattern of racketeering activity necessary to establish a RICO enterprise always falls outside the scope of the compensation bargain and is exempt from the exclusivity bar. Plaintiffs alleged that defendants conducted or conspired to conduct various enterprises through numerous acts of mail and wire fraud, acts that form a pattern of racketeering activity that by definition cannot be closely connected to a normal insurer activity. (24 C.4th 826.)

(e) *Tortious interference and unlawful competition.* Neither tortious interference nor unlawful competition law requires a motive that violates a fundamental public policy. Tortious interference requires only wrongful interference, and unlawful competition focuses solely on conduct and prohibits business practices forbidden by law. Thus, these claims escape the exclusivity rule only if the underlying acts fall outside the compensation bargain. To the extent these acts involved individual acts of a defendant that established a pattern or practice of mishandling plaintiffs' lien claims, the claims were barred by the exclusivity rule. Where the acts furthered a conspiracy among defendants to mishandle the lien claims, the claims were not barred. (24 C.4th 827.)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
D. Other Permissible Actions.
4. Other Actions Outside Act.

2 Witkin Sum. Cal. Law Work Comp § 107

[§ 107] Other Actions Outside Act.

(1) *Physician's Action for Fee.* Although the Workers' Compensation Act requires that the employer furnish medical attention, the employee may refuse it and contract independently with a physician at the employee's expense. (*Lab.C. 4605.*) If so, the physician is not required to proceed before the Board, but may sue on the contract. (*Credit Bureau of San Diego v. Johnson* (1943) 61 C.A.2d Supp. 834, 841, 142 P.2d 963; see *infra*, §350.)

(2) *Action by Insurer Against Other Insurer.* Where there is dual employment, the Board may make and enforce an award of compensation to an employee against the insurers of the general and the special employer (see *infra*, §161 et seq.), but thereafter the two insurers may litigate their respective rights of contribution and reimbursement. (See *State Comp. Ins. Fund v. Industrial Acc. Com.* (1942) 20 C.2d 264, 271, 125 P.2d 42.) However, the Board also has jurisdiction to make the apportionment. (See *infra*, §167.)

(3) *Employee's Action Against Owner of Employer's Car.* In *Baugh v. Rogers* (1944) 24 C.2d 200, 148 P.2d 633, plaintiff, an employee of defendant R, was struck by an automobile negligently driven by the employer, but owned by defendant W. *Held*, while plaintiff's sole remedy against R was for compensation under the Act, she could recover damages from the owner of the car under the driving with permission law (see 6 *Summary* (10th), *Torts*, §1260 et seq.). Because the exclusive remedy provision does not exclude actions against *third persons*, the owner of the car could be sued, despite the fact that the owner could later *recoup* from the negligent driver (the employer) the amount of a judgment (see 6 *Summary* (10th), *Torts*, §1270). (24 C.2d 207.)

(4) *Tortfeasor's Contract Action Against Employer.* *Baugh v. Rogers, supra*, makes it clear that, although the employee cannot sue the employer directly, the Act does not preclude indirect liability of the employer in damages on some other recognized legal basis. *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.* (1958) 162 C.A.2d 434, 328 P.2d 785, is to the same effect. D, an employee of defendant, was injured while washing a school window. After defendant's insurer paid compensation, D and the insurer sued the school district as a third-party tortfeasor for negligent failure to provide a safe place to work, and recovered judgments satisfied for \$ 25,000. In this present action, the school district sought to recover the \$ 25,000 and costs from defendant employer, on the theory that the latter had breached its contract with the district to provide adequate safety equipment. *Held*, the theory was sound, and judgment of nonsuit was reversed. In *Baugh*, a statute created the liability; here, the liability arose under the contract, which, either expressly or by implication, included an agreement to indemnify. (162 C.A.2d 440.) The court

found support in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.* (1956) 350 U.S. 124, 76 S.Ct. 232, 234, 100 L.Ed. 133, 139, reaching a similar result under the federal Longshoremen's Compensation Act: "The rationale of the majority opinion is that the Compensation Act provides the exclusive remedy of the employee against his employer, but in no way affects the rights of third persons against the employer." (162 C.A.2d 442.) (See *Herman Christensen & Sons v. Paris Plastering Co.* (1976) 61 C.A.3d 237, 245, 132 C.R. 86 [indemnity agreement between contractor and subcontractor was enforceable under *Lab.C. 3864*]; *Gonzales v. R.J. Novick Const. Co.* (1978) 20 C.3d 798, 809, 144 C.R. 408, 575 P.2d 1190 [same].)

(5) *Action Under Fair Employment and Housing Act.* "Prohibited racial and age discrimination are against the law and policy of this state. Such discrimination is not a normal incident of employment, no less for an employee of the state than for the one employed in the private sector." (*Watson v. Department of Rehabilitation* (1989) 212 C.A.3d 1271, 1286, 1287, 261 C.R. 204 [following *Jones v. Los Angeles Community College Dist.* (1988) 198 C.A.3d 794, 244 C.R. 37, supra, §46]; *Meninga v. Raley's* (1989) 216 C.A.3d 79, 84, 90, 264 C.R. 319; *Goldman v. Wilsey Foods* (1989) 216 C.A.3d 1085, 1096, 265 C.R. 294.)

(6) *Arbitration of Claims Under Collective Bargaining Agreement.* In *Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Trans. Authority* (2003) 107 C.A.4th 673, 132 C.R.2d 207, after surgery for an industrial injury involving loss of strength in her grip, a fully recovered employee sought return to her job as a mechanic. The agreed medical examiner suggested, as a prophylactic restriction, a modified position. The employer refused to provide a modified position, and the union filed a grievance alleging employer bad faith in failing to return the employee to work, and a discrimination claim under *Lab.C. 132a*. The trial court denied the union's petition to compel arbitration, relying on the exclusivity of workers' compensation. *Held*, reversed, and parties ordered to arbitrate.

(a) Because the union's petition for arbitration sought enforcement of the grievance procedures contained in the collective bargaining agreement, it was akin to a suit in equity to compel specific performance. The exclusivity provisions apply only to actions for damages. (107 C.A.4th 682.)

(b) Although the *Lab.C. 132a* claim was ultimately settled in the employee's favor, these claims are not subject to the exclusive remedy rule. Thus, "independent of any other reasons," because the grievance originally included the *Lab.C. 132a* claim, it was not subject to the exclusivity rule. (107 C.A.4th 683.)

(c) The claim did not attempt to arbitrate pending injury compensation issues. The employee sought her salary for the period in which she was able to work but was denied the right to do so as guaranteed under the collective bargaining agreement. The grievance also demanded that the employee be returned to work, a remedy unavailable in this workers' compensation context, thus further undermining application of the exclusive remedy rule. (107 C.A.4th 683, 684.)

SUPPLEMENT: [This section is current through the latest supplement]



108 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
III. EXCEPTIONS, DISTINCTIONS, AND PERMISSIBLE ACTIONS
E. Binding Determination of Jurisdiction.

2 *Witkin Sum. Cal. Law Work Comp* § 108

[§ 108] Binding Determination of Jurisdiction.

If a claimant proceeds before the Board and receives an award or approval of a compromise, this is necessarily a determination of the jurisdictional facts (included employment, course of employment, and injury arising out of employment), which is *res judicata* and a bar to a subsequent action in the superior court asserting a cause of action outside the Act. (*Carter v. Superior Court* (1956) 142 C.A.2d 350, 356, 298 P.2d 598; *Jones v. Brown* (1970) 13 C.A.3d 513, 521, 89 C.R. 651.)

A difficult problem arises where the *employee* files a tort action asserting inapplicability of the Act, and the *employer* contemporaneously seeks an adjustment of claim before the Board (see *infra*, §349 et seq.), asserting applicability. If both tribunals were allowed to proceed, there might be conflicting determinations of jurisdiction resulting in a tort judgment plus a compensation award or neither a judgment nor an award. These results would not only be unjust, but would violate the basic concept that the jurisdiction of the Board, when it exists, is exclusive. The problem was given careful consideration by the Supreme Court, and was resolved in accordance with the principles of priority of jurisdiction and jurisdiction to determine jurisdiction (see 2 *Cal. Proc.* (4th), *Jurisdiction*, §§330, 413).

Under these principles, the first tribunal in which a proceeding is filed has exclusive prior jurisdiction to determine whether it has jurisdiction over the cause; until it makes that determination no other tribunal can act to determine jurisdiction or to decide the merits of the claim. Hence: (1) If the personal injury action is first filed, the court has jurisdiction to determine whether there is a tort cause of action, and until its determination is made (and in the event of an appeal, has become final), the Board cannot proceed. (*Scott v. Industrial Acc. Com.* (1956) 46 C.2d 76, 81, 293 P.2d 18.) (2) If the claim is first filed with the Board, the court cannot try the tort action until there has been a final determination of the jurisdictional issue by the Board. (*Taylor v. Superior Court* (1956) 47 C.2d 148, 301 P.2d 866; see *Azevedo v. Industrial Acc. Com.* (1966) 243 C.A.2d 370, 372, 52 C.R. 283 [Board had exclusive jurisdiction]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §§424, 425; cf. *Busick v. Work. Comp. App. Bd.* (1972) 7 C.3d 967, 977, 104 C.R. 42, 500 P.2d 1386, *infra*, §415 [where application was first made to Board, but no objection was made to superior court jurisdiction over subsequent tort action, superior court's judgment was binding under rule of first final judgment (7 *Cal. Proc.* (4th), *Judgment*, §309)].)

In *Aetna Cas. & Surety Co. v. Aceves* (1991) 233 C.A.3d 544, 284 C.R. 477, plaintiff insurer filed an action for declaratory relief, seeking a determination that it did not provide workers' compensation coverage to defendant's employer for injuries defendant suffered in the course and scope of his employment. Defendant contended that the

Board, not the trial court, had exclusive jurisdiction to determine the insurer's liability. *Held*, the trial court had jurisdiction over the action for declaratory relief under *Scott v. Industrial Acc. Com.*, *supra*.

SUPPLEMENT: [This section is current through the latest supplement]

Cross-References: 2 *Cal. Proc.* (5th), *Jurisdiction*, §§339, 427; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§438, 439; 7 *Cal. Proc.* (5th), *Judgment*, §366.



109 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
A. General Principles.
1. Constitutional Due Process.

2 Witkin Sum. Cal. Law Work Comp § 109

[§ 109] Constitutional Due Process.

The Conflicts Restatement sets forth the circumstances under which a state may apply its workers' compensation statute to an industrial injury and make an award against an employer, consistently with the requirements of due process, as follows:

(1) The employee was injured in the state; otherwise the state might be required to care for the employee. (*Rest.2d, Conflict of Laws §181(a).*)

(2) The employment was principally located in the state; i.e., it is the state where the employee spends the most time on the job. (*Rest.2d, Conflict of Laws §181(b).*)

(3) The employer supervised the work from a place of business in the state. (*Rest.2d, Conflict of Laws §181(c).*)

(4) The state is the one that has the most significant relationship to the contract of employment with respect to the issue of workers' compensation. (*Rest.2d, Conflict of Laws §181(d)*; see *Rest.2d, Conflict of Laws §§187, 188, 196*; 1 *Summary* (10th), *Contracts*, §61.)

(5) The parties have agreed that their rights should be determined under the law of that state. (*Rest.2d, Conflict of Laws §181(e).*)

(6) The state "has some other reasonable relationship to the occurrence, the parties and the employment." (*Rest.2d, Conflict of Laws §181(f).*) This catch-all provision may, for example, justify application of the law of the state of the employer's principal place of business, on the theory that the cost of industrial accidents will be paid by the business as part of the cost of production. Also, the state of an employee's domicile might conceivably have jurisdiction to award relief under its law. (*Rest.2d, Conflict of Laws §181, Comment a.*)

Within these constitutional limitations the states have, by statute and judicial decision, applied their workers' compensation laws in a number of situations involving elements of extraterritoriality. (See *infra*, §111 et seq.; *Rest.2d, Conflict of Laws §181, Reporter's Note.*)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
A. General Principles.
2. When Tort Remedy Is Precluded.

2 Witkin Sum. Cal. Law Work Comp § 110

[§ 110] When Tort Remedy Is Precluded.

Constitutional due process does not compel a state to deny an action for personal injuries or wrongful death even though the employer is declared immune from tort liability by the workers' compensation law of another state. The forum state may have a sufficient relationship to apply its own tort law. (*Rest.2d, Conflict of Laws §183*, and Comment c.)

However, recognized principles of conflict of laws call for rejection of the action: It is unfair to the employer who provides workers' compensation insurance under a state statute that provides immunity from tort liability, and it would defeat the objectives of workers' compensation laws. (*Rest.2d, Conflict of Laws §184*, Comment b.) Accordingly, an insured employer who has been given immunity by the state statute requiring the insurance cannot be sued in tort under the following circumstances:

(1) The plaintiff (employee) has obtained an award for the injury. (*Rest.2d, Conflict of Laws §184(a)*.)

(2) The plaintiff could obtain an award for the injury, if the state giving the employer immunity is the state where (a) the injury occurred, (b) the employment was principally located, or (c) the employer supervised the employee's activities from a place of business in the state, or (d) the law governs the employment contract. (*Rest.2d, Conflict of Laws §184(b)*.)

The law of the state in which a compensation award is made determines the interest of the employer in reimbursement from a recovery in an action against a third-party tortfeasor. (*Rest.2d, Conflict of Laws §185*.)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
B. Employment Contract in California, Injury Outside.
1. Rights of Employees.
a. Development of Rule.

2 Witkin Sum. Cal. Law Work Comp § 111

[§ 111] Development of Rule.

Lab.C. 5305 has long provided that the Act applies to injuries or death occurring outside California when the contract of employment is made in California. Although in terms confined to residents, i.e., persons domiciled within California, the benefits of the statute were extended by judicial decision to nonresident citizens and nonresident aliens, in order to comply with the privileges and immunities and equal protection clauses of the federal Constitution. (*Quong Ham Wah Co. v. Industrial Acc. Com. of Calif.* (1920) 184 C. 26, 39, 192 P. 1021; *Alaska Packers' Assn. v. Industrial Acc. Com. of Calif.* (1934) 1 C.2d 250, 255, 34 P.2d 716; see C.E.B., 1 Workers' Compensation Practice 4th, §2.89 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Worker's Compensation* §29; 7 *Summary* (10th), *Constitutional Law*, §§609, 610.)

In *Alaska Packers' Assn.*, a number of itinerant laborers were hired in California and taken to Alaska where the injury occurred. *Held*, either the Alaska or the California statute could apply, and an attempt by contract to confine the employee to the remedy under the Alaska statute was invalid. (1 C.2d 255.) (See *Rest.2d.*, *Conflict of Laws* §§181, 182.)

In *Benguet Consol. Mining Co. v. Industrial Acc. Com.* (1939) 36 C.A.2d 158, 97 P.2d 267, the employee entered into a 2-year contract, with a 1-year extension provision, to work in the Philippines. He continued at work after the third year pursuant to an oral understanding that the same employment terms would continue, and was subsequently injured. The employer contended that a new contract was made in the Philippines. *Held*, the evidence, properly interpreted, showed an *extension* of the original contract rather than a new contract, and the California Commission had jurisdiction. (36 C.A.2d 166.)

In 1955, the expanded rule of the *Wuon Ham Wah Co.* case was codified. An employee hired or regularly employed in California and injured by an accident arising out of and in the course of employment outside of California is entitled to compensation according to California law. (*Lab.C.* 3600.5(a).)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
B. Employment Contract in California, Injury Outside.
1. Rights of Employees.
b. Making of Contract in California.
1. Earlier Decisions.

2 Witkin Sum. Cal. Law Work Comp § 112

[§ 112] Earlier Decisions.

In *Commercial Cas. Ins. Co. of Newark, New Jersey v. Industrial Acc. Com.* (1952) 110 C.A.2d 83, 242 P.2d 13, the employee was a resident of Georgia who was never physically in California, and the contract was made with a California employer for work in Saudi Arabia. However, the contract provided that compensation should be paid pursuant to the California Act. *Held*, this latter provision permitted the inference that the contract was made in California, and gave the Commission jurisdiction; lack of physical presence of the employee at the time of signing was no more of an objection than nonresidence. (110 C.A.2d 88.)

In *Chicago Bridge & Iron Co. v. Industrial Acc. Com.* (1964) 226 C.A.2d 309, 38 C.R. 57, the employer had a contract with the Boilermakers' Union, covering work in California and other states. The employer's agent made an agreement in California with the union's business agent to employ C for work in Nevada, where the injury occurred. *Held*, the California Commission had jurisdiction. The fact that C had to obtain a security clearance before he could commence work did not prevent formation of the contract here. (226 C.A.2d 317.)

Reynolds Elec. & Engineering Co. v. Work. Comp. App. Bd. (1966) 65 C.2d 429, 55 C.R. 248, 421 P.2d 96, gave Lab.C. 5305 a more extended consideration and an extremely liberal application. R, a foreign corporation qualified to do business in California, had a job in Nevada. Under its collective bargaining agreement with the Los Angeles Iron Workers Union it had to obtain employees from the union hiring hall; and, if the job was located more than 35 miles from Los Angeles, the worker was to be paid regular time while traveling to the job site, in addition to transportation and subsistence. E, a California resident and member of the union, was dispatched to the Nevada job. He filled out forms on arrival, went to work, and received his pay, travel allowance, and subsistence. Thereafter he was injured. He declined an award tendered by the Nevada Industrial Commission, filed an application in California, and received an award. *Held*, affirmed; the contract of hire was made in California.

(a) *The offer was made in California.* The employee was a third-party beneficiary of the collective bargaining agreement (see 1 Summary (10th), Contracts, §702). Under its provisions, the union acted as R's agent in transmitting employment offers to members--R had to give preference to men dispatched, and the union imposed sanctions on men who refused to go. (65 C.2d 433.)

(b) *The offer was accepted in California.* E, in receiving and acting on his referral slip, immediately became entitled to regular pay. Employment may not necessarily commence on payment of mere travel expense, but it does on payment of regular wages. (65 C.2d 433, 437.)

(c) *Security clearance was not condition precedent.* On E's arrival he was compelled to spend 6 hours filling out forms for a security clearance from the Atomic Energy Commission, without which he couldn't legally hold his job. But he did in fact start to work, and the Commission properly determined that the contingency of refusal of a security clearance was only a condition subsequent, which would merely terminate an employment already begun. (65 C.2d 434.)

The same liberal approach was taken in *Travelers Ins. Co. v. Work. Comp. App. Bd.* (1967) 68 C.2d 7, 64 C.R. 440, 434 P.2d 992. Core Corp. was engaged in drilling for oil. It had its headquarters in California and operated in several states, including Wyoming and Utah. Employee C was a California resident but was injured while working for Core in Utah. C obtained benefits under Utah's compensation law, then applied for and received larger benefits under the California statute. *Held*, award affirmed.

(a) The employment contract was made in California when C accepted an offer transmitted by the employer's agent over the telephone. (68 C.2d 15.)

(b) California has a stronger interest in applying its own law to workers' compensation benefits than to contract or tort issues. The subject is governed by a protective legislative scheme, and there is a possibility of an economic burden on the state in the event of no coverage. Hence, even if the employee is able to obtain benefits under another state's law, California is interested in the maximum coverage afforded by *California law*. (68 C.2d 12.) (See *Rest.2d, Conflict of Laws* §182 [effect of two states' statutes governing injury].)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION

B. Employment Contract in California, Injury Outside.

1. Rights of Employees.

b. Making of Contract in California.

2. Later Decisions.

2 Witkin Sum. Cal. Law Work Comp § 113

[§ 113] Later Decisions.

Bundsen v. Work. Comp. App. Bd. (1983) 147 C.A.3d 106, 195 C.R. 10, upheld California jurisdiction where there was no direct evidence about where an offer, if made, was accepted. B, a professional musician and California resident, contracted for a 2-week engagement in a Colorado hotel. The agreement was reached in a series of telephone calls between B and R, the manager of the hotel. B was killed in an automobile accident in Colorado on his way to perform, and his survivors sought death benefits. R could not be found to testify, and the workers' compensation judge concluded that the jurisdictional fact of a contract made in California was not established. The Board agreed and dismissed the proceeding. *Held*, decision annulled.

(a) The evidence showed, and the Board apparently found, that a contract was made. (*147 C.A.3d 109.*) *Reynolds Elec. & Engineering Co. v. Work. Comp. App. Bd. (1966) 65 C.2d 429, 55 C.R. 248, 421 P.2d 96*, and *Travelers Ins. Co. v. Work. Comp. App. Bd. (1967) 68 C.2d 7, 64 C.R. 440, 434 P.2d 992*, supra, §112, relied on the contract rule that a contract consummated by telephone is deemed made where the offeree utters the words of acceptance. However, under modern contract law, it is not essential that there be an actual offer and acceptance. (*147 C.A.3d 110.*) Here, because of the unavailability of the parties, neither the offer and acceptance nor the moment of formation could be determined. To apply the *Travelers Ins. Co.* rule would not only contradict the basic principles of contract law but would frustrate the policy of liberal construction of the Workers' Compensation Act (*Lab.C. 3202*). (*147 C.A.3d 110.*) Hence, "in a workers' compensation case involving injury suffered by a California resident while working outside the state, under a contract of hire made by telephone in which the offeree cannot be identified, such contract for hire is deemed to have been made in California if *one* of the parties to its formation was at that time located in California." (*147 C.A.3d 111.*)

(b) Two additional considerations call for upholding California jurisdiction: (1) The offeree was admittedly located either in California or Colorado; the liberal construction statute requires a finding that best effectuates the policies of the Act, i.e., in the employee's favor. (*147 C.A.3d 111.*) (2) Proof that a contract of hire arose raises an inference that it was the employer, the party of greater bargaining power, who dictated the terms of the offer. The basis for this inference is even more compelling where, as here, the employer fails to produce its own party to the telephone conversation. On this evidence, the fact finder must draw the inference that the employer extended the offer of employment which was

accepted in *California*. (147 C.A.3d 112.)

Ledbetter Erection Corp. v. Work. Comp. App. Bd. (1984) 156 C.A.3d 1097, 203 C.R. 396, distinguishes *Reynolds* and *Travelers*, *supra*. In those cases, there was no showing that the employee had accepted the employment offer before picking up his work referral at the union local. Here, the union referral was made at the union local in California for a job in Nevada. The union representative in California telephoned the offer of employment to the applicant in Nevada who accepted over the phone. *Held*, the contract of employment was made in Nevada, despite the fact that the employee had to come to the union office in California to pick up his work order. (156 C.A.3d 1105.)

In *Janzen v. Work. Comp. App. Bd.* (1997) 61 C.A.4th 109, 71 C.R.2d 260, petitioner sought death benefits when her father, a California resident, was killed in an airplane crash in Wyoming while crop dusting for a Wyoming employer. The employment agreement arose during a telephone conversation between the decedent in California and the employer in Wyoming. The Board upheld the portion of the workers' compensation judge's decision finding lack of subject matter jurisdiction, and denied reconsideration of that issue. *Held*, order annulled and remanded. The Board clearly had jurisdiction to award death benefits to petitioner. There was no question that decedent was employed by the Wyoming employer or that the death was an industrial accident. (61 C.A.4th 113.) *Lab.C.* 5305 (*supra*, §111) confers subject matter jurisdiction when, as here, the employee is a resident of California at the time of the injury and the employment contract was made in *California*. (61 C.A.4th 113, 117.)

In *Bowen v. Work. Comp. App. Bd.* (1999) 73 C.A.4th 15, 86 C.R.2d 95, petitioner, a California resident and minor league baseball player injured while playing baseball outside California, sought review of the Board's determination that it lacked jurisdiction over the claim because the contract for hire was not made in California. Petitioner had signed the contract in California after negotiations, and mailed it to Florida. It was then forwarded to the office of the baseball commissioner where it was, as required by the contract, approved and recorded. Contracts for subsequent years were similarly executed. Using common law contract principles, the Board concluded that there was no contract until approved by the commissioner. *Held*, Board's decision annulled. An employment contract was formed in California under *Lab.C.* 3600.5 and 5305 when petitioner signed it accepting the team's offer, and the commissioner's approval was merely a condition subsequent to employment. The Board erroneously relied on common law contract cases and failed to heed the mandate of *Lab.C.* 3202, that *Lab.C.* 3600.5 and 5305 be liberally construed with the purpose of extending their benefits for the protection of persons injured in the course of employment. Moreover, to permit the use of the clause requiring the baseball commissioner's approval to defeat an employee's claim for benefits would violate *Lab.C.* 5000, which prohibits contracts exempting employers from liability under the Act, and would frustrate California's interests in protecting employees hired in California and injured elsewhere. (73 C.A.4th 19.)

In *Tucci v. Club Mediterranee* (2001) 89 C.A.4th 180, 107 C.R.2d 401, plaintiff, a California resident, entered into an employment contract in California to work at the Club Med in the Dominican Republic, where she was injured. Defendant employer maintained workers' compensation insurance with a French insurer and had not secured a policy with an insurer in California. The French insurer paid \$ 110,000 in medical benefits but plaintiff rejected all additional benefits and filed a claim in California, simultaneously bringing a personal injury action against defendant seeking declaratory relief and damages for various claims including breach of California's statutory duty to carry workers' compensation insurance. The trial court granted defendant summary judgment on the ground that the law of the Dominican Republic governed and that law limited plaintiff's recovery to workers' compensation benefits and the Dominican Republic's social security system. *Held*, affirmed. Because plaintiff was a California resident who contracted in California for employment, there was no question that the Board had subject matter jurisdiction over plaintiff's benefit claim in California. However, *Lab.C.* 5305 is a jurisdictional statute involving the Board and the Workers' Compensation Act, and did not determine whether California law or the Dominican Republic's rule of decision governed the substantive issues in a common law action for damages. Under a governmental interest analysis to determine choice of law, both jurisdictions had legitimate interest in applying their laws, but the interests of the Dominican Republic would be more impaired if its laws were not applied. (89 C.A.4th 185, 188.)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
B. Employment Contract in California, Injury Outside.
2. Rights Between Insurers.

2 Witkin Sum. Cal. Law Work Comp § 114

[§ 114] Rights Between Insurers.

In *Travelers Ins. Co. v. Industrial Acc. Com.* (1966) 240 C.A.2d 804, 50 C.R. 114, the employee, hired in California by contract, was injured in Alaska. A Travelers policy covered claims under Alaska law, and a State Fund policy covered claims under California law. Travelers paid substantial sums under the Alaska law. Then the California Commission gave a joint and several award to the employee, and Travelers contended that it was entitled to a lien for its Alaska payments. Rejecting this contention, the court reasoned as follows:

(a) The Travelers policy, properly interpreted, provided coverage only under Alaska law; hence, the California award was improper as to *Travelers*. (240 C.A.2d 810.)

(b) To prevent double recovery by the employee, the *employer* was entitled to a *credit* against the California award of any sum paid under the *Alaska law* by *Travelers*. (240 C.A.2d 810.)

(c) Travelers was not entitled to a *lien* against the award; by the terms of its policy, it was legally liable for payments under Alaska law. In other words, because each insurer was severally liable under its policy, neither was entitled to contribution from the other by reason of moneys paid under its obligation. (240 C.A.2d 811.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
C. Injury in California, Employment Contract Outside.
1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 115

[§ 115] In General.

(1) *Full Faith and Credit*. Controversy surrounded state statutes providing that, where the employment contract is made within a state, that state has *exclusive jurisdiction* over the industrial injury, even though the accident occurs *outside the state*. In *Bradford Elec. Light Co. v. Clapper* (1932) 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026, the court held that the issue involved was not merely one of conflict of laws, but of constitutional law, and that the state where the accident occurred could not take jurisdiction because this would deny full faith and credit to the statute of the state where the contract was made. The court conceded, however, that exceptions to the rule might arise where the injured employee was a resident of the state where the accident occurred, or was continuously employed there, or left dependents there. (52 S.Ct. 572, 76 L.Ed. 1030.)

(2) *Exceptions and Distinctions*. In *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1938) 10 C.2d 567, 75 P.2d 1058, T, a resident of Massachusetts, was hired there by a Massachusetts corporation, and was injured in California on a special business trip. *Held*, the California Commission could take jurisdiction. (a) The conflict is to be resolved by appraising the governmental interests of each jurisdiction. Hence, the employee cannot recover compensation in California unless this state has a governmental interest in the controversy superior to that of Massachusetts. (b) California's Constitution, statute, and decisions indicate that the effective administration of workers' compensation requires that payment of expenses of *medical care* be assured; hence, a governmental interest is found in the fact that there are unpaid medical and hospital expenses in this case, and no award can be made to the physician unless the employer and employee are parties to a proceeding before the Commission. (c) Having thus found an important policy of this state, the court said: "It would be obnoxious to that policy to deny persons who have been injured in this state the right to apply for compensation when to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons. Under these circumstances the governmental policy of California weighs more heavily in the scale of decision than the law of Massachusetts and the conflict in laws must be resolved in favor of the state where the injury occurred." (10 C.2d 578.) (On effect of prior compensation award outside state, see *Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 64 S.Ct. 208, 211, 88 L.Ed. 149, 151, *infra*, §117; 7 *Summary* (10th), *Constitutional Law*, §35.)

The *Clapper* doctrine was virtually abandoned by *Carroll v. Lanza* (1955) 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183. Employee C was a Missouri resident hired in Missouri; but the work was in Arkansas, and C was injured there by the negligence of a third-party tortfeasor. C received 34 weekly payments of compensation under the Missouri exclusive

act, although no final award was made. On discovering his right to sue a third party in tort under Arkansas law, C did so. *Held*, the action was maintainable. Although none of the special circumstances of the *Pacific Employers* case appeared (e.g., there was no local medical care), the court set forth the general principle that the state where the tort occurs has a sufficient interest in protecting the rights of the injured person. (75 S.Ct. 807, 99 L.Ed. 1188.)

Carroll v. Lanza thus rejects the Full Faith and Credit Clause as a bar, and allows the state where the injury occurred to take jurisdiction if it wishes. However, it is not compelled to do so; "Arkansas can adopt Missouri's policy if she likes." (75 S.Ct. 807, 99 L.Ed. 1189.) (See *Rest.2d, Conflict of Laws* §183; *Collins v. American Buslines* (1956) 350 U.S. 528, 76 S.Ct. 582, 100 L.Ed. 672 [California hired bus driver injured in Arizona; either state may apply its act].)

Another unclear contribution to this area of law was made by *Crider v. Zurich Ins. Co.* (1965) 380 U.S. 39, 85 S.Ct. 769, 13 L.Ed.2d 641. Petitioner worker was an Alabama resident injured in Alabama. His employer was a Georgia corporation, and petitioner was covered by the Georgia Workers' Compensation Act, which provided an exclusive remedy. However, petitioner sued in Alabama under the Georgia Act, got a default judgment, and sued on that judgment in federal district court. *Held*, the Alabama court had jurisdiction. *Bradford Elec. Light Co. v. Clapper* would have barred the suit, but its theory has been repudiated by the later cases. The state of residence has a large interest, and where the injury occurs there also, it has jurisdiction. (85 S.Ct. 770, 13 L.Ed.2d 643.)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
C. Injury in California, Employment Contract Outside.
2. California Reciprocal Act.

2 Witkin Sum. Cal. Law Work Comp § 116

[§ 116] California Reciprocal Act.

If the injury occurs in California, California may apply its law even though the contract was made elsewhere and the employee is here only temporarily. (See *supra*, §115.) California, however, has elected to defer to the state of employment if the employee is adequately protected and if the other state has a similar reciprocal act. Thus, an employee who has been hired outside of California, and the employer, are exempt from California's Act while the employee is working temporarily in California. The workers' compensation benefits under the Workers' Compensation Act or similar laws of the other state, or other associated remedies, "shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer" in California. (*Lab.C. 3600.5(b).*)

The application of *Lab.C. 3600.5(b)* is subject to two provisos: (1) The employer must furnish insurance covering the employee while in California. (2) The extraterritorial provisions must be recognized in the other state, and employers and employees covered in California must be similarly exempted from the law of the other state. A certificate from an authorized officer of the other state's commission is *prima facie* evidence that these conditions exist. (*Lab.C. 3600.5(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



117 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IV. CONFLICT OF LAWS: EXTRATERRITORIAL OPERATION
D. Awards Under Statutes of Two States.

2 *Witkin Sum. Cal. Law Work Comp* § 117

[§ 117] Awards Under Statutes of Two States.

In *Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149, 7 Summary (10th), *Constitutional Law*, §35, a final workers' compensation award of one state was held to bar an additional award in the second state for the same injury. Although the principles of res judicata and full faith and credit set forth in this decision control, the result may be avoided by the form of the statute, or of the award, of the first state. (64 S.Ct. 210, 88 L.Ed. 151.)

In *Industrial Com. of Wisconsin v. McCartin* (1947) 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140, K was employed by a contract made in Illinois, and suffered an industrial injury while at work in Wisconsin. He applied for an award in both states. The Illinois commission made the first award, pursuant to an agreement with the employer expressly reserving any rights K might have under Wisconsin law. Then the Wisconsin commission made a larger award with credit for the amount paid in Illinois. *Held*, the Wisconsin award was valid. (a) If the Illinois award were *intended* to be final and conclusive of all the employee's rights, the *Magnolia* case would be controlling. (b) But the Illinois *statute*, making the remedy exclusive, should be construed to relate only to proceedings in Illinois and not to preclude recovery in another state; and the Illinois *agreement*, which, by approval of the commission became a part of the *award*, expressly reserved the right. This reservation "spells out what we believe to be implicit in that Act--namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state." (67 S.Ct. 890, 91 L.Ed. 1145.) Although the factual situation in this case was peculiarly favorable to the employee, the broad language of the court would seem to allow an award by a second state in cases except where the statute or award of the first state must be interpreted as expressly precluding the second award. (See *Rest.2d, Conflict of Laws* §182; cf. *Carroll v. Lanza* (1955) 349 U.S. 408, 75 S.Ct. 804, 806, 99 L.Ed. 1183, 1187, *supra*, §115 [distinguishing *Magnolia* case on ground that payments started automatically on notice of injury and no final award was made].)

It has generally been accepted as a controlling limitation on the right to receive compensation from two sources, either in the same state or in different states, that the smaller must be credited on the larger in order to avoid double recovery. (See *Rest.2d, Conflict of Laws* §182.) This theory was applied in *Industrial Indem. Exchange v. Industrial Acc. Com.* (1947) 80 C.A.2d 480, 182 P.2d 309, where the employment was in California and the injury occurred in Utah. A Utah insurance company accepted liability and paid \$ 16 per week without a formal award, following which the California commission awarded \$ 30 per week without credit for the Utah payments. *Held*, award annulled with directions to give the employer a credit. (80 C.A.2d 484.) (See 8 A.L.R.2d 628 [voluntary payment under statute of one

state as bar to claim or ground for reduction of claim under statute of another state].)

In *Thomas v. Washington Gas Light Co.* (1980) 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757, the court, in a plurality opinion of four justices, reexamined the holdings of *Magnolia* and *McCartin*, took note of criticisms of *Magnolia* (100 S.Ct. 2655, 2657, 65 L.Ed.2d 766, 768), pointed out inconsistencies between the two cases, and came to the following conclusion: "We therefore would hold that a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards." Accordingly, *Magnolia Petroleum Co. v. Hunt* was overruled. (100 S.Ct. 2663, 65 L.Ed.2d 776.)

Three concurring justices took the position that *Magnolia*, as limited by *McCartin*, was controlling, and that neither should be overruled. (100 S.Ct. 2665, 65 L.Ed.2d 778.)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

A. Interstate Commerce: Federal Employers' Liability Act.
1. In General.

2 Witkin Sum. Cal. Law Work Comp § 118

[§ 118] In General.

Where the employment is by a common carrier engaged in interstate or foreign commerce, state law does not apply (*Lab.C. 3203*), and the Federal Employers' Liability Act (FELA) provides an exclusive remedy in tort for negligence causing injury or death (*45 U.S.C., §51 et seq.*). Although the basic substantive rules are briefly considered here (see *infra*, §120 *et seq.*), the jurisdictional and procedural ramifications are beyond the scope of this work. (See generally *4 Hastings L. J. 23* [nature of liability and practice suggestions]; *69 Harv. L. Rev. 1441* [Supreme Court certiorari policy in cases arising under FELA]; *70 Harv. L. Rev. 438* [history and comparison of statutes and case law dealing with seamen, railroadmen, and longshoremen, with suggestions for unified system]; *25 San Diego L. Rev. 49* [evaluation of FELA]; *32B Am.Jur.2d* (1996 *ed.*), *Federal Employers' Liability and Compensation Acts* §5 *et seq.*; C.E.B., 1 Workers' Compensation Practice 4th, §1.77; 1 *Herlick 6th*, §13.03; 2 *Hanna 2d* (2004 *ed.*), §21.01 *et seq.*; 11 *Am.Jur. Trials, Litigation Under the Federal Employers' Liability Act* §1 *et seq.*; 11 *Am.Jur. P.P. Forms* (Rev. *ed.*), *Federal Employers' Liability and Compensation Acts*, Form 1 *et seq.*; 8 *Am.Jur. Legal Forms 2d*, §110:1 *et seq.*; *Cal. Civil Practice*, 1 Workers' Compensation, §1:22; *BAJI*, No. 11.00 *et seq.*; *CACI*, No. 2900 *et seq.*)

Case law on particular problems is extensive. (See *Jesionowski v. Boston & Maine R. Co.* (1947) 329 U.S. 452, 67 S.Ct. 401, 402, 91 L.Ed. 416, 419 [doctrine of *res ipsa loquitur*]; *Aguirre v. Southern Pac. Co.* (1965) 232 C.A.2d 636, 643, 43 C.R. 73 [refrigerating company that owns cars but does not operate railroad is not common carrier]; *Mangrum v. Union Pac. R. Co.* (1964) 230 C.A.2d 960, 970, 41 C.R. 536 [physician, under contract with railroad's hospital association, was carrier's agent on theories of nondelegable operational activity and financial benefit accruing from service]; *Still v. Norfolk & Western Ry. Co.* (1961) 368 U.S. 35, 82 S.Ct. 148, 7 L.Ed.2d 103 [fraud in obtaining employment]; *Kelley v. Southern Pac. Co.* (1974) 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 [what constitutes employment by railroad]; *Norfolk & Western Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 [instructing jury that award will not be subject to income taxes]; *Hilton v. South Carolina Public Ry. Com.* (1991) 502 U.S. 197, 112 S.Ct. 560, 563, 116 L.Ed.2d 560, 569 [state-owned railroad as within phrase "every common carrier by railroad"]; *Monarch v. Southern Pac. Trans. Co.* (1999) 70 C.A.4th 1197, 1204, 83 C.R.2d 247 [action under state law for fraudulent concealment was preempted by FELA]; 94 *A.L.R.2d* 910 [for whose benefit survival action may be prosecuted]; 96 *A.L.R.2d* 406 [person other than employee, riding on free pass, as entitled to benefits]; 96 *A.L.R.2d* 655 [restitution as condition for setting aside release]; 99 *A.L.R.2d* 176 [liability for injury or death to one other than employee, because of condition of freight car employee was loading or unloading]; 99 *A.L.R.2d* 1186 [injury inflicted

by third party's motor vehicle]; 6 *A.L.R.3d* 1307 [contribution or indemnity against joint tortfeasor as affected by employee's contributory negligence]; 16 *A.L.R.3d* 637 [tolling limitation period]; 19 *A.L.R.3d* 928 [railroad's right to contribution or indemnity from other tortfeasor].)

West's Key Number Digest, Workers' Compensation k.93, 94

SUPPLEMENT: [This section is current through the latest supplement]

See 11 Am.Jur. P.P. Forms (2007 ed.), Federal Employers' Liability and Compensation Acts, Form 4 et seq.; 8A Am.Jur. Legal Forms 2d (2007 ed.), §110.1 et seq.; 29 *A.L.R. Fed* 2d 1 [construction and application of Federal Liability and Compensation Act].



119 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

A. Interstate Commerce: Federal Employers' Liability Act.
2. Concurrent Jurisdiction of State and Federal Courts.

2 Witkin Sum. Cal. Law Work Comp § 119

[§ 119] Concurrent Jurisdiction of State and Federal Courts.

State and federal courts have concurrent jurisdiction over actions brought under FELA. (45 U.S.C., §56.) This concurrent jurisdiction, coupled with an extremely liberal venue provision, has given rise to much litigation over the proper application of the doctrine of *inconvenient forum*. (See 2 Cal. Proc. (4th), *Jurisdiction*, §§370, 371.) (For other state-federal procedural problems, see 79 A.L.R.2d 553 [applicability of state practice and procedure]; *Waller v. Southern Pac. Co.* (1967) 66 C.2d 201, 206, 57 C.R. 353, 424 P.2d 937 [federal cases govern nature and extent of review]; *South Buffalo Ry. Co. v. Ahern* (1953) 344 U.S. 367, 73 S.Ct. 340, 343, 97 L.Ed. 395, 402 [railroad's waiver of right to insist on exclusive federal remedy, by participating in state compensation proceedings].)

In *Morse v. Southern Pac. Trans. Co.* (1976) 63 C.A.3d 128, 133 C.R. 577, defendant sought to introduce evidence that plaintiff was receiving a disability pension under the Railroad Retirement Act, not to mitigate damages (inadmissible under collateral source rule; see 6 Summary (10th), *Torts*, §1631), but to show that plaintiff was malingering. *Eichel v. New York Cen. R. Co.* (1963) 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §161), had held that this type of evidence was not admissible, but defendant contended that admissibility of evidence is a "procedural" question on which California law controls. *Held*, despite the difficulty of distinguishing "substance" from "procedure," that area of state control in actions under federal statutes is extremely narrow, and the admissibility of evidence in FELA actions is governed by federal law. (63 C.A.3d 136, 137.)

However, although the general rule prohibits instructing the jury in state court actions under FELA that the injured employee is ineligible for state workers' compensation benefits or other collateral sources, in unusual cases where the probative value of the evidence outweighs its prejudicial effects, the trial court may so instruct. (*Lund v. San Joaquin Valley R.* (2003) 31 C.4th 1, 8, 11, 1 C.R.3d 412, 71 P.3d 770 [instruction was proper where employee's previous injury and application for workers' compensation benefits were significant issues at trial].)

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See *Miller v. Union Pac. R. Co.* (2007) 147 C.A.4th 451, 458, 53 C.R.3d 893 [federal law controls in actions brought in state court under FELA, which does not authorize award of expert witness fees; thus, prevailing plaintiff was not permitted to recover fees pursuant to C.C.P. 998 (costs following rejection of offer to compromise)].

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §§381, 382.



120 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

A. Interstate Commerce: Federal Employers' Liability Act.
3. Relation of Duties to Interstate Commerce.

2 Witkin Sum. Cal. Law Work Comp § 120

[§ 120] Relation of Duties to Interstate Commerce.

The employee need not be engaged directly in the movement of interstate traffic at the precise time of the accident. The Federal Employers' Liability Act (FELA) applies, and state compensation act jurisdiction is consequently excluded, if the carrier is engaged in interstate or foreign commerce, and any part of the employee's duties is in furtherance of that commerce, or closely and substantially affects it. (45 U.S.C., §51; see *Southern Pac. Co. v. Industrial Acc. Com.* (1942) 19 C.2d 271, 274, 120 P.2d 880 [car repairman, injured while repairing maintenance car used to clear tracks of obstacles]; *Lewis v. Industrial Acc. Com.* (1942) 19 C.2d 284, 285, 120 P.2d 886 [switchman not handling cars in interstate commerce at particular time]; *Southern Pac. Co. v. Industrial Acc. Com.* (1948) 88 C.A.2d 569, 571, 199 P.2d 364 [employee repairing gondola cars in company's shop]; *Ericksen v. Southern Pac. Co.* (1952) 39 C.2d 374, 378, 246 P.2d 642 [railroad lumber inspector inspecting railroad ties on lumber company premises]; *Gileo v. Southern Pac. Co.* (1955) 44 C.2d 539, 541, 282 P.2d 872 [railroad employee working on construction of new cars]; *Reed v. Pennsylvania R. Co.* (1956) 351 U.S. 502, 76 S.Ct. 958, 961, 100 L.Ed. 1366, 1373 [clerical employee of railroad filing tracings in office building]; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §13; 10 A.L.R.2d 1279 [who is employee in interstate commerce within FELA]; 61 A.L.R.2d 811 [liability of railroad company under Federal Employer's Liability Act for injury or death of employee resulting from its own activities in loading or unloading cars].)

The facts establishing course of employment (and liability) also establish jurisdiction. Thus, in *Northwestern Pac. R. Co. v. Industrial Acc. Com.* (1946) 73 C.A.2d 367, 166 P.2d 334, a railroad company furnished train crews transportation to and from work by taxicab, during hours when public transportation was unavailable. A brakeman was injured in a taxi taking him from his work. *Held*, the injury was in the course of his *interstate* employment, and consequently the California Commission had no jurisdiction. (73 C.A.2d 371.) (See *Temple v. Southern Pac. Trans. Co.* (1980) 105 C.A.3d 988, 992, 994, 164 C.R. 780 [employees, compulsorily standing by during layover period awaiting call to return to work, are acting within scope of employment].)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

A. Interstate Commerce: Federal Employers' Liability Act.
4. Liability Based on Negligence.

2 Witkin Sum. Cal. Law Work Comp § 121

[§ 121] Liability Based on Negligence.

(1) *In General*. The carrier is liable in damages for injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (45 U.S.C., §51.)

Under this language, liability is based on common law principles of negligence, and the issue is one of fact for the jury. Therefore, when the evidence is in substantial conflict it is improper to direct a verdict for the defendant. (*Wilkerson v. McCarthy* (1949) 336 U.S. 53, 69 S.Ct. 413, 416, 93 L.Ed. 497, 503; *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.* (1947) 333 U.S. 821, 68 S.Ct. 854, 92 L.Ed. 1108; see *Albert v. Southern Pac. Trans. Co.* (1994) 30 C.A.4th 529, 536, 35 C.R.2d 777 [heart attack suffered by employee with no history of heart trouble was not reasonably foreseeable; thus, negligence of employer was not established under FELA]; *Fontaine v. National R. Passenger Corp.* (1997) 54 C.A.4th 1519, 1525, 1526, 63 C.R.2d 644, *infra*, §124 [although liability under FELA is premised on railroad's negligence, Boiler Inspection Act (BIA), which supplements FELA, imposes absolute duty on carrier to maintain locomotive, and all its parts, in proper, safe condition; under plaintiff's strict liability theory, proof that violation of BIA contributed to plaintiff's injuries would establish liability under both BIA and FELA]; CACI, No. 2900 et seq.; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §25 et seq.)

Federal law governs what constitutes negligence; hence, a state safety order is inadmissible in evidence. (*Davee v. Southern Pac. Co.* (1962) 58 C.2d 572, 574, 25 C.R. 445, 375 P.2d 293.)

(2) *Proximate Cause*. Causation is also a jury question; and, under *Rogers v. Missouri Pac. R.* (1957) 352 U.S. 500, 77 S.Ct. 443, 449, 1 L.Ed.2d 493, 500, the issue is whether the employer's negligence "played any part, however small," in the injury or death. (See *Mortensen v. Southern Pac. Co.* (1966) 245 C.A.2d 241, 245, 53 C.R. 851; *Waller v. Southern Pac. Co.* (1967) 66 C.2d 201, 212, 57 C.R. 353, 424 P.2d 937; 98 A.L.R.2d 653 [tests of causation under FELA or Jones Act]; CACI, No. 2921.)

(3) *Working Conditions*. Liability may be imposed not only for active negligence of other employees, but, by a liberal interpretation of the statute, for failure of the defendant to provide a safe place for work. (See *Ericksen v. Southern Pac. Co.* (1952) 39 C.2d 374, 381, 246 P.2d 642 [no defense that plaintiff knew of danger and defendant did

not own premises]; *Carpenter v. Atchison, Topeka & Santa Fe Ry. Co.* (1952) 109 C.A.2d 18, 22, 240 P.2d 5 [highway crossing signals and warning devices on car]; *Bailey v. Central Vermont R. Co.* (1943) 319 U.S. 350, 63 S.Ct. 1062, 1063, 87 L.Ed. 1444, 1447 [safety of car being unloaded and surrounding area]; *Wilkerson v. McCarthy, supra*, 69 S.Ct. 417, 93 L.Ed. 504; 57 A.L.R.2d 493 [railroad's duty to prevent injury from surface condition of yard]; 77 A.L.R.2d 779 [requiring employee to work in cramped space or cramped or strained position]; 80 A.L.R.2d 836 [failure to furnish individual safety equipment or to require its use].)

An employer is also liable for negligent employment and retention of a person of violent and dangerous propensities who assaults an employee. (*Najera v. Southern Pac. Co.* (1961) 191 C.A.2d 634, 635, 13 C.R. 146.)

(4) *Negligent Infliction of Emotional Distress*. Claims for negligent infliction of emotional distress are cognizable under FELA, and the "zone of danger" test is the proper standard for evaluating these claims. This test limits recovery to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 114 S.Ct. 2396, 2407, 2410, 129 L.Ed.2d 427, 444, 447 [crew member witnessing death of coworker had cognizable claim, but another worker's claim arising from *work-related stress* was not cognizable; rejecting "relative bystander" test of *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912, 6 Summary (10th), Torts, §1008].) (On negligent infliction of emotional distress generally, see 6 Summary (10th), Torts, §1004 et seq.)

In *Metro-North Commuter R. Co. v. Buckley* (1997) 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560, an employee pipefitter was exposed daily to insulation dust containing asbestos. After attending an asbestos awareness class, the employee continually feared that he would develop cancer, although periodic medical examinations revealed no evidence of asbestos-related disease. Nevertheless, the employee sued under FELA, seeking in part damages for negligently inflicted emotional distress. *Held*, there can be no recovery unless and until the employee manifests symptoms of a disease. The critical issue was whether the physical contact with insulation dust amounted to a "physical impact" under *Gottshall*. The Court determined that it did not. "[T]he 'physical impact' to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time." (117 S.Ct. 2117, 138 L.Ed.2d 568.) State cases supporting the zone of danger test involve a threatened physical contact that caused, or might have caused, immediate traumatic harm. *Gottshall's* language should be read in a similarly limited manner. (117 S.Ct. 2117, 138 L.Ed.2d 568.) (See *Norfolk & Western Ry. Co. v. Ayers* (2003) 538 U.S. 135, 123 S.Ct. 1210, 1217, 155 L.Ed.2d 261, 274 [mental anguish damages resulting from fear of developing cancer were recoverable under FELA by railroad workers suffering from actionable injury asbestosis, and damages were not apportionable; following *Gottshall* and *Metro-North*]; 117 Harv. L. Rev. 420 [Norfolk].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Proximate Cause*. Under FELA's comparative fault system, the causation standard is the same for the employer's negligence as it is for the employee's contributory negligence, i.e., that the negligence, however small, played a part in the injury or death. (*Norfolk Southern Ry. Co. v. Sorrell* (2007) 549 U.S. 158, 127 S.Ct. 799, 808, 166 L.Ed.2d 638, 650 [Missouri jury instructions impermissibly imposed different standards by directing that railroad employee was contributorily negligent only if negligence "directly contributed to cause" of injury, but allowing finding of liability against employer railroad if railroad's negligence contributed "in whole or in part" to injury]; see CACI, No. 2903 [causation for defendant]; CACI, No. 2904 [contributory negligence].)



122 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

A. Interstate Commerce: Federal Employers' Liability Act.
5. Occupational Disease.

2 *Witkin Sum. Cal. Law Work Comp* § 122

[§ 122] Occupational Disease.

An occupational disease is an "injury" subject to FELA liability. (*Urie v. Thompson* (1949) 337 U.S. 163, 69 S.Ct. 1018, 1022, 93 L.Ed. 1282, 1290 [silicosis].) In *McMillan v. Western Pac. R. Co.* (1960) 54 C.2d 841, 9 C.R. 361, 357 P.2d 449, plaintiff's complaint alleged that he was employed by defendant as a train dispatcher; that defendant "negligently and carelessly" required him to be subjected to "working conditions of unusual responsibility, stress and tension," in operating a system of central traffic control, which caused him to suffer "a severe nervous collapse" which rendered him "sick, sore, lame and disabled." *Held*, a cause of action was stated. (54 C.2d 845.) (See 122 A.L.R. Fed 45 [liability under FELA for exposure to toxic substance]; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §22.)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

A. Interstate Commerce: Federal Employers' Liability Act.
6. Common Law Defenses Abolished.

2 *Witkin Sum. Cal. Law Work Comp* § 123

[§ 123] Common Law Defenses Abolished.

(1) *Fellow Servant Rule*. The original statute abolished this defense. (See 45 U.S.C., §§51, 54.)

(2) *Contributory Negligence*. The statute adopted the doctrine of comparative negligence (see 6 *Summary* (10th), *Torts*, §1295), under which contributory negligence is not a defense but only a ground for reduction of damages. (45 U.S.C., §53; *Ellis v. Union Pac. R. Co.* (1947) 329 U.S. 649, 67 S.Ct. 598, 600, 91 L.Ed. 572, 576; see 58 A.L.R.2d 1232 [contributory negligence of railroad employee in jumping from moving train or car to avoid collision or other injury]; 59 A.L.R.2d 580 [liability of railroad under FELA for injury or death of employee from collision of trains]; 60 A.L.R.2d 637 [liability under FELA for injury or death of employee riding train resulting from sudden stop, start, or jerk of train]; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §6 et seq.) However, where an employer's violation of a safety statute contributed to the injury, the employee's negligence cannot be considered. (45 U.S.C., §53.)

(3) *Assumption of Risk*. An employee may not be held to have assumed the risks of employment where the accident was a result of the negligence of the carrier, its agents, or employees. (45 U.S.C., §54; see *Tiller v. Atlantic Coast Line R. Co.* (1943) 318 U.S. 54, 63 S.Ct. 444, 446, 87 L.Ed. 610, 612 ["every vestige of the doctrine of assumption of risk was obliterated from the law" by 1939 amendments]; *Leet v. Union Pac. R. Co.* (1943) 60 C.A.2d 814, 818, 142 P.2d 37 [defense was eliminated by 1939 amendments].) Nevertheless, the concurring opinion in *Tiller* points out that "assumption of risk" in one of its meanings is still a defense; namely, where the work involves risks that the employer cannot eliminate by the exercise of due care, the employee cannot recover because negligence of the employer is the foundation of the cause of action. (63 S.Ct. 452, 87 L.Ed. 618.) (See 6 *Summary* (10th), *Torts*, §1281.)

In *Perrett v. Southern Pac. Co.* (1946) 73 C.A.2d 30, 165 P.2d 751, the court attempted to settle the confusion by emphasizing practical rather than logical considerations. An instruction on assumption of risk, proper in form ("ordinary risks ... incident to his employment, when the work is being done in the usual and ordinary way, and without negligence on the part of the defendant"), was held reversible error. "While it may be generally true, therefore, that the employee 'assumes' the risk of hazards not due to the employer's negligence, that does not mean that the jury should be so instructed. ... To interject into the case the thought that the employee assumes the risks of usual and ordinary dangers cannot help but confuse what otherwise would be a simple issue. When the jury is told that defendant can be held liable only upon proof of negligence, the defendant has received all of the protection to which it is entitled." (73 C.A.2d 38.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION
B. Interstate Commerce: Safety Appliance Acts.

2 Witkin Sum. Cal. Law Work Comp § 124

[§ 124] Interstate Commerce: Safety Appliance Acts.

(1) *In General.* The Safety Appliance Acts (SAA) (45 U.S.C., §1 et seq.) impose an absolute duty, and make the failure of equipment to perform as required an actionable wrong not dependent on negligence. (See *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.* (1949) 338 U.S. 384, 70 S.Ct. 200, 204, 94 L.Ed. 187, 192; *Affolder v. New York, Chicago & St. Louis R. Co.* (1950) 339 U.S. 96, 70 S.Ct. 509, 510, 94 L.Ed. 683, 687; 96 A.L.R.2d 419 [when equipment is being hauled or permitted to be hauled or used]; CACI, No. 2920; 65 Am.Jur.2d (2001 ed.), *Railroads*, §161 et seq.)

Violations of the SAA give rise to a cause of action under the Federal Employers' Liability Act (FELA) (supra, §118). (*Crane v. Cedar Rapids & Iowa City Ry. Co.* (1969) 395 U.S. 164, 89 S.Ct. 1706, 1708, 23 L.Ed.2d 176, 179; see 53 Cal. L. Rev. 730.) However, the distinction between liability under the FELA and the SAA is significant when claims based on both Acts are joined in a single action. Although causation and extent of injury are common to both claims, neither contributory negligence nor assumption of risk is a defense to claims based on violations of the SAA. (See 45 U.S.C., §§53, 54; *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, supra.)

(2) *Boiler Inspection Act.* In *Fontaine v. National R. Passenger Corp.* (1997) 54 C.A.4th 1519, 63 C.R.2d 644, plaintiff employee, severely injured in the course of her duties as an Amtrak assistant conductor when she fell from a locomotive ladder, sued defendant for negligence under the FELA and strict liability under the Boiler Inspection Act (BIA), a part of the SAA. The BIA claim was based on the failure to provide a safe walking surface resulting from an oil spill and a defectively designed ladder. The jury found for plaintiff on both claims. *Held*, affirmed.

(a) *Interrelationship of Acts.* The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. Liability under the FELA is premised on the railroad's negligence, however small. However, the BIA imposes an absolute duty on the carrier to maintain the locomotive, and all its parts, in proper and safe operating condition. Thus, neither contributory negligence nor assumption of risk are defenses to a BIA violation that contributes to an injury. (54 C.A.4th 1524, 1525.)

(b) *Liability under FELA and BIA.* Plaintiff's remedy for negligence did not lie exclusively with the FELA. Plaintiff's critical theory was strict liability under the BIA, a subpart of the FELA. If able to prove a violation of the BIA that contributed to the injuries, plaintiff establishes liability under both the BIA and the FELA. If not, plaintiff may still recover under the FELA by showing the employer provided unsafe working conditions under negligence standards. (54 C.A.4th 1526, citing *Lilly v. Grand Trunk Western R. Co.* (1943) 317 U.S. 481, 63 S.Ct. 347, 87 L.Ed. 411.)

(c) *Violation of any regulation violates BIA.* The trial judge did not err in instructing the jury that if defendant violated the BIA or any one of its regulations plaintiff was entitled to recover *if* the jury also found that the violation contributed to plaintiff's injuries. The instruction was completely consistent with the federal statute. (54 C.A.4th 1527.)

(d) *Design defect.* The BIA makes it unlawful for any carrier to use a locomotive unless the locomotive and all its parts are "in proper condition and safe to operate." In this case, the ladder was an integral and essential part of the locomotive. Nothing in the BIA or applicable case law excludes design claims as a basis for liability under the BIA. Thus, evidence of the ladder's defective design was proper. (54 C.A.4th 1531.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Woods v. Union Pac. R. Co.* (2008) 162 C.A.4th 571, 578, 75 C.R.3d 748 [neither Safety Appliance Act (SAA) nor its regulations prohibit use of vertical handholds in combination with horizontal; thus, trial court properly granted directed verdict for defendant in negligence action brought under Federal Employers' Liability Act in which plaintiff alleged unsafe vertical handholds on railcar in violation of SAA].

(2) *Boiler Inspection Act.* See *Frastaci v. Vapor Corp.* (2007) 158 C.A.4th 1389, 1396, 70 C.R.3d 402 [Boiler Inspection Act preempts state tort claims; thus, trial court properly dismissed action by survivors of railway worker against locomotive manufacturer for asbestos-related injuries]. *Correction:* Page 697, line 1, "45 U.S.C., §1 et seq." should be "49 U.S.C., §20301 et seq."



125 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION
C. Federal Employees' Compensation Act.

2 *Witkin Sum. Cal. Law Work Comp* § 125

[§ 125] Federal Employees' Compensation Act.

(1) *Nature of Act.* The Federal Employees' Compensation Act (FECA) (5 U.S.C., §8101 et seq.) creates a comprehensive system of compensation for federal employees injured in the performance of their duties. (See generally C.E.B., 1 Workers' Compensation Practice 4th, §1.67; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §82 et seq.)

(2) *Scope.* The FECA applies to civil officers and employees of the federal government and its instrumentalities. (5 U.S.C., §8101(1)(A); for persons included in and excluded from term "employee," see 5 U.S.C., §8101(1).) Provisions extend the FECA's coverage to a variety of persons, such as peace corps volunteers and student employees (5 U.S.C., §8140 et seq.), and to state and local law enforcement officers injured while preventing federal crimes or apprehending federal suspects or witnesses (5 U.S.C., §8191 et seq.).

The FECA also applies to disability or death resulting from personal injury sustained while in the performance of the employee's duties, unless the injury or death is caused by the employee's intoxication, wilful misconduct, or intentional act to bring about the injury or death of the employee or of another. (5 U.S.C., §8102(a).)

(3) *Exclusive Remedy.* Governmental liability under FECA "is exclusive and instead of" other liability arising in judicial proceedings, in admiralty, or under workers' compensation or federal tort liability statutes. (5 U.S.C., §8116(c).) It is the exclusive remedy for employees working on government vessels (*Johansen v. United States* (1952) 343 U.S. 427, 72 S.Ct. 849, 851, 96 L.Ed. 1051, 1055; *Patterson v. United States* (1959) 359 U.S. 495, 79 S.Ct. 936, 937, 3 L.Ed.2d 971, 972), and firefighters injured while fighting fires under orders of U.S. forest officials (*Argonaut Ins. Co. v. Industrial Acc. Com.* (1960) 54 C.2d 740, 743, 8 C.R. 438, 356 P.2d 182, *infra*, §165).

(4) *Third-Party Actions, Reimbursement, and Indemnity.* If a third person is liable for an injury or death compensable under FECA, the federal Government may require the beneficiary to either prosecute an action in the beneficiary's name or assign to the Government the right to enforce the liability. (5 U.S.C., §8131.) A recovery by the beneficiary from the third party, to the extent it exceeds the benefits received, must be refunded to the United States. (5 U.S.C., §8132; see *United States v. Lorenzetti* (1984) 467 U.S. 167, 104 S.Ct. 2284, 2289, 81 L.Ed.2d 134, 142 [refund requirement of 5 U.S.C., §8132 applied to third-party tort recovery for noneconomic losses (pain and suffering) even though only economic losses (medical expenses and lost wages) were compensable under Act].)

In *Lockheed Aircraft Corp. v. United States* (1983) 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911, defendant United States paid benefits under the FECA on behalf of a federal employee killed in the crash of a plane manufactured by plaintiff. Plaintiff settled a wrongful death action brought by the employee's administrator and sought indemnification from defendant which was admittedly primarily responsible for the crash. *Held*, the exclusive liability provision (5 U.S.C., §8116(c)) did not bar the indemnity action. The statute is "intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them." It is not concerned with the rights of unrelated third parties or with disturbing settled doctrines of tort law affecting the rights and liabilities of parties in indemnity cases. (103 S.Ct. 1037, 74 L.Ed.2d 918.)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

1. Nature of Admiralty Jurisdiction.

2 *Witkin Sum. Cal. Law Work Comp* § 126

[§ 126] Nature of Admiralty Jurisdiction.

An industrial accident occurring on or near navigable waters may necessitate a choice among three competing bodies of law: a state compensation act (*supra*, §1), the federal compensation acts (see *supra*, §§125 and *infra*, §135), and the tort and maintenance and cure remedies of admiralty law (see *infra*, §127 et seq.). While the federal and state compensation commissions may have overlapping jurisdiction over an accident (see *infra*, §142), the tort remedies in admiralty are exclusive. (*Occidental Indem. Co. v. Industrial Acc. Com.* (1944) 24 C.2d 310, 313, 149 P.2d 841; *De Court v. Beckman Instruments* (1973) 32 C.A.3d 628, 635, 108 C.R. 109, 7 Cal. Proc. (4th), Judgment, §370; see 77 *Harv. L. Rev.* 545 [admiralty tort jurisdiction over airplane crash in state territorial waters]; 79 *Harv. L. Rev.* 425 [shipowner's limitation of liability]; 18 *Hastings L. J.* 1033 [whether statute of limitations may be tolled]; 18 *Hastings L. J.* 995 [punitive damages].)

Early cases devised tests to determine federal or state jurisdiction. (See *Teahan v. Industrial Acc. Com.* (1930) 210 C. 342, 345, 292 P. 120.) Later decisions indicated that the division of jurisdiction cannot be reduced to a formula, and must be determined on a case-by-case basis. Speaking generally, however, state law is not applied if to do so would impair the uniformity of operation of maritime laws; and when employees other than seamen are involved, the employee's services must have a relation to commerce and navigation for the federal law to apply. (See *Occidental Indem. Co. v. Industrial Acc. Com.*, *supra*, 24 C.2d 312, 315; *Executive Jet Aviation v. Cleveland* (1972) 409 U.S. 249, 93 S.Ct. 493, 498, 34 L.Ed.2d 454, 459 [negligent injury to aircraft]; *Foremost Ins. Co. v. Richardson* (1982) 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 [analyzing and applying test of *Executive Jet Aviation v. Cleveland*, and upholding admiralty jurisdiction over collision of two vessels on navigable waters]; Cal. Civil Practice, 1 Workers' Compensation, §1:24; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §35 et seq.; for remedies of seamen, see *infra*, §127 et seq.; for remedies of longshoremen, see *infra*, §135 et seq.)

In *Stevedore Services v. Prudential Lines* (1986) 181 C.A.3d 154, 226 C.R. 225, S, a longshoreman employed by plaintiff stevedore, was injured while working on a vessel of defendant shipowner docked in a harbor. Plaintiff paid workers' compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA) (*infra*, §135). S filed a personal injury action against defendant shipowner, and plaintiff sued defendant for indemnity (based on compensation paid), alleging defendant's negligence and breach of contract. *Held*, the action was barred by laches.

(a) The courts have concurrent jurisdiction with federal courts over LHWCA and general maritime law claims (28

U.S.C., §1331), and must apply federal law as it would be applied in federal court. (*181 C.A.3d 158*.)

(b) Plaintiff's two claims arose under general maritime law; no federal statute of limitations governs, and the doctrine of laches therefore applies. Under that doctrine, if the analogous state statute of limitations has run, the burden is on the plaintiff to plead facts showing that exceptional circumstances prevented earlier action. Here, the action was filed more than 5 years after the injury, despite prior notice of potential liability. Hence, no sufficient excuse was shown. (*181 C.A.3d 160, 161*.) (On laches in action for breach of warranty of seaworthiness, see *Longfellow v. Presidente Miguel Aleman* (*1974*) *36 C.A.3d 508, 514, 111 C.R. 643*, *infra*, §128.)

In state court actions under the Jones Act (*infra*, §131 *et seq.*) and under *28 U.S.C., §1333(1)* (providing for exclusive federal jurisdiction over admiralty cases and "saving to suitors" all remedies to which they are otherwise entitled), federal law does not preempt state law regarding the doctrine of *forum non conveniens*. (*American Dredging Co. v. Miller* (*1994*) *510 U.S. 443, 114 S.Ct. 981, 984, 127 L.Ed.2d 285, 299* [Louisiana's Code of Civil Procedure rendered doctrine unavailable in Jones Act and maritime law cases brought in Louisiana state courts].)

SUPPLEMENT: [This section is current through the latest supplement]

De Court case:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §432.



127 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

a. Maintenance and Cure.

2 Witkin Sum. Cal. Law Work Comp § 127

[§ 127] Maintenance and Cure.

(1) *Nature of Remedy.* A long established doctrine of maritime law imposes an absolute liability on the employer to a seaman who becomes ill or is injured in service, unless the illness or injury is caused by the employee's own misconduct. The liability is for maintenance, cure, and wages, not compensatory damages. (See *Vaughan v. Atkinson* (1962) 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88; *Da Silva v. Pacific King* (1987) 195 C.A.3d 1, 8, 240 C.R. 395 [trial judge properly instructed jury to award seaman amount of maintenance provided by collective bargaining agreement]; C.E.B., 1 Workers' Compensation Practice 4th, §1.71; 76 Harv. L. Rev. 90 [maintenance and cure]; 5 U.S.F. L. Rev. 105 [should "maximum cure" be maintained]; 70 Am.Jur.2d (1987 ed.), Shipping §360 et seq.; 3 A.L.R.3d 1082 [seaman's right to maintenance and cure as affected by sickness existing prior to employment].)

(2) *Injuries Covered.* The courts have applied the doctrine to situations far beyond the seaman's duties on the ship, including injuries suffered on land while not engaged in services for the employer. (See *Farrell v. United States* (1949) 336 U.S. 511, 69 S.Ct. 707, 709, 93 L.Ed. 850, 853 [absent over time permitted for shore leave; employer's liability ceased, however, when disability became permanent]; *Warren v. United States* (1951) 340 U.S. 523, 71 S.Ct. 432, 433, 95 L.Ed. 503, 506 [injury at dance hall by falling off ledge]; *Aguilar v. Standard Oil* (1943) 318 U.S. 724, 63 S.Ct. 930, 935, 87 L.Ed. 1107, 1114 [injuries during shore leave]; *Occidental Indem. Co. v. Industrial Acc. Com.* (1944) 24 C.2d 310, 321, 322, 149 P.2d 841 [injury in shoreside warehouse]; *Petersen v. Marine Transport Lines* (1948) 86 C.A.2d Supp. 927, 933, 194 P.2d 161 [attack by unknown assailants during shore leave].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Injuries Covered.* See *Price v. Connolly-Pacific Co.* (2008) 162 C.A.4th 1210, 1221, 76 C.R.3d 872 [commuter seaman (i.e., seaman who does not navigate "high seas") was not entitled to award of maintenance and cure where he failed to establish that he contracted West Nile virus during daytime service on derrick barge used in pier reconstruction project].



128 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

b. Breach of Warranty of Seaworthiness.

1. Nature of Remedy.

2 Witkin Sum. Cal. Law Work Comp § 128

[§ 128] Nature of Remedy.

The maritime law requirement that a shipowner provide a seaworthy ship for seamen gave rise to another type of absolute liability. A tort action lies for injuries arising from breach of the warranty of seaworthiness, even though the shipowner is not responsible for the condition and has no knowledge of it. (See *Mahnich v. Southern Steamship Co.* (1943) 321 U.S. 96, 64 S.Ct. 455, 457, 88 L.Ed. 561, 564; *McAllister v. Magnolia Petroleum Corp.* (1958) 357 U.S. 221, 78 S.Ct. 1201, 1204, 2 L.Ed.2d 1272, 1276 [combined with Jones Act suit]; *Mitchell v. Trawler Racer* (1960) 362 U.S. 539, 80 S.Ct. 926, 932, 4 L.Ed.2d 941, 948; *Morales v. Galveston* (1962) 370 U.S. 165, 82 S.Ct. 1226, 1229, 8 L.Ed.2d 412, 415; *Gutierrez v. Waterman Steamship Corp.* (1963) 373 U.S. 206, 83 S.Ct. 1185, 1189, 10 L.Ed.2d 297, 302; *Vittone v. American President Lines* (1964) 228 C.A.2d 689, 693, 39 C.R. 758 [reviewing important federal decisions]; *Freeze v. Lost Isle Partners* (2002) 96 C.A.4th 45, 50, 52, 116 C.R.2d 520 [fact that plaintiff island restaurant employee, who was injured while mooring her employer's barge, was not "seaman" for purposes of Jones Act did not preclude alternative causes of action for unseaworthiness and negligence under general maritime law; nor were her claims barred by exclusivity provisions of *Lab.C. 3601*]; C.E.B., 1 Workers' Compensation Practice 4th, §1.72; 40 *Santa Clara L. Rev.* 473 [aspects of seaworthiness]; 32B *Am.Jur.2d* (1996 ed.), *Federal Employers' Liability and Compensation Acts* §47.)

Although state courts have concurrent jurisdiction, the federal substantive law applies. (*Dixon v. Grace Lines* (1972) 27 C.A.3d 278, 284, 103 C.R. 595.) However, procedural matters are governed by the state law of the forum. Thus, where a longshoreman recovered judgment in an action against a shipowner, his concurrently negligent employer was barred from claiming a lien for workers' compensation payments under the California rule of *Witt v. Jackson* (1961) 57 C.2d 57, 17 C.R. 369, 366 P.2d 641, supra, §92. (*Carlson v. Pacific Far East Lines* (1973) 29 C.A.3d 883, 889, 105 C.R. 885.)

When an action is brought in the California court, the maritime doctrine of laches and not the state statute of limitations applies. However, in referring to the statutory time limitations by analogy, to determine whether there was a delay sufficient to invoke the defense of laches, the reference should be to the state limitations period (1 year) rather than the federal Jones Act period (3 years). (*Longfellow v. Presidente Miguel Aleman* (1974) 36 C.A.3d 508, 514, 111 C.R. 643.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

b. Breach of Warranty of Seaworthiness.

2. Scope of Warranty.

2 *Witkin Sum. Cal. Law Work Comp* § 129

[§ 129] Scope of Warranty.

The warranty applies to the condition of the ship and its equipment and to the fitness and competence of the crew. (See *Boudoin v. Lykes Bros. Steamship Co.* (1955) 348 U.S. 336, 75 S.Ct. 382, 385, 99 L.Ed. 354, 358 [seaman attacked by drunken shipmate]; *Bell v. Seatrain Lines* (1974) 40 C.A.3d 16, 25, 115 C.R. 76 [temperament of fellow crewman who attacked plaintiff is jury question]; 91 A.L.R.2d 1019 [failure to require or use safety equipment]; 22 A.L.R.3d 624 [liability under Jones Act or seaworthiness doctrine for injuries caused by assault]; 108 A.L.R. Fed 264 [recovery under Jones Act or seaworthiness doctrine by seaman or maritime worker injured in boarding or leaving ship].)

In *Mitchell v. Trawler Racer* (1960) 362 U.S. 539, 80 S.Ct. 926, 932, 4 L.Ed.2d 941, 948, the Court reviewed the history of the warranty, and held that recovery could be had for transitory or temporary conditions (here, slime on the rail of a fishing boat that caused a slip and fall), and that neither actual nor constructive knowledge of the condition is essential to liability.

The warranty does not apply to the following situations:

(1) Where the vessel is out of navigation. (*Roper v. United States* (1961) 368 U.S. 20, 82 S.Ct. 5, 7 L.Ed.2d 1; *Pollack v. Standard Oil Co.* (1965) 231 C.A.2d 714, 717, 42 C.R. 128 [jury question whether vessel was "out of navigation"]; *Longfellow v. Presidente Miguel Aleman* (1974) 36 C.A.3d 508, 515, 111 C.R. 643 [factors considered in determining whether vessel is "out of navigation"].)

(2) Where injury results from an unsafe condition caused by an isolated negligent act of the shipowner or a fellow employee. "To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions." (*Usner v. Luckenbach Overseas Corp.* (1971) 400 U.S. 494, 91 S.Ct. 514, 518, 27 L.Ed.2d 562, 567 [longshoreman injured by negligent operation of winch by fellow employee].)

(3) Where the injury is caused by commonly known dangers inherent in common consumer products. (*Tinsley v. American President Lines, Ltd.* (1992) 6 C.A.4th 562, 569, 8 C.R.2d 851 [cigarettes supplied by employer that did not

contain warning label].)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

b. Breach of Warranty of Seaworthiness.

3. Persons Covered.

2 Witkin Sum. Cal. Law Work Comp § 130

[§ 130] Persons Covered.

(1) *Former Law: Longshore and Harbor Workers Covered.* In a number of cases, the breach of warranty remedy was extended to persons injured on shipboard even though they were not seamen. (See *Seas Shipping Co. v. Sieracki* (1946) 328 U.S. 85, 66 S.Ct. 872, 875, 90 L.Ed. 1099, 1103 [stevedore, loading cargo, injured by defective boom shackle]; *Pope & Talbot v. Hawn* (1953) 346 U.S. 406, 74 S.Ct. 202, 205, 98 L.Ed. 143, 151 [carpenter]; *Alaska Steamship Co. v. Petterson* (1954) 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 [stevedore]; *Reed v. The Yaka* (1963) 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 [longshoreman]; *Green v. Los Angeles* (1974) 40 C.A.3d 819, 832, 115 C.R. 685 [longshoreman, loading cargo, injured by defective crane].)

(2) *Current Law: Longshore and Harbor Workers Excluded.* The Federal Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C., §901 et seq.) provides compensation benefits for shoreside employees who are not covered by workers' compensation statutes. (See *infra*, §135 et seq.) The remedies under the LHWCA are exclusive for actions against a vessel, and liability of a vessel may not be based on a warranty of seaworthiness or its breach. (33 U.S.C., §905(b).) Thus, shoreside employees compensated under LHWCA are prevented from also collecting damages from a shipowner for unseaworthiness. However, LHWCA allows a shoreside employee to bring a third-party negligence action against a vessel in much the same way as an ordinary worker may bring a third-party action against an independent tortfeasor (see *infra*, §§138, 139). (See *Stance v. Jackson* (1984) 155 C.A.3d 838, 841, 202 C.R. 480 [LHWCA was exclusive remedy for security guard employed by firm providing stevedore services to shipowner]; 84 A.L.R.2d 820 [applicability of doctrine of unseaworthiness to those other than crew, longshoremen, and stevedores].)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

c. Jones Act.

1. In General.

2 Witkin Sum. Cal. Law Work Comp § 131

[§ 131] In General.

(1) *Nature of Act.* The Jones Act (46 U.S.C. Appx., §688) authorizes a tort action for injuries or death to a *seaman* in the course of employment on a vessel, and makes the FELA (supra, §118) the rule of decision. The following cases are instructive:

Occidental Indem. Co. v. Industrial Acc. Com. (1944) 24 C.2d 310, 312, 149 P.2d 841 [seaman held to have two remedies, one under Jones Act, and another for maintenance, cure, and wages].

Guay v. American President Lines (1947) 81 C.A.2d 495, 519, 184 P.2d 539 [no double recovery; prior maintenance award credited on Jones Act judgment].

Correia v. Van Camp Sea Food Co. (1952) 113 C.A.2d 71, 75, 248 P.2d 81 [wrongful death claim arises even though seaman's death occurs outside U.S. territorial limits].

Cox v. Roth (1955) 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 [claim survives death of shipowner employer].

Fitzgerald v. U.S. Lines Co. (1963) 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 [right to jury trial on negligence issue].

Gillespie v. United States Steel Corp. (1964) 379 U.S. 148, 85 S.Ct. 308, 312, 13 L.Ed.2d 199, 204 [Jones Act as exclusive remedy in death case].

Dixon v. Grace Lines (1972) 27 C.A.3d 278, 286, 103 C.R. 595 [federal substantive law applies].

Bell v. Seatrains Lines (1974) 40 C.A.3d 16, 21, 115 C.R. 76 [scope of liability where seaman is returning to ship after shore leave].

De Court v. Beckman Instruments (1973) 32 C.A.3d 628, 635, 108 C.R. 109, 7 Cal. Proc. (4th), Judgment, §370 [death benefit award by Workers' Compensation Appeals Board made without express adverse determination of Jones

Act factors of jurisdiction (seaman, vessel, employer-owner) was not binding in subsequent Jones Act action by decedent's widow].

The purpose of the Jones Act is to extend the provisions of FELA to seamen, by providing a cause of action for negligence attributable to the employer and to make the fellow servant doctrine inapplicable to maritime injuries. (*Mitchell v. Trawler Racer* (1960) 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941, 946.) (See 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §33 et seq.; 94 A.L.R.2d 910 [persons for whose benefit survival action may be prosecuted]; 22 A.L.R.3d 624 [liability under Act for injuries caused by assault]; 22 A.L.R.3d 852 [overlapping of Jones Act and Death on the High Seas Act]; 170 A.L.R. Fed 587 [validity, construction, and application of Jones Act]; C.E.B., 1 Workers' Compensation Practice 4th, §1.74.)

(2) *Recovery of Punitive Damages*. "[W]hile numerous courts have expounded on the availability of punitive damages in a proper case, few have approved their imposition in the actual cases before the courts." However, no federal case has held that punitive damages are not recoverable as a matter of law, and accordingly a plaintiff may seek punitive damages on proper pleading and proof. (*Baptiste v. Superior Court* (1980) 106 C.A.3d 87, 96, 100, 104, 164 C.R. 789; see dissent, pointing out that federal maritime law adopts FELA rules, and that punitive damages are not allowed in FELA actions.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Act*. 46 U.S.C. Appx., §688 was renumbered 46 U.S.C., §30104 in 2006.

See *Donaldson v. National Marine* (2005) 35 C.4th 503, 511, 25 C.R.3d 584, 107 P.3d 254 [California courts may exercise concurrent jurisdiction to hear wrongful death claims under Jones Act]. *De Court case*:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §432.



132 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

c. Jones Act.

2. Seaman Status.

2 Witkin Sum. Cal. Law Work Comp § 132

[§ 132] Seaman Status.

(1) *Masters and Crew Members*. The Jones Act applies to seamen who suffer personal injury. (46 U.S.C. Appx., §688(a).) Because the Longshore and Harbor Workers' Act provides the exclusive remedy for persons within its scope (any employee not a "master or member of a crew of any vessel"; see *infra*, §136), the term "seamen" in the Jones Act is generally held applicable to masters and crew members of vessels. (See *Senko v. LaCrosse Dredging Corp.* (1957) 352 U.S. 370, 77 S.Ct. 415, 416, 1 L.Ed.2d 404, 406; *Soucie v. Trautwein Bros.* (1969) 275 C.A.2d 20, 26, 79 C.R. 671 [derrick barge was "special purpose vessel" and injured worker was seaman even though he performed no traditional seaman's duties, was paid on hourly basis, ate and slept at home, belonged to pile drivers' union, and did not have seaman's papers]; *Southwest Marine v. Gizoni* (1991) 502 U.S. 81, 112 S.Ct. 486, 492, 116 L.Ed.2d 405, 416 [fact that ship repairman is occupation covered by LHWCA does not preclude repairman from being "seaman" under Jones Act]; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §39 et seq.)

The key to seaman status is employment-related connection to a vessel in navigation. A necessary element of the connection is that a seaman's duties must contribute to the function of the vessel or to the accomplishment of its mission. "It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." (*McDermott Int. v. Wilander* (1991) 498 U.S. 337, 111 S.Ct. 807, 817, 112 L.Ed.2d 866, 882.) Moreover, the connection must be substantial in terms of both its duration and its nature. Although seaman status is not merely a temporal concept, it necessarily includes a temporal element. (*Chandris v. Latsis* (1995) 515 U.S. 347, 376, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314, 337 [following and clarifying *McDermott Int.*].) (See *Harbor Tug & Barge Co. v. Papai* (1997) 520 U.S. 548, 117 S.Ct. 1535, 1542, 137 L.Ed.2d 800, 812 [important part of test is whether injured worker has substantial connection to vessel or fleet of vessels, and latter concept requires requisite degree of common ownership or control; following *Chandris*]; *Freeze v. Lost Isle Partners* (2002) 96 C.A.4th 45, 50, 116 C.R.2d 520 [test for seaman status under Jones Act is different from test for purposes of unseaworthiness claim; thus, although island restaurant worker injured while mooring employer's barge was not seaman for purposes of Act, she was not precluded from pursuing unseaworthiness and negligence claims under general maritime law]; *Gault v. Modern Continental/Roadway Const. Co. Joint Ventures* (2002) 100 C.A.4th 991, 999, 123 C.R.2d 85 [summary judgment for defendant was improper where pile driver worker on barge in bridge construction project sued for injuries

under Jones Act and raised triable issues as to his seaman status given barge's mobility; applying *Chandris* analysis]; *Spears v. Kajima Engineering & Const.* (2002) 101 C.A.4th 466, 474, 124 C.R.2d 97 [summary judgment for defendant affirmed where engineer working aboard stationary derrick barge at waterfront construction site failed to raise issue of his seaman status given barge's immobility; following *Chandris* and distinguishing *Gault*.)]

(2) *Foreign Seamen*. The Act does not cover foreign seamen on ships of foreign registry. (*Lauritzen v. Larsen* (1953) 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254; *Romero v. International Terminal Operating Co.* (1959) 358 U.S. 354, 79 S.Ct. 468, 485, 3 L.Ed.2d 368, 388; see 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §38; 68 A.L.R. Fed 360 [applicability of Jones Act to foreign seamen, foreign ships, or other foreign circumstances]; cf. *Hellenic Lines Ltd. v. Rhoditis* (1970) 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 [Jones Act was applicable to Greek seaman employed on vessel owned by Greek corporation where 95% of stock was owned by Greek citizen residing and doing business in United States].)

SUPPLEMENT: [This section is current through the latest supplement]



133 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

c. Jones Act.

3. Employment Relationship.

2 Witkin Sum. Cal. Law Work Comp § 133

[§ 133] Employment Relationship.

(1) *Course of Employment.* The Jones Act applies to injury in the course of employment. (See *Larson v. Lewis-Simas-Jones Co.* (1938) 29 C.A.2d 83, 88, 84 P.2d 296 [charterer of commercial fishing boat was not employee of owner]; *Senko v. LaCrosse Dredging Corp.* (1957) 352 U.S. 370, 77 S.Ct. 417, 416, 1 L.Ed.2d 408 [maintenance of dredge anchored at shore]; *Braen v. Pfeifer Oil Trans. Co.* (1959) 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed.2d 191 [mate on barge injured while working on repair raft not being used for repairs was within Act]; *Tinsley v. American President Lines, Ltd.* (1992) 6 C.A.4th 562, 567, 8 C.R.2d 851 [seaman's death from smoking cigarettes, some of which were bought from employer, did not occur in course of employment, where much of smoking occurred on land or before and after employment as seaman]; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §44; 75 A.L.R.2d 1312 [applicability of Act to workers on dredges, etc.]; 8 A.L.R.3d 505 [boarding or leaving ship]; 75 A.L.R. Fed 733 [applicability of Jones Act to workers on dredges, etc.]; 108 A.L.R. Fed 264 [recovery under Jones Act or seaworthiness doctrine by seaman or maritime worker injured in boarding or leaving ship].) Whether the person injured or killed was an employee or independent contractor is a jury question. (See *Smith v. Union Oil Co.* (1966) 241 C.A.2d 338, 344, 50 C.R. 499 [deep-sea diver hired for offshore drilling operations; judgment notwithstanding verdict for plaintiff reversed].)

(2) *Employer.* Several cases arose out of wartime control of merchant shipping by the United States War Shipping Administration, and the operation of vessels by shipping companies as operating or "general agents" under government contracts. It was first held that the seaman could still sue the general agent as an employer. (*Hust v. Moore-McCormack Lines* (1946) 328 U.S. 707, 66 S.Ct. 1218, 1226, 90 L.Ed. 1534, 1543.) However, in *Cosmopolitan Shipping Co. v. McAllister* (1949) 337 U.S. 783, 69 S.Ct. 1317, 1321, 93 L.Ed. 1692, 1698, the Supreme Court held that there could be only one employer in a Jones Act case, and that the United States, and not the general agent, was liable as the employer. (See *Scanlon v. J.J. Moore & Co.* (1950) 97 C.A.2d 132, 133, 217 P.2d 78 [following *Cosmopolitan*].)

The Jones Act applies to publicly owned vessels. (*Petty v. Tennessee-Missouri Bridge Com.* (1959) 359 U.S. 275, 79 S.Ct. 785, 790, 3 L.Ed.2d 804, 810.) The state exclusive compensation remedy provision (supra, §24) does not bar a seaman employed by a political subdivision of the state from recovering damages from that employer under the Jones Act or general maritime law. (*Hamilton v. Los Angeles* (1982) 131 C.A.3d 982, 986, 991, 182 C.R. 868 [lifeguard and

rescue boat lieutenant employed by defendant county's department of beaches had attack of "bends" following scuba dive; depth gauge supplied by county to calculate safe time underwater was inaccurate].)

The Jones Act does not authorize a federal court action against a state by its employee. (*Welch v. Texas Dept. of Highways & Public Trans.* (1987) 483 U.S. 468, 107 S.Ct. 2941, 2946, 97 L.Ed.2d 389, 398, 7 Summary (10th), *Constitutional Law*, §41 [no intent to override Eleventh Amendment immunity].)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

2. Remedies of Seaman.

c. Jones Act.

4. Liability Based on Negligence.

2 Witkin Sum. Cal. Law Work Comp § 134

[§ 134] Liability Based on Negligence.

An action under the Jones Act, like that under the FELA, is based on negligence, and there can be no recovery without proof of lack of due care. (*Gladstone v. Matson Navigation Co.* (1954) 124 C.A.2d 493, 496, 269 P.2d 37; *Zar v. Alafetich* (1954) 126 C.A.2d 643, 650, 272 P.2d 922; *Blodow v. Pan Pac. Fisheries* (1954) 128 C.A.2d 428, 434, 275 P.2d 795; *Dixon v. Grace Lines* (1972) 27 C.A.3d 278, 287, 103 C.R. 595.) However, the courts take an extremely liberal view of what constitutes negligence, and of the inferences in support of a jury verdict for the plaintiff. (See *Schulz v. Pennsylvania R. Co.* (1956) 350 U.S. 523, 76 S.Ct. 608, 610, 100 L.Ed. 668, 671; *Peterson v. Permanente Steamship Corp.* (1954) 129 C.A.2d 579, 587, 277 P.2d 495 [failure to provide safe place to work]; *Ferguson v. Moore-McCormack Lines* (1957) 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511 [inadequacy of equipment]; *Kernan v. American Dredging Co.* (1958) 355 U.S. 426, 78 S.Ct. 394, 398, 2 L.Ed.2d 382, 388 [violation of Coast Guard rule]; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §46 et seq.; 81 A.L.R.2d 1170 [unexplained drowning of seaman]; 90 A.L.R.2d 710 [injury caused by cargo or stowage]; 91 A.L.R.2d 1019 [failure to furnish individual safety equipment or to require its use]; 98 A.L.R.2d 653 [tests of causation].)

Even prior to the abolition of the defense of assumption of risk under the FELA (*supra*, §123), the doctrine had been practically eliminated in actions by seamen. (See *Socony-Vacuum Oil Co. v. Smith* (1939) 305 U.S. 424, 59 S.Ct. 262, 265, 83 L.Ed. 265, 269; *Jacob v. New York* (1942) 315 U.S. 752, 62 S.Ct. 854, 855, 86 L.Ed. 1166, 1170; *Hutchins v. Juneau Tanker Corp.* (1994) 28 C.A.4th 493, 501, 33 C.R.2d 542 [doctrine of comparative negligence applies under Jones Act and general maritime law governing unseaworthiness claims; citing *Socony-Vacuum Oil Co.*].)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 135

[§ 135] In General.

Congress originally attempted to provide by legislation that employees within the admiralty jurisdiction should have the right to proceed under state compensation acts, but the federal statutes were held unconstitutional, chiefly on the ground that they interfered with the uniformity of the maritime law. (*Southern Pac. Co. v. Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524, 526, 61 L.Ed. 1086, 1096; *Washington v. Dawson & Co.* (1924) 264 U.S. 219, 44 S.Ct. 302, 303, 68 L.Ed. 646, 650.)

Subsequently, the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C., §901 et seq.) was passed, creating a system of workers' compensation for longshoremen and other harbor workers, and administered by the Secretary of Labor. (See *Davis v. Department of Labor* (1942) 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246; *O'Leary v. Brown-Pacific-Maxon* (1950) 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483; *Pillsbury v. United Engineering Co.* (1952) 342 U.S. 197, 72 S.Ct. 223, 96 L.Ed. 225; *Voris v. Eikel* (1953) 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5; Cal. Civil Practice, 1 Workers' Compensation, §1:24; C.E.B., 1 Workers' Compensation Practice 4th, §1.63 et seq.; 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §104 et seq.)

In 1984 the Act was renamed the Longshore and Harbor Workers' Compensation Act (LHWCA). (See 33 U.S.C., §901.) (See *Swanson v. Marra Bros.* (1946) 328 U.S. 1, 66 S.Ct. 869, 870, 90 L.Ed. 1045, 1046 [longshoreman loading cargo on pier and struck by life raft falling from ship had no remedy under Jones Act]; *Director, Office of Workers' Comp. Programs v. Greenwich Collieries* (1994) 512 U.S. 267, 114 S.Ct. 2251, 2254, 129 L.Ed.2d 221, 227 [§7(c) of Administrative Procedure Act (5 U.S.C., §556(d)), assigning burden of proof to proponent of rule or order, is applicable to LHWCA]; *Metropolitan Stevedore Co. v. Rambo* (1995) 515 U.S. 291, 115 S.Ct. 2144, 2150, 132 L.Ed.2d 226, 235 [disability award may be modified under 33 U.S.C., §922 where there is change in employee's wage-earning capacity even without any change in employee's physical condition]; 33 U.S.C., §905(a) [exclusiveness of employer's liability]; 33 U.S.C., §933(i) [compensation as exclusive remedy against fellow employees]; on negligence action against owner of vessel, see *infra*, §§138, 139; on recovery under both federal Act and state compensation laws, see *infra*, §142.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Stewart v. Dutra Const. Co.* (2005) 543 U.S. 481, 125 S.Ct. 1118, 1129, 160 L.Ed.2d 932, 947 [dredge engaged in maritime transportation at time of marine engineer's injury was vessel within meaning of Longshoremen's and Harbor

Workers' Compensation Act].



136 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
Copyright (c) 2010 By B.E. Witlin Article Sixth Testamentary Trust

CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.

b. Employees Covered.

2 Witkin Sum. Cal. Law Work Comp § 136

[§ 136] Employees Covered.

An employee claiming compensation under LHWCA must meet both a *situs* test and a *status* test. (*Herb's Welding v. Gray* (1985) 470 U.S. 414, 105 S.Ct. 1421, 1423, 84 L.Ed.2d 406, 409; see C.E.B., 1 Workers' Compensation Practice 4th, §1.63.)

(1) *Situs*. As originally enacted, the Act covered injuries occurring on navigable waters, i.e., injuries incurred seaward from the water's edge. (See 32B Am.Jur.2d (1996 ed.), *Federal Employers' Liability and Compensation Acts* §105.) In 1972, the definition of "navigable waters" was expanded to include an adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. (33 U.S.C., §903(a).) (On 1972 amendments, see 31 *Hastings L. J.* 473.)

(2) *Status*. An "employee" is a person engaged in *maritime employment*, including longshoremen or other persons engaged in longshoring operations, and harbor workers including ship repairers, shipbuilders, and ship-breakers. (33 U.S.C., §902(3).) (See *Northeast Marine Terminal Co. v. Caputo* (1977) 432 U.S. 249, 97 S.Ct. 2348, 2358, 53 L.Ed.2d 320, 334 [Act applies to workers checking and marking unloaded cargo and loading cargo onto truck]; *Pfeiffer Co. v. Ford* (1979) 444 U.S. 69, 100 S.Ct. 328, 333, 62 L.Ed.2d 225, 230 [LHWCA applies to workers moving cargo between ship and land transportation]; *Director, Office of Workers' Comp. Programs v. Perini North River Associates* (1983) 459 U.S. 297, 103 S.Ct. 634, 651, 74 L.Ed.2d 465, 485 [marine construction worker injured on navigable waters was engaged in maritime employment]; *Riley v. Southwest Marine* (1988) 203 C.A.3d 1242, 1247, 250 C.R. 718 [special employee provided by labor broker]; *Jones v. Dutra Const. Co.* (1997) 57 C.A.4th 871, 881, 67 C.R.2d 411, *infra*, §139 [welder dispatched from union hall to modify scows belonging to marine construction firm was engaged in maritime employment].)

In *Herb's Welding v. Gray*, *supra*, the court held that the employee, a welder working on a fixed offshore oil drilling platform in state territorial waters, was not engaged in maritime employment.

(a) Prior to the 1972 amendments, coverage under the LHWCA was limited to accidents occurring on navigable waters. Stationary oil rigs were considered to be islands, and oil rig workers inside the three-mile limit were left to recover under state schemes. (105 S.Ct. 1425, 84 L.Ed.2d 406.)

(b) The amendments were designed in part to extend coverage to longshoremen, harbor workers, and others injured on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, rather than while actually afloat. Thus, 33 U.S.C., §903 expressly extended coverage to the "adjoining area." (105 S.Ct. 1425, 84 L.Ed.2d 412.)

(c) However, the amended definition of "employee" limited coverage to employees engaged in "maritime employment"; and here, the employee's work had nothing to do with loading or unloading or maintenance of equipment. "There is nothing inherently maritime about those tasks" (i.e., his welding work). (105 S.Ct. 1428, 84 L.Ed.2d 415.) To hold that he was necessarily engaged in maritime employment because he was on a drilling platform--or in a "maritime environment"--would blur the distinction between situs and status. (105 S.Ct. 1428, 84 L.Ed.2d 416.)

(3) *Persons Excluded.* The following persons are excluded from coverage under the LHWCA:

(a) The master and crew members of a vessel--those persons generally entitled to compensation under the Jones Act (supra, §131). (33 U.S.C., §902(3)(G).)

(b) Specified persons who are "subject to coverage under a State workers' compensation law"; e.g., clerical and security workers, aquacultural workers, and employees of recreational and retail establishments. (33 U.S.C., §902(3).) (See 22 *San Diego L. Rev.* 941 [exclusion of security personnel].)

(c) Officers and employees of state, federal, and foreign governments. (33 U.S.C., §903(b).)

(d) Certain employees of facilities building, repairing, or dismantling small vessels. (33 U.S.C., §903(d).)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.
c. Injuries Covered.

2 Witkin Sum. Cal. Law Work Comp § 137

[§ 137] Injuries Covered.

The LHWCA applies to injury or death arising out of and in the course of employment and to occupational disease or infection that arises naturally out of the employment or unavoidably results from the accidental injury, including an injury caused by the wilful act of a third person directed against an employee because of the employee's employment. (33 U.S.C., §902(2).) It is liberally construed. (See *O'Keefe v. Smith, Hinchman & Grylls Associates* (1965) 380 U.S. 359, 85 S.Ct. 1012, 1015, 13 L.Ed.2d 895, 898 [death in recreational accident on Sunday was compensable where employment was at hazardous overseas base on "365-day per year basis"].)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION
D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.
 - d. Employee's Action Against Third Party.
 1. In General.

2 Witkin Sum. Cal. Law Work Comp § 138

[§ 138] In General.

(1) *Available Remedies.* As originally enacted, the LHWCA required a shoreside worker to elect between a compensation award from the employer and a tort action against a third party. (See *Seas Shipping Co. v. Sieracki* (1946) 328 U.S. 85, 66 S.Ct. 872, 874, 90 L.Ed. 1099, 1103; *Alaska Steamship Co. v. Petterson* (1954) 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798.) Under 33 U.S.C., §933(a), where a third person may be liable for an employee's injuries, the injured employee is not required to elect between an award under the LHWCA and an action against the third person. However, the LHWCA restricts claims against a vessel to certain negligence actions. (See *infra*, §139.)

(2) *Assignment of Cause of Action.* If an injured employee fails to commence an action against a third person within 6 months of accepting a compensation award, acceptance constitutes an assignment of the cause of action to the employer. (33 U.S.C., §933(b); see *Rodriguez v. Compass Shipping Co.* (1981) 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472.) However, voluntary acceptance of benefit payments, without a formal award, does not have this effect. (*Pallas Shipping Agency v. Duris* (1983) 461 U.S. 529, 103 S.Ct. 1991, 76 L.Ed.2d 120.)

If the employer does not commence an action within 90 days of the assignment, the cause of action reverts to the employee. (33 U.S.C., §933(b).) (On distribution of proceeds between employer and employee, see 33 U.S.C., §933(e); *Bloomer v. Liberty Mut. Ins. Co.* (1980) 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215.)

(3) *Measure of Liability.* In *Edmonds v. Compagnie General Transatlantique* (1979) 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521, a longshoreman sued a shipowner for negligence. The jury found plaintiff 10% negligent, his shoreside employer 70% negligent, and the shipowner 20% negligent. *Held*, the shipowner was liable for 90% of plaintiff's damages. Congress, in amending the LHWCA, did not impose a proportionate-fault rule. Hence, the traditional admiralty rule applies, i.e., the shipowner is liable for all damages not due to the longshoreman's own negligence. (99 S.Ct. 2758, 61 L.Ed.2d 529.) (See *Bloomer v. Liberty Mut. Ins. Co.*, *supra*, 100 S.Ct. 925, 931, 63 L.Ed.2d 215, 225 [stevedore was entitled to reimbursement for full amount of compensation payment to longshoreman, without reduction by proportionate share of longshoreman's legal expenses in obtaining recovery from shipowner]; *Schreefel v. Okuly* (1983) 143 C.A.3d 818, 822, 192 C.R. 402 [following *Edmonds* and *Bloomer*]; *Hernandez v. Badger Const. Equipment Co.* (1994) 28 C.A.4th 1791, 1826, 34 C.R.2d 732 [employer is entitled to recoup full amount of LHWCA workers'

compensation benefits paid to employee without reduction for comparative fault; following *Schreefel*].)

(4) *Recovery for Loss of Consortium*. In *Pesce v. Summa Corp.* (1975) 54 C.A.3d 86, 126 C.R. 45, a shoreside worker was injured, and his wife sued the owner of the vessel for her loss of consortium. *Held*, the cause of action was maintainable. A 1963 Second Circuit opinion (*Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257) denied recovery, but a 1975 Fifth Circuit opinion (*Skidmore v. Grueninger*, 506 F.2d 716) held that, under *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, *infra*, §145, a wife could recover for loss of consortium in a wrongful death action. (54 C.A.3d 90.) Moreover, *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, 6 *Summary* (10th), *Torts*, §1679, recognized that recovery for the loss by either spouse is now the established rule. (54 C.A.3d 91, 92.) "Accordingly, since we can perceive no logical, sound or reasonable basis to differentiate between the case where the husband is killed, as contrasted to injured, in respect to the wife's entitlement to recover for loss of consortium, we conclude that *Igneri* has been overruled by *Sea-Land Services*." (54 C.A.3d 92.) (See *American Export Lines v. Alvez* (1980) 446 U.S. 274, 100 S.Ct. 1673, 1679, 64 L.Ed.2d 284, 293.)

(5) *Death Benefits Following Settlement*. Before an injured worker's death, the worker's spouse is not a "person entitled to compensation" for death benefits within the meaning of 33 U.S.C., §933(g)(1), and does not forfeit the right to collect death benefits under the LHWCA for failure to obtain approval of the deceased worker's employer for settlements with third-party tortfeasors entered into before the worker's death. (*Ingalls Shipbuilding v. Director, OWCP* (1997) 519 U.S. 248, 117 S.Ct. 796, 804, 136 L.Ed.2d 736, 750 [worker claimed benefits for asbestosis, sued manufacturers and suppliers, and on settling was required, along with spouse, to sign settlement releases which were not approved by plaintiff; on worker's death, spouse sought death benefits under LHWCA].)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.

d. Employee's Action Against Third Party.

2. Action Against Shipowner.

2 *Witkin Sum. Cal. Law Work Comp* § 139

[§ 139] Action Against Shipowner.

Where an injury covered by the LHWCA is caused by the negligence of a vessel, the owner of the vessel may be sued as a third party under 33 U.S.C., §933. However, the vessel's liability may not be based on the warranty of seaworthiness (*supra*, §128 et seq.) or its breach. (33 U.S.C., §905(b).)

An action is not permitted if the injured person was employed by the vessel as a stevedore and the injury was caused by the negligence of other stevedores. In addition, if the injured person was employed by the owner, agent, operator, or charterer of the vessel to provide shipbuilding, repairing, or breaking services, no action is allowed against the employer in any capacity or against fellow employees. (33 U.S.C., §905(b).) A longshoreman employed by the owner of a vessel where the owner is acting as its own stevedore may receive compensation under the LHWCA and also sue the employer in tort. (*Jones & Laughlin Steel Corp. v. Pfeifer* (1983) 462 U.S. 523, 103 S.Ct. 2541, 2548, 76 L.Ed.2d 768, 780.)

In *Jones v. Dutra Const. Co.* (1997) 57 C.A.4th 871, 67 C.R.2d 411, plaintiff welder, dispatched from a union hall and injured while modifying scows owned and operated by defendant marine construction firm, sued defendant for negligence. The trial judge granted defendant summary judgment, finding that the action was barred by the exclusive remedy provisions (33 U.S.C., §905(b)). *Held*, affirmed; at the time of injury plaintiff was engaged in maritime employment activity within the bar of 33 U.S.C., §905(b).

(a) *Vessel owning employers.* 33 U.S.C., §905(b) does not bar negligence suits only against *shipyard* employers. The critical language focuses on the purpose for which the employee was employed, not on the business of the employer. While the language clearly includes shipyard employers it does not exclude other employers, and cases construing the statute's bar have not limited it to employees of shipyard employers. (57 C.A.4th 877.)

(b) *Nonmaritime employment.* Federal cases do not support plaintiff's contention that he should not be considered a shipbuilder or ship repairer for purposes of 33 U.S.C., §905(b) because his job for defendant was the first involving maritime activity in a long employment history. Under the occupational test for coverage, an employee whose employment history consists almost entirely of maritime work is covered by the LHWCA for an injury sustained during

a temporary, nonmaritime job. However, the converse is not true: An employee is also considered covered if he is engaged in maritime work *at the moment of injury*. Thus, as here, an employee engaged in maritime employment solely by virtue of work within the meaning of 33 U.S.C., §905(b) may not avoid the statute's bar by claiming that his overall occupation is not that of a shipbuilder, repairer, or breaker. (57 C.A.4th 878, 881.)

(c) *Repairing or shipbuilding.* 33 U.S.C., §905(b) permits a negligence action against a vessel owner by persons covered under the LHWCA *except* by those persons engaged in shipbuilding, repairing, or breaking services. This exception distinguishes those workers specified from longshore and harbor workers who generally provide routine maintenance. Here, it is apparent that plaintiff's work was of a nature similar to repair, building, or breaking a vessel. It is unimaginable that Congress wished to preclude negligence actions by builders, repairers, and breakers but allow actions by workers employed to modify or alter an existing vessel. (57 C.A.4th 883.)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.

d. Employee's Action Against Third Party.

3. Shipowner's Duty of Care.

2 *Witkin Sum. Cal. Law Work Comp* § 140

[§ 140] Shipowner's Duty of Care.

(1) *Nondelegable Duties*. In *Johnson v. Canadian Trans. Co.* (1976) 54 C.A.3d 827, 127 C.R. 72, a shoreside employee sued the owner of a vessel for injuries suffered while he was unloading it, relying on the owner's nondelegable duty to provide him a safe place to work. The trial court granted the owner's motion for summary judgment. *Held*, reversed. (a) The 1972 amendments to the LHWCA were designed to eliminate liability for unseaworthiness to shoreside workers, but to permit development of uniform common law principles of negligence. Those principles include liability for "peculiar risks" which impose a nondelegable duty to take "suitable precautions," as espoused in *Rest.2d, Torts* §§413, 416 (see 6 *Summary* (10th), *Torts*, §1248). (54 C.A.3d 838.) (b) The law imposes this liability on the owner even though the shoreside employer's negligence may also have contributed to the injuries. (54 C.A.3d 839.)

A different view was taken in *Kelleher v. Empresa Hondurena de Vapores, S.A.* (1976) 57 C.A.3d 52, 129 C.R. 32. A shoreside worker was unloading and restacking in the hold of defendant's vessel. A banana box, on which he was standing contrary to instructions from his employer, gave way. He sued the owner on three theories: (1) the boxes were shipped and stored in a manner that imposed an unreasonable risk in unloading; (2) an unsafe work method was imposed on defendant; and (3) the boxes were poorly designed and constructed for their intended purpose. The trial court granted summary judgment for defendant on all theories. *Held*, reversed and remanded to enter partial summary judgment only.

(a) The 1972 amendments to the LHWCA preclude recognition of a nondelegable duty to provide a safe place to work. (57 C.A.3d 59.) Primary responsibility lies with the shoreside employer who is an expert in loading and unloading ships. The *Johnson* opinion is contrary to federal decisions, and is therefore of limited precedential value. (57 C.A.3d 59, 60.)

(b) An analysis of the LHWCA as amended indicates "a limited application" of the provisions of *Rest.2d, Torts* §§413, 416 in the context of injuries to shoreside workers on a vessel. (57 C.A.3d 60, 61.) Recognition of the special expertise of the shoreside employer and employees rationalizes the limited duty of the shipowner with *Rest.2d, Torts* §413, and the prohibition of an express contract of indemnity under the LHWCA (see *infra*, §141) defeats the

underlying premise of *Rest.2d, Torts* §416. (57 C.A.3d 62.)

(c) A danger created by the manner of stowage of the boxes was equally if not more apparent to "the expert plaintiff and his expert employer," and under federal law, the vessel's owner is not liable. (57 C.A.3d 63.)

(d) As to the design and construction of the boxes, however, there was nothing negating the possibility of a latent defect that would not be apparent; and summary judgment as to that issue was improperly granted. (57 C.A.3d 64.) (See *Keith v. S.S. Goldstone* (1978) 81 C.A.3d 699, 703, 705, 146 C.R. 639 [following *Kelleher*]; *Prohoroff v. Kawasaki Kisen Kaisha, Ltd.* (1979) 90 C.A.3d 640, 648, 153 C.R. 287 [judgment based on negligence affirmed].)

(2) *Duty To Discover Dangerous Conditions.* Once a loading operation has begun, a shipowner has no duty to exercise reasonable care to discover dangerous conditions that develop within the confines of cargo operations assigned to the stevedore. (*Scindia Steam Navigation Co. v. De Los Santos* (1981) 451 U.S. 156, 101 S.Ct. 1614, 1622, 68 L.Ed.2d 1, 15.) Also, a shipowner may be liable to the stevedore's employees for injuries resulting from open and obvious dangers of which the shipowner has actual knowledge only if the shipowner should know that the stevedore cannot be relied on to avoid the hazard. (*Dugas v. Brewer & Co.* (1985) 165 C.A.3d 203, 210, 211 C.R. 573 [lack of restraining devices and nonskid surface on loading platform; summary judgment for shipowner reversed].) (See *Torres v. Cool Carriers A.B.* (1994) 26 C.A.4th 900, 907, 31 C.R.2d 790 [time charterer, as a matter of law, owed no duty to injured longshoreman to protect or warn of defective deck gratings].)

(3) *Duty To Warn of Latent Hazards.* A shipowner's duty to warn of latent defects in the cargo stow area on turning the ship over to a stevedore for unloading (turnover) is a narrow one. It attaches only to *latent hazards*, i.e., hazards that are *not* known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of its work. The duty encompasses only the hazards that are known to the vessel, or should be known to it in the exercise of reasonable care, and does not require the shipowner to supervise the ongoing operations of the loading stevedore, or to inspect the completed stow. (*Howlett v. Birkdale Shipping Co.* (1994) 512 U.S. 92, 114 S.Ct. 2057, 2067, 129 L.Ed.2d 78, 91 [longshoreman injured during unloading of cargo after slipping and falling on clear plastic placed under cargo and supplied by vessel owner].)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

3. Longshore and Harbor Workers' Compensation Act.

e. No Right of Indemnity in Shipowner.

2 *Witkin Sum. Cal. Law Work Comp* § 141

[§ 141] No Right of Indemnity in Shipowner.

An injured worker's employer is not liable to the owner of the vessel "directly or indirectly," and any agreement or warranty to the contrary is void. (33 U.S.C., §905(b).) Indemnity is also precluded where the injured person was employed by the owner, agent, operator or charterer of the vessel to provide shipbuilding, repairing, or breaking services. (33 U.S.C., §905(b); see *Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co.* (1975) 52 C.A.3d 305, 311, 125 C.R. 111 [time charterer of vessel could not seek indemnification from shoreside employer of injured worker; dismissal of cross-complaint affirmed]; *IT Corp. v. Superior Court* (1978) 83 C.A.3d 443, 451, 147 C.R. 828 [implied indemnity claims between shoreside employers are also prohibited].)

The exclusive liability provision of 33 U.S.C., §905 also precludes a third party from obtaining contribution from an employer who has paid benefits under the LHWCA. In *Graco v. Colberg* (1984) 162 C.A.3d 322, 208 C.R. 465, C, employed by defendant Colberg at its boat works, was fatally injured while using a spray painter manufactured by G and sold to Colberg by E. Colberg's insurer paid death benefits to C's widow and children pursuant to the LHWCA. Then C's widow and children filed a wrongful death action against G and E, based on negligence and strict products liability. G and E did not originally seek contribution or indemnity from Colberg because of the current belief that the exclusive liability provision of the LHWCA precluded an action, but when *Lockheed Aircraft Corp. v. United States* (1983) 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911, supra, §125, construed a similar provision of the Federal Employees' Compensation Act (FECA) differently, G and E cross-complained against Colberg, alleging that it was negligent in failing to ground the barge as a precaution against sparks. *Held*, dismissal of cross-complaint affirmed.

(a) Prior to *Lockheed Aircraft Corp.*, the exclusive liability provision of the LHWCA had been construed to preclude an action for indemnity or contribution against an employer based on allegations of negligence. (162 C.A.3d 330.) And *Lockheed* is not controlling. The judicial and congressional history show that the FECA and the LHWCA differ completely despite similarity in language. (162 C.A.3d 334.)

(b) Policy considerations also support exclusive liability. In the 1972 amendments, Congress intended a uniform system of compensation, which would not depend on the fortuitous circumstance of whether the accident occurred over land or over water. Arguments of G and E would defeat this purpose by once again injecting disparity into the Act depending on the location of the accident; i.e., an employer would either be liable or immune from contribution

depending on whether the accident occurred over land or over water. Hence, "we adhere to the decisions" in *IT Corp.* and *Standard Fruit, supra.* (162 C.A.3d 335.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

4. Concurrent Federal and State Jurisdiction.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 142

[§ 142] In General.

Despite attempts to state a test for admiralty and local jurisdiction (*supra*, §126), there remains a "twilight zone" involving nonmaritime employees temporarily engaged in maritime activities. (See *Teahan v. Industrial Acc. Com.* (1930) 210 C. 342, 344, 292 P. 120 [wharfinger injured while boarding vessel to obtain manifest papers; state law applied]; *Parker v. Motor Boat Sales* (1941) 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed 184 [janitor drowned in navigable waters while testing boat motor; federal law applied]; *Davis v. Department of Labor* (1942) 317 U.S. 249, 63 S.Ct. 225, 227, 87 L.Ed. 246, 248 [steelworker engaged in dismantling bridge over navigable river, drowned while working on barge; state law applied]; *Clark v. Cahill Bros.* (1945) 67 C.A.2d 689, 691, 155 P.2d 125 [worker transported by employer, injured while alighting from tug onto float; state law applied]; *Baskin v. Industrial Acc. Com.* (1950) 97 C.A.2d 257, 263, 217 P.2d 733 [shipyard materialman usually worked ashore but was injured on board vessel; state law applied]; Cal. Civil Practice, 1 Workers' Compensation, §1:19.; C.E.B., 1 Workers' Compensation Practice 4th, §1.64; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §35 et seq.)

In *Hahn v. Ross Island Sand & Gravel Co.* (1959) 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed.2d 292, petitioner was injured while working on a barge in navigable waters in Oregon. The employer, under Oregon law, elected not to be covered by workers' compensation, and petitioner therefore had an action in the state court, with no common law defenses. However, the work occurred in the "twilight zone," and petitioner thus had an election to recover compensation under the Federal Longshore Act. When the employer elected to reject the state's compensation act, petitioner could proceed under either state or federal law, and therefore could bring a common law action in the state court. (79 S.Ct. 267, 3 L.Ed.2d 293.)

In *Calbeck v. Travelers Ins. Co.* (1962) 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368, 371, welders were injured while working on the construction of new vessels that had been launched and were floating on navigable waters. *Held*, the federal law could be applied. "Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." (82 S.Ct. 1198, 8 L.Ed.2d 371.) (See *Sun Ship v. Pennsylvania* (1980) 447 U.S. 715, 100 S.Ct. 2432, 2437, 65 L.Ed.2d 458, 464 [state compensation law applied to land-based injury within coverage of LHWCA; following *Calbeck*].)

Duong v. Work. Comp. App. Bd. (1985) 169 C.A.3d 980, 215 C.R. 609, held that petitioner, a land-based shipyard worker, injured when making minor repairs on a commissioned vessel floating in federal navigable waters but tied to a dock, was engaged in activities covered by both the federal and state Acts; hence, he was entitled to workers' compensation. Petitioner first applied for and received benefits under the LHWCA, but sought compensation in California in the belief that the state benefits were greater.

(a) When dual federal and state coverage is available, simultaneous applications may be made under each Act because delays might allow a statute of limitations to run where the applicant files only with an agency eventually found to lack jurisdiction. There is no danger of double recovery in cases of concurrent jurisdiction because an employer's contributions under one Act will be credited against the other. (169 C.A.3d 982.)

(b) The "twilight zone" doctrine recognizes "the futility of reasoning logically about fixing jurisdictional boundaries in areas where waterfront employers and employees regularly engage in land-based work with only occasional incursions on floating commissioned vessels." (169 C.A.3d 984, quoting a New Jersey case.) This is the proper approach here. "[A]n employee should not be deemed to leave the protection of state law behind when ordered by an employer to perform brief duties over navigable waters, especially where, as here, it would deprive the worker of substantial benefits." (169 C.A.3d 984.)

In *Seide v. Bethlehem Steel Corp.* (1985) 169 C.A.3d 985, 215 C.R. 629, S, employed by defendant shipyard to perform repair work on a ship docked at defendant's pier, was run over and killed by a forklift operated by another employee. S was covered by the LHWCA, but plaintiff, S's nondependent mother, brought this state action for wrongful death. *Held*, the cause of action was barred by both federal and state compensation law.

(a) There is concurrent state and federal jurisdiction over *compensation* claims relating to injuries sustained by maritime employees on navigable waters of the *United States*. (169 C.A.3d 987, citing *Calbeck, supra*.)

(b) It does not follow, however, that a state may apply its own *tort law* under that concurrent jurisdiction. Tort principles or common law concepts of employment are not relevant to compensation under the LHWCA; and the basic rule of *Southern Pac. Co. v. Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524, 526, 61 L.Ed. 1086, 1096, *supra* §135, is still valid. (169 C.A.3d 988, 989.) Even if plaintiff's wrongful death action were outside the scope of the LHWCA, state tort law could not be applied, for the basis of the action is a maritime tort (killed on navigable waters). (169 C.A.3d 989.)

(c) 33 U.S.C., §905(a) makes the liability for compensation exclusive, with two exceptions: (1) The injured employee may claim compensation under the LHWCA or bring a damage action where the employer has failed to pay compensation. (169 C.A.3d 989.) (2) There is a judicially created exception for the intentional tort of the employer. Neither exception is applicable here. (169 C.A.3d 990.)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

4. Concurrent Federal and State Jurisdiction.

b. Crediting Payments.

2 Witkin Sum. Cal. Law Work Comp § 143

[§ 143] Crediting Payments.

In concurrent jurisdiction situations, double recovery is avoided because awards under one compensation system are credited against a recovery under the second system. The proper method of crediting was decided in *Sea-Land Service v. Work. Comp. App. Bd.* (1996) 14 C.4th 76, 58 C.R.2d 190, 925 P.2d 1309, and a dollar-for-dollar credit system was adopted.

In *Sea-Land Service*, a maritime warehouse worker's injury fell within the concurrent jurisdiction of California's Act and the LHWCA. Sea-Land, a permissibly self-insured employer, provided all medical care and paid *temporary* disability payments in an amount in excess of the injured worker's entitlement under the California Act. Sea-Land also paid unscheduled wage loss *permanent* disability benefits to the worker even though these benefits were not available under the LHWCA. The worker was subsequently awarded scheduled permanent partial disability indemnity under the California Act. Although the maximum amount of temporary disability benefits the worker received under the LHWCA exceeded the total combined amount of temporary and permanent disability benefits under the California Act, the worker claimed entitlement to and received state permanent disability benefits because similar benefits were not allowed under the LHWCA. Sea-Land was credited for federal temporary disability payments against state temporary disability payments (category-by-category credit) but was denied credit of excess federal temporary disability against state permanent disability liability. The worker was awarded the amount of the employer's remaining liability for state permanent disability. *Held*, credit for LHWCA disability benefits must be calculated on a dollar-for-dollar basis, regardless of category.

(a) *Double recovery*. An injured employee may receive only a single recovery of benefits based on a single injury or disability. Thus, when an injury falls under concurrent jurisdiction, the right to recovery from more than one source is subject to the rule that a credit must be allowed against an award for any payment that might result in a double recovery. (14 C.4th 82.)

(b) *Crediting*. In this case, two crediting systems are at issue. Under the category-by-category system here advocated by the employee, the employee's final recovery of state and federal disability benefits could exceed that available under either the LHWCA or the California Act alone. Under the dollar-for-dollar system, the employee's final recovery would be limited to the higher available recovery under one act or the other. (14 C.4th 83.)

(c) *Federal and state law support full economic credit.* Federal law strongly supports application of full economic credit for the LHWCA benefit payments. Moreover, although California's Act contains no specific crediting provision covering the LHWCA benefit payments, *Duong v. Work. Comp. App. Bd.* (1985) 169 C.A.3d 980, 215 C.R. 609, supra, §142, and *Bobbitt v. Work. Comp. App. Bd.* (1983) 143 C.A.3d 845, 192 C.R. 267, infra, §144, recognize the rule against double recovery and express the view that full economic credit for LHWCA benefit payments is proper. (14 C.4th 84, 86.)

(d) *Adoption of dollar-for-dollar credit system consistent with Lab.C. 3202.* Giving full economic credit for the LHWCA disability payments would not infringe on the policy of liberal construction of the California Act (*Lab.C. 3202*; supra, §6) because the crediting permits an injured maritime worker to obtain a final recovery of benefits that amounts to "no less than the maximum allowable recovery under the California system." (14 C.4th 90.) Moreover, providing full economic credit comports with the underlying purposes of both the federal and state schemes, is fair to both employers and employees, and is consistent with the system of crediting for successive and supplementary sister state workers' compensation awards. (14 C.4th 92.)

Three justices dissented, arguing that allowing a reduction in a worker's state-mandated *permanent* disability indemnity simply because the federally required *temporary* disability indemnity exceeded the amount available under state law violates *Lab.C. 4661* and upsets the balance of distinct economic interests. (14 C.4th 93.)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

4. Concurrent Federal and State Jurisdiction.

c. Workers' Compensation for Injury on Land.

2 *Witkin Sum. Cal. Law Work Comp* § 144

[§ 144] Workers' Compensation for Injury on Land.

The 1972 amendments of the LHWCA extended coverage to injuries on land that formerly had been the exclusive province of state workers' compensation acts. (See *supra*, §136.) However, state acts are not superseded. "Absent any contradicting signal from Congress," the principles of *Davis v. Department of Labor* (1942) 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, and of *Calbeck v. Travelers Ins. Co.* (1962) 370 U.S. 114, 82 S.Ct. 1196, 1198, 8 L.Ed.2d 368, 371, lead to the conclusion that "the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law." Accordingly, federal jurisdiction will coexist with state compensation laws in the field "in which the latter may constitutionally operate" under the doctrine of *Southern Pac. Co. v. Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, *supra*, §135. (*Sun Ship v. Pennsylvania* (1980) 447 U.S. 715, 100 S.Ct. 2432, 2436, 2437, 65 L.Ed.2d 458, 463, 464.) (See *Bobbitt v. Work. Comp. App. Bd.* (1983) 143 C.A.3d 845, 192 C.R. 267 [Outer Continental Shelf Land Act (43 U.S.C., §1331 et seq.) extends LHWCA to outer continental shelf, but does not preclude award under state compensation systems; hence, California Board properly exercised jurisdiction over employee injured on oil drilling platform in Santa Barbara channel].)

In addition, the exclusive remedy provision of the LHWCA does not preempt an industrially injured, shore-based maritime employee's cause of action for tort damages authorized by specified provisions of the California Act. In *Lenane v. Continental Maritime of San Diego* (1998) 61 C.A.4th 1073, 72 C.R.2d 121, defendant, a sheet metal mechanic employed at a shipyard located on the waterfront, lost three fingers in an industrial accident involving a power press machine. He filed an application for adjudication with the California Board and later sued defendant, his former employer, under *Lab.C. 4558* (employer's failure to provide power press guard, *supra*, §49 et seq.). The trial judge granted summary judgment for defendant, finding that the LHWCA provided plaintiff's exclusive remedy. *Held*, reversed. Congress, in amending the LHWCA in 1972 to extend federal workers' compensation jurisdiction inland, intended to supplement rather than supplant state remedies. A cause of action such as one brought under *Lab.C. 4558* is consistent with Congress' intent to aid maritime workers and does not clearly conflict with federal law. (61 C.A.4th 1087.)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

V. FEDERAL JURISDICTION

D. Admiralty Jurisdiction.

4. Concurrent Federal and State Jurisdiction.

d. Federal Maritime Action in Death Case.

2 Witkin Sum. Cal. Law Work Comp § 145

[§ 145] Federal Maritime Action in Death Case.

The early leading case of *The Harrisburg* (1886) 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358, established the rule that maritime law does not afford a cause of action for wrongful death. In *The Tungus v. Skovgaard* (1959) 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, the Court held that, where a death on state territorial waters is left remediless by maritime law and federal statutes, a remedy may be provided under an applicable state law, and that the state law must be applied to both the creation of the right and when recovery is to be permitted. The extent of the role to be played by state law was the subject of much uncertainty in later cases. (See *Hess v. United States* (1960) 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed.2d 305; *Goett v. Union Carbide Corp.* (1960) 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed.2d 341.)

In *Moragne v. States Marine Lines* (1970) 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339, decedent longshoreman was killed while working aboard a vessel within Florida's navigable waters. *Held*, an action for wrongful death was maintainable under maritime law. In an extensive review of the law the Court found that *The Harrisburg* was no longer supportable and overruled it. "A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law." (90 S.Ct. 1781, 26 L.Ed.2d 350.) Accordingly, "an action does lie under the general maritime law for death caused by violation of maritime duties." (90 S.Ct. 1792, 26 L.Ed.2d 351.)

In *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, the Court (5-4) applied the *Moragne* rule to create an expanded remedy.

(a) Decedent had already recovered damages for personal injuries in his lifetime, and a majority of courts interpreting state and federal wrongful death statutes have held that such recovery is a bar to the dependents' action for wrongful death. However, *res judicata* does not apply because the two causes of action are distinct; and in determining the scope of the new judicially created death action, the court should be guided by the humane and liberal character of admiralty proceedings recognized in *Moragne*. (94 S.Ct. 814, 39 L.Ed.2d 20.)

(b) All of the modern elements of recovery, including loss of society, are proper. (94 S.Ct. 817, 39 L.Ed.2d 22.)

(c) However, where the decedent has recovered damages for loss of future wages, the claim of dependents for loss

of support is precluded by collateral estoppel, and double liability of the defendant is thereby avoided. (94 S.Ct. 819, 39 L.Ed.2d 25.)

In *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275, a seaman was killed by a fellow crew member while the ship was docked in the harbor of Vancouver, Washington. His mother sued the vessel's operators and others, mainly seeking compensation for loss of support and services and loss of society. The Court, relying primarily on *Moragne*, concluded that there is a maritime cause of action for the wrongful death of a seaman, whether under the Death on the High Seas Act, the Jones Act, or general maritime law. (111 S.Ct. 326, 328, 112 L.Ed.2d 291, 293.) However, the damages recoverable do not include loss of society, and there can be no recovery for the decedent's lost future earnings. (111 S.Ct. 328, 112 L.Ed.2d 294.)

In *Norfolk Shipbuilders & Drydock v. Garris* (2001) 532 U.S. 811, 121 S.Ct. 1927, 150 L.Ed.2d 34, a harbor worker died as a result of injuries sustained while sandblasting aboard a vessel berthed in U.S. navigable waters. Plaintiff, decedent's mother, sued a drydock company, and another subcontractor whose employee accidentally caused her son's death, for wrongful death based on negligence under general maritime law and Virginia wrongful death statutes. *Held*, the general maritime cause of action recognized in *Moragne* for death caused by a violation of maritime duties is available for the negligent breach of a maritime duty of care. Although the issue of wrongful death for negligence was technically left open after *Moragne*, there is no rational basis for distinguishing negligence from seaworthiness. (121 S.Ct. 1930, 150 L.Ed.2d 40.)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE
A. Nature of Requirement.
1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 146

[§ 146] In General.

(1) *Employer Must Secure Payment of Compensation.* All employers (except the state) must secure the payment of compensation by (a) obtaining insurance against liability, or (b) establishing a self-insurance plan, either as an individual or as part of a group of employers. (*Lab.C. 3700(a)*, (b); see *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1949) 95 C.A.2d 10, 15, 212 P.2d 1 [no valid partial self-insurance by obtaining limited policy, without certificate of consent from Commission under *Lab.C. 3700*]; Cal. Civil Practice, 1 Workers' Compensation, §1:4 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §1.5; 1 Herlick 6th, §3.01 et seq.; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §470 et seq.; *infra*, §§147, 148; on oral binder, see *Granco Steel v. Work. Comp. App. Bd.* (1968) 68 C.2d 191, 197, 65 C.R. 287, 436 P.2d 287; 2 *Summary* (10th), *Insurance*, §42.)

(2) *Posting Requirement.* Every employer subject to the compensation provisions of the Labor Code must post, and keep posted in a conspicuous location, a notice stating the name of the current compensation insurer of the employer, or that the employer is self-insured, and who is responsible for claims adjustment. (*Lab.C. 3550(a)*.)

Lab.C. 3550(d) requires that the notice be easily understandable and posted in both English and Spanish where there are Spanish-speaking employees. In addition, the notice must contain the following information:

- (a) How to get emergency medical treatment.
- (b) The events, injuries, and illnesses covered by workers' compensation.
- (c) The injured employee's right to receive medical care.
- (d) The employee's right to select and change treating physicians.
- (e) The employee's right to receive temporary and permanent disability indemnity, vocational rehabilitation services, and death benefits.
- (f) To whom injuries are reported.
- (g) The time limits for notifying the employer of an injury.

(h) The protections against discrimination.

(i) The location and phone number of the nearest information and assistance officer.

Failure to keep a notice posted constitutes a misdemeanor and is prima facie evidence of noninsurance. (*Lab.C. 3550(b)*.) Failure to provide notice automatically permits an employee to be treated by his or her personal physician for an injury occurring during that failure. (*Lab.C. 3550(e)*.)

All new employees must be given written notice of the required information. The information must be easily understandable and available in both English and Spanish. The content must inform the employee how to obtain appropriate medical care for an industrial injury, and explain the role of a primary treating physician. The notice must also contain a form to notify the employer of the name of the employee's personal physician or chiropractor. (*Lab.C. 3551*.)

(3) *Failure To Insure*. An employer who fails to secure payment of compensation as required by *Lab.C. 3700* is guilty of a misdemeanor. (*Lab.C. 3700.5, 3710.2*.) A violation is punishable by imprisonment in county jail for up to 1 year or by a fine of up to twice the amount of the required premium, but not less than \$ 10,000, or both. (*Lab.C. 3700.5(a)*.) A subsequent conviction is punishable by imprisonment in county jail for up to 1 year, or by a fine of triple the amount of premium, but not less than \$ 50,000, or both. (*Lab.C. 3700.5(b)*.) In addition, on a first conviction, an employer may be charged the costs of investigation; on a second conviction, charges for costs are mandatory. (*Lab.C. 3700.5(c)*.) The Department of Insurance must post on its website the name and address of the violator together with all relevant information about the case. The posting remains for 5 years, or until the conviction is reversed or expunged. (*Ins.C. 1871.9*.)

(4) *Agreement With Other Employer*. An employer may secure the payment of compensation on employees furnished under an agreement from another employer by an additional agreement under which the other employer obtains the necessary coverage. Both employers are then considered to have secured the payment of compensation within the meaning of *Lab.C. 3602* (see supra, §24 et seq.), *Lab.C. 3700*, supra, and *Lab.C. 3706*, provided the coverage has in fact been obtained and remains legally sufficient and in effect for the duration of the employment. (*Lab.C. 3602(d)*.) Employers complying with *Lab.C. 3602(d)* are exempt from civil, criminal, or other penalties normally applicable for failure to provide workers' compensation coverage, and are exempt from tort liability in the event of an employee injury. (*Lab.C. 3602(d)*.)

(5) *Business and Professions Code Requirements*. Contractors with employees must maintain workers' compensation insurance as a condition for licensure. (*B. & P.C. 7125(a)*.) (On failure to comply, see infra, §150.)

West's Key Number Digest, Workers' Compensation k.1045 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1a) *(New) Employer Must Provide Access to Insurer for Audit*. *Ins.C. 11760.1* was added in 2007 to require an employer to accommodate a workers' compensation insurer's access to specified employer payroll records to permit the insurer to perform necessary audits. An employer who fails to provide access will "be liable to pay to the insurer a total premium for the policy equal to three times the insurer's then-current estimate of the annual premium on the expiration date of the policy." The employer may also be liable for costs incurred by the insurer in connection with the audit after failing to provide access following the insurer's third request within a 90-day period. (*Ins.C. 11760.1(a), (d)*.) "Access" means during regular business hours through the policy period and within 3 years after the policy period ends. The employer and insurer may agree to other access periods. (*Ins.C. 11760.1(b)*.) The insurer must maintain and follow reasonable rules and procedures to notify employers of the duty to provide access and for making appointments for that purpose. (*Ins.C. 11760.1(c)*.) (5) *Business and Professions Code Requirements*. *B. & P.C. 7125(b)* was amended in 2006 to provide that *B. & P.C. 7125* does not apply to a contractor who (a) has no employees and so certifies, and (b) does not hold a C-39 (roofing contractor) license, as defined by 16 Cal. Code Reg. §823.39.

B. & P.C. 7125 is effective until January 1, 2011, and is repealed on that date unless otherwise extended. (*B. & P.C. 7125(f)*, added in 2006.) Another version of *B. & P.C. 7125* will become operative on January 1, 2011. (See Stats. 2006, Chap. 38, §2.)



147 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VI. WORKERS' COMPENSATION INSURANCE A. Nature of Requirement. 2. Insurers.

2 Witkin Sum. Cal. Law Work Comp § 147

[§ 147] Insurers.

(1) *In General.* Policies may be taken either with private insurers, or with the State Compensation Insurance Fund (Fund), a public corporation organized to operate as an insurer for this purpose. (See *Ins.C. 11770* et seq.; Cal. Civil Practice, 1 Workers' Compensation, §1:5.) (On California Insurance Guarantee Association, established to provide protection against insolvent insurers, see 2 *Summary* (10th), *Insurance*, §12.)

(2) *State Compensation Insurance Fund.* The Fund may insure a California employer against liability under another state's law for California employees temporarily working in that state on a specific assignment, if the Fund insures the employer's other employees who work in California. (*Ins.C. 11780.5*.) (On workers' compensation coverage of employees working outside state, see *supra*, §111 et seq.)

The Fund must investigate claims adequately and promptly, pay only legitimate claims in the proper amount, permit review and auditing of files, and set rates accurately and fairly. These duties are implied contractual conditions. As such, they are enforceable under the theories of breach of contract and implied covenant of good faith and fair dealing. (*Tricor Calif. v. State Comp. Ins. Fund* (1994) 30 C.A.4th 230, 238, 35 C.R.2d 550.) (See *Salimi v. State Comp. Ins. Fund* (1997) 54 C.A.4th 216, 220, 62 C.R.2d 640 [jurisdiction of employer's claim of bad faith and breach of contract against its workers' compensation insurer rests with court, not Appeals Board].) (On exclusive jurisdiction of Appeals Board, see *supra*, §15.)

Ins.C. 11873, which exempts the Fund from the application of Government Code provisions governing state agencies except as specifically provided in the statute, excludes the Fund from immunities in the Tort Claims Act (*Govt.C. 810* et seq.). (*Courtesy Ambulance Service v. Superior Court* (1992) 8 C.A.4th 1504, 1514, 11 C.R.2d 161; *Maxon Industries v. State Comp. Ins. Fund* (1993) 16 C.A.4th 1387, 1391, 20 C.R.2d 730.) (See *Tricor Calif. v. State Comp. Ins. Fund*, *supra*, 30 C.A.4th 242 [following *Courtesy Ambulance Service*; Fund is not immune from punitive damages].)

(3) *Loss Control.* An insurer desiring to write workers' compensation insurance must maintain or provide occupational safety and health loss control consultation services to places of employment posing significant preventable hazards to workers. (*Lab.C. 6354.5(a), (e).*) Generally, the services must include (a) workplace surveys to identify health and safety problems, (b) reviews of employer injury records with appropriate personnel, and (c) development of

plans to improve employer health and safety loss records, including injury and prevention programs. (*Lab.C. 6354.5(b).*) When the insurance policy is issued, and then annually, the insurer must provide each insured employer with a written description of the consultation services together with a notice that the services are available at no additional charge. (*Lab.C. 6354.5(b), (c).*)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VI. WORKERS' COMPENSATION INSURANCE A. Nature of Requirement. 3. Self-Insurance.

2 Witkin Sum. Cal. Law Work Comp § 148

[§ 148] Self-Insurance.

(1) *Requirements.* An employer may be self-insured if the following Labor Code requirements are met:

(a) The employer must obtain from the Director of Industrial Relations a certificate of consent to self-insure, either as an individual or as one employer in a group of employers. (*Lab.C. 3700(b).*) In addition, each year the employer must deposit a security of at least 125% of the employer's estimated future liability, plus 10% of that estimated liability to secure payment of administrative and legal costs relating to the employer's self-insuring. The security must be at least \$ 220,000, and may consist of cash, securities, surety bonds, or irrevocable letters of credit, in any combination the Director deems adequate. (*Lab.C. 3701.*) Enhanced security requirements apply when a self-insuring employer has had a period of unlawful uninsurance. (See *Lab.C. 3701.7.*) (See 1 Herlick 6th, §3.08.)

(b) The Director may use the security deposit to pay an employer's compensation obligation when an employer fails to do so. (*Lab.C. 3701.5.*)

(c) The Director may revoke the certificate of consent at any time for good cause after a hearing. (*Lab.C. 3702.*) (On regulation of persons or firms administering self-insurance plans, see *Lab.C. 3702.1, 3702.3, 3702.5, 3702.7.*)

(2) *Self-Insurers' Security Fund.* The Self-Insurers' Security Fund (*Lab.C. 3742*) provides for continuation of workers' compensation benefits that are delayed because of a private, self-insurer's failure to meet its compensation obligations due to an inadequate or inaccessible security deposit. (*Lab.C. 3740.*)

The fund must assume the workers' compensation obligations of an insolvent self-insurer (*Lab.C. 3743(a)*), and must be a party in interest in all proceedings involving claims against insolvent self-insurers whose compensation obligations have been paid or assumed by the fund (*Lab.C. 3743(c)*). Accordingly, the fund has the right and obligation to obtain reimbursement from an insolvent self-insurer up to the amount of the workers' compensation obligations paid and assumed by it, including reasonable administrative and legal costs. (*Lab.C. 3744(a).*)

Reimbursement may be sought either from the security deposit of an insolvent self-insurer (*Lab.C. 3744(b)*) or in an action against any person (*Lab.C. 3744(c)*); and the fund may be a party in interest in any action brought by any other person seeking damages resulting from the insolvent self-insurer's failure to pay workers' compensation. (*Lab.C.*

3744(d); see *Self-Insurers' Sec. Fund v. ESIS* (1988) 204 C.A.3d 1148, 1154, 251 C.R. 693 [nature and purpose of fund, and authority to bring actions to recover compensation paid and liability assumed by fund]; *Insurance Co. of North America v. Department of Industrial Relations* (1988) 209 C.A.3d 760, 764, 259 C.R. 277 [jurisdiction of Director under Lab.C. 3701.5(g) to resolve disputes between surety and fund]; C.E.B., 2 Workers' Compensation Practice 4th, §20.48.)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE
B. Effect of Compliance.

2 Witkin Sum. Cal. Law Work Comp § 149

[§ 149] Effect of Compliance.

Employers who comply with the insurance requirement (*supra*, §146) are relieved of liability for compensation, and the insurer assumes liability. (*Lab.C. 3755, 3757, 3759*; see *infra*, §349.) The insurer is then subrogated to all rights of the employer arising out of assumption of liability or payment of compensation. (*Ins.C. 11662*; *Burum v. State Comp. Ins. Fund* (1947) 30 C.2d 575, 580, 184 P.2d 505.) In addition, an insurer is both benefited and bound by a contract between the employer and a third party that provides for attorneys' fees to a prevailing party. (*Employers Mut. Liab. Ins. Co. v. Tutor-Saliba Corp.* (1998) 17 C.4th 632, 638, 640, 71 C.R.2d 851, 951 P.2d 420, citing the text [where subcontractor's insurer sued to recover compensation benefits from general contractor and recovered nothing, general contractor was entitled to attorneys' fees under contract with subcontractor].)

Subrogation is a right, not an obligation, and the employer cannot force its insurer to pursue a reimbursement claim against a third party. Thus, the insurer has the option of not pursuing subrogation recovery at all. (*New Plumbing Contractors v. Nationwide Mut. Ins. Co.* (1992) 7 C.A.4th 1088, 1095, 9 C.R.2d 469 [plaintiff's claims were premised on defendant insurer's alleged failure to diligently pursue its subrogation rights, thus causing plaintiff to lose opportunity to obtain refund of premiums due to lowered "experience modification"].)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE
C. Effect of Failure To Comply.
1. In General.

2 Witkin Sum. Cal. Law Work Comp § 150

[§ 150] In General.

(1) *Tort Action.* An injured employee may bring a tort action against the uninsured employer. (*Lab.C. 3706*; see *supra*, §52 et seq.)

(2) *Compensation Proceeding.* In addition to bringing a tort action, the employee may file a claim with the Board. (*Lab.C. 3715(a)*.) The Board may direct the appropriate county clerk to issue writs of attachment for the employer's property to secure a possible award (*Lab.C. 5600*), and may also award a reasonable attorneys' fee in addition to the award (*Lab.C. 4555*). When the fee is allowed, no further fee may be awarded under *Lab.C. 4903* (*infra*, §342), but a lien may be granted to secure payment of the fee allowed. (*Lab.C. 4555*.)

(3) *Criminal Proceeding.* Criminal prosecution is expressly authorized. (*Lab.C. 3710*; see *People v. Barker (1938) 29 C.A.2d Supp. 766, 767, 770, 77 P.2d 321* [award is not admissible in criminal prosecution as either conclusive or prima facie evidence against alleged employer]; *People v. Doctor (1967) 257 C.A.2d 105, 111, 64 C.R. 608* [accusatory pleading filed beyond 1-year limitation period must allege date of discovery and why violation was not discovered earlier through due diligence].)

(4) *Stop Order, Penalties, and Restraints.* Where an employer has failed to secure payment of compensation, the Director of Industrial Relations must issue a stop order prohibiting the use of employee labor until compliance. (*Lab.C. 3710.1*.) Failure to observe the stop order is a misdemeanor. (*Lab.C. 3710.2*.) (See C.E.B., 1 Workers' Compensation Practice 4th, §8.61.)

At the time the stop order is issued and served, the Director must also issue and serve a penalty assessment order requiring the employer to pay into the State Treasury, for credit to the Uninsured Employers Fund, \$ 1,000 per employee employed at the time the order is issued and served. (*Lab.C. 3722(a)*); see *Woodline Furniture Mfg. Co. v. Department of Industrial Relations (1994) 23 C.A.4th 1653, 1659, 29 C.R.2d 17* [employer is liable for monetary penalty under *Lab.C. 3722* imposed with stop order regardless of whether employer subsequently obtains insurance]; *Bradshaw v. Park (1994) 29 C.A.4th 1267, 1274, 34 C.R.2d 872* [monetary penalty under *Lab.C. 3722(a)* is triggered by employer's failure to be covered by workers' compensation insurance and is not dependent on claim for industrial injury having been made]; *Catalina Car Wash v. Department of Industrial Relations (2003) 105 C.A.4th 162, 167, 129 C.R.2d 118* [penalty assessment and stop order were improper where employer was insured at time of inspection but lacked

documentary proof; distinguishing *Woodline*]; *Leo's Associates v. Department of Industrial Relations* (2004) 120 C.A.4th 628, 631, 15 C.R.3d 594 [retroactive reinstatement of lapsed policy did not satisfy requirement that insurance be in effect on day of inspection and thus, did not preclude penalties; following *Woodline* and distinguishing *Catalina*].)

The Director may also bring an action to impose monetary penalties and restrain the further conduct of business as long as the violation continues. (*Lab.C. 3712.*) In addition, *Lab.C. 129.5* provides for the assessment of administrative penalties and additional civil penalties against delinquent insurers, self-insured employers, and third-party administrators. (See Cal. Civil Practice, 1 Workers' Compensation, §5:1 et seq.)

(5) *Condition of Licensure for Contractors.* Contractors with employees must maintain workers' compensation insurance as a condition for licensure. A licensed contractor who fails to comply is subject to automatic suspension "by operation of law." (*B. & P.C. 7125(a).*) The registrar must notify the licensee that the license will be suspended 30 days from the date of the notice, and the notice must further furnish the suspension date, cause for suspension, and reinstatement procedures. (*B. & P.C. 7125.2(a).*) (See *Smith v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 117, 127, 129, 116 C.R.2d 728, *infra*, §190 [suspension of license under *B. & P.C. 7125.2* requires issuance of requisite notice].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Stop Order, Penalties, and Restraints.*

(*New*) *Withdrawal of erroneous penalty assessments:* *Lab.C. 3727.1* permits the Director of Industrial Relations to withdraw erroneous penalty assessments or stop orders only when an investigation reveals that (a) the employer had secured the required compensation at the time of service of the order, (b) the employer was insured at the time of the injury, or (c) the insured employer furnished evidence of coverage within the prescribed time. (*Starving Students v. Department of Industrial Relations, Div. of Labor Standards Enforcement* (2005) 125 C.A.4th 1357, 1366, 23 C.R.3d 583 [director had no discretion under *Lab.C. 3727.1* to withdraw penalty where employer obtained workers' compensation insurance from unauthorized insurer; penalty assessment under *Lab.C. 3722(a)* did not violate employer's due process rights].)(5) *Condition of Licensure for Contractors.* *B. & P.C. 7125.2* was amended in 2002 to refer to both obtaining and maintaining workers' compensation insurance. For failure to obtain the insurance, license suspension is effective on the date the coverage is required to be obtained. (*B. & P.C. 7125.2(a)(2).*) For failure to maintain the insurance, the suspension is effective on the date the coverage lapses. (*B. & P.C. 7125.2(a)(1).*) For failure to maintain the insurance, the registrar must provide notice to the licensee of the following: (a) The reason for the suspension and its effective date, (b) that a pending suspension will be posted to the license record for not more than 45 days prior to the posting of a mandatory license suspension period, and (c) the procedures to reinstate the license. (*B. & P.C. 7125.2(b).*) The 30-day requirement discussed in the text was deleted.

Under *B. & P.C. 7125.2*, suspension of a license without notice occurs where a licensee fails to *obtain* workers' compensation insurance. The notice requirements for suspension are applicable only when a licensee fails to *maintain* the insurance. (*Wright v. Issak* (2007) 149 C.A.4th 1116, 1120, 58 C.R.3d 1 [trial court properly determined that plaintiff was not licensed contractor because his license had been automatically suspended for failure to obtain workers' compensation insurance; distinguishing *Smith v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 117, 116 C.R.2d 728, text, p. 731, as interpreting former statute].)

(*New*) *Roofing contractor:* As of January 1, 2007, for a license that includes a C-39 classification designating a roofing contractor (see 16 Cal. Code Reg. §823.39), the registrar must remove the C-39 classification unless the registrar has received a valid Certificate of Workers' Compensation Insurance or Certification of Self-Insurance. (*B. & P.C. 7125(e)*, added in 2006.)

B. & P.C. 7125 is effective until January 1, 2011, and is repealed on that date unless otherwise extended. (*B. & P.C. 7125(f)*, added in 2006.) Another version of *B. & P.C. 7125* will become operative on January 1, 2011. (See Stats. 2006, Chap. 38, §2.) *Correction:* Page 731, line 17, "*B. & P.C. 7125(a)*" should be "*B. & P.C. 7125.2*".



151 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE
C. Effect of Failure To Comply.
2. Increase of Award.

2 Witkin Sum. Cal. Law Work Comp § 151

[§ 151] Increase of Award.

(1) *In General.* Where the failure to insure is *wilful*, the Board must increase a compensation award by 10%. (*Lab.C. 4554.*) For the purpose of determining the increase, failure to obtain insurance or to obtain authorization for self-insurance is *prima facie* evidence of wilfulness. (*Lab.C. 4554.*) However, the determination cannot be made on the basis of the presumption alone, without affording the employer an opportunity for a hearing. (*National Auto. & Cas. Ins. Co. v. Industrial Acc. Com. (1949) 95 C.A.2d 10, 15, 212 P.2d 1*; see C.E.B., 1 Workers' Compensation Practice 4th, §8.61.)

(2) *Wilful.* The "wilful" element was carefully examined in *Goodhew v. Industrial Acc. Com. (1958) 157 C.A.2d 252, 320 P.2d 515*. Decedent, president of a small corporation, was informed by his broker that coverage for corporate officers was required by law but an exclusion would cut down the policy expense. He and the secretary authorized the exclusion. On his death, his widow received a death benefit but the Commission refused to add the 10% on the ground that there was no showing of intent to violate the law and thereby to incur the criminal and other penalties. *Held*, order annulled; the penalty was recoverable. The term "wilful" as used in the statute means only "conscious, intentional and deliberate"; it was intended merely to exclude failure through ignorance or inadvertence; and no criminal intent need be shown. "It is apparent that the respondent commission erred in failing to distinguish between an intentional and deliberate decision not to secure the payment of compensation for corporate officers and an intent or decision to incur the penalties arising from a failure to secure such payment." (*157 C.A.2d 257.*)

(3) *Increase Is Not Available in Tort Action.* In *Leung v. Chinese Six Cos. (1992) 2 C.A.4th 801, 3 C.R.2d 593*, plaintiffs, the heirs of an employee killed while working for defendant uninsured employer, brought a wrongful death action against defendant under *Lab.C. 3706* (supra, §52) and obtained a judgment that included a 10% increase under *Lab.C. 4554*. *Held*, the penalty must be stricken from the judgment. *Lab.C. 4554* provides for an increase in "compensation," which is defined in *Lab.C. 3207* as benefits or payments made *without regard to negligence*. However, an action under *Lab.C. 3706* is one for *damages* and hence requires proof of the employer's liability under tort principles. "Accordingly, the penalty provision of section 4554 may not serve to increase the amount of damages awarded in a section 3706 action." (*2 C.A.4th 807.*)

SUPPLEMENT: [This section is current through the latest supplement]



152 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE
C. Effect of Failure To Comply.
3. Enforcement of Award.

2 Witkin Sum. Cal. Law Work Comp § 152

[§ 152] Enforcement of Award.

When the Board determines that the employer has not secured payment of compensation and the award remains unpaid for more than 10 days after having become final, the claim may be assigned to the Labor Commissioner. (*Lab.C. 96(i)*; see *C.E.B., 2 Workers' Compensation Practice 4th, §20.33.*)

As an alternative, the employee may convert the award to a judgment and enforce it in the same manner as other judgments. (*Lab.C. 5806*; *C.E.B., 2 Workers' Compensation Practice 4th, §20.34.*) Moreover, the state, on behalf of the Uninsured Employers Benefits Trust Fund (*infra, §153*), may have judgment entered against the employer and, if the employer is a corporation, against its parent corporation and substantial shareholders. (*Lab.C. 5806.*)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE

C. Effect of Failure To Comply.

4. Payment From Uninsured Employers Benefits Trust Fund.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 153

[§ 153] In General.

If an employer fails to pay the compensation required by *Lab.C. 3715* (supra, §52), or fails to furnish the required bond within 10 days after notification of the award, on application by the person entitled to it the award must be paid by the Director from the Uninsured Employers Benefits Trust Fund. (*Lab.C. 3716(a)*.) The Director must pay the claimant only those benefits allowed, recognizing proper liens, that would have accrued against an employer properly insured, and the Fund is not liable for penalties or for the payment of interest on an award. (*Lab.C. 3716.2*; see *DuBois v. Work. Comp. App. Bd.* (1993) 5 C.4th 382, 398, 20 C.R.2d 523, 853 P.2d 978 [*Lab.C. 3716.2* relieves Fund of liability for penalties premised on its own delay, even where delay might be characterized as unreasonable].) (On penalties imposed on employer and payable to Fund, see *Lab.C. 3722* et seq.)

The Fund has no liability for claims for occupational disease or cumulative injury unless no employer during the period of the disease or injury had insurance, was permissibly self-insured, or was legally uninsured. Moreover, no employer has a right to contribution against the Fund for the liability of an illegally uninsured employer under an award of benefits for occupational disease or injury nor may an employee in the claim of occupational disease or cumulative injury elect to proceed against an illegally uninsured employer. (*Lab.C. 3716(b)*.) Nor is the Fund liable for the payment of medical expenses for which the employer is liable and which have been provided or paid for by the California Medical Assistance Program. (*Lab.C. 3716(c)*.) (See *Symar v. Work. Comp. App. Bd.* (1982) 135 C.A.3d 65, 70, 185 C.R. 67 [Fund is not liable unless there is award against employer who has failed to secure payment of compensation or pay award; award solely against insurer for cumulative injury does not permit insurer to seek contribution from Fund]; *Ortiz v. Work. Comp. App. Bd.* (1992) 4 C.A.4th 392, 398, 5 C.R.2d 484 [prerequisite for Fund's liability is that employee must apply for award; thus, where employer's debts were discharged in bankruptcy and applicant had made no prior claim for compensation, applicant could not obtain award in workers' compensation proceeding against Fund].)

SUPPLEMENT: [This section is current through the latest supplement]

Fund not liable for penalties: The provisions of *Lab.C. 3716.2* that relieve the Uninsured Employers Benefits Trust Fund (Fund) of liability for penalties or interest are applicable as well to the sanction imposed by *Lab.C. 5813* (text, §414) for litigation abuses. Moreover, the sanction under *Lab.C. 5813* is not a workers' compensation "benefit" within the meaning of *Lab.C. 3716.2*, which limits the Fund's liability only to benefits that would be paid by a properly insured

employer. (*Duncan v. Work. Comp. App. Bd.* (2008) 166 C.A.4th 294, 303, 82 C.R.3d 664 [sanctions under *Lab.C.* 5813 could not be imposed on Fund for delay in paying attorneys' fees].)



154 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VI. WORKERS' COMPENSATION INSURANCE

C. Effect of Failure To Comply.

4. Payment From Uninsured Employers Benefits Trust Fund.

b. Notice to Employer.

2 Witkin Sum. Cal. Law Work Comp § 154

[§ 154] Notice to Employer.

(1) *Condition for Fund Liability.* The Uninsured Employers Benefits Trust Fund has no liability to pay compensation and cannot be joined in a Board proceeding, unless the allegedly uninsured employer has either made a general appearance or has been served with the application pursuant to *Lab.C. 3715* (supra, §150) and with a special notice of lawsuit issued by the Board. The applicant must identify a legal person or entity as the employer named in the special notice of lawsuit. (*Lab.C. 3716(d)*.)

Lab.C. 3716(d) does not expressly require the service of an "application for adjudication" with the special notice of lawsuit. It requires service of the "application specified in *Lab.C. 3715*," which is *the document* that must be filed with the Board to give the Board jurisdiction over the claim. Thus, that is the document that must be served on the employer with the special notice of lawsuit in the manner required by *Lab.C. 3716* in order to give the Board personal jurisdiction over the employer. (See *Aubry v. Work. Comp. App. Bd.* (1997) 56 C.A.4th 1032, 1035, 65 C.R.2d 856 [service of "claim form," used during specified years to give notice of injury and establish Board's jurisdiction, and special notice of lawsuit was proper for Board to obtain personal jurisdiction].)

(2) *Special Notice.* The required special notice must be on a form prescribed by the Board, and must contain the following: (a) the information and warnings required by the Code of Civil Procedure to be contained in the summons issued in a civil action (see 3 *Cal. Proc.* (4th), *Actions*, §896 et seq.); (b) a notice that a Board award against the employer may result in the nonjudicial sale of dwellings and other property belonging to the employer, with no exemptions from execution; and (c) a notice that a lien may be imposed on the employer's property without further hearing and before the issuance of an award. (*Lab.C. 3716(d)*.)

(3) *Service and Proof of Service.* The application and special notice of lawsuit may be served in the same manner as a summons, and proof of service must be filed with the Board. An employee's reasonable expenses serving the application and the special notice must be awarded as costs. (*Lab.C. 3716(d)*; see 3 *Cal. Proc.* (4th), *Actions*, §896 et seq.)

(4) *Effect of Service.* After service, the employer must furnish the Board with an address for service of official notices and papers, and must notify the Board of a change in the address. Thereafter, unless the employer files an

answer or otherwise makes a general appearance, or furnishes the Board with its address, no findings, order, decision, award, or other notice or paper need be served on the employer, but may be mailed as the Board provides by regulation. (*Lab.C. 3716(d)(1)*.) However, the Board must serve these papers on the employer by mail at the address the Board has for the employer. The failure of delivery at that address or the lack of personal service of the papers on an employer does not constitute grounds for reopening or invalidating a Board action pursuant to *Lab.C. 5506* (infra, §388), or for contesting the validity of a judgment obtained under *Lab.C. 3716* or *5806* (supra, §152), a lien under *Lab.C. 3720* (infra, §155), or a settlement under *Lab.C. 3715(e)*. (*Lab.C. 3716(d)(2)*.)

(5) *Fund's Obligation To Provide Information*. On request of the Board or on good cause shown by the employee or the employee's representative, the Fund, through its director, must furnish information about the identities, legal capacities, and addresses of uninsured employers known to the director. (*Lab.C. 3716(d)(4)*.) Good cause includes a representative's declaration under penalty of perjury that the information is necessary to represent the employee in workers' compensation proceedings. (*Lab.C. 3716(d)(4)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Condition for Fund Liability*. See *Rea v. Work. Comp. App. Bd.* (2005) 127 C.A.4th 625, 644, 25 C.R.3d 828, Supp., infra, §418 [Board violated *Lab.C. 3716(d)* by impermissibly legislating provisional joinder procedures for former Uninsured Employers Benefits Trust Fund with respect to priority conferences].(2) *Special Notice*.

Cross-Reference: 3 Cal. Proc. (5th), Actions, §981 et seq.

(3) *Service and Proof of Service*.

Cross-Reference: 3 Cal. Proc. (5th), Actions, §981 et seq.



155 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VI. WORKERS' COMPENSATION INSURANCE

C. Effect of Failure To Comply.

4. Payment From Uninsured Employers Benefits Trust Fund.

c. Recovery From Employer.

2 Witkin Sum. Cal. Law Work Comp § 155

[§ 155] Recovery From Employer.

(1) *Civil Action.* A finding and award that is the subject of a demand on the Uninsured Employers Benefits Trust Fund constitutes a liquidated claim for damages against an employer, and the Director may seek recovery from the employer. The Board must certify the amount to the Director, who may (a) institute a civil action against the employer, or (b) obtain a judgment against the employer by filing a certified copy of the findings and order, decision, or award of the Board with the clerk of the superior court of any county (see *Lab.C. 5806*). (*Lab.C. 3717(a).*)

Where an employer corporation has not secured payment of compensation, the following persons are jointly and severally liable with the corporation: (a) All persons who are parents (see *Corp.C. 175*) of the corporation, and (b) all persons who are substantial shareholders (see *Lab.C. 3717(b)*) of the corporation or its parent. (*Lab.C. 3717(a).*) Excluded corporations are set forth in *Lab.C. 3717(d)*. (On joinder of parent corporations and substantial shareholders, see *Lab.C. 3717.1, 3717.2*; on procedure to determine whether person is substantial shareholder or parent, see *Lab.C. 3720.1*.)

(2) *Lien on Employers' Property.* When it is determined that an employer is illegally uninsured, the Director may file a certificate of lien with the recorder in the counties where the employer's property is possibly located. Thus recorded, the certificate creates a lien in favor of the Director with the force, effect, and priority of a judgment lien; it continues for 10 years from the time of recording unless discharged or released sooner. (*Lab.C. 3720(a).*) The lien has a continued existence, and may be foreclosed, independent of a right of action arising out of *Lab.C. 3717* or *5806*. (*Lab.C. 3720(d).*)

(3) *Nonjudicial Foreclosure.* The Director may enforce judgments obtained against uninsured employers by nonjudicial foreclosure, and this enforcement is not subject to *C.C.P. 703.010* et seq. (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §160 et seq.). (*Lab.C. 3716.3(a)*; see *Lab.C. 3716.3(e)* [procedure applies to judgments under *Lab.C. 3717, 3726*, and *5806*]; *Lab.C. 3716.3(f)* [procedure is not applicable to principal residence of employer of 10 or fewer employees].)

The Director must record a certified copy of the judgment, together with a notice of intent to foreclose containing specified information in the county where the defendant's real property is located. (*Lab.C. 3716.3(b).*) After 20 days

following this recording, the trustee may sell the real property in accordance with C.C. 2920 et seq. (see 4 *Summary* (10th), *Security Transactions in Real Property*, §144 et seq.). (*Lab.C. 3716.3(c)*; see *Lab.C. 3716(d)* [trustee appointed by director].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Nonjudicial Foreclosure*.

C.C.P. 703.010 et seq.:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §168 et seq.



156 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law VI. WORKERS' COMPENSATION INSURANCE

C. Effect of Failure To Comply.

4. Payment From Uninsured Employers Benefits Trust Fund.

d. Recovery From Third Person.

2 Witkin Sum. Cal. Law Work Comp § 156

[§ 156] Recovery From Third Person.

(1) *Authority of Director.* The Director may recover damages from a person or entity, other than the employer, whose tortious act or omission proximately caused the injury or death of the employee for which compensation has been paid or has become payable from the Fund. The action may be maintained whether the compensation was paid as a result of findings and an award, an award based on stipulations, compromise, and release, or payments voluntarily furnished by the Director under *Lab.C. 4903.3*. (*Lab.C. 3732(a)*.) The action must be commenced within 1 year after the later of either the time the Director pays or the time the Director becomes obligated to pay compensation from the Fund. (*Lab.C. 3732(c)*.)

Except as otherwise provided in *Lab.C. 3732*, the provisions of *Lab.C. 3850* et seq., relating to subrogation of employers, are applicable to these actions, with the Director being treated as an employer. (*Lab.C. 3732(b)*.)

The Director may compromise, settle and release, or waive claims in whole or in part. (*Lab.C. 3732(a)*.)

(2) *Amount Recoverable.* The damages must include compensation, interest, penalties, reasonable expenses of investigating and litigating the compensation claim, and reasonable attorneys' fees. (*Lab.C. 3732(a)*.) The compensation paid from the Fund pursuant to an award is conclusively presumed to be reasonable in amount and to be proximately caused by the event or events causing the employee's injury or death. (*Lab.C. 3732(k)*.) Moreover, the Director is entitled to recover the entire amount of damages recoverable under *Lab.C. 3732(a)*, regardless of whether the damages recoverable by the employee or the employee's representative are of a lesser amount. (*Lab.C. 3732(l)*.)

(3) *No Imputation of Negligence.* Negligence of the employer may not be imputed to the Director or to the Fund, and the damages recoverable by the Director are not reduced by a percentage of fault attributable to the employer or to the employee. (*Lab.C. 3732(d)*.) In determining the credit to the Fund provided by *Lab.C. 3861* (supra, §§73, 74), the Board must not take into consideration negligence of the employer, but must allow a credit for the entire amount of the employee's recovery, either by settlement or after judgment, that has not previously been applied to the payment of expenses or attorneys' fees. (*Lab.C. 3732(e)*.)

(4) *Director's Lien.* A settlement or judgment in an employee's action or claim against a third party is subject to the

Director's claim for damages recoverable under *Lab.C. 3732(a)*, thus giving the Director a lien against the settlement. (*Lab.C. 3732(f)*.) Hence, a judgment or settlement may be satisfied only after first giving the Director notice and a reasonable opportunity to perfect and satisfy the lien. (*Lab.C. 3732(g)*.) The lien is enforceable by a writ of execution (*Lab.C. 3732(h)*), and the entire amount of a settlement or claim is subject to it. (*Lab.C. 3732(i)*.)

(5) *Action by Employee or Representative.* When an employee or the employee's representative incurs liability for attorneys' fees and costs in a tort action and the Director did not join in that action, the Director's claim is limited to the claim amount less that portion of the costs determined by multiplying the total cost of litigation by the ratio of the amount of the Director's claim to the judgment, less 25% of the balance after subtracting the Director's share of the litigation expenses which represents the Director's reasonable share of attorney's fees incurred. (*Lab.C. 3732(j)*.)

SUPPLEMENT: [This section is current through the latest supplement]



157 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law VI. WORKERS' COMPENSATION INSURANCE D. Scope and Interpretation of Policies.

2 *Witkin Sum. Cal. Law Work Comp* § 157

[§ 157] Scope and Interpretation of Policies.

(1) *Scope*. The Insurance Commissioner regulates both the substance and form of insurance policies (*Ins.C. 11658*; see *Fyne v. Industrial Acc. Com.* (1956) 138 C.A.2d 467, 473, 292 P.2d 78), and premiums and rates (see *State Comp. Ins. Fund v. McConnell* (1956) 46 C.2d 330, 335, 294 P.2d 440; *Key System Transit Lines v. Pacific Employees Ins. Co.* (1959) 52 C.2d 800, 807, 345 P.2d 257). (For discussion of insurance law, see 2 *Summary* (10th), *Insurance*, §1 et seq.)

Subject to the provisions of *Ins.C. 11659* (limiting endorsements) and *Ins.C. 11660* (unlimited policies), limited workers' compensation policies may be issued insuring either the whole or part of the liability of an employer for compensation, provided that the policy is previously approved as to substance and form by the commissioner. (*Ins.C. 11657*; see *Ins.C. 11659* [limitations can only be imposed under forms and regulations prescribed by commissioner].)

Thus, a policy may provide coverage only for operations on particular premises, or at a particular location. It is usually held, however, that these limitations merely mean that the policy covers only the business conducted at such an address as a headquarters, and that activities incidental to that particular business, carried on in the public streets or elsewhere, are likewise covered. (See *State Comp. Ins. Fund v. Industrial Acc. Com.* (1938) 28 C.A.2d 474, 476, 82 P.2d 732; *Fyne v. Industrial Acc. Com.*, *supra*, 138 C.A.2d 471.)

A policy may also specify the particular persons or class of employees to be covered. (See *National Auto. Ins. Co. v. Industrial Acc. Com.* (1934) 220 C. 642, 646, 32 P.2d 356; *Maryland Cas. Co. v. Industrial Acc. Com.* (1930) 209 C. 394, 395, 287 P. 468 [limitation to persons legally employed].) A policy may also insure a named employer, and consequently not cover a successor in interest or transferee. (*Pacific Indem. Co. v. Industrial Acc. Com.* (1934) 136 C.A. 158, 161, 28 P.2d 397 [policy to administrator running decedent's business, did not cover liability of heir who took property under decree of distribution].)

An employer is prohibited from obtaining insurance coverage against statutory penalties imposed for violation of the Act. (*Ins.C. 11661*; *Ins.C. 11661.5*.) However, an insurer may provide coverage against the expense of defending an action for serious and wilful misconduct against an employer. (*Ins.C. 11661*.) (See *Azevedo v. Abel* (1968) 264 C.A.2d 451, 458, 70 C.R. 710 [*Ins.C. 11661* does not prohibit insurance against employer's ordinary liability for disability and medical expenses, even when employer is wilful wrongdoer and subject to increased liability].) (On duty to defend, see *La Jolla Beach & Tennis Club v. Industrial Indem. Co.* (1994) 9 C.4th 27, 36 C.R.2d 100, 884 P.2d 1048; 2 *Summary* (10th), *Insurance*, §281.)

(2) *Interpretation Against Insurer*. In accordance with the general rule governing construction of insurance policies (see 2 *Summary* (10th), *Insurance*, §62), ambiguous exclusionary clauses and restrictions will be construed against the insurer. (*Mary Len Mine v. Industrial Acc. Com.* (1944) 64 C.A.2d 153, 157, 148 P.2d 106; *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1947) 80 C.A.2d 769, 777, 182 P.2d 634; *Arrowhead Highlands Mut. Service Co. v. Industrial Acc. Com.* (1964) 230 C.A.2d 541, 543, 41 C.R. 149 [president of small mutual water company was deemed employee under law, and public policy supported interpretation that brought him under "all employees" provision of policy]; *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 C.3d 903, 912, 913, 226 C.R. 558, 718 P.2d 920 [rule of construction applies only when policy language is unclear; finding of ambiguity cannot be based on unreasonable misunderstanding on part of insured].)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VI. WORKERS' COMPENSATION INSURANCE
E. Nondisclosure of Medical Information.

2 Witkin Sum. Cal. Law Work Comp § 158

[§ 158] Nondisclosure of Medical Information.

Although an insurer must discuss with an employer all elements of a claim file that affect the employer's premium, the insurer cannot disclose medical information about an employee who has filed a workers' compensation claim except where (1) medical information is limited to the diagnosis and treatment of the claimed mental or physical condition, or (2) medical information about the injury is necessary to permit the employer to modify the employee's work duties. (*Lab.C. 3762.*) This prohibition extends to third-party administrators retained by a self-insured employer and employees and agents specified by a self-insured employer to administer workers' compensation claims. (*Lab.C. 3762(c).*)

"Medical information" means individually identifiable information in possession of or derived from a health care provider, pharmaceutical company, or contractor concerning a patient's medical history, mental or physical condition, or treatment. (*Lab.C. 3762(c)*; C.C. 56.05(g).)

SUPPLEMENT: [This section is current through the latest supplement]



159 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
A. Who Are Employers.
1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 159

[§ 159] In General.

(1) *Statutory Definitions.* For purposes of the Act, the term "employer" is defined as (a) the state and every state agency, (b) each county, city, district, public or quasi-public corporation, and public agency, (c) every person (including a public service corporation) that has a natural person in service, and (d) a deceased employer's legal representative. (*Lab.C. 3300*; see *Healy v. Industrial Acc. Com.* (1953) 41 C.2d 118, 121, 258 P.2d 1 [city]; Cal. Civil Practice, 1 Workers' Compensation, §1:29; C.E.B., 1 Workers' Compensation Practice 4th, §2.60; for excluded employments, see *infra*, §191.)

The term "employer" excludes (a) persons acting solely as bowling team sponsors, and (b) private, nonprofit organizations acting solely as sponsors of persons working for them as a condition of a court-imposed sentence. (*Lab.C. 3301*.)

(2) *Insurer.* For purposes of subrogation and recovery from a third-party tortfeasor, the term "employer" includes an insurer (*Lab.C. 3850(b)*) and the Self-Insurers' Security Fund (*supra*, §148), where it has assumed an employer's compensation obligations (*Lab.C. 3850(c)*). (See *Hazelwerdt v. Industrial Indem. Exchange* (1958) 157 C.A.2d 759, 764, 321 P.2d 831, *supra*, §62.)

(3) *Receiver.* A receiver can be an employer. In *Pacific Indem. Co. v. Work. Comp. App. Bd.* (1968) 258 C.A.2d 35, 65 C.R. 429, A owned a number of investment properties and carried workers' compensation coverage with insurer P. On foreclosure of a deed of trust on an apartment house, S and F were appointed coreceivers. An employee sustained an industrial injury. The Board dismissed A and found that the injured person was an employee of the receivers. *Held*, this was correct.

(a) Under the broad definition of a receiver's powers in *C.C.P. 568*, the receiver may have employees in carrying out the receivership duties; and the receiver is not an agent of a party, but an officer of the court. In insolvency receiverships the old relations between the insolvent employer and employee are terminated (where the contract is terminable at will) because the insolvent employer cannot perform. The same rule applies to other receiverships. (258 C.A.2d 40, 41.)

(b) Hence, by receivership, A was effectively dispossessed, and the employees were working for the receivers. This

foreclosure-type receivership, applicable only to a single property of A, is to be distinguished from a receivership of the total business of a corporation, which may continue the employer-employee relationship of the corporation. (258 C.A.2d 42.)

(c) Because the employment was by receivers, P's policy, applying only to A, did not cover the liability, and an award against the insurer was improper. (258 C.A.2d 48.)

West's Key Number Digest, Workers' Compensation k.186 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Definitions*. See *An Independent Home Support Service v. Superior Court* (2006) 145 C.A.4th 1418, 1429, 52 C.R.3d 562 [agency that places domestic workers on request and complies with requirements of C.C. 1812.5095 (employment agencies and domestic workers) is not employer for purposes of workers' compensation insurance].



160 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
A. Who Are Employers.
2. Joint Venture.

2 Witkin Sum. Cal. Law Work Comp § 160

[§ 160] Joint Venture.

In *Rogness v. English Moss Joint Venturers* (1987) 194 C.A.3d 190, 239 C.R. 387, plaintiffs were employed as carpenters by M, one joint venturer in defendant joint venture. They sued the joint venture and the other joint venturers for injuries sustained at the construction site. The trial court granted summary judgment for the other joint venturers on the ground that the action was barred by the exclusive remedy provisions of *Lab.C. 3601* (supra, §24). *Held*, reversed. "[A]n employee of one party in a joint venture is not as a matter of law also an employee of the joint venture itself or the other joint venturers and therefore is not limited to his workers' compensation remedy under the Labor Code in seeking recovery from the remaining joint venturers for alleged negligence." (194 C.A.3d 191.) "Joint venturers who wish to rely upon *Labor Code section 3601* in order to avoid general exposure to employment related tort actions by employees of their other joint venturers must cause the joint venture to employ such individuals." (194 C.A.3d 194.)

However, a nonnegligent joint venture should not be held liable where a member of the joint venture negligently injures the member's employee and the member has provided workers' compensation. (*Orosco v. Sun-Diamond Corp.* (1997) 51 C.A.4th 1659, 1669, 60 C.R.2d 179 [employee injured while working at raisin plant of member of marketing cooperative filed claim under employer's workers' compensation insurance and sued members of cooperative; following reasoning and holding of *Privette v. Superior Court* (1993) 5 C.4th 689, 21 C.R.2d 72, 854 P.2d 721, 6 Summary (10th), *Torts*, §1245].)

In *Orosco*, plaintiff failed to establish a joint venture or a structural interrelationship between his employer and other parties engaged in various business pursuits with his employer that would establish shared liability. In examining plaintiff's reliance on *Rogness*, the court viewed the phrase "for alleged negligence" in *Rogness* as a critical ambiguity: "We have no disagreement with *Rogness* if the negligence in question was the negligence of the joint venture. *Rogness* would simply stand for the proposition that a joint venture is in the same position as any other third party tortfeasor who injures another's employee." However, "if ... *Rogness* were taken for the proposition that a joint venture may be derivatively liable in tort as a result of one venturer's negligent injury of that venturer's own employee, then *Rogness* would be erroneous, in our opinion. *Privette v. Superior Court* ... leads us to conclude there should be no such derivative liability for the nonnegligent joint venture." (51 C.A.4th 1668.)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
 - a. Liabilities of Employers.
 - 1. General and Special Employment.
 - aa. Test: Right of Control.

2 Witkin Sum. Cal. Law Work Comp § 161

[§ 161] Test: Right of Control.

Difficult problems arise when an employee works for more than one employer. In a general and special employment, the employee is at the same time in the service of two employers, one general, and the other special. If the general employer retains some right of control over the employee, an award may be made against both employers, jointly, or jointly and severally, for the full amount of compensation. (*National Auto. Ins. Co. v. Industrial Acc. Com.* (1943) 23 C.2d 215, 219, 143 P.2d 481; *Industrial Indem. Exchange v. Industrial Acc. Com.* (1945) 26 C.2d 130, 134, 156 P.2d 926; *Department of Water & Power v. Industrial Acc. Com.* (1934) 220 C. 638, 640, 32 P.2d 354; cf. *Ridgeway v. Industrial Acc. Com.* (1955) 130 C.A.2d 841, 846, 279 P.2d 1005 [employee of subcontractor was not special employee of general contractor; award against latter annulled]; see C.E.B., 1 Workers' Compensation Practice 4th, §2.80; on employee loaned to school district, see *Educ.C.* 32350.)

Where an employer has supervision and control over the job duties of a temporary employee provided by a labor broker, the employee is in a special employment relationship with that employer. Thus, the exclusive remedy for job-related injuries is workers' compensation. (*Santa Cruz Poultry v. Superior Court* (1987) 194 C.A.3d 575, 577, 239 C.R. 578 [employee furnished by labor broker for 1-day assignment was barred from suing employer to whom assigned]; see *Riley v. Southwest Marine* (1988) 203 C.A.3d 1242, 250 C.R. 718 [laborer furnished by labor broker was injured while working on oceangoing tug for defendant; Longshore and Harbor Workers' Compensation Act (supra, §135 et seq.) provides exclusive remedy]; *Johnson v. Berkofsky-Barret Productions* (1989) 211 C.A.3d 1067, 1074, 260 C.R. 67 [*Riley* followed; assuming that company that arranged actor's work on commercial is labor broker, actor is employee of production company that directed and supervised performance and had right to discharge]; *Wedek v. Unocal Corp.* (1997) 59 C.A.4th 848, 858, 69 C.R.2d 501 [special employment relationship found for chemist furnished by placement agency; chemist (a) received ongoing training, supervision, and instruction from defendant's chemists, (b) followed defendant's procedures and instructions in work performance, and (c) received all work assignments from defendant].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Caso v. Nimrod Productions* (2008) 163 C.A.4th 881, 890, 77 C.R.3d 313 [companies that coordinated stunts for television production company were deemed special employees of production company under terms of employment agreements and on evidence that production company controlled and directed all activity; thus, injured stuntperson was coemployee, and personal injury claim against stunt companies was precluded by exclusivity rule under which sole remedy was workers' compensation claim with production company].



162 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
 - a. Liabilities of Employers.
 - 1. General and Special Employment.
 - bb. No Transfer of Right of Control.

2 Witkin Sum. Cal. Law Work Comp § 162

[§ 162] No Transfer of Right of Control.

The general employer may retain such a large measure of control that a jury may find no employment relationship with the second party. Hence, a compensation award may only be made against the general employer, while a tort action may be maintained against the second party for negligence. (*Miller v. Long Beach Oil Dev. Co. (1959) 167 C.A.2d 546, 550, 334 P.2d 695; McFarland v. Voorheis-Trindle Co. (1959) 52 C.2d 698, 705, 343 P.2d 923; Barajas v. USA Petroleum Corp. (1986) 184 C.A.3d 974, 983, 229 C.R. 513.*)

In *Marsh v. Tilley Steel Co. (1980) 26 C.3d 486, 162 C.R. 320, 606 P.2d 355*, M, a general concrete contractor for a freeway, employed plaintiff as a truck driver. Defendant, a steel subcontractor, employed W as its crane operator. Efficient completion of the job required some sharing of crane operators for temporary periods, usually less than half a day, with the crane operator remaining on his own employer's payroll, and achieving the work results of the borrowing employer without supervision of details. On the date of the accident, W was ordered to assist in loading heavy concrete forms onto plaintiff's truck, and plaintiff was injured through the alleged negligence of W. Plaintiff sued defendant on respondeat superior liability for W's negligence. The trial judge granted a nonsuit on the ground that M was the special employer of W at the time of the accident, and plaintiff was limited to his compensation remedy against M. *Held*, reversed.

(a) *General and special employers.* (1) When the general employer lends an employee and relinquishes to the borrowing employer all right of control over the employee, a special employment relationship arises, and during the period of transferred control, the special employer becomes solely liable for the employee's job-related torts. So, if defendant had transferred that control over W to M, defendant would not be liable for W's tort. (*26 C.3d 492.*) (2) However, where control has not been transferred, no special employment results; and special employment may be negated where the employee is not paid by the borrower, is a skilled worker with substantial control over operational details, is employed for only a brief period of time, and uses tools and equipment of the lending employer. (*26 C.3d 492, citing Kowalski v. Shell Oil Co. (1979) 23 C.3d 168, 151 C.R. 671, 588 P.2d 811, infra, §163.*) Also, where the employees of two employers are jointly engaged in a project of mutual interest, each employee remains the employee of his or her own employer. (*26 C.3d 493.*)

(b) *No special employment.* (1) Under these tests, a jury could conclude that W was merely doing a special job for M with unlimited discretion in operation of the crane, and remained solely the employee of defendant. (2) The contention that the *Kowalski* tests should be replaced by the test of "whose business" the tortfeasor was about at the time of the accident is rejected; it has been criticized as "ambiguous and sterile." (26 C.3d 494.) (3) At the trial, the jury need not find that W remained exclusively defendant's employee in order to impose liability on defendant. Where general and special employers share control of an employee's work, a "dual employment" arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts. (26 C.3d 494, 495.) (See *Von Beltz v. Stuntman* (1989) 207 C.A.3d 1467, 1487, 255 C.R. 755 [quoting *Marsh* on circumstances tending to negate existence of special employment relationship].)

In *Brassinga v. Mountain View* (1998) 66 C.A.4th 195, 77 C.R.2d 660, three local police departments cooperated as a regional special weapons and tactics (SWAT) team (Regional Team). The members trained and responded to incidents as a single team, but remained employed by their individual departments. Regional Team paid no salaries, owned no property, and had no office. Regional Team training exercises often utilized role players. During one exercise, a reserve police officer with one of the member departments, not a SWAT team member himself but assigned as a role player, was shot and killed by another local police officer who was a regional team member, and who had negligently failed to unload his weapon. Plaintiffs, decedent's heirs, sued the negligent officer and his employer city for wrongful death. Defendant city asserted as an affirmative defense that workers' compensation was the exclusive remedy because either defendant city was decedent's special employer at the time of his death, or Regional Team was the special employer of both the decedent and defendant officer. The trial judge denied defendant city's summary judgment motion, but granted defendant officer's motion for summary adjudication. After a jury trial on damages, the trial judge granted plaintiffs' motion for a directed verdict on negligence in respondeat superior. *Held*, reversed; the trial judge erred in granting defendant officer's motion and in directing the verdict for plaintiffs.

(a) *Regional Team was not employer.* Regional Team could not qualify as an employer under *Lab.C. 3300*. It was not a state agency, public or quasi-public corporation, or a public agency within the meaning of *Lab.C. 3300*; it had no office, property, employees, letterhead, phone number, or any other indicia that it functioned as a public agency. Thus, Regional Team was not an entity that could have been subjected to any claim for recompense because there would have been no way to contact it. (66 C.A.4th 213.)

(b) *Factual dispute existed whether defendant city was decedent's special employer.* Although the key to the existence of a special employment relationship is control, *Marsh v. Tilley Steel Co.*, *supra*, makes clear that relinquishment of *all* control is not necessary for creation of a special employment relationship. (66 C.A.4th 215, 216.) For example, there may be both general and special employers sharing control, thus giving rise to dual employment. Hence, other factors relevant to deciding whether a special employment relationship exists include whether (1) the alleged special employer paid wages to the employee, (2) the alleged special employer had the power to discharge the employee, (3) the work performed by the employee was unskilled, (4) the work tools were provided by the alleged special employer, (5) the work was part of the alleged special employer's regular business, (6) the employee expressly or impliedly consented to a special employment relationship, (7) the parties believed they were creating a special employment relationship, and (8) the alleged special employment period was lengthy. (66 C.A.4th 216, 217.) Thus, special employment is most often resolved on the basis of reasonable inferences drawn from the circumstances. (66 C.A.4th 217.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Tilley v. CZ Master Assn.* (2005) 131 C.A.4th 464, 482, 32 C.R.3d 151 [homeowners association that contracted with security company was not special employer of security guard; there was no transfer of control by security company, nor was there evidence of substantial direct relationship between injured guard and association; following *Marsh v. Tilley Steel Co.* (1980) 26 C.3d 486, 162 C.R. 320, 606 P.2d 355, text, p. 743].



163 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
 - a. Liabilities of Employers.
 - 1. General and Special Employment.
 - cc. Contract Is Not Controlling.

2 Witkin Sum. Cal. Law Work Comp § 163

[§ 163] Contract Is Not Controlling.

(1) *Contract Negating Special Employment.* Unless the elements of an estoppel are present, an agreement between employers that one is not a special employer will not be given effect when the facts establish a special employment. In *Martin v. Phillips Petroleum Co.* (1974) 42 C.A.3d 916, 117 C.R. 269, the general employer supplied laborers to defendant under a contract designed to negate a special employment arrangement. Plaintiff was injured in the locker room supplied by his general employer on defendant's premises. His general employer's insurer paid compensation, and plaintiff sued defendant as a third-party tortfeasor. Finding that defendant was a special employer, the trial court entered judgment for defendant. *Held*, affirmed. Special employment was shown by the following facts: plaintiff had worked steadily for over a year for defendant; his labor primarily benefited defendant; his tools were supplied by defendant; and, most important, his work was controlled and supervised by defendant. (42 C.A.3d 921, 922.)

(2) *Contract Purportedly Creating Special Employment.* The same approach is used where the contract states that employees of the general employer are subject to the control of and become special employees of another. In *Kowalski v. Shell Oil Co.* (1979) 23 C.3d 168, 151 C.R. 671, 588 P.2d 811, P agreed to perform maintenance work at defendant's refinery. Plaintiff, P's employee, was injured while working there, and sued defendant. The contract stated that a general and special employment relationship was created for all labor furnished by P, and that defendant, as a special employer, had the right to control the details of the work. However, the evidence showed that defendant did not exercise any control over plaintiff, and defendant's foreman testified that he had no right to supervise plaintiff's work and did not know of any employee who did. (23 C.3d 173, 174, 178.) Also, plaintiff was unaware of the contract and did not expressly or impliedly consent to a special employment relationship with defendant. (23 C.3d 179.) *Held*, the jury's finding that plaintiff was not defendant's special employee was supported by the evidence, and the personal injury action was proper. (23 C.3d 179.)

SUPPLEMENT: [This section is current through the latest supplement]



164 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
 - a. Liabilities of Employers.
- 2. Concurrent or Joint Employment.

2 *Witkin Sum. Cal. Law Work Comp* § 164

[§ 164] Concurrent or Joint Employment.

In concurrent employment, the employee may act separately for different employers at different times, in which event only one employer is liable--the one for whom services were being rendered at the time of the injury. In *joint* employment, the worker performs services for the mutual benefit of both, and both are liable. In *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1947) 80 C.A.2d 769, 182 P.2d 634, joint employment was found, although two typical characteristics (joint enterprise of employers, and joint hiring of employee) were absent. P served as manager of C, a rice drier, and as manager of a warehouse company, being on call by either. His salary and compensation insurance premiums were paid entirely by C, but the warehouse company, in return for its share of his services, gave C the use of certain property rent-free. *Held*, this was a joint employment, and it was improper to make the award run only against C even though the employee was rendering services to C at the time of the injury. (80 C.A.2d 776.)

SUPPLEMENT: [This section is current through the latest supplement]



165 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
- a. Liabilities of Employers.
- 3. Public Emergency Service.

2 *Witkin Sum. Cal. Law Work Comp* § 165

[§ 165] Public Emergency Service.

In *Argonaut Ins. Co. v. Industrial Acc. Com.* (1960) 54 C.2d 740, 8 C.R. 438, 356 P.2d 182, a bulldozer operator for S was ordered by a federal Forest Service officer to take his equipment and assist in suppressing a fire, where he was injured. *Held*, he was not an employee of S at that time, and the compensation award was annulled. The officer has power to commandeer workers and equipment for this purpose, and the operator's performance of services under direction of the officer made him an employee of the United States under the Federal Employees Compensation Act (*supra*, §125). (For special statute on persons engaged in suppressing fire, see *infra*, §177.)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
A. Who Are Employers.
3. Multiple Employment.
a. Liabilities of Employers.
4. Licensed Contractor and Temporary Agency.

2 *Witkin Sum. Cal. Law Work Comp* § 166

[§ 166] Licensed Contractor and Temporary Agency.

When a licensed contractor enters into an agreement with an entity that supplies temporary employees (e.g., temporary employment agency) under which the entity supplies a person to perform acts or contracts for which a contractor's license is required and the licensed contractor is responsible for supervision, the temporary employment entity must pay workers' compensation premiums and is solely responsible for the temporary employee's workers' compensation. (*Lab.C. 3302(a)(1)* and (b).) The supplying entity may pass on to the contractor additional costs incurred because of this requirement. (*Lab.C. 3302(b)* and (e).) (On matters that must be reported to insurer, see *Lab.C. 3302(a)(2)*.)

The contractor must notify the temporary employment entity whenever the temporary employee is being used on a public works project, or is assigned to work different from the original classification. (*Lab.C. 3302(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
- b. Rights Between Insurers.

2 Witkin Sum. Cal. Law Work Comp § 167

[§ 167] Rights Between Insurers.

From both a substantive and a procedural standpoint the employee is not concerned with the rights of insurers. (See *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 C.2d 79, 82, 172 P.2d 884, *infra*, §168.) However, between the insurers the substantive problem of apportionment remains, as does the procedural problem of how and in what forum it is to be determined. The Board has jurisdiction to make the apportionment, and may be directed to do so. (*Colonial Ins. Co. v. Industrial Acc. Com.*, *supra*, 29 C.2d 86.) (Cf. *Fireman's Fund Indem. Co. v. Industrial Acc. Com.* (1952) 39 C.2d 831, 835, 250 P.2d 148 [apportionment ordered where there was only one employment but successive insurers].)

If, however, the joint employer or insurer does not seek a review of the award, but allows it to become final, an equitable action may be brought, and the award is not *res judicata* as to the respective rights of the employers or insurers. In *Fireman's Fund Indem. Co. v. State Comp. Ins. Fund* (1949) 93 C.A.2d 408, 209 P.2d 55, a death benefit award had been made by the Commission against a general and a special employer, and each insurer paid half. Plaintiff insurer then brought this action, seeking the remedy of equitable subrogation, and proving that its insured (the special employer) had not carried the deceased employee on the company payroll and that plaintiff had received no premium to cover that risk. *Held*, defendant, insurer of the general employer, which had received a premium for the risk, was liable to the beneficiary of the deceased employee for the entire amount of the award; and plaintiff, having satisfied part of defendant's obligation to that beneficiary, was subrogated to the rights of the beneficiary against defendant. (93 C.A.2d 411.)

The principle followed in *Fireman's Fund Indem. Co. v. State Comp. Ins. Fund* has been codified. "As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation ... unless the special employer had the employee on his payroll at the time of injury, in which case the insurer of the special employer is solely liable." (*Ins.C. 11663*.) This statute applies only between insurers, and does not affect employees' rights against general and special employers (*supra*, §161). (*McFarland v. Voorheis-Trindle Co.* (1959) 52 C.2d 698, 703, 343 P.2d 923.)

The same rule of apportionment applies to both permanent and temporary disability. (*Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 C.2d 60, 64, 45 C.R. 1, 403 P.2d 129; *Fibreboard Paper Products Corp. v. Industrial Acc. Com.* (1965) 63 C.2d 65, 67, 45 C.R. 5, 403 P.2d 133; see *Dickey v. Work. Comp. App. Bd.* (1990) 224 C.A.3d

1460, 1464, 274 C.R. 620, infra, §305 [apportionment of temporary disability caused by combined effect of three injuries].)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
- c. Disability From Progressive Disease.
- 1. Liability of Last Insurer.

2 Witkin Sum. Cal. Law Work Comp § 168

[§ 168] Liability of Last Insurer.

Another variation of the problem of multiple employment occurs where, at the time of the compensable disability, the employee is working for a single employer who is covered by a single insurer, but the cause of the disability goes back to several employments, or to a single employment covered by several insurers. (See 34 A.L.R.4th 958 [liability of successive employers for disease or condition].)

In *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 C.2d 79, 172 P.2d 884, the employee worked for a single employer from 1928 to 1943, but that employer took out policies in seven different companies during the period. An award for disability resulting from silicosis, solely against petitioner, the last insurer, was affirmed. "We believe the more workable and fairer rule to be in progressive occupational diseases, that the employee may, at his option, obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability. To require an employee disabled with such a disease to fix upon each of the carriers or employers the precise portion of the disability attributable to its contribution to the cause of the malady is not in consonance with the required liberal interpretation and application of the workmen's compensation laws. The successive carriers or employers should properly have the burden of adjusting the share that each should bear and that should be done by them in an independent proceeding between themselves. They are in a better position to produce evidence on the subject and establish the proper apportionment." (29 C.2d 82.) (On rights between insurers, see *supra*, §167.)

This rule received a practical qualification under unusual circumstances in *Glass Containers v. Industrial Acc. Com.* (1953) 121 C.A.2d 656, 264 P.2d 148. Decedent employee formerly worked for petitioner, and presumably that employment contributed to some part of the disability, so that normally a proportion of a compensation award or death benefit would be made against petitioner. However, there was no second employer; after that, decedent was self-employed, and carried self-employers' insurance--a disability and death benefit insurance policy giving the same benefits as those prescribed by the Act. Under *Lab.C. 5308*, the Board may act as arbitrator on a voluntary submission by the parties (i.e., the self-employed insured and the insurer) of any controversy arising out of the insurance. Decedent's widow sought a death benefit under the policy, and the Commission, purporting to act under *Lab.C. 5308*,

made an apportionment of part of the award against petitioner. *Held*, annulled for lack of jurisdiction. The special statute gave the Commission authority to act only by agreement of the parties to the insurance contract and to determine their contractual liability; it had no authority in that proceeding to impose on petitioner, who was not a party to the contract, a portion of the contractual liability of the insurer. (121 C.A.2d 658.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
- c. Disability From Progressive Disease.
- 2. Apportionment Among Multiple Employers.
- aa. In General.

2 Witkin Sum. Cal. Law Work Comp § 169

[§ 169] In General.

In a case involving a claim of occupational disease or cumulative injury that occurs as a result of more than one employment, the employee or the employee's dependents may elect to proceed against one or more of the employers. If the employee successfully proves a claim against one of the named employers, an Appeals Board award must be joint and several against two or more employers who may be held liable. (*Lab.C. 5500.5(c)*.)

Nothing in *Lab.C. 5505.5* conditions the joint and several liability of multiple defendants on the employee's "election" to proceed against one or more of the employers. (*Lab.C. 5505.5(c)*.) Nor does the statute preclude an employee from obtaining a joint and several award where all insurers participate as defendants. (*Industrial Indem. Co. v. Work. Comp. App. Bd. (1997) 60 C.A.4th 548, 555, 70 C.R.2d 295* [employer and more than one solvent insurer were found liable for employee's single cumulative injury; thus, each insurer was obligated to discharge fully employer's liability for entire disability].)

Lab.C. 5500.5 permits multiple employers of an employee who suffers a *cumulative* occupational injury to litigate apportionment and contribution before the Board. However, the Board has no jurisdiction to resolve apportionment and contribution among joint employers who are subject to an operating agreement where an employee suffers a *specific* injury. In *Victor Valley Transit Authority v. Work. Comp. App. Bd. (2000) 83 C.A.4th 1068, 100 C.R.2d 235*, the Board ruled that it had jurisdiction to construe a joint powers agreement to determine the contribution rights and obligations of the five members of a public joint powers agency whose employee had suffered a specific, noncumulative industrial injury. *Held*, order annulled. *Lab.C. 5500.5* permits the Board to decide apportionment and contribution when the issue is whether the employee was exposed to injurious conditions in his or her various employments, usually successive. If so, apportionment becomes essentially arithmetical. However, if there are overlapping employments (e.g., joint ventures or joint powers), the employers' rights and obligations usually are governed by contract, and its interpretation is not within the Board's jurisdiction. (*83 C.A.4th 1072*.)

An employer liable under an award for occupational disease or cumulative injury may, within 1 year after the award, request the Board to determine apportionment of liability or a right of contribution. However, this proceeding

may not in any way affect the award to the employee. (*Lab.C. 5500.5(e)*; see *General Acc. Ins. Co. v. Work. Comp. App. Bd.* (1996) 47 C.A.4th 1141, 1148, 55 C.R.2d 272 [*Lab.C. 5500.5(e)* applies where supplemental proceeding concerns multiple insurers for single employer].) (On insurer's 1-year period to petition for contribution under *Lab.C. 5500.5(e)*, see *Republic Indem. Co. v. Work. Comp. App. Bd.* (1981) 115 C.A.3d 361, 364, 366, 368, 171 C.R. 265.)

If a supplemental award is issued granting a new and distinct class of benefits, a petition for contribution filed within 1 year of the supplemental award is timely as to that award, even though more than 1 year has passed since the original award. (*Rex Club v. Work. Comp. App. Bd.* (1997) 53 C.A.4th 1465, 1472, 62 C.R.2d 393 [insurer's petition for contribution was filed within 1 year of order approving compromise and release, which is equivalent of award of compensation].)

Reform legislation in 2004 repealed the apportionment statutes dealing with aggravation of prior diseases and previous permanent disability, and enacted provisions that apportion permanent disability to *actual cause*. (See *infra*, §296.)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
 - 3. Multiple Employment.
 - c. Disability From Progressive Disease.
- 2. Apportionment Among Multiple Employers.
 - bb. Employers Who Are Liable.

2 Witkin Sum. Cal. Law Work Comp § 170

[§ 170] Employers Who Are Liable.

(1) *In General.* Liability for claims for occupational disease or cumulative injury is limited to those employers for whom the employee worked within 1 year preceding the earlier of either: (a) The date of injury, as defined in *Lab.C. 5412*, or (b) the last date on which the employee was employed in an occupation exposing the employee to the hazards of the disease or injury. (*Lab.C. 5500.5(a).*)

If no employer is insured during the applicable period, liability is imposed on the last insured employer exposing the employee to the disease or cumulative injury. That employer has a right of reimbursement from the uninsured employers and is subrogated to the employee's rights against those employers under *Lab.C. 3700* et seq. (see *supra*, §155). (*Lab.C. 5500.5(a).*) (See *Flesher v. Work. Comp. App. Bd.* (1979) 23 C.3d 322, 327, 152 C.R. 459, 590 P.2d 35 [background and purpose of *Lab.C. 5500.5*]; *Human Engineering Laboratory v. Work. Comp. App. Bd.* (1980) 108 C.A.3d 339, 342, 346, 166 C.R. 501 [same]; *Torrance v. Work. Comp. App. Bd.* (1982) 32 C.3d 371, 374, 185 C.R. 645, 650 P.2d 1162 [same]; *Scott Co. v. Work. Comp. App. Bd.* (1983) 139 C.A.3d 98, 104, 188 C.R. 537 [same].)

In *Western Growers Ins. Co. v. Work. Comp. App. Bd.* (1993) 16 C.A.4th 227, 20 C.R.2d 26, an employee suffered a continuous cumulative industrial depression that resulted in two distinct periods of disability. Different insurers were providing workers' compensation coverage during these two periods. The workers' compensation judge apportioned liability between these two insurers, and the Appeals Board affirmed. *Held*, apportionment of liability was improper.

(a) Under *Lab.C. 5500.5(a)*, liability for a cumulative injury is imposed on the insurer providing coverage during the year immediately preceding the date of injury or the date of last exposure, whichever occurs first. (16 C.A.4th 239.)

(b) Under *Lab.C. 5412*, the date of a cumulative injury is the date the employee first suffers a disability and knew or should have known that the disability was work-related. In this case, the date of injury was the date of the beginning of the first period of disability because at that time the employee believed his depression was work-related. (16 C.A.4th 238, 239.)

(c) On returning to work after the first period of disability, the employee experienced his last occupational exposure to the hazards of injury, which resulted in his second period of disability. Because this exposure followed the date of injury, the insurer who provided coverage at the date of injury and during the preceding year bore full liability for the benefits owed the employee. (16 C.A.4th 240.)

(2) *Employers of Household Employees.* Household employees are covered by workers' compensation. (See *infra*, §191.) Liability for occupational and cumulative injuries, resulting from exposure solely during employment as an employee defined by *Lab.C. 3351(d)* (see *infra*, §191), is limited to the employers in whose employment the employee was exposed to the disease or injury during the last day the employee was so employed. If that employer is uninsured, then liability is imposed on the last employer exposing the employee to the hazards who has secured coverage or an approved alternative. The liability is not apportioned to prior employers, but evidence of disability due to a specific injury, non-work-related causes, and prior compensation, voluntary or otherwise, is admissible for purposes of apportionment. (*Lab.C. 5500.6*.) (On exclusion of employees who work less than 52 hours or earn less than \$ 100 within 90 calendar days, see *Lab.C. 3352(h)*, *infra*, §191.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) (*New*) *Insurer As Employer.* An insurer found liable for workers' compensation benefits under *Lab.C. 5500.5* may pursue an action in superior court for reimbursement from an unlawfully uninsured employer and need not commence the claim before the Workers' Compensation Appeals Board. In *Graphic Arts Mut. Ins. Co. v. Time Travel Int.* (2005) 126 C.A.4th 405, 23 C.R.3d 864, plaintiff insured defendant from 1993 to 1994, after which defendant was unlawfully uninsured. G, employed by defendant, sought benefits for cumulative trauma injury for a period beginning in 1988 through June 1997. In June 2002, the Board issued an award finding plaintiff, as the last insurer, liable for the full benefit under *Lab.C. 5500.5(a)*. Over a year later, plaintiff filed an action in superior court seeking indemnity from defendant under *Lab.C. 5500.5(a)*. The trial court sustained defendant's demurrer on the ground that the Board had exclusive jurisdiction under *Lab.C. 5500.5(e)*, and that plaintiff had failed to file a petition for contribution with the Board within 1 year after the award, as required. *Held*, reversed.

(a) *Insurer qualifies as employer.* Under *Lab.C. 5500.5(a)*, an employer held liable for benefits as a result of another employer being uninsured is entitled to reimbursement from the employer unlawfully uninsured during the last year of the employee's employment and is subrogated to the rights of the employee. *Lab.C. 3850(b)* provides that for purposes of subrogation and recovery from third parties, "employer" includes an "insurer," and cases dealing with *Lab.C. 5500.5* have consistently interpreted the reference to employer to include an insurer. Thus, for purposes of reimbursement under *Lab.C. 5500.5(a)*, plaintiff qualifies as an employer. (126 C.A.4th 413.)

(b) *Action at law.* Because under *Lab.C. 5500.5(a)* plaintiff's rights are subrogated to those granted the employee, plaintiff is also entitled to proceed against defendant in superior court. "Subrogation means to substitute one person for another. ... Thus, where an employer is subrogated to the rights granted to an employee against an unlawfully uninsured employer, and the employee has the right to sue the unlawfully uninsured employer in superior court for damages, the employer should have the same right." (126 C.A.4th 414.)

(c) *Board does not have exclusive jurisdiction.* *Lab.C. 5500.5(e)* permits an employer to institute a proceeding before the Board for purposes of determining apportionment of liability or a right of contribution. However, plaintiff was not seeking apportionment or contribution and the provisions are not applicable here. Because plaintiff was found solely liable there is no need to determine an appropriate division of commonly held liability. Moreover, the use of the word "reimbursement" in *Lab.C. 5500.5(a)* distinguishes it from "contribution" used in *Lab.C. 5500.5(e)* and shows the Legislature's intent to "confer upon an employer the right to seek reimbursement directly from another unlawfully uninsured employer, as opposed to seeking contribution or apportionment of liability." Thus, plaintiff is entitled to proceed in superior court. (126 C.A.4th 415.)



171 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

- A. Who Are Employers.
- 3. Multiple Employment.
- c. Disability From Progressive Disease.
- 2. Apportionment Among Multiple Employers.
- cc. Procedure.

2 Witkin Sum. Cal. Law Work Comp § 171

[§ 171] Procedure.

(1) *In General.* An application for benefits made for an occupational disease or cumulative injury that may have arisen out of more than one employment must state the following: (a) the names and addresses of all employers liable, (b) the places of employment, and (c) the approximate periods of employment when the exposure occurred. (*Lab.C. 5500.5(b).*)

Parties defendant may be joined at or before the first hearing. After the first hearing, the Board must also join as a defendant an employer that appears to be a proper party, but the liability of the employer may not be determined until supplemental proceedings are instituted. (*Lab.C. 5500.5(b)*; see 1 Herlick 6th, §10.29.) (On special procedures where disability or death results from silicosis in underground metal mining, see *Lab.C. 5500.5(f), (g).*) (On retroactive application of former provisions, see *Harrison v. Work. Comp. App. Bd. (1974) 44 C.A.3d 197, 203, 118 C.R. 508.*)

(2) *Causation.* In *Scott Co. v. Work. Comp. App. Bd. (1983) 139 C.A.3d 98, 188 C.R. 537*, the employee claimed to have developed mesothelioma as a result of asbestos exposure while working for various employers from 1938 to 1970, and contended that, under the statute, all exposure to asbestos must be presumed injurious. The court disagreed: "The legislative history of the 1977 amendments clearly indicates that while the time restrictions on employer liability were concerned with streamlining procedures and allocating costs among employers and insurers, they were never viewed as eliminating the fundamental causation requirement." (*139 C.A.3d 105.*) Hence, the Board's dismissal of the second and third employers, based on a finding that the last date of injurious exposure was in 1963, was proper. (*139 C.A.3d 107.*) (See *Industrial Indem. Co. v. Work. Comp. App. Bd. (1983) 145 C.A.3d 480, 487, 193 C.R. 471* [absent substantial medical evidence establishing that prior period of employment constituted exclusively hazardous exposure to asbestos, *Lab.C. 5500.5* requires Board to determine liability strictly according to applicant's last day of exposure to asbestos; discussing *Scott Co.*].)

SUPPLEMENT: [This section is current through the latest supplement]



172 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

1. Nature of Classification.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 172

[§ 172] In General.

(1) *Appointment or Contract of Hire*. "Employee" means every person in the service of an employer under an appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. (*Lab.C. 3351*.) (See *112 A.L.R.5th* 365 [workers' compensation benefits for professional athletes].) Specifically included are the following:

(a) Aliens and minors. (*Lab.C. 3351(a)*; see *Del Taco v. Work. Comp. App. Bd.* (2000) 79 C.A.4th 1437, 1440, 94 C.R.2d 825 [illegal alien is entitled to temporary disability compensation]; *121 A.L.R.5th* 523 [application of workers' compensation laws to illegal aliens].)

(b) Elected and appointed paid public officers. (*Lab.C. 3351(b)*; see *infra*, §176 et seq.)

(c) Officers and board members of quasi-public or private corporations while rendering actual service for the corporations for pay, except where the officers and directors of a private corporation are its sole shareholders, in which case they must elect to be covered by the Act pursuant to *Lab.C. 4151(a)* (*infra*, §192). (*Lab.C. 3351(c)*.) For purposes of *Lab.C. 3351(c)*, persons holding the power to revoke a trust as to shares of a private corporation or as to general partnership or limited liability company interests held in the trust are deemed to be the shareholders, general partners, or managers of the private corporation, partnership, or limited liability company, respectively. (*Lab.C. 3351(g)*.)

(d) Domestic workers who meet specified wage and hour requirements. (*Lab.C. 3351(d)*; see *infra*, §§187, 191.)

(e) State prisoners engaged in assigned work. (*Lab.C. 3351(e)*; see *infra*, §§180, 181.)

(f) Working members of a partnership or limited liability company receiving wages irrespective of profits, except where the working members are general partners or managers, in which case they are covered only if they so elect under *Lab.C. 4151(a)* (see *infra*, §192). (*Lab.C. 3351(f)*; *infra*, §184.)

(g) Persons whose employment training is arranged by the State Rehabilitation Department. (*Lab.C. 3351.5(a)*.)

(h) Volunteers performing services for private nonprofit organizations when authorized in writing by the

organization's board. (*Lab.C. 3363.6.*) (On volunteers for nonprofit organizations not considered employees, see *Lab.C. 3352(i)*; *infra*, §191.)

(2) *Presumption From Service.* A person rendering service for another, other than as an independent contractor, or unless expressly excluded by statute, is presumed to be an employee. (*Lab.C. 3357.*) Moreover, where the injured person was actually performing service for the alleged employer at the time of the injury, the burden of proof to exclude the worker is on the employer. (*Lab.C. 5705(a).*) (See generally 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §120 et seq.; C.E.B., 1 *Workers' Compensation Practice* 4th, §2.61.)

In *Yellow Cab Cooperative v. Work. Comp. App. Bd.* (1991) 226 C.A.3d 1288, 277 C.R. 434, applicant was formerly a Yellow Cab driver under a union contract. Yellow subsequently adopted a system under which drivers leased cabs, and were no longer deemed employees. Applicant signed a "Taxicab Lease Agreement" that detailed provisions negating employment status and eliminating workers' compensation insurance. Applicant signed the lease without negotiation because he needed work. He was later injured when pinned between two cabs at a taxi stand. The Board ruled that, under *Lab.C. 3357* and *5705*, Yellow was his employer for compensation purposes. Yellow petitioned for review. *Held*, the ruling was correct.

(a) The presumption of *Lab.C. 3357* applies where the conduct is for the employer's benefit and under the employer's control. (226 C.A.3d 1293.) Yellow's enterprise was not merely the leasing of vehicles; it was operating a fleet of cabs for public carriage. (226 C.A.3d 1293.) The drivers, as active instruments of that enterprise, provided an indispensable "service" to Yellow. (226 C.A.3d 1294.)

(b) The statutory presumption applies despite the putative employer's contract designating the worker as an independent contractor; "a service provider is presumed to be an employee unless the principal affirmatively proves otherwise." (226 C.A.3d 1294.) "Whether these statutes are described in terms of a presumption, an affirmative defense, or an allocation of the burden of proof, the effect is the same: the employer must show that the applicant is not entitled to the benefits of the act." (226 C.A.3d 1294.)

(c) Common law notions of employment are not determinative. (226 C.A.3d 1295.) The actual conduct of the parties indicated that Yellow controlled various aspects of the work, such as instructions by dispatchers, use of the radio, assignment of shifts, and prohibition on driving cabs for other companies. (226 C.A.3d 1298.) "In sum, Yellow exercised pervasive control over the enterprise as a whole; it exercised at least some direct control over applicant's work; indirect control was effected through the payment system and the threat of termination; and such actual independence as applicant enjoyed was inherent in the work and was not the product of any specialized skill or expertise." (226 C.A.3d 1299.) (See *Land v. Work. Comp. App. Bd.* (2002) 102 C.A.4th 491, 494, 125 C.R.2d 432 [university student injured during field portion of animal husbandry class was not rendering service to university by participating in university's educational program and was not employee even though she received portion of profits from sale of cattle at end of term].)

(3) *Furtherance of Purposes of Act.* In *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 100 C.R. 377, 424 P.2d 1, *infra*, §175, the court, discussing *Lab.C. 3351* and *3357*, said: "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (6 C.3d 777.) The disjunctive (*or* contract of hire, etc.) refutes the contention that a contract is a prerequisite. (6 C.3d 777, footnote 5.) In addition, common law notions of employment are not determinative. At common law, the "master-servant" concept was utilized primarily to delimit the scope of vicarious tort liability; i.e., it was concerned with injuries caused by the employee. In compensation law, the basic inquiry involves injuries to the employee which the employer should insure against. Although there is overlap, determination of the issue must ultimately depend on the purpose of the inquiry. (6 C.3d 777, footnote 7.)

(4) *Fetus Is Not Employee.* In *Snyder v. Michael's Stores* (1997) 16 C.4th 991, 68 C.R.2d 476, 945 P.2d 781, *supra*,

§65, a minor sued for injuries received *in utero* when her mother breathed toxic amounts of carbon monoxide while working in defendant's store. One of defendant's arguments for applying the Act's exclusive remedy provisions (see *supra*, §24 et seq.) was that plaintiff herself was an employee of defendant at the time of injury. *Held*, the argument was without merit. In permitting plaintiff's claim for her own injuries, the court reasoned that although courts have liberally extended the statutory definition of employee beyond traditional contracts of hire, a claimant must still satisfy the basic statutory requirements of being in service of or rendering service for another. (16 C.4th 1003, citing *Lab.C.* 3351 and 3357.) A fetus is not under an employer's control merely because the mother is, and hence is not an employee or subject to special risks of the workplace. As between plaintiff and defendant at the time of plaintiff's injury, no employment relationship existed, inchoate or otherwise. (16 C.4th 1004.)

West's Key Number Digest, Workers' Compensation k.230 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Appointment or Contract of Hire*.

(a) *Aliens and minors*. See *Farmers Bros. Coffee v. Work. Comp. App. Bd.* (2005) 133 C.A.4th 533, 542, 35 C.R.3d 23 [illegal alien was not precluded from obtaining benefits]; 41 U.C. Davis L. Rev. 2001 [undocumented immigrants and workers' compensation; rejecting federal preemption of California Workers' Compensation Act]. (2) *Presumption From Service*. See *Heiman v. Work. Comp. App. Bd.* (2007) 149 C.A.4th 724, 736, 57 C.R.3d 56 [worker injured while rendering services to unlicensed contractor was contractor's employee under *Lab.C.* 3357]; 33 A.L.R.6th 251 [students as covered employees].



173 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

1. Nature of Classification.

b. Compensation.

2 Witkin Sum. Cal. Law Work Comp § 173

[§ 173] Compensation.

A pecuniary compensation is not essential, nor is it necessary that it be paid directly to the employee, provided the service is not voluntary. (*Union Lumber Co. v. Industrial Acc. Com.* (1936) 12 C.A.2d 588, 595, 55 P.2d 911 [vocational student learning trade as part of high school course, with compensation paid to school authorities, was employee of tradesman]; *Gabel v. Industrial Acc. Com.* (1927) 83 C.A. 122, 125, 256 P. 564 [agreement to exchange labor]; *Anaheim General Hosp. v. Work. Comp. App. Bd.* (1970) 3 C.A.3d 468, 472, 83 C.R. 495 [nursing school student receiving practical training at hospital, compensation paid by hospital to school]; *Edwards v. Chico* (1972) 28 C.A.3d 148, 153, 104 C.R. 481 [following *Union Lumber*]; *Barragan v. Work. Comp. App. Bd.* (1987) 195 C.A.3d 637, 648, 240 C.R. 811 [unpaid student extern at hospital]; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §127 et seq.)

In *Jones v. Work. Comp. App. Bd.* (1971) 20 C.A.3d 124, 97 C.R. 554, J, a picket captain of a union on strike, was run over by a truck and killed while on picket duty. Petitioner, J's widow, sought death benefits from the union. The Board denied the application on the ground that J was not on the union payroll with other union employees. *Held*, order annulled. (a) The presumption of *Lab.C.* 3357, where a person renders services "for another" (supra, §172), applied. A labor union is an entity for purposes of personal injury liability (see 5 *Summary* (10th), *Torts*, §§36, 37), and a union picket, ordered to perform on pain of loss of benefits and a fine, is working for the union, even though he was an employee of the truck company and may be again at the end of the strike. (20 C.A.3d 128.) (b) There was a contract of hire under *Lab.C.* 3351 (supra, §172), even though there was no stated wage and he was not on a payroll. (20 C.A.3d 129.) (c) Where there is economic compensation, the most important element is the right of control; and here the union control over its pickets was clear. (20 C.A.3d 130.)

Where there is an appointment or contract of hire, express or implied, the fact that the services are rendered without pay is not controlling; if performed under a compulsory appointment, there is an employment relationship even though no compensation is received. However, if they are voluntarily rendered without compensation, there is not. Thus, in *Edwards v. Hollywood Canteen* (1946) 27 C.2d 802, 805, 167 P.2d 729, plaintiff, a volunteer hostess at a recreation center for servicemen, giving her services gratuitously, was held not to be an employee, and was therefore entitled to bring a tort action. (See *Peterson v. Twentieth Century Fox Films* (1946) 76 C.A.2d 587, 589, 173 P.2d 851 [plaintiff, naval enlisted man, directed by superior officer to assist defendant in making motion picture, was not special employee of defendant and could sue].) (On when volunteers for nonprofit organizations are considered employees, see supra,

§172; on when volunteers for nonprofit organizations are not considered employees, see *infra*, §191.)

SUPPLEMENT: [This section is current through the latest supplement]



174 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

1. Nature of Classification.

c. Unlawful Employment.

2 *Witkin Sum. Cal. Law Work Comp* § 174

[§ 174] Unlawful Employment.

The definition of employees covers those "lawfully or unlawfully employed" (Lab.C. 3351; cf. Lab.C. 3604 [no defense to public entity that worker was not lawfully employed due to violation of law respecting hiring].) Thus, it is no defense to liability that the employee was an entertainer employed on commission to encourage the sale of liquor in violation of P.C. 303, or a minor employed in violation of the law. (Massachusetts Bonding & Ins. Co. v. Industrial Acc. Com. (1937) 19 C.A.2d 583, 587, 65 P.2d 1349 [entertainer]; Leong v. Postal Tel.-Cable Co. (1944) 66 C.A.2d 849, 850, 153 P.2d 204 [minor]; see 77 A.L.R.4th 844 [workers' compensation statute as barring illegally employed minor's tort action].)

Where an illegally employed minor under 16 is injured, a 50% penalty is added to the award, unless the employer relied on a birth certificate, driver's license, or other reasonable evidence that the minor was over 15. (*Lab.C. 4557; see Ins.C. 11661.5* [employer cannot insure against this penalty].)

SUPPLEMENT: [This section is current through the latest supplement]



175 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

1. Nature of Classification.

d. Preemployment Tryout.

2 Witkin Sum. Cal. Law Work Comp § 175

[§ 175] Preemployment Tryout.

In *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 100 C.R. 377, 424 P.2d 1, petitioner applied for a position as a "refuse crew worker" with the city of Covina. Hiring required a written examination and an agility test. Petitioner passed the written examination and was successful in the first three parts of the agility test, but was injured in the obstacle course portion. The Board denied compensation. *Held*, order annulled.

(a) Prior Board decisions and a leading New York case had approved awards under similar circumstances. (6 C.3d 778, 779.) The Board distinguished them on the ground that the tryouts in those cases involved the actual tasks of the positions for which the injured person was applying. On this theory, if petitioner's tryout had involved the collection of refuse, compensation would have been allowed. (6 C.3d 779.)

(b) The Board's theory, dependent on the mere format of the tryout, is unsound. The agility test, selected by the employer, served the same purpose as an on-the-job performance; during the tryout the applicant was subject to the employer's control; and the latter directed the activity. (6 C.3d 787.)

(c) Moreover, "one fundamental purpose of our comprehensive workmen's compensation scheme is to provide protection against any special risk of employment." (6 C.3d 782.) Here, petitioner incurred his injury while undertaking a special risk--a test designed to correlate with the skills of the position. "The program for the tryout thus structured a relationship between applicant and employer, which, although not necessarily resultant in permanent employment, was inchoate and viable. Pursuant to it applicant undertook special risks in performing designated, dangerous tasks; at this preliminary stage these were essentially 'risks of employment' for which our compensation laws, mandating liberal interpretation in favor of awarding compensation, compel coverage." (6 C.3d 783.) (See Cal. Civil Practice, 1 Workers' Compensation, §1:38; 8 A.L.R.5th 798 [compensability of injury during tryout, employment test, or similar activity designed to determine employability].)

A job applicant, however, is not an employee. In *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1976) 59 C.A.3d 647, 130 C.R. 831, a tape punch operator reported to her union representative on the premises of a newspaper for possible "substitute" work. No work was available that day, and as she left the premises she fell and was injured. *Held*, award annulled. (a) The employee reported to what was essentially a "hiring hall" on the newspaper's premises, where

union members were required by the union, not the employer, to "show up" at least once a week; and she reported to union representatives, not management. (59 C.A.3d 653.) (b) The policy considerations in *Laeng, supra*, "do not apply to a person merely calling at employment premises to inquire as to the availability of employment, even though if there were work, hiring would be a virtual certainty." The potential employer is not offering employment and is not considering offers of services. "He exerts no control and the risks of the caller are the same as those to any business visitor." (59 C.A.3d 654, 655.)

SUPPLEMENT: [This section is current through the latest supplement]



176 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

2. Public Employees.

a. Broad Application.

2 Witkin Sum. Cal. Law Work Comp § 176

[§ 176] Broad Application.

(1) *In General.* All elected and appointed *paid* public officers are employees. (*Lab.C. 3351(b).*) This inclusive statement covers a wide variety of employments by the state, its subdivisions, and agencies. (See, e.g., *Singleton v. Bonnesen* (1955) 131 C.A.2d 327, 329, 280 P.2d 481 [county sheriff and deputy]; *Greenaway v. Work. Comp. App. Bd.* (1969) 269 C.A.2d 49, 59, 74 C.R. 452 [inheritance tax appraiser]; cf. *Argonaut Ins. Co. v. Industrial Acc. Com.* (1960) 54 C.2d 740, 743, 8 C.R. 438, 356 P.2d 182, *supra*, §165 [emergency public service]; see also 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §155 et seq.)

By implication from the statutory definition, *unpaid* public officers are ordinarily excluded. (See *Department of Natural Resources v. Industrial Acc. Com.* (1929) 208 C. 14, 15, 279 P. 987.) However, a number of nonsalaried public officers are expressly included by special statutes. (See *infra*, §177 et seq.)

(2) *Juror.* A juror who sustains an injury in the course of performing jury service is an employee within the meaning of the Act. In *Waggener v. Los Angeles* (1995) 39 C.A.4th 1078, 46 C.R.2d 141, plaintiff juror, injured when she slipped and fell exiting a jury box, sued the county for negligence and premises liability. The county was granted summary judgment, the trial judge concluding that plaintiff was an employee of the county within the meaning of the Act and that workers' compensation was plaintiff's sole and exclusive remedy. *Held*, affirmed.

(a) *Jurors not specifically mentioned in the Act.* Jurors are neither designated as persons who do not fit the traditional definition of employees but are nevertheless *included* within the workers' compensation system, nor are they specifically *excluded* from the Act's provisions. (39 C.A.4th 1080.)

(b) *Rigid contractual or common law concepts of employment not controlling.* Cases from other jurisdictions concluding that jurors are not employees for purposes of those states' workers' compensation law because the jurors' relationship to their counties did not fit squarely within the common law definition of an employment relationship do not support plaintiff. In *Arriaga v. Alameda* (1995) 9 C.4th 1055, 40 C.R.2d 116, 892 P.2d 150, *infra*, §183, the court cautioned against adhering to a rigid contractual analysis, preferring instead to resolve the issue of an employment relation for workers' compensation purposes by reference to the "history and fundamental purposes underlying the Act." (39 C.A.4th 1081.)

(c) *Employment defined broadly.* *Arriaga* reiterated that the Act accomplishes its goal of comprehensive coverage of injuries in employment by defining employment broadly in terms of service to an employer and by including a general presumption that any person in service to another is a covered employee. Thus, there is no rational basis to distinguish cases extending coverage to welfare recipients (see *Los Angeles v. Work. Comp. App. Bd. (Conroy)* (1981) 30 C.3d 391, 179 C.R. 214, 637 P.2d 681, *infra*, §185), or to persons performing services to offset a speeding ticket (see *Arriaga, supra*), from this case. A juror provides a service to the county, and while a county does not and cannot exercise control over the juror's ultimate work product of deliberation, the county does control each and every other aspect of the juror's work environment. (39 C.A.4th 1082.) (See 13 A.L.R.5th 444 [jurors as within coverage of workers' compensation law].)

West's Key Number Digest, Workers' Compensation k.374 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



177 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
B. Who Are Employees.
2. Public Employees.
b. Firefighters and Other Emergency Personnel.

2 Witkin Sum. Cal. Law Work Comp § 177

[§ 177] Firefighters and Other Emergency Personnel.

By special legislation, the following specified firefighters and other emergency personnel who would not otherwise qualify are deemed to be employees of public entities:

(1) *Voluntary fire department members.* (Lab.C. 3361; see *Le Febvre v. Work. Comp. App. Bd.* (1968) 69 C.2d 386, 388, 71 C.R. 703, 445 P.2d 319 [volunteer fireman].)

(2) *Disaster service workers.* (Lab.C. 3600.6, 4351 et seq.)

(3) *Persons rendering technical assistance to public entities to prevent hazardous occurrences.* (Lab.C. 3367(a); on exceptions, see Lab.C. 3367(b), *infra*, §191.)

(4) *Firefighters not under immediate direction of employer.* (Govt.C. 19886.1 [state firefighter], Govt.C. 50926 [other firefighters]; Lab.C. 3600.1 [off-duty state firefighter], Lab.C. 3600.4 [off-duty local firefighter].)

(5) *Persons engaged in suppressing fires.* Under Lab.C. 3365, if summoned pursuant to Pub.Res.C. 4153 or 4436, or if acting at the request of a public officer or employee charged with preventing or suppressing fires, the following are deemed employees of the public entity being assisted: Persons fighting fires, persons being transported to or from fires, and persons being trained in fire suppression. Exceptions, however, are stated for (a) the United States and its agencies, (b) independent contractors and their employees, (c) members of the armed services under military command, (d) persons and their employees who contract to furnish aircraft with pilots for fire prevention or suppression. However, a person who contracts to furnish and pilot an aircraft for a public entity is an employee of the entity. (Lab.C. 3365(c).)

Prisoners and wards are specially treated: (a) When the entity being served is the United States or its agency, the State Department of Corrections is the employer. (Lab.C. 3365(a).) (b) When the person is confined in a county jail, industrial farm, road camp, or city jail, the person is considered an employee of the county or city. (P.C. 4017.) (c) When the wards are inmates of camps and ranches, they must be treated as other county employees. (Welf.C. 883.) (See *Leroy T. v. Work. Comp. App. Bd.* (1974) 12 C.3d 434, 437, 115 C.R. 761, 525 P.2d 665, *infra*, §305 [Welf.C. 883; inmate of forestry camp].)

SUPPLEMENT: [This section is current through the latest supplement]



178 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

2. Public Employees.

c. Law Enforcement Personnel.

2 Witkin Sum. Cal. Law Work Comp § 178

[§ 178] Law Enforcement Personnel.

(1) *Active Officers.* Active police officers of organized police departments, and unsalaried members of a sheriff's reserve actively engaged in law enforcement under the direction and control of the sheriff, are covered by workers' compensation, if the appropriate governing body has adopted a resolution declaring them to be employees. (*Lab.C. 3362* [members of police department]; *Lab.C. 3364* [unsalaried members of sheriff's reserve not covered under *Lab.C. 3362* are entitled to benefits when declared to be employees by resolution of board of supervisors]; see *Govt.C. 59021*, *Lab.C. 3600.2* [peace officer not acting under immediate control of employer is still covered]; *Lab.C. 3600.3* [off-duty peace officer with Department of Forestry is subject to workers' compensation law if, as condition of employment, officer is required to be on call during off-duty hours]; *Luna v. Work. Comp. App. Bd. (1988) 199 C.A.3d 77, 244 C.R. 596* [police officer injured on way to work when car was struck by speeding vehicle, who testified of police action he thought of taking but did not, was not entitled to benefits under *Lab.C. 3600.2*]; *Cal. Civil Practice, 1 Workers' Compensation, §1:30.*)

(2) *Posse.* A person serving on a posse comitatus or on request in assisting a peace officer in active law enforcement is deemed an employee of the public entity. (*Lab.C. 3366(a)*; see *Monterey v. Industrial Acc. Com. (1926) 199 C. 221, 225, 248 P. 912* [man forced into emergency service as deputy sheriff to act as member of posse].)

(3) *Reserve and Auxiliary Officers.* A qualified person, not otherwise performing services as a disaster service worker, who is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, a deputy sheriff, or a reserve police officer of a regional park or a transit district, and is assigned specific police functions, is an employee of the municipality or district for the purposes of workers' compensation while performing peace officer duties. (*Lab.C. 3362.5.*)

SUPPLEMENT: [This section is current through the latest supplement]



179 of 192 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
B. Who Are Employees.
2. Public Employees.
d. Miscellaneous Employees.

2 Witkin Sum. Cal. Law Work Comp § 179

[§ 179] Miscellaneous Employees.

Registered, active members of the Department of Fish and Game's reserve fish and warden program are employees for the purposes of the Act. (*Lab.C.* 3363.)

The following statutes deem specified persons performing services for public entities to be employees, if the public entity adopts a resolution so declaring:

- (1) *Lab.C.* 3361.5 [authorized volunteer workers for park and recreation districts].
- (2) *Lab.C.* 3363.5 [those performing "voluntary service without pay" for public agencies, which includes those receiving only meals, transportation, lodging or reimbursement for incidentals].
- (3) *Lab.C.* 3364.5 [volunteer workers for school district or county superintendent of schools].
- (4) *Lab.C.* 3364.55 [wards doing rehabilitative work under court order for governmental entity; benefits limited].
- (5) *Lab.C.* 3364.6 [juvenile traffic offenders and juvenile probationers working on public property without pay, under assignment by juvenile court order; benefits limited].

SUPPLEMENT: [This section is current through the latest supplement]



180 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

3. Prisoners.

a. State Prison Inmate.

2 Witkin Sum. Cal. Law Work Comp § 180

[§ 180] State Prison Inmate.

Workers' compensation benefits are available to inmates of state penal or correctional institutions for injuries or death arising out of and in the course of assigned employment subject to the following conditions:

- (1) The inmate was not injured as the result of an assault in which the inmate was the initial aggressor or by an intentional, self-inflicted injury. (*Lab.C. 3370(a)(1).*)
- (2) The inmate is not entitled to temporary disability indemnity benefits while incarcerated. (*Lab.C. 3370(a)(2).*)
- (3) No benefits are payable to an inmate while the inmate is incarcerated; the period of benefit payments must begin on the inmate's release. If a released inmate who has been receiving benefits is reincarcerated in a state penal or correctional institution, or in a city or county jail, the benefits must cease immediately and throughout the duration of that incarceration. (*Lab.C. 3370(a)(3).*)
- (4) In determining temporary and permanent disability benefits for the inmate, the average weekly earnings must be taken at not less than the minimum amount set forth in *Lab.C. 4453*. (*Lab.C. 3370(a)(5).*) (See *Department of Corrections v. Work. Comp. App. Bd. (2003) 109 C.A.4th 1720, 1726, 1 C.R.3d 348* [prison inmate was not receiving cash wages but was working for sentence credits; thus, board erred in computing temporary disability based on earning capacity rather than actual prison weekly earnings, which were zero].)
- (5) When a dispute exists over an inmate's rights to workers' compensation benefits, he or she may file an application with the Board to resolve the dispute. The application may be filed at any time during the inmate's incarceration. (*Lab.C. 3370(a)(6).*)
- (6) After release or discharge from a correctional institution, the former inmate has 1 year in which to file an original application with the Board, unless the time of injury permits more time under *Lab.C. 5804*. (*Lab.C. 3370(a)(7).*)
- (7) Disability is determined as for the occupation of a laborer of the same age according to the authorized schedule. (*Lab.C. 3370(a)(8).*)

(8) *Lab.C. 3370* is the exclusive remedy against the state for injuries occurring while the inmate is engaged in assigned work or work under contract. However, nothing in the statute affects a right or remedy of an injured inmate for injuries not compensated by the statute. (*Lab.C. 3370(a)(9)*; see *Crawford v. Work. Comp. App. Bd. (1986) 185 C.A.3d 1265, 1269, 230 C.R. 425, infra, §211* [injuries suffered by prisoner at conservation camp while off duty are noncompensable].)

The inmate must be given a statement of the right to benefits and a description of applicable procedure. (*Lab.C. 3370(b)*.) The Department of Corrections, however, has complete medical control over an injured inmate during incarceration, except that in serious cases the inmate is entitled to the services of a consulting physician, if requested. (*Lab.C. 3370(c)*, *infra, §261*.) Inmates are not entitled to compensation for psychiatric injury. (*Lab.C. 3208.3(j)*, *infra, §244*.)

Lab.C. 3370(a)(2), *(a)(3)*, and *(a)(4)* are applicable to an inmate who would otherwise be entitled to receive workers' compensation benefits based on an injury sustained prior to incarceration. However, temporary and permanent disability benefits that would otherwise be payable to an inmate during incarceration based on an injury sustained prior to incarceration must be paid instead to the dependents of the inmate. If the inmate has no dependents, the temporary disability benefits are paid to the State Treasury to the credit of the Uninsured Employers Benefits Trust Fund, and any permanent disability benefits will be held in trust for the inmate by the Department of Corrections during the incarceration. (*Lab.C. 3370(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]



181 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

3. Prisoners.

b. County Inmate.

2 Witkin Sum. Cal. Law Work Comp § 181

[§ 181] County Inmate.

Although *Lab.C. 3351(e)* (supra, §172) includes within the definition of employee persons incarcerated in state penal institutions who are engaged in assigned work, no mention is made of the status of county inmates. Thus, the trial court must determine whether a county inmate was an employee on a case-by-case basis using the general definition of employee. In making the decision, the trial court should consider (1) whether the county required the inmate to work as a condition of incarceration, (2) whether the inmate volunteered for the assignment, and (3) what considerations were received, e.g., monetary compensation, work-time credit, and freedom from incarceration. (*Rowland v. Sonoma (1990) 220 C.A.3d 331, 334, 269 C.R. 426* [in plaintiff inmate's suit for damages, trial court granted county's motion for summary judgment on grounds of statutory immunity; *held*, reversed and remanded with directions to conduct hearing on issue of employee status at time of injury].)

SUPPLEMENT: [This section is current through the latest supplement]



182 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

3. Prisoners.

c. Jail Inmate Lent to Third Party.

2 *Witkin Sum. Cal. Law Work Comp* § 182

[§ 182] Jail Inmate Lent to Third Party.

Under some circumstances, jail inmates can be considered employees. (See *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1970) 8 C.A.3d 978, 980, 87 C.R. 770 [county jail inmate voluntarily working on road gang for pay, in absence of ordinance requiring him to do so, was county employee]; on extension of benefits to ward of juvenile court engaged in rehabilitative work without pay, see *Lab.C.* 3364.55.)

In *Pruitt v. Work. Comp. App. Bd.* (1968) 261 C.A.2d 546, 552, 68 C.R. 12, petitioner was sentenced to the Nevada County jail for 6 months. Prisoners were permitted to volunteer for work and receive 5 days off a sentence for every 30 days of work. Petitioner worked in the Nevada City sewerage plant, where he was injured. *Held*, he was an employee of the city. He was not a felon deprived of civil rights, and was not performing compulsory work as an incident to incarceration; he was performing a nongratuitous service for the city.

SUPPLEMENT: [This section is current through the latest supplement]



183 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

3. Prisoners.

d. Nonincarcerated Convicted Person.

2 Witkin Sum. Cal. Law Work Comp § 183

[§ 183] Nonincarcerated Convicted Person.

A person convicted of a crime but not incarcerated, who undertakes community service in lieu of paying a fine, is an employee within the meaning of *Lab.C. 3600* and *3602*. In *Arriaga v. Alameda* (1995) 9 C.4th 1055, 40 C.R.2d 116, 892 P.2d 150, as part of her sentence to work off a 4-year-old speeding ticket, plaintiff was assigned by the sheriff's department through the department's Weekender Program to work for the State Department of Transportation, cleaning the greasy walls of a ventilation duct inside a CalTrans building. While cleaning the duct plaintiff was allegedly exposed to toxic fumes, experienced dizziness, and lost consciousness. Plaintiff sued both the county and state for negligence. The trial judge sustained defendants' demurrer without leave to amend on the ground that the complaint established as a matter of law that plaintiff was an employee under the Act, and that workers' compensation constituted plaintiff's exclusive remedy. *Held*, affirmed.

(a) *Employee defined broadly.* The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining employment broadly in terms of service to an employer and by including a general presumption that any person in service to another is a covered employee. (9 C.4th 1055.) Under *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 100 C.R. 377, 494 P.2d 1, *supra*, §175, and *Los Angeles v. Work. Comp. App. Bd. (Conroy)* (1981) 30 C.3d 391, 179 C.R. 214, 637 P.2d 681, *infra*, §185, factors determining employment include whether (1) the person is in service to an entity; (2) the entity receives a benefit; (3) the person is under the control of the entity; and (4) the person is exposed to the same risks of employment as other workers normally employed by the entity. (9 C.4th 1061, 1062.) Plaintiff was doing maintenance work for the state within the county's boundaries at the time of her injury, thus, she was in the service of both entities. Both entities benefited from her work, she was under the control of both the program and the state, and she was exposed to the same job risks that other transportation workers face. Therefore, plaintiff was an employee of both the county and the state for workers'; compensation purposes. (9 C.4th 1063.)

(b) *Voluntary service distinguished.* *California State University, Fullerton v. Work. Comp. App. Bd.* (1993) 16 C.A.4th 1819, 21 C.R.2d 50, *infra*, §191, is distinguishable. There, the court concluded that R, convicted of a criminal offense, was performing voluntary service by completing 78 hours of community service under his probation order rather than paying a fine. Thus, R was subject to the voluntary service exclusion of *Lab.C. 3352(i)*. Here, plaintiff was performing work pursuant to a court order, and this is not "voluntary service" within the meaning of *Lab.C. 3352(i)*, because plaintiff was not acting free of compulsion. (9 C.4th 1064.) Further, plaintiff received credit against the

court-imposed fine, thus receiving remuneration sufficient to render *Lab.C. 3352(i)* inapplicable. (*9 C.4th 1065.*)

SUPPLEMENT: [This section is current through the latest supplement]



184 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

4. Other Categories.

a. Working Member of Partnership or Limited Liability Company.

2 Witkin Sum. Cal. Law Work Comp § 184

[§ 184] Working Member of Partnership or Limited Liability Company.

(1) *Statutory Provisions.* Working members of a partnership or limited liability company who receive wages irrespective of profits are employees, except where the working members are general partners or managers, in which case they are covered by the Act only if they so elect under *Lab.C. 4151(a)* (see *infra*, §192). (*Lab.C. 3351(f)*.) (See 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §154; 78 *A.L.R.4th* 973 [ownership interest in employer business as affecting status as employee].)

If a private corporation is the general partner or manager, the phrase "working members of a partnership or limited liability company" includes the corporation and its officers and directors, provided the officers and directors are the sole shareholders. If a limited liability company is a partner or member, the phrase includes the managers of the limited liability company. (*Lab.C. 3351(f)*.)

For purposes of *Lab.C. 3351(f)*, persons holding the power to revoke a trust as to general partnership or limited liability company interests held in the trust are deemed to be the general partners of the partnership or the managers of the limited liability company. (*Lab.C. 3351(g)*.)

(2) *Partners Performing Work for Another.* Workers associated as partners to perform labor are employees of the person having the work done, except that the latter is not liable if the partners themselves carry the compensation insurance. (*Lab.C. 3360*.) Thus, liability is imposed on a person employing partners to perform work regardless of whether the partnership is acting as a partnership, an independent contractor, or otherwise, and regardless of whether the employer is aware of a partnership status. (*Guzman v. Work. Comp. App. Bd.* (1984) 158 *C.A.3d* 190, 195, 204 *C.R.* 527.)

SUPPLEMENT: [This section is current through the latest supplement]



185 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
B. Who Are Employees.
4. Other Categories.
b. Worker Receiving Welfare Assistance.

2 Witkin Sum. Cal. Law Work Comp § 185

[§ 185] Worker Receiving Welfare Assistance.

The former rule excluding an indigent who works in order to obtain welfare assistance (see *McBurney v. Industrial Acc. Com.* (1934) 220 C. 124, 126, 30 P.2d 414) was repudiated in *Los Angeles v. Work. Comp. App. Bd. (Conroy)* (1981) 30 C.3d 391, 179 C.R. 214, 637 P.2d 681. Los Angeles County provides "welfare" benefits to indigents unable to work, and "workfare" benefits to those able to work and assigned to jobs with the county or a local governmental agency. Petitioner, on the workfare program, performed services as a school district watchman for 7 or 8 hours per day on 7 days each month. He suffered injuries on the premises from a fall, and sought workers' compensation. *Held*, he was entitled to an award.

(a) The broad test of employment laid down in *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 100 C.R. 377, 424 P.2d 1, *supra*, §175, rejects technical contractual or common law conceptions and covers service without a contract of hire. "Even more so than the job applicant in *Laeng*, respondent was in the service of the county when he was injured. He performed the job of watchman on the grounds of a school. Similar to the applicant in *Laeng*, respondent subjected himself to the county's control. The county, though it did not directly supervise his day-to-day activities, exercised its right of control by assigning him to jobs. Also, the county determined respondent's rate of pay, specified the number of hours he was to work, and had the sole power to terminate his benefits if he did not perform his work to the county's satisfaction. The county received a benefit from respondent's work, which helped to ensure the safety of a school within the county's boundaries. Finally, by assigning respondent to work at the school, the county exposed him to the same risks of employment faced by similar school employees. The special risks inherent in employment are the very dangers the workers' compensation laws are intended to cover." (30 C.3d 398.)

(b) *McBurney v. Industrial Acc. Com.*, *supra*, has no validity today. It was one of a series of Depression-era cases, applying the Elizabethan Poor Law concept of the disfavored status of the poor, and treating indigents given government work as paupers receiving charity. (30 C.3d 399, 400, 401.) Work relief is not the same as direct relief; work relief programs are not intended to discipline or reform the poor, but to relieve hardship in an era of widespread unemployment caused by economic conditions. (30 C.3d 401, 402.) "[T]he *McBurney* case is overruled and its progeny are disapproved." (30 C.3d 402, citing, in footnote 9, a long list of Court of Appeal decisions disapproved.)

SUPPLEMENT: [This section is current through the latest supplement]



186 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
B. Who Are Employees.
4. Other Categories.
c. Agricultural Workers.

2 *Witkin Sum. Cal. Law Work Comp* § 186

[§ 186] Agricultural Workers.

A statutory exclusion for agricultural workers was deleted in 1959, thus bringing agricultural workers into the class of included employees, subject to exclusion only if the work is casual (*infra*, §191). (See *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 C.3d 341, 355, 256 C.R. 543, 769 P.2d 399, *infra*, §189 [migrant workers were employees rather than independent contractors and covered by Act]; 42 *Hastings L. J.* 1455 [independent contractor status of migrant farm workers]; 9 *A.L.R.3d* 1061 [liability to agricultural worker injured other than by farm machinery]; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §140.)

SUPPLEMENT: [This section is current through the latest supplement]



187 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

4. Other Categories.

d. Domestic Employees.

2 Witkin Sum. Cal. Law Work Comp § 187

[§ 187] Domestic Employees.

(1) *In General.* Except as expressly excluded from coverage by *Lab.C. 3352(h)* (see *infra*, §191), "employee" includes a person employed by the owner or occupant of a residential dwelling where the person's duties are incidental to the ownership, maintenance, or use of the building, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant. (*Lab.C. 3351(d)*; see *Cal. Civil Practice*, 1 Workers' Compensation, §1:32; for definition of "course of trade, business, profession, or occupation," see *Lab.C. 3355, 3356; Lab.C. 3715(b).*)

In-Home Supportive Services v. Work. Comp. App. Bd. (1984) 152 C.A.3d 720, 199 C.R. 697, involved a provider of domestic services under the In-Home Supportive Services Program, who injured her back when helping a recipient of the services out of a car. Claimant had not exceeded the minimum wages and hours requirements with the individual recipient as required for coverage under *Lab.C. 3352(h)* (see *infra*, §191); however, if services to other recipients were included, she would qualify. The Board upheld the claim against the state. *Held*, affirmed. Even though *Lab.C. 3351.5(b)* makes the provider the employee of the recipient, this does not preclude the provider from also being an employee of the State. The particular facts and relationship involved in IHSS services establishes a dual employment, with the provider being both an employee of the recipient and the State. (152 C.A.3d 732.)

(2) *Family Members.* Generally, a person employed by one's parent, spouse, or child is excluded from the definition of covered domestic employees. (*Lab.C. 3352(a)*; *infra*, §191.)

However, in *State Farm Fire & Cas. Co. v. Work. Comp. App. Bd.* (1997) 16 C.4th 1187, 69 C.R.2d 602, 947 P.2d 795, claimant, the son of the insured, sought benefits for injuries received while working for the insured on the insured's residential property. The insured had a comprehensive personal liability policy that included an endorsement covering workers' compensation benefits for "residence employees" defined as "an employee of an insured who performs duties, including household or domestic services, in connection with the maintenance or use of the residence premises. This includes employees who perform similar duties elsewhere for the insured." The insurer stipulated that claimant met the wage and hour requirements of *Lab.C. 3352(h)* (*infra*, §191), but was barred from recovering benefits under *Lab.C. 3352(a)* (*infra*, §191) as the son of the employer. The workers' compensation referee ruled that claimant was a covered employee. *Held*, affirmed.

(a) *Lab.C. 3351(d)* and *Lab.C. 3352(h)* establish the following mandatory rule: If the owner of a residential dwelling purchases comprehensive personal liability insurance, the policy must provide coverage for workers' compensation benefits (*Ins.C. 11590*) for persons employed by that owner when the duties are incidental to the maintenance of the dwelling (*Lab.C. 3352(d)*), if that person meets specified wage and hours requirements (*Lab.C. 3352(h)*). The definition of an "employee" under *Ins.C. 11590* is thus broader than under the general workers' compensation law as expressed in *Lab.C. 3352(a)*. (16 C.4th 1194.)

(b) Although an employer is not required to purchase workers' compensation coverage for the employer's parent, spouse, or child, an insurer may not exclude these persons from coverage if the insured purchases a policy for comprehensive personal liability insurance. In this way, the coverage is truly "comprehensive." An insured is protected against liability both in an action for damages and under the workers' compensation law, when applicable, including claims brought by a parent, spouse, or child. (16 C.4th 1195.) Moreover, an employer may elect to come under the workers' compensation law by insuring against liability for compensation, in which case the employer is deemed, as to all persons employed by the employer and covered by insurance, to have so elected during the period the insurance remains in force (*Lab.C. 4151(a)*). (16 C.4th 1195.)

(c) A person in the service of an employer who has elected to come under the workers' compensation law by insuring against liability is "deemed" to have accepted the compensation provisions of the workers' compensation law (*Lab.C. 4151*, *infra*, §192) unless the person gives timely notice in writing to the employer that he or she "elects" not to be subject to it (*Lab.C. 4154*, *infra*, §192). (16 C.4th 1196.) Moreover, the compensation provisions of the workers' compensation law must be construed liberally in favor of coverage for persons injured in the course of employment (*Lab.C. 3202*, *supra*, §6). (16 C.4th 1196.)

(d) Here, the policy included a mandatory workers' compensation coverage for specified employed persons and tracked *Ins.C. 11590*. That statute does not incorporate *Lab.C. 3352(a)*, which excludes family members from the definition of "employee." (16 C.4th 1197.) Nor was it necessary for the insured to make a conscious election under *Lab.C. 4151*. This election was demonstrated when he insured against liability for compensation. Because claimant gave no written notice electing out of coverage, claimant is thus deemed to be a covered employee under the workers' compensation law and the policy. (16 C.4th 1200.)

Two justices dissented, arguing that *Ins.C. 11590* was not intended to create a new definition of employee broader than that in the Labor Code, that the policy did not constitute an election by the insured to bring excluded domestic employees within the workers' compensation system, and that claimant was excluded from benefits by *Lab.C. 3552(a)*. (16 C.4th 1201.)

SUPPLEMENT: [This section is current through the latest supplement]



188 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP

B. Who Are Employees.

4. Other Categories.

e. Author of Work Made for Hire.

2 Witkin Sum. Cal. Law Work Comp § 188

[§ 188] Author of Work Made for Hire.

An author of a work "made for hire" is an employee for purposes of workers' compensation insurance, under the following conditions: (1) The author is engaged by contract for the creation of a specially ordered or commissioned work in which the parties expressly agree in writing that the work will be considered a work "made for hire" (as defined by the federal Copyright Law), and (2) the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work. (*Lab.C. 3351.5(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



189 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
C. Excluded Employments and Relationships.
1. Independent Contractors.
a. Determining Status.

2 *Witkin Sum. Cal. Law Work Comp* § 189

[§ 189] Determining Status.

(1) *In General.* Independent contractors are excluded, and the rules to determine whether a person is an employee or an independent contractor apply. (See *Lab.C.* 3357; *supra*, §172.) Under the Act, an "independent contractor" is a person who renders service for a specified recompense for a specified result, under the control of a principal as to the result of the work only, and not as to the means by which the result is accomplished. (*Lab.C.* 3353; see *Torres v. Reardon* (1992) 3 *C.A.4th* 831, 838, 5 *C.R.2d* 52 [self-employed gardener hired to trim homeowner's tree was independent contractor; agreement between parties specified the result, but not means of achieving it]; *Cal. Civil Practice*, 1 Workers' Compensation, §1:28; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §143 et seq.; for full discussion, see 3 *Summary* (10th) *Agency and Employment*, §21 et seq.)

(2) *Control of Work Test Is Not Rigidly Applied.* The determination of employee or independent contractor status is ordinarily one of fact, but if the evidence is undisputed it becomes a question of law; and the label placed by the parties on their relationship is not dispositive. The distinction between the two relationships arose at common law to limit a person's vicarious liability for the misconduct of another rendering service to that person; and the principal's supervisory power was crucial in that context. Thus, the "control of details" test became the principal measure of the servant's status for common law purposes. (*S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 *C.3d* 341, 349, 350, 256 *C.R.* 543, 769 *P.2d* 399; see *Truesdale v. Work. Comp. App. Bd.* (1987) 190 *C.A.3d* 608, 613, 235 *C.R.* 754 [contract label of cosmetologist as independent contractor was not controlling].)

Legislation for the protection of employees, e.g., by workers' compensation and unemployment insurance, has adopted the control test. However, courts have long recognized that the control test, applied rigidly and in isolation, is often of little use. (*S.G. Borello & Sons v. Department of Industrial Relations*, *supra*, 48 *C.3d* 350, 351.)

In *S.G. Borello & Sons*, *supra*, plaintiff, a grower, contracted with migratory harvest workers to harvest his cucumber crop as "sharefarmers," managing their own labor without supervision, and sharing profits from the sale of the crops. The contract expressly provided that the workers were independent contractors and not employees. The Division of Labor Standards Enforcement approved a stop order and penalty assessment against plaintiff for failure to obtain workers' compensation coverage. The trial court agreed with the department and denied administrative mandamus. The Court of Appeal reversed, concluding that plaintiff's relinquishment of control and lack of authority to

discharge, the furnishing of tools by the workers, the "result" method of compensation, and the temporary nature of the work, together with the mutual understanding in the written agreement, rendered the sharefarmers independent contractors. *Held*, Court of Appeal judgment reversed; the sharefarmers were employees as a matter of law.

(a) The control test is a significant consideration, but there are other indicia of the nature of a service relationship, set forth in the Rest.2d, Agency §220, such as: (1) whether the worker is engaged in a distinct occupation; (2) whether the occupation is the kind that is usually done under the direction of the principal or specialist without supervision; (3) the skill required; (4) whether the worker or the principal supplies the instrumentalities; (5) the duration of the services; (6) the method of payment, i.e., by time or by the job; (7) whether the work is part of the principal's regular business; and (8) whether the parties intended to create an employer-employee relationship. (48 C.3d 350, 351.)

(b) The express exclusion of independent contractors has a limited but important function: "It recognizes those situations where the Act's goals are best served by imposing the risk of 'no-fault' work injuries directly on the provider, rather than the recipient, of a compensated service. This is obviously the case, for example, when the provider of service has the primary power over work safety, is best situated to distribute the risk and cost of injury as an expense of his own business, and has independently chosen the burdens and benefits of self-employment." (48 C.3d 354.)

(c) Federal and state courts, in deciding whether migrant harvesters of cucumber crops were independent contractors, have generally rejected the contention. "The decisions emphasize that the growers, though purporting to relinquish supervision of the harvest work itself, retained absolute overall control of the production and sale of the crop. Moreover, the cases note, the workers made no capital investment beyond simple hand tools; they performed manual labor requiring no special skill; their remuneration did not depend on their initiative, judgment or managerial abilities; their service, though seasonal, was rendered regularly and as an integrated part of the grower's business; and they were dependent for subsistence on whatever farm work they could obtain." (48 C.3d 355.) Here, "the sharefarmers and their families exhibit no characteristics which might place them outside the Act's intended coverage of employees." (48 C.3d 357.)

(d) Signing the agreement to forgo coverage as an independent contractor is significant but not controlling where compelling indicia of employment are otherwise present, and there is no indication that plaintiff offered the harvesters a real choice of terms. (48 C.3d 358, 359.) "A conclusion that the sharefarmers are 'independent contractors' under the Act would suggest a disturbing means of avoiding an employer's obligation under other California legislation intended for the protection of 'employees' including laws enacted specifically for the protection of agricultural labor." (48 C.3d 359.)

A strong dissent of two justices attacked the majority opinion as incorrect on the facts and contrary to established law in declaring illegal a practice followed almost universally in the area for many years and satisfactory to all concerned, and held that the decision would harm the very persons it was intended to help. (48 C.3d 360.) (See *Yellow Cab Cooperative v. Work. Comp. App. Bd.* (1991) 226 C.A.3d 1288, 1296, 277 C.R. 434, supra, §172 [cabdriver who "leased" cabs was employee under "criteria and principles identified in *Borello*"]; *Rinaldi v. Work. Comp. App. Bd.* (1991) 227 C.A.3d 756, 762, 278 C.R. 105 [agricultural worker on crew of "labor contractor" hired by ranch owner was employee of ranch owner under *Borello* test]; *State Comp. Ins. Fund v. Brown* (1995) 32 C.A.4th 188, 204, 38 C.R.2d 98 [applying factors discussed in *Borello*, independent owner-operator truckers were independent contractors for insurance purposes and not employees of trucking company that functioned as broker to market services of truckers]; *Gonzalez v. Work. Comp. App. Bd.* (1996) 46 C.A.4th 1584, 1593, 1594, 54 C.R.2d 308 [newspaper carrier was employee under *Borello* test]; *Ware v. Work. Comp. App. Bd.* (1999) 78 C.A.4th 508, 513, 92 C.R.2d 744 [country club caddie was employee under *Borello* test].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 103 Proof of Facts 3d 1 [proving independent contractor status in challenging unemployment insurance and workers' compensation assessments].

(2) *Control of Work Test Is Not Rigidly Applied.* See *JKH Enterprises v. Department of Industrial Relations* (2006)

142 C.A.4th 1046, 1065, 48 C.R.3d 563 [driver couriers were employees and employer was required to carry workers' compensation insurance; applying *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 C.3d 341, 256 C.R. 543, 769 P.2d 399, text, p. 771]; *Antelope Valley Press v. Poisner* (2008) 162 C.A.4th 839, 856, 75 C.R.3d 887 [carriers responsible for home deliveries of newspapers and other publications were employees of publisher for purposes of workers' compensation law despite having signed contracts purporting that carriers were independent contractors; applying *S.G. Borello & Sons*].



190 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
C. Excluded Employments and Relationships.
1. Independent Contractors.
b. Exception: Unlicensed Construction Contractor.

2 *Witkin Sum. Cal. Law Work Comp* § 190

[§ 190] Exception: Unlicensed Construction Contractor.

(1) *Rebuttable Presumption.* *Lab.C. 2750.5* creates a rebuttable presumption that an unlicensed contractor is an employee rather than an independent contractor. (See 3 *Summary* (10th), *Agency and Employment*, §32.) In *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1985) 40 *C.3d* 5, 219 *C.R. 13*, 706 *P.2d* 1146, M, a former licensed contractor who no longer had a license, contracted to do a remodeling job for C. While working, M suffered serious injuries and applied for compensation. Although the facts of his performance clearly classified him as an independent contractor, the Board awarded benefits on the ground that a valid contractor's license is a condition of independent contractor status. *Held*, affirmed.

(a) *Conflict between Lab.C. 2700 and 2750.5.* *Lab.C. 2750.5* is in Division 3 of the Labor Code (Employment Relations), and *Lab.C. 2700*, also in that division, states that the provisions of that division are not applicable to workers' compensation. However, *Lab.C. 2700*, a general provision, was adopted in 1937. The special provision, *Lab.C. 2750.5*, was enacted later and takes precedence. Hence, *Lab.C. 2750.5* applies in workers' compensation cases. (40 *C.3d* 10.)

(b) *Policy considerations.* When a person hires a licensed independent contractor, the hirer anticipates that the contractor will insure against the risk of injuries, and it is reasonable to exonerate the hirer. However, when the contractor is unlicensed, the likelihood that the contractor will carry insurance is greatly reduced. "While it may seem anomalous to hold that the hirer is liable for compensation only if the contractor lacks the required license, and that he would not be liable if the contractor were licensed, the justification is apparent in that the Legislature has sought to assure that both licensed and unlicensed contractors and their employees will have compensation should they be injured on the job." (40 *C.3d* 13.) (See *Furtado v. Schriefer* (1991) 228 *C.A.3d* 1608, 1616, 280 *C.R. 16* [*Lab.C. 2750.5* supplements definitions of employee and independent contractor found in workers' compensation statutory scheme and does not purport to override those definitions; thus, trial court erred in assuming that statute preempted exclusions from employee status found in *Lab.C. 3352(h)*].)

(2) *Unlicensed Subcontractor Employed by Licensed General Contractor.* In *Blew v. Horner* (1986) 187 *C.A.3d* 1380, 232 *C.R. 660*, B was injured while working as a roofer for S, a contractor who was both unlicensed and uninsured for workers' compensation. At the time of B's injury, S was employed by defendant H, a general contractor. Plaintiff,

who was awarded benefits to be paid by S or the Uninsured Employers Fund, sued defendant for his personal injuries. The trial judge granted defendant's motion for summary judgment, ruling that, under *Lab.C. 2750.5*, defendant was the employer of both S and plaintiff, hence, workers' compensation provided plaintiff's exclusive remedy. *Held*, affirmed.

(a) "[A]mong the consequences which flow from a determination that a person is an employee rather than an independent contractor is that an employer-employee relationship exists between the hirer of the employee and those whom the employee has hired to do the hirer's work. On that point, the law has long been settled in this state. ... We must presume that the Legislature was aware of that law when it declared unequivocally that a person lacking the requisite license cannot be an independent contractor; we must also presume, therefore, that it intended all the consequences flowing from that declaration, including the creation of an employer-employee relationship between the ultimate hirer and the employees of the unlicensed contractor. We can only assume that the Legislature concluded that an effective workers' compensation system requires imposition of workers' compensation liability on the part of the ultimate hirer not only for injuries to the unlicensed contractor, but for the employees of that contractor as well." (187 C.A.3d 1389.)

(b) Plaintiff argues that because the sole result of this determination is that he is unable to sue defendant for negligence, he is in effect being punished for S's failure to obtain a license. However, the purpose underlying workers' compensation is to put a burden in limited amounts on employers for all industrially caused injuries and deaths regardless of fault, and concomitantly to take from employees the right of recovering a greater amount even though the injury is tortiously caused by the employer. (187 C.A.3d 1389.) (See *Rinaldi v. Work. Comp. App. Bd.* (1988) 199 C.A.3d 217, 222, 244 C.R. 637 [Blew followed]; *Nick Hagopian Drywall v. Work. Comp. App. Bd.* (1988) 204 C.A.3d 767, 770, 251 C.R. 455 [same]; *Neighbours v. Buzz Oates Enterprises* (1990) 217 C.A.3d 325, 330, 265 C.R. 788 [same].)

(3) *Person Hired by Unlicensed Contractor*. In *Zellers v. Playa Pacifica, Ltd.* (1998) 61 C.A.4th 129, 70 C.R.2d 919, defendant property owner hired a licensed contractor for repair work. Several months later the contractor hired plaintiff to help with the work. About a month after that, the contractor's license expired and 3 weeks later plaintiff was injured while working on defendant's property. Defendant's insurer determined that the unlicensed contractor was also unlawfully uninsured and paid plaintiff's workers' compensation claim. Plaintiff then decided that he was an independent contractor and sued defendant for tort damages. The trial judge granted summary judgment for defendant, finding that workers' compensation was plaintiff's exclusive remedy. *Held*, affirmed.

(a) It was undisputed that (1) the contractor was hired by defendant, (2) plaintiff was hired by the contractor, (3) performance of the work required a contractor's license, and (4) the contractor was unlicensed at the time plaintiff was injured. It follows that plaintiff must be treated as the employee of defendant, the ultimate hirer, under *Lab.C. 2750.5*. (61 C.A.4th 132.)

(b) Plaintiff contends that his status should be determined as of the date the contractor contracted with defendant. Not so: The presumption of *Lab.C. 2750.5* applies to a worker performing services for a person who is required to obtain a license. The date of injury approach has been assumed in every relevant case including those determining the availability of workers' compensation insurance benefits. Because the availability of benefits is determined as of the date of injury, it follows that the date of injury governs for purposes of deciding the worker's employment status under *Lab.C. 2750.5*. Thus, the date of injury is the dispositive date that plaintiff was an employee of defendant, not the employee of an independent contractor. Therefore, plaintiff's action is barred by the exclusivity provisions of the Act. (61 C.A.4th 134.)

In *Cedrillo v. Work. Comp. App. Bd.* (2003) 106 C.A.4th 227, 130 C.R.2d 581, a homeowner, H, hired C, an unlicensed contractor, to repair his roof. C hired R for the job. After working approximately 14 hours on the roof, R was injured crossing the street with supplies. The Workers Compensation Appeals Board concluded that neither C nor R were employees of H, and that C was therefore R's employer, and ordered the Director of Industrial Relations, as administrator for the Uninsured Employers Fund, to pay benefits to R if C did not. *Held*, order affirmed. C and R were

not H's employees, each having worked less than 52 hours on the roof, and thus were excluded as employees under *Lab.C. 3352(h)*. Moreover, the presumption of *Lab.C. 2750.5* applies in this case to R who was performing work for unlicensed C. Using this analysis, "the board properly determined that for purposes of the workers' compensation law" R was an employee of C. (106 C.A.4th 234.)

(4) *Failure To Maintain Workers' Compensation Insurance*. In *Smith v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 117, 116 C.R.2d 728, Y was a licensed contractor with no employees, and thus exempt under *B. & P.C. 7125(b)* (supra, §150) from securing a certificate of workers' compensation insurance. Y entered into a painting contract with T and hired L but failed to secure the insurance. When L was injured, he filed for benefits and Y ignored the claim. The workers' compensation judge found that, under *B. & P.C. 7125* and *7125.2*, Y's license was automatically suspended as a matter of law when Y hired L but failed to acquire workers' compensation insurance. Thus, he found that Y and T were L's joint employers and jointly and severally liable for the injuries. The Workers' Compensation Appeals Board granted reconsideration and concluded that, under *B. & P.C. 7125(a)*, a contractor's license is suspended 30 days *after* the registrar sends the required notice, and that no notice was sent to Y. Thus, Y had a valid license when L was injured, was L's sole employer on that date, and T was not liable. *Held*, affirmed.

(a) Although the first sentence of *B. & P.C. 7125.2(a)* states that failure to maintain compensation insurance results in an automatic suspension of a license by "operation of law," the subsequent sentence provides for automatic suspension 30 days *after* notice to the licensee of noncompliance. To ignore the qualifying sentence would render it "redundant and a nullity, thereby violating one of the most elementary principles of statutory construction." (96 C.A.4th 126.)

(b) *B. & P.C. 7125.2* enhances the protective value of information about contractors that is available to hirers (e.g., whether contractors are properly insured). However, the only information T would have received was that Y was licensed and exempt from the insurance requirement, when in fact he was not exempt. Nothing in the record reasonably suggests that T suspected Y had violated the conditions of his license in employing L. Thus, the Board properly determined that T had no workers' compensation liability for L's injuries. (96 C.A.4th 128.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Rebuttable Presumption*. See *Moehring v. Thomas* (2005) 126 C.A.4th 1515, 1524, 25 C.R.3d 118 [because defendant was not performing work for which contractor license was required, he was not irrefutably deemed statutory employee under *Lab.C. 2750.5* and thus was not, as matter of law, entitled to summary judgment in action brought by heirs of coworker alleging defendant negligently caused coworker's death]; *Mendoza v. Brodeur* (2006) 142 C.A.4th 72, 81, 47 C.R.3d 310 [although injured unlicensed roofer was not employee of defendant homeowner under *Lab.C. 3352(h)* for purposes of workers' compensation, *Lab.C. 2750.5* presumption was applicable and roofer was permitted to maintain tort action]. (3) *Person Hired by Unlicensed Contractor*. See *Heiman v. Work. Comp. App. Bd.* (2007) 149 C.A.4th 724, 738, 57 C.R.3d 56 [property manager who hired unlicensed contractor for rain gutter work on homes belonging to homeowners association was employer and liable for benefits for injured worker hired by contractor].



191 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
C. Excluded Employments and Relationships.
2. Statutory Exclusions.

2 Witkin Sum. Cal. Law Work Comp § 191

[§ 191] Statutory Exclusions.

Persons engaged in the following services or activities are not employees:

(1) *Domestic Services*. Although *Lab.C. 3351(d)* includes some- domestic service workers as employees (supra, §187), the following are two specific exclusions:

(a) Household domestic services for a parent, spouse, or child. (*Lab.C. 3352(a)*.) (For exception involving son of insured homeowner, see *State Farm Fire & Cas. Co. v. Work. Comp. App. Bd.* (1997) 16 C.4th 1187, 69 C.R.2d 602, 947 P.2d 795, supra, §187.)

(b) Persons employed by residential owners who, in the 90 calendar days before the injury, work less than 52 hours or earn less than \$ 100. (*Lab.C. 3352(h)*.) (See *Stewart v. Work. Comp. App. Bd.* (1985) 172 C.A.3d 351, 354, 218 C.R. 245 [plaintiff handyman injured in fall from homeowner's roof while removing tree limb was excluded from coverage under *Lab.C. 3352(h)*; fact that homeowner derived rental income from part of property did not bring owner within *Lab.C. 3351(d)*]; C.E.B., 1 Workers' Compensation Practice 4th, §2.66.)

(2) *Services in Return for Charitable Aid*. A person performing services in return for aid or sustenance only, received from a religious, charitable, or relief organization. (*Lab.C. 3352(b)*); see C.E.B., 1 Workers' Compensation Practice 4th, §3.12.) *Lab.C. 3352(b)* applies only to *private* entities, and does not exclude public welfare agencies from workers' compensation coverage. (*Los Angeles v. Work. Comp. App. Bd. (Conroy)* (1981) 30 C.3d 391, 404, 179 C.R. 214, 637 P.2d 681, supra, §185; *Hoppman v. Work. Comp. App. Bd.* (1991) 226 C.A.3d 1119, 277 C.R. 116 [worker injured in fall from church roof was receiving wages of \$ 5 per hour and, hence, was employee and entitled to benefits].)

(3) *Voluntary Services for Nonprofit Corporation*. A person performing voluntary service for a public agency or a private, nonprofit organization who receives only meals, transportation, lodging, or reimbursement for incidental expenses. (*Lab.C. 3352(i)*); see *Arriaga v. Alameda* (1995) 9 C.4th 1055, 1064, 40 C.R.2d 116, 892 P.2d 150, supra, §183 [persons performing work pursuant to court order are not performing voluntary service under *Lab.C. 3352(i)* even if order permits paying fine instead of working]; *California State University, Fullerton v. Work. Comp. App. Bd.* (1993) 16 C.A.4th 1819, 1828, 21 C.R.2d 50 [person convicted of crime who elected to perform community service on

university campus in lieu of paying fine was not university employee but was volunteer subject to *Lab.C. 3352(i)* exclusion]; *Barragan v. Work. Comp. App. Bd.* (1987) 195 C.A.3d 637, 648, 240 C.R. 811 [exclusion was not applicable to student extern; remuneration includes instruction and training]; *Brassinga v. Mountain View* (1998) 66 C.A.4th 195, 77 C.R.2d 660, supra, §162 [SWAT team members from local police departments forming regional team; discussing nature of volunteer status].) However, the person may be covered if the board of directors of the organization so declares. (*Lab.C. 3363.6*; supra, §172.)

(4) *Voluntary Services for Recreational Camp.* A person performing voluntary services at or for a recreational camp operated by a tax-exempt nonprofit organization, of which the person or someone in the person's family is a member, who receives only meals, lodging, or transportation. (*Lab.C. 3352(d)*.)

(5) *Ski Patrolman.* A person performing voluntary service as a ski patrolman who receives only use of ski-tow or ski-lift facilities, meals, or lodging. (*Lab.C. 3352(e)*.)

(6) *Ski-Lift Operator.* A person employed by a ski-lift operator who is participating in recreational activities of his or her own initiative after being relieved of duties. (*Lab.C. 3352(f)*; see *Northstar at Tahoe v. Work. Comp. App. Bd.* (1996) 42 C.A.4th 1481, 1485, 50 C.R.2d 475 [injury to ski-lift employee skiing on day off was not compensable; bunkhouse rule (infra, §211) was abrogated by *Lab.C. 3352(f)*]; *Vine v. Bear Valley Ski Co.* (2004) 118 C.A.4th 577, 586, 13 C.R.3d 370 [ski resort employee injured while snowboarding at employee party came within exemption].)

(7) *Deputy Clerk or Sheriff.* A person appointed for his or her own convenience and receiving no compensation for services from the city, county, or the citizens. Although not an employee of the city or county, the person may have rights against a private employer. (*Lab.C. 3352(c)*.)

(8) *Specified Law Enforcement Officers.* Regularly employed out-of-state law enforcement officers who are deputized under P.C. 832.6(a)(4). (*Lab.C. 3352(l)*, 3366(b)(1), 3367(b)(1).) Law enforcement officers employed by the Oregon State Police, the Nevada Department of Motor Vehicles and Public Safety, or the Arizona Department of Public Safety who are acting as peace officers in California pursuant to P.C. 830.32 are also excluded. (*Lab.C. 3352(m)*, 3366(b)(2), 3367(b)(2).)

(9) *Private Watchman.* A private watchman for a nonindustrial establishment, paid for by subscription by several persons. (*Lab.C. 3358*.)

(10) *Nonemployee Athletes.* A person, other than a regular employee, participating in sports or athletics for only the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or reimbursement for incidental expenses. (*Lab.C. 3352(g)*.)

(11) *Student Athlete.* A student participating as an athlete in an amateur sporting event where the only compensation is the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other incidental expenses. (*Lab.C. 3352(k)*.) (For discussion of former law on athletic scholarships, see *Van Horn v. Industrial Acc. Com.* (1963) 219 C.A.2d 457, 33 C.R. 169; see also 58 A.L.R.4th 1259 [student athlete as "employee" of college or university providing scholarship or similar financial assistance].)

(12) *Amateur Sports Official.* A person, other than a regular employee, performing as an official for amateur sporting events and receiving no compensation other than specified per diem expenses. (*Lab.C. 3352(j)*.)

(13) *Specified Sports Officials.* A person, other than a regular employee, performing services as a sports official for (a) an entity sponsoring an *intercollegiate or interscholastic* sports event, or (b) a public agency, public entity, or private nonprofit organization sponsoring an amateur sports event. "Sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, or other neutral participant in the event. (*Lab.C. 3352(n)*.)

(14) *Owner-Builder of Self-Help Housing.* An owner-builder participating in a mutual self-help housing program

under *Health & Saf.C. 50087*, sponsored by a nonprofit corporation. (*Lab C. 3352(o)*.) An owner-builder is a person or family who provides all, or a substantial amount, of the labor in building a housing unit to be the principal residence of that person or family. (*Health & Saf.C. 50692*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Domestic Services*.(b) *Persons employed by residential owners*: See *California State Auto. Assn. Inter-Ins. Bureau v. Work. Comp. App. Bd. (2006) 137 C.A.4th 1040, 1048, 40 C.R.3d 743* [under *Lab.C. 3352(h)*, unlicensed contractor, injured on first day of painting homeowners' house, was not employee and was not entitled to workers' compensation].



192 of 192 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VII. THE EMPLOYMENT RELATIONSHIP
C. Excluded Employments and Relationships.
3. Election To Come Under Act.

2 Witkin Sum. Cal. Law Work Comp § 192

[§ 192] Election To Come Under Act.

(1) *In General.* The employer of an excluded employee and the employee may jointly elect to come under the Act. (*Lab.C. 4150*; see *Jones v. Brown* (1970) 13 C.A.3d 513, 518, 89 C.R. 651; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §40 et seq.)

The *employer* so elects either by taking out workers' compensation insurance, or by filing a statement of acceptance of the Act with the Administrative Director. (*Lab.C. 4151*.) The *employee* is then deemed to have elected unless he or she gives notice of rejection. (*Lab.C. 4154*.) But the employee cannot give notice unless he or she is aware of the employer's election, and no election (with its waiver of the tort remedy) results where no knowledge or notice is shown. (See *Jones v. Brown*, *supra*.)

An employer who elects to have independent contractors benefit from the Act under *Lab.C. 4150* is subject to *Lab.C. 3751*, which prohibits an employer from deducting compensation costs from an employee's earnings. (*Albillo v. Intermodal Container Services* (2003) 114 C.A.4th 190, 200, 8 C.R.3d 350 [transportation industry employers violated *Lab.C. 3751* by deducting from pay to independent truckers to secure workers' compensation coverage].)

A filed statement of acceptance subjects the employer to the Act's compensation provisions for 1 year, and for successive 1-year terms unless the employer files a withdrawal notice at least 60 days before the end of a term. (*Lab.C. 4152*.)

(2) *Public Employments.* The State, municipalities, public agencies, and all State institutions are *conclusively presumed* to have elected to come within the Act as to all employments otherwise excluded. (*Lab.C. 4155*; *Edwards v. Chico* (1972) 28 C.A.3d 148, 152, 104 C.R. 481.) (On undertaking by state agency to provide by insurance or otherwise for medical treatment and compensation where injury or death is not compensable, see *Lab.C. 6110* et seq.)

(3) *News Vendor.* Where an employer has elected to include an independent contractor engaged in selling or delivering directly to the public, a newspaper, magazine, or periodical, the status of that person as an independent contractor for all other purposes is not affected by the election. (*Lab.C. 4157*.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
A. Conditions Essential to Compensation.

2 *Witkin Sum. Cal. Law Work Comp* § 193

[§ 193] Conditions Essential to Compensation.

(1) *In General.* Liability for compensation exists, without regard to the negligence of the employer, where the following conditions of compensation concur:

(a) The employer and the employee are, at the time of the injury, subject to the Workers' Compensation Act. (*Lab.C. 3600(a)(1).*)

(b) At the time of the injury, the employee is performing services growing out of and incidental to employment and is acting within the course of employment (*infra*, §194 et seq.). (*Lab.C. 3600(a)(2).*)

(c) The injury is proximately caused by the employment, either with or without negligence. (*Lab.C. 3600(a)(3)*; see *infra*, §230.)

(d) The injury is not caused by the intoxication of the injured employee. (*Lab.C. 3600(a)(4)*; see *infra*, §325.)

(e) The injury is not intentionally self-inflicted. (*Lab.C. 3600(a)(5)*; see *infra*, §326.)

(f) The employee has not wilfully and deliberately caused his or her own death. (*Lab.C. 3600(a)(6)*; see *infra*, §327.)

(g) The injury does not arise out of an altercation in which the injured employee is the initial physical aggressor. (*Lab.C. 3600(a)(7)*; see *infra*, §250.)

(h) The injury is not caused by a felony, or a crime that is punishable as specified in P.C. 17(b) (see 3 *Cal. Crim. Law* (3d), *Punishment*, §247) for which the injured employee has been convicted. (*Lab.C. 3600(a)(8)*; see *infra*, §256.)

(i) The injury does not arise out of voluntary participation in an off-duty recreational, social, or athletic activity unrelated to work duties. (*Lab.C. 3600(a)(9)*; see *infra*, §225 et seq.)

Special rules deal with certain firefighters and police officers. (See *Lab.C. 3600.1* et seq.; *supra*, §§177, 178.) (On conditions for compensation of out-of-state employees, see *Lab.C. 3600.5*; *supra*, §§111, 116.)

(2) *Post-Termination Claims.* *Lab.C. 3600(a)(10)* provides that where the claim for compensation is filed after a notice of termination or layoff, including a voluntary layoff, for an injury occurring prior to that notice, no compensation is payable unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:

- (a) The employer received notice of the injury before issuance of the notice of termination or layoff.
- (b) The employee's medical records, compiled before issuance of the notice of termination or layoff, contained evidence of the injury.
- (c) The date of injury under *Lab.C. 5411* (infra, §367) was after the date of the notice of termination or layoff, but before the effective date of the termination or layoff.
- (d) The date of injury under *Lab.C. 5412* (infra, §§368, 369) was after the date of the notice of termination or layoff.

Lab.C. 3600(a)(10) does not apply in the following instances:

- (a) Where a school district that has provided a district employee notice pursuant to specified Education Code provisions has not finally decided against reemploying that person.
- (b) Where the notice of termination or layoff is not followed by that termination or layoff within 60 days, until receipt of a later notice of termination or layoff.
- (c) Where notices of termination or layoff are frequently issued to an employee, a practice constituting a bad faith personnel action.
- (d) Where the injury is a psychiatric one governed by *Lab.C. 3208.3(e)* (see infra, §244 et seq.).

Nor does *Lab.C. 3600(a)(10)* apply to employees who voluntarily resign. (*CJS Co. v. Work. Comp. App. Bd. (1999) 74 C.A.4th 294, 298, 88 C.R.2d 109* [work-related auto accident injury predated employee's voluntary resignation].)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

1. In General.

a. Nature of Requirement.

2 Witkin Sum. Cal. Law Work Comp § 194

[§ 194] Nature of Requirement.

Compensation may be awarded under the Act for an injury "arising out of and in the course of the employment." (*Lab.C. 3600.*) Of these two basic requirements, the first is that the injury must occur *in the course of the employment*, which means roughly that the employee must be engaged in the work the employee has been hired to perform. (*Griffin v. Industrial Acc. Com. (1937) 19 C.A.2d 727, 732, 66 P.2d 176; Dimmig v. Work. Comp. App. Bd. (1972) 6 C.3d 860, 865, 101 C.R. 105, 495 P.2d 433; see Cal. Civil Practice, 1 Workers' Compensation, §1:55; C.E.B., 1 Workers' Compensation Practice 4th, §2.33 et seq.; 1 Herlick 6th, §10.01 et seq.; 61 A.L.R.4th 196 [injuries during organized labor activities]; 10 A.L.R.5th 245 [injuries suffered after termination of employment]; 107 A.L.R.5th 441 [workers' compensation benefits for physical injury caused by sudden mental stimuli; particular circumstances]; 109 A.L.R.5th 161 [same; under particular statutory provisions]; 112 A.L.R.5th 509 [same; particular injuries or illnesses]; 82 Am.Jur.2d (2003 ed.), Workers' Compensation §§209 et seq., 236 et seq.]*

The employee must be "performing service growing out of and incidental to" his or her employment. (*Lab.C. 3600(a)(2).*) Generally speaking, this condition is met when the employee is (1) on the work site or premises, (2) performing acts within the scope of assigned duties, and (3) in conformity with directions of the employer. (See *Winter v. Industrial Acc. Com. (1954) 129 C.A.2d 174, 176, 276 P.2d 689.*) (On meaning of "premises," see *infra*, §206 et seq.)

Although in theory the other condition--"arising out of" the employment--refers to the wholly distinct element of causation (*infra*, §230 et seq.), classification of the cases is not a simple task, as the court observed in *Scott v. Pacific Coast Borax Co. (1956) 140 C.A.2d 173, 178, 294 P.2d 1039*: "It has generally been held that the phrase 'arising out of' is the causal element and refers to the origin of the accident ... while the words 'in the course of employment' have reference to the time, place and circumstances of the disabling event. ... Although the two elements must coexist concurrently to sustain an award, they are nonetheless often so intertwined that no valid line of demarcation can be drawn, so that in certain cases an injury has been considered to have occurred 'in the course of employment' because the employment was its cause ... while in others the injuries, though emanating from some external instrumentality, were regarded as 'arising out of the employment' because they were sustained during and at the place of employment." (See *Argonaut Ins. Co. v. Work. Comp. App. Bd. (1967) 247 C.A.2d 669, 683, 55 C.R. 810, infra*, §251 [condoned horseplay].)

In *Mason v. Lake Dolores Group* (2004) 117 C.A.4th 822, 11 C.R.3d 914, plaintiff, a pool technician for defendant water park, was rendered a paraplegic after he rode down a water slide at the park, crashing into the dam located at the end of the slide. The park was closed when plaintiff reported for work, and plaintiff had not clocked in when he instructed another employee to turn on the water slide. An insufficient amount of water pooled at the end of the slide, which caused the accident and injuries. In his action for negligence, plaintiff testified that he rode the slide because it was hot and the slide was his favorite attraction. After the jury found defendant negligent and 52% at fault, the trial court granted defendant's motion for judgment notwithstanding the verdict and found that plaintiff's action was barred by the workers' compensation exclusive remedy rule. *Held*, reversed. Plaintiff's injuries neither arose from nor occurred in the course of his employment, and thus did not come within the workers' compensation bargain. Plaintiff was not testing the slides at the time he was injured, or performing any other duty related to his work. In addition, defendant expressly prohibited employees from using the water slides when the park was closed and the slides were shut down. "Thus, the jury could have reasonably concluded that [plaintiff's] use of the water slide was not reasonably contemplated by nor causally connected to his employment or his employment duties at the time he was injured." Nor was plaintiff doing something reasonable that was expressly or impliedly permitted by his contract of employment. (117 C.A.4th 834.)

West's Key Number Digest, Workers' Compensation k.614 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See 4 A.L.R.6th 57 [compensation for injury at home where home is claimed as "work situs"]; 20 A.L.R.6th 641

[compensation for particular injuries and illnesses caused by sudden mental stimuli]. *Correction:* Page 782, line 14 of first paragraph, replace bracketed statement for 112 A.L.R.5th 509 with "compensation for particular physical injuries or illnesses caused by nonsudden mental stimuli".



3 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
1. In General.
b. Activity Outside Course.

2 *Witkin Sum. Cal. Law Work Comp* § 195

[§ 195] Activity Outside Course.

Under the general test (see *supra*, §194), an employee will ordinarily be held *outside* the course of employment in the following situations:

- (1) When the employee is not on the employer's premises (the "going and coming rule"). (See *infra*, §201 et seq.)
- (2) When the employee's activity is personal and not related to the employment. (See *infra*, §218 et seq.)
- (3) When the employee has violated the employer's instructions regarding the time, place, or manner of working. (See *infra*, §200.)
- (4) When the employee's acts are outside the scope of his or her duties, e.g., where without authority the employee performs the specialized work of another employee. (*San Francisco & Sacramento Ry. Co. v. Industrial Acc. Com.* (1927) 201 C. 597, 599, 258 P. 86; *Williamson v. Industrial Acc. Com.* (1918) 177 C. 715, 718, 171 P. 797.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

1. In General.

c. Injury After Regular Hours.

2 *Witkin Sum. Cal. Law Work Comp* § 196

[§ 196] Injury After Regular Hours.

The mere fact that the injury is sustained after regular working hours does not preclude an award; i.e., notwithstanding this fact it may still be in furtherance of the employer's business. (See *Bethlehem Steel Co. v. Industrial Acc. Com.* (1945) 70 C.A.2d 382, 387, 161 P.2d 59 [pursuant to notice, employee called for war savings bond at company window after working hours; award upheld on theory that bond sales were part of total operations of employer]; *Gardner v. Industrial Acc. Com.* (1946) 73 C.A.2d 361, 362, 166 P.2d 362 [bartender, during working hours, refused liquor to intoxicated man; later, after working hours, he was injured while ejecting man]; *Scott v. Pacific Coast Borax Co.* (1956) 140 C.A.2d 173, 181, 294 P.2d 1039 [compensable injury to gas station employee who returned after hours for personal reasons but helped fellow employee fix gas pump that subsequently exploded]; *Wright v. Beverly Fabrics* (2002) 95 C.A.4th 346, 352, 115 C.R.2d 503 [workers' compensation was exclusive remedy for employee injured on employer's premises on her day off after going there to sign condolence card for coworkers and injuring her back while assisting employees with collapsing shelf; following *Scott*]; Cal. Civil Practice, 1 Workers' Compensation, §1:56; C.E.B., 1 Workers' Compensation Practice 4th, §2.45; 1 Herlick 6th, §10.13; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §§246, 256 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

1. In General.

d. Work Outside Regular Duties.

2 *Witkin Sum. Cal. Law Work Comp* § 197

[§ 197] Work Outside Regular Duties.

In *Eckis v. Sea World Corp.* (1976) 64 C.A.3d 1, 134 C.R. 183, plaintiff was employed by defendant as secretary for the director of its animal training department. The director asked plaintiff to ride a killer whale for publicity pictures, and, although warned of the dangers, she accepted the assignment, and practiced riding on a few occasions. On the last ride, the whale bit her and she suffered serious injuries, for which she sued. *Held*, judgment for plaintiff reversed; the Act applied.

"Where, as here, an employee is injured on the employer's premises during regular working hours, when the injury occurs while the employee is engaged in an activity which the employer has requested her to undertake, and when the injury-causing activity is of service to the employer and benefits the employer's business, the conditions imposing liability for compensation under *Labor Code section 3600* are met as a matter of law, and it is immaterial that the activity causing the injury was not related to the employee's normal duties or that the circumstances surrounding the injury were unusual or unique." (64 C.A.3d 9.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

1. In General.

e. Injury While Going to Physician's Office.

2 *Witkin Sum. Cal. Law Work Comp* § 198

[§ 198] Injury While Going to Physician's Office.

An employee is entitled to benefits for injuries sustained en route to receive medical treatment for an existing industrial injury even if (1) the existing injury was not a factor contributing to the second injury, and (2) the journey did not commence at the employee's place of employment. In *Laines v. Work. Comp. App. Bd.* (1975) 48 C.A.3d 872, 122 C.R. 139, the employee was injured while riding his motorcycle to a physician for treatment of a recent industrial injury. The Board found that the motorcycle accident injuries were not proximately caused by the industrial accident and, hence, were not compensable. *Held*, Board reversed; the two major conditions of compensability--course of employment and causation--were met.

(a) *Course of employment.* As several out-of-state cases point out, an employee must accept medical attention furnished by the employer pursuant to the statutory obligation; furnishing and receiving medical attention benefits both; and an employee who refuses to accept it risks losing the compensation. Hence, it is reasonable to conclude that the injury received in the course of the trip is work-connected. (48 C.A.3d 877.)

(b) *Proximate cause.* Causation (see *infra*, §230 et seq.) was a more difficult problem. The Board thought that an injury suffered on a trip from the jobsite to the physician's office for the first treatment would be compensable; but here the employee left from his attorney's office, and of course chose his own means of transportation and followed his own route with no opportunity for control by the employer. "[A] choice must be made between requiring the employer to bear the risk of the employee's injury or requiring the employee to bear the risk of any mishap that may befall him while seeking statutorily required medical attention. We conclude that the risk should be borne by the employer. We determine, therefore, that the industrial injury of petitioner was a proximate cause of his accident injury." (48 C.A.3d 879.) (See 83 A.L.R.4th 110 [compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury].)

The *Laines* reasoning was followed in *Southern Calif. Rapid Transit Dist. v. Work. Comp. App. Bd.* (1979) 23 C.3d 158, 151 C.R. 666, 588 P.2d 806, on different facts. The employee drove to the physician's office to obtain a medical release required by his employer, and was injured after he delivered the release to his employer and was on his way home. "[A] second injury may be found compensable where as a consequence of a prior compensable injury an employee is required by his employer to present to the employer a doctor's release prior to returning to work and the

employee, after going to his place of employment to present the release, is injured in an automobile accident as he drives homeward." (23 C.3d 165.)

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7 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

1. In General.

f. Return for Tools After Discharge.

2 *Witkin Sum. Cal. Law Work Comp* § 199

[§ 199] Return for Tools After Discharge.

In *Mitchell v. Hizer* (1977) 73 C.A.3d 499, 140 C.R. 790, R and M were hired by H Co. to fell timber on a logging road. Their compensation was \$ 2.25 per thousand board feet cut, 80% as wages and 20% as rental for the tools, equipment and fuel they were required to furnish. They were discharged for missing work assignments, and returned to the jobsite for the dual purpose of inquiring about reemployment and picking up their tools and equipment. While at the jobsite, R was killed and M was injured by a falling tree. In tort actions against H Co. and its logging supervisor, the trial judge concluded that, although the employment had been terminated, the injury and death arose out of and in the course of employment. Plaintiffs appealed from the resulting judgments for defendants. *Held*, affirmed.

(a) *Requirement of existing employment and recognized exceptions.* The basic requirement of employment is subject to several exceptions or qualifications; e.g., the "tryout" cases before employment has begun (see *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 100 C.R. 377, 424 P.2d 1, *supra*, §175), and the cases involving employees injured in the process of gathering belongings on the jobsite after discharge. (73 C.A.3d 504, 505.)

(b) *Return to jobsite.* The case law, both here and elsewhere, is in conflict on compensability of injuries sustained by discharged employees returning to the jobsite for paychecks or to collect clothes or tools. (73 C.A.3d 505, 506.) Here, one of the purposes of the return--to see if they could be reemployed--would exclude compensation under the "job applicants" rule. (73 C.A.3d 507.) However, the dual purpose does not preclude application of the statute. "[T]he employment contract contemplated that they had a reasonable time after termination within which to secure the tools of trade which they provided and they were protected by the provisions of the Workers' Compensation Act when they were so doing." (73 C.A.3d 507.)

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8 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

1. In General.

g. Violation of Instructions.

2 *Witkin Sum. Cal. Law Work Comp* § 200

[§ 200] Violation of Instructions.

If the employee violates instructions regarding the time, place, or manner of performing assigned work, the employee may be operating outside the course of employment. (*San Francisco & Sacramento Ry. Co. v. Industrial Acc. Com.* (1927) 201 C. 597, 599, 258 P. 86; *National Auto. Ins. Co. v. Industrial Acc. Com.* (1937) 8 C.2d 715, 718, 68 P.2d 361; see 1 Herlick 6th, §10.20; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §228 et seq.)

A mere technical violation, however, in the interests of the employer and not increasing the risks, will not defeat the compensation claim. Thus, in *Griffin v. Industrial Acc. Com.* (1937) 19 C.A.2d 727, 66 P.2d 176, a branch manager of an oil company, whose duties were to supervise gas stations and negotiate for agents, was instructed not to use the company's car "under ordinary circumstances after nine or ten o'clock" at night. He was killed at 3 a.m. while driving someone home following an evening of business discussions. *Held*, a death benefit was proper. (19 C.A.2d 733.) (See *Pacific Employers Ins. Co. v. Chavez* (1936) 5 C.2d 247, 251, 54 P.2d 701 [inference was possible that action was permissible under exception stated in instructions].)

Moreover, even a serious and substantial violation of instructions does not always take the employee out of the course of employment. A distinction is drawn "between doing an *act* entirely outside the scope of employment and doing an act within the scope of employment in a *forbidden manner*." In *Auto Lite Battery Corp. of Calif. v. Industrial Acc. Com.* (1947) 77 C.A.2d 629, 176 P.2d 62, the employee was required to bring machine parts from a storeroom *by hand* if the regular driver of an electric truck was not available, and was expressly forbidden to drive the truck. The employee brought parts with the truck and was injured. *Held*, the injury was compensable, although the violation of instructions justified reduction of the award by 50%, for serious and wilful misconduct (*infra*, §331). (77 C.A.2d 631.) (See *Williams v. Work. Comp. App. Bd.* (1974) 41 C.A.3d 937, 940, 116 C.R. 607 [part-time hourly delivery man was injured when he struck another vehicle while speeding to avoid arrest for running red light; order denying compensation annulled].)

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9 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
2. Going and Coming Rule.
a. General Rule Denying Compensation.

2 *Witkin Sum. Cal. Law Work Comp* § 201

[§ 201] General Rule Denying Compensation.

Under the going and coming rule, the employee is not in the course of employment, and compensation is denied, where the injury or death is sustained while on the way to work or returning from it. (See *Dellepiani v. Industrial Acc. Com.* (1931) 211 C. 430, 439, 295 P. 826 [death-causing injury after alighting from employer's street car that furnished employees free transportation was not compensable]; *California Cas. Indem. Exchange v. Industrial Acc. Com.* (1923) 190 C. 433, 435, 213 P. 257 [employee returning from lunch]; *Seymour v. Setzer Forest Products* (1954) 124 C.A.2d 608, 609, 268 P.2d 1084 [employee visiting another employee, on his own time, before reporting for work]; *Westinghouse Elec. Corp. v. Industrial Acc. Com.* (1966) 239 C.A.2d 533, 534, 48 C.R. 758, *infra*, §215; *Arboleda v. Work. Comp. App. Bd.* (1967) 253 C.A.2d 481, 483, 61 C.R. 505, *infra*, §204; *Hinson v. Work. Comp. App. Bd.* (1974) 42 C.A.3d 246, 250, 116 C.R. 792, *infra*, §217; *Wilson v. Work. Comp. App. Bd.* (1976) 16 C.3d 181, 184, 127 C.R. 313, 545 P.2d 225 [school teacher's injury sustained in auto accident during regular commute was subject to rule even though she had taken work home night before and was transporting work-related items]; *General Ins. Co. v. Work. Comp. App. Bd.* (1976) 16 C.3d 595, 598, 128 C.R. 417, 546 P.2d 1361, *infra*, §204; *Rivera v. Work. Comp. App. Bd.* (1977) 70 C.A.3d 705, 707, 139 C.R. 67 [employee hit and killed by car while crossing street after conferring with union official; fact that union official directed decedent to report to work did not provide exception to rule]; *Mission Ins. Co. v. Work. Comp. App. Bd.* (1978) 84 C.A.3d 50, 54, 148 C.R. 292, *infra*, §223; *Santa Rosa Junior College v. Work. Comp. App. Bd.* (1985) 40 C.3d 345, 220 C.R. 94, 708 P.2d 673, *infra*, §202; Cal. Civil Practice, 1 Workers' Compensation, §1:60; C.E.B., 1 Workers' Compensation Practice 4th, §2.46 *et seq.*; 1 Herlick 6th, §10.14; 82 *Am.Jur.2d* (2003 *ed.*), *Workers' Compensation* §269 *et seq.*) (For similar rule on scope of employment as condition of liability under respondeat superior doctrine, see 3 *Summary* (10th), *Agency and Employment*, §181 *et seq.*)

An employee voluntarily participating in a government-sponsored or mandated alternative commute program (i.e., a transportation alternative to single occupant vehicles), is *not* acting within the course of employment when utilizing the program to travel to or from work unless the employee is paid a regular wage or salary for those commute periods. (*Lab.C. 3600.8(a).*) Unless the employer and employee have a written agreement to the contrary, payment of a salary not based on hours worked is not considered compensation for the commute period. (*Lab.C. 3600.8(b).*) Nor is an employer's reimbursement of employee expenses or subsidization of costs related to the program considered payment of wages or salary for the commute period. (*Lab.C. 3600.8(b).*) (For exceptions, see *infra*, §214.) *Lab.C. 3600.8(a)* does

not bar an employee who is injured while acting outside the course of employment, or the employees' dependents in the event of the employee's death, from suing the employer for damages. (*Lab.C. 3600.8(a).*)

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10 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
2. Going and Coming Rule.
b. Nature of Exceptions.

2 Witkin Sum. Cal. Law Work Comp § 202

[§ 202] Nature of Exceptions.

In *Hinojosa v. Work. Comp. App. Bd.* (1972) 8 C.3d 150, 104 C.R. 456, 501 P.2d 1176, *infra*, §217, the court observed that the rigid rule has fallen into disfavor (8 C.3d 156), and that "the cases indicate a more refined definition, specifying with more exactitude the circumstances under which workmen's compensation covers death and injury in transit and those in which it does not." (8 C.3d 151.)

The Supreme Court later took a more emphatic position: "The going and coming rule resulted from the type of judicial line-drawing frequently required when construing and applying vague or open-ended statutory provisions. With its genesis in the practical need of drawing a 'line' delineating an employee's 'scope of employment,' the rule was necessarily arbitrary, later explanations of its underlying rationale notwithstanding. California courts--manifesting much unease both in applying as well as in refusing to apply the rule--have recognized this essential arbitrariness and its potential harshness." Moreover, the courts customarily introduce each new discussion of the rule "with a litany of reservations and qualifications," describing it as a "slippery concept," "riddled with exceptions," and difficult to apply uniformly. (*Santa Rosa Junior College v. Work. Comp. App. Bd.* (1985) 40 C.3d 345, 352, 220 C.R. 94, 708 P.2d 673.) (See Cal. Civil Practice, 1 Workers' Compensation, §1:60 et seq.)

In *Santa Rosa Junior College*, *supra*, in denying compensation, the court undertook an extended examination of the exceptions to the rule. S, an instructor at Santa Rosa Junior College, lived 60 miles away. He and other instructors regularly took work home; the work consisted of grading papers or preparing lesson plans and work schedules. Their principal purpose was to avoid interruptions that occurred when working in their offices. S was killed in an automobile accident on the way home. The workers' compensation judge found that S had adequate facilities and sufficient time to complete his work on the campus, and concluded that the rule applied. The Board, relying on the "home as second jobsite" exception, awarded death benefits. *Held*, award annulled; the facts "do not fit convincingly" into any of the established exceptions.

(a) *Premises line doctrine* (*infra*, §206). The employment relationship begins when the employee enters the employer's premises; but S's accident occurred miles away from the campus. (40 C.3d 353, and footnote 11.)

(b) *Wage payment or travel expense exception* (*infra*, §215). S received no special or additional compensation for

his commute; hence, the exception for payment of wages or travel expenses could not apply. (40 C.3d 353.)

(c) *Required transportation exception* (infra, §216). The college did not require S to furnish his own vehicle on the job; hence, this exception was inapplicable. (40 C.3d 353.)

(d) *Special risk exception* (infra, §§208, 209). S's employment in no way created a "special risk" causally related to the employment. Although the accident would not have occurred "but for" the employment, the employment did not subject S to a risk distinct or quantitatively greater than that common to the public. (40 C.3d 353, 354.)

(e) *Special mission exception* (infra, §§203, 204). S was not on a "special mission" or "errand" undertaken at the request of his employer. The accident occurred during his regular commute, and his practice of taking work home could not convert that into a special mission. (40 C.3d 354.)

(f) *Home as second jobsite*. This concept, relied on by the Board, is likewise inapplicable. *Wilson v. Work. Comp. App. Bd.* (1976) 16 C.3d 181, 184, 127 C.R. 313, 545 P.2d 225, states that work done at home may exempt an injury from the going and coming rule if the circumstances of the employment make the home "a second jobsite." However, where the employee takes work home for the employee's own convenience, an injury sustained while transporting work-related materials is not compensable. "[T]his hearthside activity--while commendable--does not create a white collar exception to the going and coming rule." (40 C.3d 356.) Here, the Board concluded that use of the home as a second jobsite "was in effect an implied term or condition of the employment contract." This is contrary to the *Wilson* holding that "hearthside activity" does not create a "white collar exception" to the rule. (40 C.3d 356.)

"Therefore, applying established 'going and coming rule' principles and precedents, we conclude that the Board erred in awarding compensation. We could, of course, abrogate the rule or expand any of its exceptions, for they have evolved simply as 'the product of judicial gloss on the statutory conditions of compensability.' ... However, they have become an important part of our workers' compensation law. Although the Legislature has enacted significant changes in the Workers' Compensation Act during the last 70 years, it has not disturbed the going and coming rule or its judicially created exceptions. Unless the judiciary can devise rules which are fairer, less arbitrary, less problematic in application, and more clearly consistent with the public policies underlying the act, it should leave to the Legislature the major task of restructuring the rules governing employer liability." (40 C.3d 357.)

Two justices dissented, contending that the home as a second jobsite exception applied and that *Wilson* was distinguishable on its facts. (40 C.3d 358.)

SUPPLEMENT: [This section is current through the latest supplement]

See 15 A.L.R.6th 633 [compensable injuries going to and from home where home is claimed as "work situs"].



11 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

c. Special Mission for Employer.

1. Compensation Allowed.

2 Witkin Sum. Cal. Law Work Comp § 203

[§ 203] Compensation Allowed.

If the employee is off the premises, but is en route to perform or returning from completing an errand or special mission at the employer's request, the employee is in the course of employment, provided the employee does not substantially deviate from the mission for personal purposes. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1928) 89 C.A. 197, 200, 264 P. 514; *Robinson v. George* (1940) 16 C.2d 238, 245, 105 P.2d 914; *Fenton v. Industrial Acc. Com.* (1941) 44 C.A.2d 379, 381, 112 P.2d 763; *Los Angeles Jewish Community Council v. Industrial Acc. Com.* (1949) 94 C.A.2d 65, 69, 209 P.2d 991; *Guest v. Work. Comp. App. Bd.* (1970) 2 C.3d 670, 672, 87 C.R. 193, 470 P.2d; *Dimmig v. Work. Comp. App. Bd.* (1972) 6 C.3d 860, 867, 101 C.R. 105, 495 P.2d 433, *infra*, §229 [employee's educational program was activity connected with employment and injury occurring en route home from class was compensable]; *Southern Calif. Rapid Transit Dist. v. Work. Comp. App. Bd.* (1979) 23 C.3d 158, 166, 151 C.R. 666, 588 P.2d 806, *supra*, §198 [trip to physician's office to obtain medical release and deliver release to employer]; *Green v. Work. Comp. App. Bd.* (1986) 187 C.A.3d 1419, 1422, 232 C.R. 465 [employee injured while going from work to home to obtain clothes to wear at trade show later that day]; see C.E.B., 1 Workers' Compensation Practice 4th, §2.48; 1 Herlick 6th, §10.17; 63 A.L.R.4th 253 [traveling to or from work with employer's receipts].) (For discussion of limits of doctrine, see *Fremont Indem. Co. v. Work. Comp. App. Bd.* (1977) 69 C.A.3d 170, 174, 137 C.R. 847 [award affirmed under "personal comfort" doctrine (see *infra*, §§222, 223)].)

The exception was liberally applied in *Shell Oil Co. v. Industrial Acc. Com.* (1962) 199 C.A.2d 426, 18 C.R. 540. Decedent, a Merced Shell service station manager, attended a dinner meeting of Shell dealers in Stockton; this was obviously a special errand. However, his car developed trouble on the trip, so he left it in a station and returned 2 days later with a pickup truck to tow it back to his own station. It was on the return tow-trip that his death occurred. *Held*, the return of his car to Merced was "a natural, normal and necessary result of his performing a special errand for his employer." (199 C.A.2d 431.)

A further extension appears in *Schreifer v. Industrial Acc. Com.* (1964) 61 C.2d 289, 38 C.R. 352, 391 P.2d 832. S, a Los Angeles deputy sheriff on 24-hour call in a special enforcement detail, normally worked an 8-hour day with shifts posted 1 day ahead. On the day of the accident his posted hours were 7 p.m. to 3 a.m. However, at 1 p.m. he received a call at his home--25 miles away--to report for duty "as soon as possible." He came in his own car and was injured en

route. *Held*, the injury was compensable. Although this was not a special or unusual service, there was a special request for the usual service at an odd hour; i.e., a regular trip at a special time to meet a special need. "The fact that a particular mission is encompassed within the terms of hire, even contemplated at the time employment began, is not determinative. Nearly every employment relationship contemplates that extraordinary needs may arise and must be met. 'Special' means extraordinary in relation to routine duties, not outside the scope of the employment." (61 C.2d 295.)

In *McGinty v. Work. Comp. App. Bd.* (1968) 266 C.A.2d 280, 71 C.R. 877, petitioner, an outside salesman, was required to attend an evening sales meeting each month. On the night in question he left his car in the company parking lot, rode with the sales manager to a restaurant where the salesmen gathered, and ate and drank there. At 10 p.m., the sales manager offered him a ride back, but he refused and stayed with the others. At 3:42 a.m., he was found on the highway in his own car, having struck a bridge abutment. Brain damage prevented him from testifying, and there was no evidence as to his movements from the restaurant to the parking lot. The Board thought the special errand of the sales meeting ended at 10 when the manager left. *Held*, reversed. There was no compulsion in the invitation of a ride back, the employer knew that petitioner would attend the meeting and go home, and his going to his car in the lot first was not a deviation. (266 C.A.2d 283.)

In *Safeway Stores v. Work. Comp. App. Bd.* (1980) 104 C.A.3d 528, 163 C.R. 750, the employee reported for work at his usual starting time (3 p.m.), but instead of leaving at his usual quitting time (11:15 p.m.), he remained at work pursuant to a practice of rotating overtime to help complete a grocery inventory. At 5:30 a.m., he left for home and, when he got out of his car to enter the house, he was attacked by an unknown assailant. *Held*, the injury was compensable under *Schreifer*; there is no significant difference between going to work early on a special mission and coming home late from one. (104 C.A.3d 537.)

In *Perez v. Work. Comp. App. Bd.* (1984) 152 C.A.3d 60, 199 C.R. 280, the employer's union contract had expired and a new proposed contract was being considered at a union meeting. The employer posted a notice authorizing employees to attend the meeting, although no wages or expenses were paid for the time off. Petitioner, though not an official of the union, was a member of the local bargaining unit and qualified to vote on ratification. *Held*, injuries suffered in an automobile accident while going to the meeting were compensable under the special mission and dual purpose exceptions. The company hoped for a ratification vote, and employee attendance would be likely to achieve it; hence, petitioner's attendance at the meeting "was substantially connected to the employment and materially benefited the employer." (152 C.A.3d 65.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

c. Special Mission for Employer.

2. Compensation Denied.

2 Witkin Sum. Cal. Law Work Comp § 204

[§ 204] Compensation Denied.

(1) *Deviation for Personal Purposes.* The special mission exception cannot be invoked if the injury occurs while the employee is deviating for personal purposes. (*Red Arrow Bonded Messenger Corp. v. Industrial Acc. Com. (1940) 39 C.A.2d 559, 561, 103 P.2d 1004.*)

(2) *Split Shifts.* In *Arboleda v. Work. Comp. App. Bd. (1967) 253 C.A.2d 481, 61 C.R. 505*, decedent, a room-service waiter in a hotel, had regular hours of 7 a.m. to 3 p.m., and additional hours in the evening according to the headwaiter's schedule. On the day of the accident, he went home after 3 p.m., then left for work at 5:50 p.m., in his own car, on his own time, paying his own expenses. He was killed en route. *Held*, order denying death benefits affirmed.

A dissenting justice argued that, because the work schedule was posted 5 days before the accident, there was a special errand, just as there was in *Schreifer v. Industrial Acc. Com. (1964) 61 C.2d 289, 38 C.R. 352, 391 P.2d 832*, supra, §203, with its telephonic request; i.e., that the shorter advance notice in *Schreifer* did not result in a greater additional risk than the 5-day notice here. (253 C.A.2d 488.) The majority, however, saw nothing but split hour employment. "A man who makes two round trips to his place of employment in a day is, of course, subjected to more traffic risks than one who makes a single trip. A man who lives 25 miles from his place of employment is subjected to more traffic risks in going to and from work than one who lives two miles away. A man who works a 6-day week is subjected to greater risks than one who works a 5-day week. A man who leaves the premises for lunch is subjected to more traffic risks than one who brings his lunch. In none of these cases does the law provide coverage because the employment relationship is suspended." (253 C.A.2d 486.)

(3) *Performance of Routine Duty.* In *General Ins. Co. v. Work. Comp. App. Bd. (1976) 16 C.3d 595, 601, 128 C.R. 417, 546 P.2d 1361*, the employee's work day commenced at 8 a.m. He commuted to work in his own automobile and parked on the public street near the employer's premises. He and other employees had keys, and the first to arrive for work customarily made coffee for all, using coffee and a pot provided by the employer. On the day of the accident--a Saturday--he left home early to get gasoline, parked his car on the street in front of the premises at 7:15 a.m., and was struck and killed by a passing motorist when he alighted. *Held*, the death was not compensable.

The Board and two dissenting justices thought that decedent's early trip on Saturday to prepare coffee, sanctioned by the employer and for the benefit of the employer, brought the case within the special mission exception; i.e., "[p]erformance at a special time of a service routinely performed by employees during the normal work day constitutes a 'special mission.' " (16 C.3d 603.) However, the majority saw the trip as an ordinary commute and performance of an ordinary chore by the first arriving employee; the employer did not request or expect that any employee would arrive earlier than usual for this purpose. (16 C.3d 601.) (See *Baroid v. Work. Comp. App. Bd.* (1981) 121 C.A.3d 558, 572, 175 C.R. 633 [distinguishing *Safeway Stores v. Work. Comp. App. Bd.* (1980) 104 C.A.3d 528, 163 C.R. 750, supra, §203, and quoting *General Ins. Co.*; special mission rule is ordinarily not applicable where "the only special component is the fact that the employee began work earlier ... than usual"]; *C.L. Pharris Sand & Gravel v. Work. Comp. App. Bd.* (1982) 138 C.A.3d 584, 593, 187 C.R. 899 [employee injured on way home from apprentice class required by his union; no express request or invitation by employer to undertake mission or errand, and no benefit to employer from which request or invitation could be implied]; *Luna v. Work. Comp. App. Bd.* (1988) 199 C.A.3d 77, 82, 244 C.R. 596 [police officer injured on way to work was not on special mission despite "obligation (known well beforehand) to report for his shift early on this particular evening"]; *San Diego v. Work. Comp. App. Bd.* (2001) 89 C.A.4th 1385, 1387, 108 C.R.2d 510 [police officer whose routine duties included testifying in court was not on special mission when injured commuting from home to court].)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

- B. Injury in Course of Employment.
 - 2. Going and Coming Rule.
 - d. Wages Paid During Period.

2 *Witkin Sum. Cal. Law Work Comp* § 205

[§ 205] Wages Paid During Period.

If the employer pays compensation for the period going and coming, or during the time permitted for eating meals off the premises, it may reasonably be inferred that the employer impliedly agrees that the service is continuous throughout the period even though the employee is not actually at work. (*Western Pipe & Steel Co. v. Industrial Acc. Com. (1942) 49 C.A.2d 108, 110, 121 P.2d 35* [overtime work and pay commenced at end of regular day, but employees were allowed half hour, at convenient time, for meals]; *Kobe v. Industrial Acc. Com. (1950) 35 C.2d 33, 35, 215 P.2d 736* [employer paid 1 hour's extra pay, to cover time required for travel to and from work, to employees living over 15 miles away]; *Baroid v. Work. Comp. App. Bd. (1981) 121 C.A.3d 558, 567, 574, 175 C.R. 633*; *Wood Pontiac Cadillac v. Superior Court (1992) 5 C.A.4th 810, 813, 6 C.R.2d 924* [employee paid by commission was covered by workers' compensation law during authorized lunch break].)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

e. Approach to Premises Under Employer's Control.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 206

[§ 206] In General.

By a practical enlargement of the meaning of "premises," accidents are sometimes held compensable when they occur outside of, but in close proximity to, the place where the work is done. Thus, the term may include more than the particular plant or building in which the employees work; it may cover driveways, approaches and even roads leading to buildings under the employer's control, where the employment necessarily requires that the employees use these for ingress and egress. (*California Cas. Indem. Exchange v. Industrial Acc. Com.* (1943) 21 C.2d 751, 754, 135 P.2d 158 [employee returning from personal errand injured on driveway]; *Smith v. Industrial Acc. Com.* (1941) 18 C.2d 843, 846, 118 P.2d 6 [employee working in administration building of island fair was injured after leaving work and while traveling on road to reach ferry terminal]; *Freire v. Matson Navigation Co.* (1941) 19 C.2d 8, 10, 118 P.2d 809 [steamship company employee was injured when leaving taxicab at bulkhead adjacent to pier entrance]; *Pacific Indem. Co. v. Industrial Acc. Com.* (1946) 28 C.2d 329, 337, 170 P.2d 18, *infra*, §207 [injury in parking lot].)

Under *Greydanus v. Industrial Acc. Com.* (1965) 63 C.2d 490, 47 C.R. 384, 407 P.2d 296, an employee driving a car may be considered "on" the premises on making the turn from a public road, even though the employee does not actually reach the place of employment. Here the employee made a left turn off the highway and was struck by a passing truck after completing the turn but while still a few feet from the driveway apron. *Held*, award affirmed. (63 C.2d 492.) (See *Le Febvre v. Work. Comp. App. Bd.* (1980) 106 C.A.3d 745, 749, 165 C.R. 246 [applying "left hand turn" exception to going and coming rule; following *Greydanus*].)

Van Cleve v. Work. Comp. App. Bd. (1968) 261 C.A.2d 228, 67 C.R. 757, is even more liberal. Petitioner, a police officer, came to work for a compulsory briefing scheduled for 8:30 a.m. She arrived at 8:15, intending to have coffee first. She parked in the employer's (city) parking lot, pushed open the car door, and was injured while twisting her body to reach for her raincoat. The Board denied compensation. *Held*, order annulled and Board directed to allow it. (a) The intention to have coffee did not contribute to the injury. (261 C.A.2d 229.) (b) Her appearance 15 minutes early, on a rainy day, was not unreasonable. (261 C.A.2d 230.)

In *Peterson v. Moran* (1952) 111 C.A.2d 766, 768, 245 P.2d 540, the employee, discharged at the end of the day's work, was injured in an argument with the foreman on his way out. Although the discharge terminated his employment,

it did not terminate his right to leave the premises in the capacity of a protected employee.

SUPPLEMENT: [This section is current through the latest supplement]



15 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
2. Going and Coming Rule.
e. Approach to Premises Under Employer's Control.
2. Parking.

2 Witkin Sum. Cal. Law Work Comp § 207

[§ 207] Parking.

(1) *In General*. The approach exception (supra, §206) extends to injuries suffered while in a parking area maintained by the employer for the use of the employees. (See *Pacific Indem. Co. v. Industrial Acc. Com.* (1946) 28 C.2d 329, 337, 170 P.2d 18 [employee injured while parking car in lot 31/2 blocks from his station, prior to coming to work]; *North Amer. Rockwell Corp. v. Work. Comp. App. Bd.* (1970) 9 C.A.3d 154, 157, 87 C.R. 774, infra, §221 [reviewing parking lot cases and applying rule to employee assisting coemployee to start stalled car]; 4 A.L.R.5th 585 [injury in employer's parking lot while employee going to or from work].)

(2) *Noncontiguous Lot*. In *Lewis v. Work. Comp. App. Bd.* (1975) 15 C.3d 559, 125 C.R. 353, 542 P.2d 225, the employer maintained a parking lot for employees about three blocks away from petitioner's place of work. Petitioner parked her car there, walked along the public street to her office by the most direct way, and was injured by a slip and fall a block from the office. *Held*, the injury was compensable. In most of the prior decisions involving approaches or other premises under the employer's control, the accident occurred on the premises. (See supra, §206.) However, under the reasoning of *Freire v. Matson Navigation Co.* (1941) 19 C.2d 8, 10, 118 P.2d 809, *California Cas. Indem. Exchange v. Industrial Acc. Com.* (1943) 21 C.2d 751, 754, 135 P.2d 158, and *Greydanus v. Industrial Acc. Com.* (1965) 63 C.2d 490, 47 C.R. 384, 407 P.2d 296, supra, §206, this is not essential. "Once the employee steps into the premises of the employer, be it parking lot, plant or office, the relationship of the employer and employee begins, and it is not terminated because the employee, in order directly to reach his allotted post, may cross public property. Travel upon a direct route from the lot to the building where the employee works must fall within that 'reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done'." (15 C.3d 563.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

e. Approach to Premises Under Employer's Control.

3. Special Risk to Employee.

aa. Compensation Denied.

2 *Witkin Sum. Cal. Law Work Comp* § 208

[§ 208] Compensation Denied.

In *General Ins. Co. v. Work. Comp. App. Bd.* (1976) 16 C.3d 595, 599, 600, 128 C.R. 417, 546 P.2d 1361, supra, §204, the court discussed the "premises line" concept, and limited broad language in such cases as *Freire v. Matson Navigation Co.* (1941) 19 C.2d 8, 10, 118 P.2d 809, and *Greydanus v. Industrial Acc. Com.* (1965) 63 C.2d 490, 47 C.R. 384, 407 P.2d 296, supra, §206, as unduly extending the "special risk" exception. The employee commuted to work, parked on the public street, and was killed by a passing motorist when he alighted from his car. Thus, his injury was causally related to his employment, but the risk involved in parking was neither distinctive in nature nor quantitatively greater than risks common to the public. (16 C.3d 601.) (See *G.E. Engine Maintenance & Elec. Ins. v. Work. Comp. App. Bd.* (1998) 69 C.A.4th 1528, 1531, 82 C.R.2d 199 [Board erred in granting compensation and denying reconsideration where employee was injured in traffic accident on his way to work and there was no evidence that route held hazards not shared by general motoring public].)

In *Rivera v. Work. Comp. App. Bd.* (1977) 70 C.A.3d 705, 139 C.R. 67, decedent, an employee of R Corp., walked out with members of his union in sympathy with striking members of another union. The next morning he parked his truck in the street, consulted representatives of his union at the jobsite, and was told to report for work. He started to cross the street, to get his truck to park it in the employer's lot, and was killed by a passing automobile. *Held*, order denying death benefits affirmed. The court distinguished *Lewis v. Work. Comp. App. Bd.* (1975) 15 C.3d 559, 125 C.R. 353, 542 P.2d 225, supra, §207, and followed *Chairez*, reasoning as follows: (a) Decedent had terminated his employment the previous day and did not intend to reinstate it until told to do so by his union. (70 C.A.3d 709.) (b) At the time of the accident, he was acting in accordance with directions from his union rather than his employer. (70 C.A.3d 709.) (c) The existence of a labor dispute and its attendant confusion at the jobsite did not create a "special risk" that would justify an exception to the going and coming rule. (70 C.A.3d 710.)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

e. Approach to Premises Under Employer's Control.

3. Special Risk to Employee.

bb. Compensation Allowed.

2 *Witkin Sum. Cal. Law Work Comp* § 209

[§ 209] Compensation Allowed.

Parks v. Work. Comp. App. Bd. (1983) 33 C.3d 585, 190 C.R. 158, 660 P.2d 382, greatly extended the special risk exception. Petitioner, a school teacher, completed her workday, drove her car out of the school parking lot, and turned onto the street. After she had driven one or two car lengths, traffic was stopped by a group of school children crossing the street, and petitioner's car was boxed in from the front and rear. At that moment, three youths pulled open the driver's door, wrestled her purse away and fled. She was unable to return to work for 3 weeks as a result of the physical and emotional trauma from the assault, and sought compensation for disability. The Board, applying the going and coming rule, denied compensation. *Held*, order annulled.

(a) *Going and coming rule*. This rule, frequently criticized as difficult to apply and harsh in result, has been abandoned in two states; and it has been suggested that the dangers inherent in a modern commuter-oriented society may make travel to and from work more dangerous than work itself. (33 C.3d 589, and footnote 4.) However, it is still established law in California, though subject to exceptions. (33 C.3d 588, 589.)

(b) *Special risk exception*. The two-prong test was set forth in *General Ins. Co. v. Work. Comp. App. Bd.* (1976) 16 C.3d 595, 599, 600, 128 C.R. 417, 546 P.2d 1361, *supra*, §208: (1) but for the employment the employee would not have been at the place, and (2) the risk is distinctive and quantitatively greater than risks common to the public. (33 C.3d 590.) Prior California cases have not applied the exception to injuries suffered on a public street while driving home *after* work, but *Pacific Indem. Co. v. Industrial Acc. Com.* (1946) 28 C.2d 329, 337, 170 P.2d 18, and *Greydanus v. Industrial Acc. Com.* (1965) 63 C.2d 490, 47 C.R. 384, 407 P.2d 296, *supra*, §206, did apply the exception to accidents occurring *before* work at or just outside the boundary of the workplace. (33 C.3d 590.) Cases in other states have applied principles similar to those invoked in *Greydanus* and *Pacific Indemnity* to post-workday injuries. (33 C.3d 591.) Hence: "Compensation will be allowed for injuries off the work premises both before or after work if the injury occurs within the field of a risk created by the employment. This is true whether the employment creates a risk in gaining entry to the workplace or in exiting therefrom." (33 C.3d 592.)

(c) *Exception applied*. The second prong of the *Chairez* test was met here. Petitioner "was regularly subjected at the

end of each day's work to the risk of becoming blocked by school children in traffic and becoming a 'sitting duck' for an assault." Moreover, her risk was quantitatively greater than that to which "passing motorists might be subjected on a sporadic or occasional basis." (33 C.3d 592.) (See *Childers v. Shasta Livestock Auction Yard* (1987) 190 C.A.3d 792, 813, 814, 235 C.R. 641 [by encouraging employees to drink at work site after hours, employer created special risk to employees who had to drive home; thus, plaintiff's exclusive remedy was workers' compensation]; *Johnson v. Stratlaw* (1990) 224 C.A.3d 1156, 1160, 274 C.R. 363 [plaintiff's pleadings in wrongful death action for death of minor son killed in auto accident en route home at 2 a.m. alleged special risk by charging that defendant violated Labor Code in requiring minor to work to that hour; thus, action was barred by exclusivity of workers' compensation remedy; following *Parks*].)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

e. Approach to Premises Under Employer's Control.

4. Waiting for Admission to Workplace.

2 Witkin Sum. Cal. Law Work Comp § 210

[§ 210] Waiting for Admission to Workplace.

In *Price v. Work. Comp. App. Bd.* (1984) 37 C.3d 559, 209 C.R. 674, 693 P.2d 254, petitioner's employer had a building fronting directly on the sidewalk, with no parking lot for employees. Petitioner, whose workday started at 8 a.m., generally arrived at work early, the premises often being open before 8 a.m. On the day of the accident, petitioner arrived at 7:45 a.m. The doors were still locked, so he parked his car on the street, and decided to put a quart of oil into the engine while waiting. In doing so, his leg extended to the side of the car and he was struck by a passing motorist. The Board denied compensation under the premises line test. *Held*, decision annulled.

(a) Petitioner was at his place of employment, having finished his journey to work; and "where an employee is injured outside the employer's premises while waiting to be admitted to the workplace, the injury occurs within the course of the employment and is compensable." (37 C.3d 566.)

(b) The premises line test (*supra*, §208) should not preclude compensation. In *General Ins. Co. v. Work. Comp. App. Bd.* (1976) 16 C.3d 595, 599, 600, 128 C.R. 417, 546 P.2d 1361, *supra*, §208, the employee was walking across the street away from his parked car and toward the workplace; i.e., he was still on his way to work. Petitioner, on the other hand, had arrived and was waiting to be admitted. (37 C.3d 567.)

(c) The Board further contended that even if the going and coming rule was inapplicable, petitioner temporarily abandoned his employment for an act of personal convenience--putting oil in his car. However, under *North Amer. Rockwell Corp. v. Work. Comp. App. Bd.* (1970) 9 C.A.3d 154, 87 C.R. 774, *infra*, §221, acts of personal convenience are within the course of employment if reasonably contemplated, and petitioner's act came within this rule. Making use of his waiting time by adding oil to the car was a normal and expectable act. (37 C.3d 568.) Moreover, the act also provided a benefit to the employer, because petitioner was waiting near the premises so he could begin work as soon as the doors were unlocked; hence, the dual purpose doctrine applied. (37 C.3d 569, 570.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

f. Bunkhouse Rule.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 211

[§ 211] In General.

Under the "bunkhouse rule," if the employee's work requires the employee to live or board on the premises of the employer, an injury received while on the premises may be compensable even though the employee is not working at the time of the injury. (*Larson v. Industrial Acc. Com.* (1924) 193 C. 406, 409, 224 P. 744; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1924) 194 C. 28, 32, 227 P. 168; *Union Oil Co. v. Industrial Acc. Com.* (1931) 211 C. 398, 403, 295 P. 513; *Truck Ins. Exchange v. Industrial Acc. Com.* (1946) 27 C.2d 813, 816, 167 P.2d 705; *Employers' Liab. Assur. Corp. v. Industrial Acc. Com.* (1940) 37 C.A.2d 567, 569, 99 P.2d 1089; *Jiminez v. Liberty Farms Co.* (1947) 78 C.A.2d 458, 463, 177 P.2d 785; see Cal. Civil Practice, 1 Workers' Compensation, §1:57; C.E.B., 1 Workers' Compensation Practice 4th, §2.23; 1 Herlick 6th, §10.19.)

In *Argonaut Ins. Co. v. Work. Comp. App. Bd.* (1967) 247 C.A.2d 669, 678, 55 C.R. 810, *infra*, §251, the rule was extended to cover the situation where the employee was not required to remain, but was *permitted* to do so, and the injury occurred during leisure time.

However, the rule does not automatically call for compensation in situations where it applies; the basic requirement of causation ("arise out of" employment) must be satisfied. (*Leffler v. Work. Comp. App. Bd.* (1981) 124 C.A.3d 739, 744, 177 C.R. 552; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1982) 133 C.A.3d 643, 653, 184 C.R. 111.)

In *Crawford v. Work. Comp. App. Bd.* (1986) 185 C.A.3d 1265, 230 C.R. 425, a prisoner, who was assigned to serve his sentence living and working at a forestry conservation camp operated by the Department of Forestry, was injured when he fell from the porch of a camp dormitory at a time when he was not performing work duties. *Held*, the bunkhouse rule did not apply. Unlike the usual situations applying the bunkhouse rule, this prisoner was required to live at the camp, not by reason of his employment relationship, but because of his custodial status as a prisoner. "We do not believe the Legislature reasonably could have intended the incongruous result of providing industrial insurance to prisoners on a 24-hour basis simply because their conditions of confinement require their presence full time at their assigned place of work." (185 C.A.3d 1269.)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

f. Bunkhouse Rule.

2. Tenant Employee.

2 Witkin Sum. Cal. Law Work Comp § 212

[§ 212] Tenant Employee.

The bunkhouse rule can apply to an employee who is also a tenant of the employer, where the basic relationship is employment, and the tenancy is subsidiary. Thus, in *Aubin v. Kaiser Steel Corp.* (1960) 185 C.A.2d 658, 8 C.R. 497, defendant employer, operating a mine, furnished dormitories and meals at less than cost, and there were no adequate housing facilities within a reasonable distance. Decedent employee lived in the dormitory and took his meals there. *Held*, the bunkhouse rule applied, despite the requirement of payment for room and board; hence, a tort action for wrongful death did not lie. (185 C.A.2d 661.)

However, where a basic relationship is landlord and tenant, the fact that the tenant is employed to render minor services for the landlord does not bring the rule into operation. Thus, in *Rosen v. Industrial Acc. Com.* (1966) 239 C.A.2d 748, 49 C.R. 706, Mr. and Mrs. R were owners of a six-unit apartment building. Mr. and Mrs. L were tenants. The owners agreed with the tenants to give them a \$ 25 per month credit allowance on their apartment rental of \$ 85 per month, in exchange for certain caretaking services (watering lawn, taking out trash, receiving rent from other tenants) and for showing the premises when a vacancy occurred. Either Mr. or Mrs. L had to be on the premises until 6 p.m. each day to receive complaints from tenants, and until 10 p.m. whenever there was a vacancy. One night, at 8 p.m., there being no vacancy, Mr. L descended an outside stairway on a personal errand, fell, and was injured. The Commission gave him an award. *Held*, annulled, for the following reasons:

(a) The Commission's theory would require a landlord who gives a modest allowance for relatively minor services to carry full comprehensive insurance coverage of the tenants for 24 hours a day so long as they are on the premises. (239 C.A.2d 750.)

(b) Because Mrs. L was also an employee, and Mr. L worked most of the day at his regular job, Mrs. L would be performing the service of receiving tenants' complaints; and if she fell in her bathtub or injured her back making beds or cut her finger preparing dinner or while operating a sewing machine, she would also have been entitled to compensation under that theory. (239 C.A.2d 754.)

(c) The basic aim of the law is served by limiting liability of a landlord-employer to situations in which the

tenant-employee sustains injury "while he is engaged more directly in performing some service required of him" and not extending it to injuries sustained while engaged in an activity having no connection with the employment relationship but only incident to continued enjoyment of rights as a tenant. (239 C.A.2d 756.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Vaught v. California* (2007) 157 C.A.4th 1538, 69 C.R.3d 605, M, a California park ranger, accepted a new position as a district resource manager for which he received a month-to-month tenancy in a State-owned ranch house. While inspecting a water leak in a bathroom following incomplete plumbing work by State personnel, M slipped and fell, sustaining injuries. M sued the State for negligence and failure to make the ranch house habitable. The trial court granted the State's motion for summary judgment on the ground that the exclusivity rule barred the action. *Held*, summary judgment affirmed.

(a) *Course of employment.* At the time of injury, M was acting within the course of his employment. M understood that the house was offered as an employment benefit and an incentive to accept his new position. Thus, it was part of M's total compensation package. Moreover, M resided in the house out of work necessity. As a park ranger M was always on call, and although he would report to a district office it was agreed that M could work out of the house. Accordingly, M used a portion of the house as an office where he stored equipment and maps used on patrol, for fire protection, and for search and rescue operations. (157 C.A.4th 1546.)

(b) *Landlord-tenant relationship.* The creation of a landlord-tenant relationship here did not diminish the bunkhouse rule. Unlike *Rosen v. Industrial Acc. Com.* (1966) 239 C.A.2d 748, 49 C.R. 706, text, p. 801, where the primary relationship between the parties was that of landlord and tenant and nominal services rendered by the tenant were incidental, here the landlord-tenant relationship between M and the State was collateral to the basic employment relationship, which had begun in 1981. M was offered the residence because of his employment as a park ranger, as a benefit and out of work necessity, "not because the State sought to enter into a landlord-tenant relationship." (157 C.A.4th 1547.)

(c) *Nature of employment agreement controls.* M argued that the bunkhouse rule did not apply here because he was not compelled by the State to live in the house and could have elected to reside elsewhere. Earlier cases supported that distinction, but modern cases focus not on whether an employee had a choice between employer and nonemployer housing and apply the bunkhouse rule when "the employment agreement contemplates, or the nature of the employee's work necessitates" that the employee reside in employer housing. That was the case here. (157 C.A.4th 1547.)

(d) *Arising out of employment.* Unless the cause of an injury "is so remote that it cannot be deemed incidental to, and thus arising out of, the employment, an injury occurring in employer-furnished housing in the course of employment ordinarily arises out of employment." (157 C.A.4th 1548.) And, although M was injured on his day off, compensation under the bunkhouse rule "does not turn on whether the employee is injured on his or her day off, or after work, or while engaged in a purely personal activity ... as long as there is some causal connection between the employment and the injury, and the injury is sustained in the course of employment." These requirements are satisfied here because M sustained his injuries while residing on his employer's premises and engaged in an activity incidental to his employment. (157 C.A.4th 1549.)



21 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

g. Unlimited Territory or Hours of Work.

2 *Witkin Sum. Cal. Law Work Comp* § 213

[§ 213] Unlimited Territory or Hours of Work.

In many employments, the employee's duties are not performed on particular premises or at specific times; instead the employee has discretion about the place and time of work. This kind of employee may be considered to be within the course of employment even when not actually performing the work. (See 1 Herlick 6th, §10.18.) The following are examples:

(1) *Salesperson*. A traveling salesperson is in the course of employment during the entire time of travel. (*California Cas. Indem. Exchange v. Industrial Acc. Com.* (1936) 5 C.2d 185, 186, 53 P.2d 758.)

(2) *Commercial Traveler*. As with traveling salespersons, commercial travelers are also in the course of employment during the time of travel. (See *Wiseman v. Industrial Acc. Com.* (1956) 46 C.2d 570, 572, 297 P.2d 649 [officer of San Francisco bank in New York on business trip]; *Leonard Van Stelle v. Industrial Acc. Com.* (1963) 59 C.2d 836, 837, 31 C.R. 467, 382 P.2d 587 [real estate salesperson on trip to inspect property was injured in auto accident after normal hours and after relying on another driver's search for place to dine]; *IBM Corp. v. Work. Comp. App. Bd.* (1978) 77 C.A.3d 279, 282, 142 C.R. 543 [10-day training assignment to another city, death while returning from weekend visit to relatives, which employer had encouraged]; *Hartford Acc. & Indem. Co. v. Work. Comp. App. Bd.* (1982) 132 C.A.3d 796, 806, 183 C.R. 440 [employee temporarily living with father while his own home was being sold, and not as requirement of his employment, was not within exception].)

(3) *Job Superintendent*. In *Goodrich v. Industrial Acc. Com.* (1943) 22 C.2d 604, 608, 140 P.2d 405, a death benefit was allowed where a drilling superintendent, on call 24 hours a day, with discretion as to the time, place, and manner of doing the work, was killed while driving home to inform his wife that he would be working all night.

(4) *Firefighter*. In *Le Febvre v. Work. Comp. App. Bd.* (1968) 69 C.2d 386, 71 C.R. 703, 445 P.2d 319, decedent, a volunteer fireman, was required to answer calls and attend scheduled drills. A drill was called by proper authority. He drove from his home and, on the way to the station on a direct route, met death on a narrow road in heavy rain. *Held*, his employment began from the moment he left his home or other place in answer to a summons; the travel was required by the employment and the risk was incident to that employment. (69 C.2d 388.)

(5) *Law Enforcement Officer*. Officers who are expected to render their services at any time are within the course of their employment even though off duty when injured. (See *State Employees' Retirement System v. Industrial Acc. Com.* (1950) 97 C.A.2d 380, 383, 217 P.2d 992 [game warden on night patrol, died of carbon monoxide poisoning while asleep in car]; *Garzoli v. Work. Comp. App. Bd.* (1970) 2 C.3d 502, 505, 86 C.R. 1, 467 P.2d 833 [uniformed police officer killed in traffic accident while riding home on his own motorcycle at end of work shift; there was no place to change clothes at police station and, with consent of police chief, he regularly wore uniform while commuting]; *Petrocelli v. Work. Comp. App. Bd.* (1975) 45 C.A.3d 635, 638, 119 C.R. 620 [uniformed off-duty police officer was injured approaching group of youths who "didn't look right" in parking lot after dark]; *Carrillo v. Work. Comp. App. Bd.* (1983) 149 C.A.3d 1177, 197 C.R. 425 [uniformed reserve deputy sheriff was injured en route to assignment at honor farm; no place to change clothes at place of assignment].)

In *Luna v. Work. Comp. App. Bd.* (1988) 199 C.A.3d 77, 244 C.R. 596, L, a police officer, was injured en route to work when a speeding car struck L's private automobile. The court, distinguishing *Garzoli*, *supra*, denied compensation. "In this case, the city provided officers with a room to change clothes and had no policy with respect to providing extra-hours services. Luna was concededly not in uniform when the accident occurred. He was wearing only a T-shirt and his police trousers and boots; his duty blouse was folded in the seat beside him, along with his baton and police identification. His badge was in his pocket. His weapon remained in a police station locker. Substantial evidence supports the determination of the WCJ and the Board that the city had no expectation of Luna's providing routine peace officer services when not on duty." (199 C.A.3d 84.) (See *State Lottery Com. v. Work. Comp. App. Bd.* (1996) 50 C.A.4th 311, 318, 57 C.R.2d 745, *infra*, §214 [state lottery agent was not entitled to compensation under *Garzoli* where he was not in uniform at time of slip and fall on path between residence and state-furnished vehicle].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Commercial Traveler*. See *Fleetwood Enterprises v. Work. Comp. App. Bd.* (2005) 134 C.A.4th 1316, 1323, 37 C.R.3d 587 [employee's unilateral decision to extend business trip in Europe and take road trip was not in course of employment and thus, his injuries in auto accident were not compensable; road trip was neither required nor encouraged by employer nor necessary for business purposes].

(5) *Law Enforcement Officer*. See *Pettigrew v. Work. Comp. App. Bd.* (2006) 143 C.A.4th 397, 405, 48 C.R.3d 922 [correctional officer who was injured after stopping and assisting at accident scene while on his way to work was not acting within course and scope of his employment and was not entitled to benefits; distinguishing *Garzoli v. Work. Comp. App. Bd.* (1970) 2 C.3d 502, 86 C.R.1, 467 P.2d 833, text, p. 803].



22 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

h. Special Transportation Requirements.

1. Transportation Furnished by Employer.

2 *Witkin Sum. Cal. Law Work Comp* § 214

[§ 214] Transportation Furnished by Employer.

If transportation to and from work is furnished by, and is under the control of, the employer, as part of the conditions of the employment and not merely as an independent courtesy or accommodation, the employee is in the course of employment while making use of the transportation. (*California Cas. Indem. Exchange v. Industrial Acc. Com.* (1942) 21 C.2d 461, 463, 132 P.2d 815; *Trussless Roof Co. v. Industrial Acc. Com.* (1931) 119 C.A. 91, 93, 6 P.2d 254; *San Francisco v. Industrial Acc. Com.* (1943) 61 C.A.2d 248, 251, 142 P.2d 760; *Northwestern Pac. R. Co. v. Industrial Acc. Com.* (1946) 73 C.A.2d 367, 369, 166 P.2d 334; see 1 Herlick 6th, §10.16; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §286.)

The agreement may be express or implied, and it may be established by custom in contravention of express written declarations of the employer. (*California Cas. Indem. Exchange v. Industrial Acc. Com.*, *supra*; *San Francisco v. Industrial Acc. Com.*, *supra* [custom to furnish streetcar transportation to employees of car company was controlling despite recital in free pass that it was "courtesy" and not part of consideration for employment].) The facts that the employer is not obligated to *continue* the service, but can terminate it at will, or that other transportation is available to the employee, do not negative the agreement. (*California Cas. Indem. Exchange v. Industrial Acc. Com.*, *supra*.)

The transportation exception was held inapplicable in *Sullivan v. San Francisco* (1950) 95 C.A.2d 745, 214 P.2d 82. Plaintiff city firefighter was injured while riding on a streetcar. In this action for personal injuries, defendant city contended that the remedy was under the Act, because the city's rules allowed plaintiff to ride free on his badge, and consequently his injury occurred while making use of transportation furnished by his employer. *Held*, the tort action was proper. Although plaintiff received a copy of the rules he had no actual knowledge of this one, traveled without his badge, and paid the usual fare. (95 C.A.2d 753.)

In *State Lottery Com. v. Work. Comp. App. Bd.* (1996) 50 C.A.4th 311, 57 C.R.2d 745, a state lottery agent, a position designated as a peace officer, was injured when he slipped and fell on the icy sidewalk leading from his residence to his state-supplied vehicle. The workers' compensation judge awarded compensation, finding an exception to the going and coming rule. *Held*, order annulled. Cases permitting the exception to the going and coming rule where the employer provides a vehicle and requires its use have done so only when the employee was actually driving the

vehicle at the time of injury. "To stretch this exception so far as to include cases where the employee has not yet entered the vehicle ... would make it almost infinitely elastic." (50 C.A.4th 315.)

Employees voluntarily participating in an alternative commute program sponsored or mandated by a governmental entity are considered to be within the course of their employment when an employer provides workers' compensation coverage for employees who are passengers in a vehicle owned and operated by the employer, provided the employer gives written notice to the employees before the employees participate or coverage becomes effective. (*Lab.C. 3600.8(b).*) State employees participating in a program are deemed to be within the course and scope of employment when riding in a vanpool vehicle either owned by or registered to the state. (*Lab.C. 3600.8(e).*)

SUPPLEMENT: [This section is current through the latest supplement]
See 28 A.L.R.6th 1 [workers' compensation for injury while driving employer's vehicle].



23 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

h. Special Transportation Requirements.

2. Transportation Allowance.

2 *Witkin Sum. Cal. Law Work Comp* § 215

[§ 215] Transportation Allowance.

In *Westinghouse Elec. Corp. v. Industrial Acc. Com.* (1966) 239 C.A.2d 533, 48 C.R. 758, the employee was given a 60-cent daily carfare allowance for commuting from his home in Los Angeles to the job in Beverly Hills. He was injured while driving his own car to work. In holding the injury noncompensable, the court emphasized the lack of relation between the allowance and the actual travel expense, and also the fact that the employer exercised no control over the means of transportation or route. (239 C.A.2d 534.)

The Supreme Court, however, took a different approach in *Zenith Nat. Ins. Co. v. Work. Comp. App. Bd.* (1967) 66 C.2d 944, 59 C.R. 622, 428 P.2d 606. C, a bricktender, was employed by S on a construction job 130 miles from home. In order to induce employment, S paid employees \$ 10 per day "to cover transportation costs and living expenses," and it was the practice of employees to travel to their homes on weekends. On some occasions when they could not arrange transportation themselves, the employer would furnish it. On the occasion of the injury, C, at home, asked the superintendent on Sunday evening for transportation, and the latter arranged for a ride with other workers, during which the accident and injury occurred. *Held*, award affirmed.

(a) Where the employer makes a *substantial payment* for travel expenses to induce the employee to accept work at an *extensive distance* the employer impliedly agrees that the employment relationship shall continue. It is immaterial that the employer fails to designate a fraction as subsistence allowance and the remainder as travel expense. (66 C.2d 949.)

(b) The *Westinghouse* case is distinguishable as involving only local commuting and a nominal allowance; but part of its holding is rejected. "To the extent that the Court of Appeal suggested that the travel expense exception does not apply unless the employer himself controls the mode of transportation or compensates the employee for his travel time, it imposed novel conditions which we do not approve." (66 C.2d 949.)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

- B. Injury in Course of Employment.
 - 2. Going and Coming Rule.
 - h. Special Transportation Requirements.
- 3. Employee's Car Required by Employer.

2 Witkin Sum. Cal. Law Work Comp § 216

[§ 216] Employee's Car Required by Employer.

In *Postal Tel. Cable Co. v. Industrial Acc. Com.* (1934) 1 C.2d 730, 733, 37 P.2d 441, the court held that the transportation exception did not apply where the vehicle was owned by the employee. However, the case was overruled in *Smith v. Work. Comp. App. Bd.* (1968) 69 C.2d 814, 73 C.R. 253, 447 P.2d 365.

(a) Decedent was a social worker who drove his car to the county office (employer's premises). On conflicting evidence, it was found that he was required to furnish his own car. Under the *Postal Telegraph* rule, this made no difference. However, a number of jurisdictions now take the position that the going and coming rule is inapplicable where the employee's act is required by the employer for his own purposes. "Indeed, an employer must be conclusively presumed to benefit from employee action reasonably directed towards the execution of the employer's orders or requirements." (69 C.2d 820.)

(b) "We conclude that the decisional basis of *Postal Telegraph* has been eroded, that the case does not represent the trend of authority, and that it must be overruled. Surely in this day of a highly motorized society we cannot cast the going and coming rule as a protective cloak over the shoulders of the employer who, for his own advantage, demands that the employee furnish the car on the job." (69 C.2d 825.)

In *Joyner v. Work. Comp. App. Bd.* (1968) 266 C.A.2d 470, 72 C.R. 132, decided before *Smith*, petitioner, a heating and air conditioning service person, owned his own truck. His employer testified that this was practically a condition of the job. Petitioner was paid mileage only for the truck's use at work, and the injury occurred on his way home from a jobsite. The Board applied the going and coming rule because petitioner was not being reimbursed for the cost of transportation at that time. *Held*, reversed. The truck, full of equipment necessary for the work, was in effect a mobile shop. The employer did not contemplate that it would be left at the jobsite at the end of the day; returning home with the truck, safeguarding it, and bringing it to the job the next day were integral parts of the total service to the employer, and the relationship therefore existed at the time of the accident. (266 C.A.2d 476.)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

2. Going and Coming Rule.

h. Special Transportation Requirements.

4. Transportation Advantageous to Job.

2 *Witkin Sum. Cal. Law Work Comp* § 217

[§ 217] Transportation Advantageous to Job.

In *Hinojosa v. Work. Comp. App. Bd.* (1972) 8 C.3d 150, 104 C.R. 456, 501 P.2d 1176, W, the employer, operated a number of noncontiguous fruit ranches. H, the employee, was a farm laborer, working 9 to 9 1/2-hour days and 6-day weeks at the ranches, being shifted by the foreman from one to another. This required the employees to furnish automobile transportation, and H, not owning a car, paid R, a fellow worker, \$ 3 a week to ride in the latter's car. At the close of 1 day's work, he left for home in R's car, and was injured in a collision. The Board refused to apply the exception of *Smith v. Work. Comp. App. Bd.* (1968) 69 C.2d 814, 73 C.R. 253, 447 P.2d 365, supra, §216, because H did not furnish his own car. *Held*, order annulled. The court proposed the following for reconciling the conflicting interest of employer and employee:

(a) *Going and coming rule applies to local commute.* Injuries occurring in ordinary, local commutes that mark the daily transit of workers to and from their jobs at fixed hours are noncompensable in the absence of special or extraordinary circumstances. The employment there plays no special role in the requisites of portage except the normal need for the presence of the person to perform the work. (8 C.3d 157.)

(b) *Situations not involving local commute.* Extraordinary transits vary from the norm because the employer requires a special or different transit, means of transit, or use of a car, for reasons particular to the employer. When the employer gains that kind of an advantage, the job plays a different role, giving a special benefit to the employer under the extraordinary circumstances. Thus, the employer's special request imposes an unusual condition, removes the transit from the employee's choice or convenience, and places it within the employer's choice or convenience, restoring the employer-employee relationship. (8 C.3d 157.)

(c) *Conclusion.* H's travel involved an extraordinary transit. The job was structured and dependent on transportation from one workplace to another so that the use of an instrument of that transportation was "a requisite of employment." (8 C.3d 162.) Moreover, lack of ownership of the automobile was of no significance; if it were, the anomalous result would follow that H and R, injured in the same accident, would be treated differently, R receiving compensation and H not. (8 C.3d 162.)

In *Rhodes v. Work. Comp. App. Bd.* (1978) 84 C.A.3d 471, 148 C.R. 713, R and M, employed by Los Angeles County as eligibility workers, were required to use their own cars on the job and were reimbursed for mileage. At times they rode to work in each other's car, and each used the other's car to perform work duties. On the day of the accident in which R was injured, they drove their own cars to work, but at day's end R was unable to start her car and rode home in M's car. *Held*, the transportation exception applied.

(a) Under *Smith, supra*, the injury would have been compensable if R had been driving her own car home from work. Under *Hinojosa, supra*, it would have been compensable if R and M had ridden to work together with the understanding that each could use the car for employment duties, irrespective of ownership of the vehicle involved in the accident. (84 C.A.3d 475.)

(b) Neither of these cases is precisely on point, for R and M had not "car pooled" to work, and the injury to R did not occur in driving her own car. (84 C.A.3d 477.) However, R was restricted to a particular transportation mode prescribed by her employer; and, when that failed, she had to obtain whatever alternative transportation was available. Because the county obtained the benefit of R's compliance with the requirement of bringing her car to work, it cannot escape liability for a hazard originating in compliance. (84 C.A.3d 478.)

In *Hinson v. Work. Comp. App. Bd.* (1974) 42 C.A.3d 246, 116 C.R. 792, the court distinguished *Hinojosa*. H, a tractor driver on a large ranch, drove his car to the headquarters shop each day to check in. The employer had a pickup truck at the shop that the foreman would use to get the tractor drivers to the field; but, with the approval of the foreman, the tractor drivers would sometimes drive to the field in their own vehicles, and could then go directly home after work. H was injured in a car accident on the way to work. In affirming the Board's determination that the injury was noncompensable, the court said: "A practice adopted for the mutual convenience of the employer and employee and left to the discretion of the employee (if he didn't want to take his car to the field he would be taken in the company pickup), does not rise to the status of a requirement of employment, nor does it establish such a 'special' advantage to the employer as to extend the employer-employee relationship to the regular commute from the home to the place of work." (42 C.A.3d 250.)

Tulare v. Work. Comp. App. Bd. (1985) 170 C.A.3d 1247, 216 C.R. 885, attempts to reconcile *Hinojosa*, *Smith*, and *Hinson*. C, employed as a supervisory secretary for Tulare County's building and planning department, used her personal car on an "as needed, but regular, basis," to procure office supplies, deliver reports, and perform other necessary tasks. County cars could also be used for these purposes, but were not always available, and use of her personal car was less costly. Accordingly, her supervisor approved its use and she was reimbursed for mileage. She was injured on her way to work, and the Board awarded compensation on the ground that having her car available for errands had become an "expectation" from past approved practice and was of economic benefit to the employer. *Held*, affirmed. "Once an employee has impliedly agreed to accommodate the employer and use his own vehicle, the employer can reasonably come to rely upon its use and expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. Added to this formulation is the reimbursement of the employee for mileage on the job, and the fact the use of the employee's vehicle is to the economic advantage of the employer." (170 C.A.3d 1253.)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

3. Personal Acts Not Related to Employment.

a. General Rule Denying Compensation.

2 Witkin Sum. Cal. Law Work Comp § 218

[§ 218] General Rule Denying Compensation.

An employee is not in the course of employment when engaged in personal activity that is of no benefit to the employer. (See *Pacific Indem. Co. v. Industrial Acc. Com.* (1938) 27 C.A.2d 499, 503, 81 P.2d 572 [employee was injured while attending union meeting on premises with employer's permission]; *Robbins v. Yellow Cab Co.* (1948) 85 C.A.2d 811, 814, 193 P.2d 956 [employee injured when making voluntary trip to employer's office prior to working hours to collect employee-husband's paycheck; injury was not compensable, and tort action was proper]; *Arabian Amer. Oil Co. v. Industrial Acc. Com.* (1949) 94 C.A.2d 388, 392, 210 P.2d 732 [employee was injured while using car furnished by employer, but on pleasure jaunt to beach after working hours]; *Dalglish v. Holt* (1952) 108 C.A.2d 561, 563, 237 P.2d 553 [employee and employer were injured on pleasure trip in employer's car; evidence could support recovery in tort action]; *Osborn v. Work. Comp. App. Bd.* (1979) 93 C.A.3d 163, 168, 155 C.R. 748 [compensation was denied where employee was injured while performing tasks outside his job on day when construction site was closed and work was of no benefit to employer]; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §257 et seq.)

In *Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1952) 39 C.2d 512, 247 P.2d 697, a college student was employed as a dishwasher and helper in a mountain resort. During his free time he was allowed to go some 10 blocks away to the resort-owned pool to swim, and was injured there while diving. *Held*, award annulled. The Commission, Court of Appeal, and dissenting justice in the Supreme Court thought that, in view of his confined area of employment and limited free time, this recreational activity was practically the only one available, and was therefore contemplated as a part of his compensation, along with his pay, room, and board. However, the majority concluded that this loose theory could have no logical limits. His "permissive use of the recreational area beyond the employer's premises does not give rise to blanket protection under the compensation law. Rather, [his] swimming activities, unrelated to the employment, remote from his place of work and its risk, pursued as an off-duty personal diversion in the employee's free time, in an area beyond the dominion and control of his employer, and yielding neither advantage nor benefit to the employer, must be held to have been wholly without the compass of the compensation law." (39 C.2d 516.)

In *Fireman's Fund Indem. Co. v. Industrial Acc. Com.* (1952) 39 C.2d 529, 247 P.2d 707, E, a cook and housekeeper for an elderly woman, worked an 8-hour day but ate and slept on the premises. She customarily took a daily walk on her physician's advice, and on the day of the accident told her employer she was going. The latter replied: "Don't go far. You can go, but don't go far." *Held*, an injury on the walk was not compensable; she was engaged in "an

act of recreational diversion of her own free choice and when off-duty from her work." (39 C.2d 535.) The court rejected two theories of recovery: (a) That the employer "authorized" the act; the latter's statement was a mere cautionary response of a sick and lonely woman. (39 C.2d 533.) (b) That the employee in following her physician's orders was conditioning herself to better perform the duties of her employment; if that were true, any recreational activity would be compensable. (39 C.2d 534.)

In *Ralphs Grocery Co. v. Work. Comp. App. Bd.* (1997) 58 C.A.4th 647, 68 C.R.2d 161, the workers' compensation judge awarded death benefits to the surviving minor children of a laid-off meat cutter who died at home of a heart attack following a telephone call from petitioner employer ordering the employee back to work on a part-time basis and without benefits. The judge found the back-to-work phone call was so stressful that it triggered the fatal attack and that the phone call arose out of and occurred in the course of employment, although the employee had not worked at petitioner's grocery for 8 months. *Held*, order annulled. At the time of injury the employee was off duty, at home, conducting his own affairs, and not engaged in any special errand or activity for petitioner. Hence, the employment relationship was suspended, and the injury did not arise in the course of employment. (58 C.A.4th 652.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Los Angeles v. Work. Comp. App. Bd.* (2007) 157 C.A.4th 78, 68 C.R.3d 343, L, widow of city employee J, sought death benefits after J fell, struck his head, and died while attending a certified public accountant's (CPA) convention. J's position as a Principal Accountant II with the city did not require a CPA license, but the city paid a personal achievement bonus if its accountants were licensed and J, having been licensed for years, had received the bonus since beginning his employment. The city provided annual mandatory training and monthly seminars for its accountants, and although some of the training accrued credit toward CPA licensing, the city never reimbursed its accountants for outside classes toward a license. The workers' compensation judge (WCJ) found J's death to be work-related in that the city encouraged its accountants to maintain a CPA license through its salary bonus program without limitations on how or where the credits were obtained. In addition, J would not have been at the convention but for the work-related need to maintain his license. Alternatively, the judge reasoned that participation in continuing professional education was undertaken at the implied request and encouragement of the city and was a special requirement. The judge concluded that J's death was also work-related based on the special mission exception to the going-and-coming rule. The Board agreed, and denied reconsideration. *Held*, Board's decision reversed.

(a) *Commercial traveler doctrine is not applicable.* If the city had benefited from J's attendance at the convention, J might have been regarded as acting within the course of his employment during the entire period of his travel as he would have been on his employer's business. However, the evidence showed that the city did not require its accountants to have a CPA license and that the city provided any necessary training; the bonus for the license was simply a reward "for going above and beyond the requirements" of employment, and was afforded undue weight by the WCJ. Thus, traveling to attend the convention was neither expressly nor impliedly authorized by the employment contract, and no benefit accrued to the city. (157 C.A.4th 84.)

(b) *Not special mission.* The special mission exception to the going-and-coming rule (see text, §203), did not apply here, and *Dimmig v. Work. Comp. App. Bd.* (1972) 6 C.3d 860, 101 C.R. 105, 495 P.2d 433, text, §229 is distinguishable. *Dimmig* found that the employee's attendance at college was a special activity entirely reimbursable by the employer, that the employee's belief that a bachelor's degree was required for his continued employment was justified, and thus, that further education was undertaken at the request or invitation of the employer. Here, the city neither required that its accountants be licensed CPAs nor considered a license necessary for the job. The city did not encourage J to maintain his license, nor did it request or invite J to travel to the convention for educational purposes; hence, the trip was voluntary, personal, and not compensable. (157 C.A.4th 86.)



27 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

3. Personal Acts Not Related to Employment.

b. Exceptions.

1. Personal Acts Combined With Business.

2 *Witkin Sum. Cal. Law Work Comp* § 219

[§ 219] Personal Acts Combined With Business.

If the employee's activity has a dual purpose, i.e., it combines personal acts with the business of the employer, and the business is a substantial factor, the employee is considered in the course of his or her employment. (*Tingey v. Industrial Acc. Com.* (1943) 22 C.2d 636, 640, 140 P.2d 410 [business conference while eating lunch]; *Lockheed Aircraft Corp. v. Industrial Acc. Com.* (1946) 28 C.2d 756, 758, 172 P.2d 1 [employee, with duty to travel between employer's plants on approved routes and with authority to stop for lunch en route, inadvertently deviated from approved route while seeking eating place]; *Leonard Van Stelle v. Industrial Acc. Com.* (1963) 59 C.2d 836, 840, 31 C.R. 467, 382 P.2d 587, quoting the text [real estate salesperson was injured during search for restaurant while returning from property inspection trip for employer]; *Gagnebin v. Industrial Acc. Com.* (1934) 140 C.A. 80, 84, 34 P.2d 1052; *Employers' Liab. Assur. Corp. v. Industrial Acc. Com.* (1940) 37 C.A.2d 567, 569, 99 P.2d 1089 [housekeeper in her own room but "on call" was injured while mending her dress]; *Fenton v. Industrial Acc. Com.* (1941) 44 C.A.2d 379, 381, 112 P.2d 763.)

In *Phoenix Indem. Co. v. Industrial Acc. Com.* (1948) 31 C.2d 856, 193 P.2d 745, an award was made for the death of a flight instructor who, during working hours and with the permission of his employer, took his 12-year-old daughter on an "orientation ride." The Commission's decision was upheld on the theory that it was the practice of the employer to take children on these rides to interest them in future flight training. (31 C.2d 861.)

In *Bramall v. Work. Comp. App. Bd.* (1978) 78 C.A.3d 151, 144 C.R. 105, petitioner, a legal secretary, drove home at the end of a business day with two depositions in Spanish that she had to translate into English. She had followed this practice in the past, with her employer's approval, in order to have the uninterrupted concentration on the task not possible in the office. The Board denied compensation on the basis of her statement: "For my own convenience I bring the work home rather than stay at the office late so that I will not be bothered." *Held*, decision annulled; the dual purpose exception to the going and coming rule applied. The earlier "dominant purpose" test has given way to the "major factor" test and then to the "impliedly authorized" test, which governs here. (78 C.A.3d 156, 157, 158.) Her statement, fairly interpreted, was merely her way of saying that the decision was motivated by both personal and business concerns. (78 C.A.3d 159.) Unlike *Wilson v. Work. Comp. App. Bd.* (1976) 16 C.3d 181, 127 C.R. 313, 545 P.2d 225, *supra*, §202, where the evidence did not show any necessity for working at home, here, "the uncontradicted evidence shows that the work could not be properly performed in the after-hours environment of the office and that

translation work at home was the normal practice approved by the employer." (78 C.A.3d 160.)

Where the employee is a commercial traveler or other person with unlimited hours (see *supra*, §213), the fact that the employee was with a guest at the time of injury or death, even for immoral purposes, does not of itself negative the course of employment. (See *Wiseman v. Industrial Acc. Com.* (1956) 46 C.2d 570, 573, 297 P.2d 649, *infra*, §255; *State Employees' Retirement System v. Industrial Acc. Com.* (1950) 97 C.A.2d 380, 383, 217 P.2d 992 [game warden died on duty from carbon monoxide poisoning while sleeping with paramour in vehicle].)

Even where the employee's errand is wholly personal, if the employee completes it and returns to the place of employment to resume work, the employee reenters the course of employment. (See *McCarty v. Work. Comp. App. Bd.* (1974) 12 C.3d 677, 684, 117 C.R. 65, 527 P.2d 617, *infra*, §325.)

SUPPLEMENT: [This section is current through the latest supplement]

See 11 A.L.R.6th 351 [application of mutual benefit doctrine to workers' compensation cases].



28 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

3. Personal Acts Not Related to Employment.

b. Exceptions.

2. Efforts To Prevent Theft of Employer's Property.

2 Witkin Sum. Cal. Law Work Comp § 220

[§ 220] Efforts To Prevent Theft of Employer's Property.

In *Martinez v. Work. Comp. App. Bd.* (1976) 15 C.3d 982, 127 C.R. 150, 544 P.2d 1350, petitioner, a member of a church council, was a volunteer worker at a church fund-raising fiesta. His principal duty was to assist in the beer booth, but the council had chosen to do self-policing, and petitioner, having received reports of juvenile pilfering, accosted youths in possession of beer that he thought was stolen. He was severely beaten, and claimed compensation under the church's policy covering volunteer workers. *Held*, he was entitled to benefits. Emergency efforts to save the employer's property are within the course of employment even though the acts take place outside working hours. Also, the employee's judgment about the existence of an emergency should be accepted if the employee acted in good faith. (15 C.3d 986, 987.)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

3. Personal Acts Not Related to Employment.

b. Exceptions.

3. Human Response to Situation.

2 *Witkin Sum. Cal. Law Work Comp* § 221

[§ 221] Human Response to Situation.

Some acts, although not part of the required duties of the employee, are nevertheless normal, proper, and reasonably to be expected; hence, they are considered as taking place in the course of the employment. Typical examples are humane or friendly acts for the benefit of others. (See *Ocean Acc. & Guarantee Corp., Ltd. v. Industrial Acc. Com.* (1919) 180 C. 389, 392, 182 P. 35 [attempt to rescue persons in apparent danger on employer's premises]; *Los Angeles v. Industrial Acc. Com.* (1928) 89 C.A. 736, 739, 265 P. 362 [trip by election official to secure water for board member who had fainted].)

In *North Amer. Rockwell Corp. v. Work. Comp. App. Bd.* (1970) 9 C.A.3d 154, 87 C.R. 774, employees S, D, and K completed their shift and went to the company parking lot for their cars. D's car was stalled. K drove his car up, and S stood between the two cars attaching jumper cables to D's car. K's car suddenly lurched forward, injuring S. *Held*, award affirmed.

(a) Although the employee here was not himself entering or departing the lot but only assisting a coemployee to depart, this was a normal, expectable human act. "[A] contract which contemplates the use of a parking area on the premises where employees and automobiles gather must necessarily envision that on occasion an automobile will not function and the employees in the vicinity will go to the aid of the one who has trouble." (9 C.A.3d 159.)

(b) As to the requirement of mutual benefit to employee and employer, "[w]hile this rationale is still reflected in the decisions it is apparent from an examination of the cases ... that benefit to the employer was presumed. ... [I]f the element of 'benefit' retains any validity today, the clearing of employer's parking lot so as to preclude the necessity of its surveillance of left over cars and the probability of increased goodwill among the several employees would be sufficient." (9 C.A.3d 160.)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
3. Personal Acts Not Related to Employment.
b. Exceptions.
4. Personal Acts of Comfort.

2 Witkin Sum. Cal. Law Work Comp § 222

[§ 222] Personal Acts of Comfort.

The "personal acts" exception extends to those necessary for the comfort, convenience, and welfare of the employee. Thus, an occasional rest, a drink of water, smoking, simple treatment of a minor ailment, or a necessary personal errand will not take the employee out of the course of the employment. (*Whiting-Mead Commercial Co. v. Industrial Acc. Com.* (1918) 178 C. 505, 507, 173 P. 1105; *Leffert v. Industrial Acc. Com.* (1934) 219 C. 710, 714, 28 P.2d 911 [employee attempting to save overcoat in burning building]; *Employers' Liab. Assur. Corp. v. Industrial Acc. Com.* (1940) 37 C.A.2d 567, 569, 99 P.2d 1089 [housekeeper fell from stool while mending dress]; *Pacific Indem. Co. v. Industrial Acc. Com.* (1945) 26 C.2d 509, 513, 159 P.2d 625 [grape picker drowned in irrigation reservoir commonly used for washing after work]; *Toohey v. Work. Comp. App. Bd.* (1973) 32 C.A.3d 98, 101, 107 C.R. 773 [employee left plant during "beer break" to get his lunch from his car, was struck by hit-and-run driver; though technically in violation of work rules, acts were tolerated by management]; *Lizama v. Work. Comp. App. Bd.* (1974) 40 C.A.3d 363, 369, 115 C.R. 267, citing the text [employee was injured using employer's saw with permission, after punching out, to construct "small bench" to sit on while eating lunch]; see 1 Herlick 6th, §10.12; 80 A.L.R.5th 417 [injuries while using workplace restroom].)

In *Satchell v. Industrial Acc. Com.* (1949) 94 C.A.2d 473, 210 P.2d 867, the employers, operating a dry-cleaning establishment, knew that their spotters regularly played cards and drank whiskey on Friday afternoons, and also knew that cleaning fluid was kept in empty whiskey bottles. *Held*, the death of an employee who mistook a bottle of carbon tetrachloride for whiskey was compensable. (94 C.A.2d 477.) (See *Elliott v. Industrial Acc. Com.* (1942) 21 C.2d 281, 282, 131 P.2d 521 [employee, to alleviate cough, drank from bottle labeled "wine," which contained poison].)

In *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1967) 67 C.2d 925, 64 C.R. 323, 434 P.2d 619, C was a mechanic employed by a canal company. Employees occasionally swam in a nearby canal to clean up and cool off. On a very hot day C and other employees went for a swim on their work break, and C was injured in a dive. *Held*, the injury was compensable under the liberal approach of *Western Greyhound Lines v. Industrial Acc. Com.* (1964) 225 C.A.2d 517, 519, 37 C.R. 580, *infra*, §223, and other cases. "These holdings are in accord with the 'personal comfort' doctrine, under which the course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee." (67 C.2d

928.) (See *Mason v. Lake Dolores Group* (2004) 117 C.A.4th 822, 838, 11 C.R.3d 914, supra, §194 [employee's off-duty use of water slide at employer's water park did not come under personal comfort doctrine; although employee used slide for relief from hot weather, activity was not work-related, was contrary to employer's policy, and thus, was not reasonably contemplated by employment].)

In *Rankin v. Work. Comp. App. Bd.* (1971) 17 C.A.3d 857, 95 C.R. 275, a county employee, authorized to make up prior leaves by not more than a half hour in a given day, worked through the lunch hour. To obtain food she crossed the street to a lunch counter, and was assaulted and robbed on her way back. *Held*, order denying award annulled; the injury was compensable, for she intended to work on county business throughout the lunch hour. (17 C.A.3d 861.)

In *Dixon v. Ford Motor Co.* (1975) 53 C.A.3d 499, 125 C.R. 872, the employee received first-aid treatment at work from two coemployees--a nurse and an orderly, and died the same day. Plaintiff widow sued defendant employer on the theory that the deceased was not performing the duties of his employment at the time of the alleged negligent treatment. *Held*, summary judgment for defendant affirmed. Under the rule of liberal construction in favor of compensation (see supra, §§6, 7), this was one of the activities incidental to the rendition of service and for the mutual benefit and convenience of the employer and employee. (53 C.A.3d 505.)

West's Key Number Digest, Workers' Compensation k.652 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



31 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
3. Personal Acts Not Related to Employment.
b. Exceptions.
5. Coffee and Lunch Breaks.

2 Witkin Sum. Cal. Law Work Comp § 223

[§ 223] Coffee and Lunch Breaks.

(1) *In General.* Injuries occurring during coffee and lunch breaks are compensable if the employee was being compensated during the time involved and there is some substantial connection to the employment. (*Mission Ins. Co. v. Work. Comp. App. Bd.* (1978) 84 C.A.3d 50, 53, 57, 148 C.R. 292.) (See C.E.B., 1 Workers' Compensation Practice 4th, §2.22; 1 Herlick 6th, §10.12.)

(2) *Coffee Break.* In *Western Greyhound Lines v. Industrial Acc. Com.* (1964) 225 C.A.2d 517, 37 C.R. 580, the employee, a female bus driver, had a 41-minute layover at 1:45 a.m. before a new run. She left the bus station to have coffee in a restaurant located about half a block away, and was there assaulted by a man. The employer contended that the act was not compensable because, although the bus station restaurant closed at midnight, coffee was available from a vending machine, and there was a restroom with chairs in the terminal. It appeared, however, that the employer was aware of the custom of drivers going to the restaurant for better coffee and a more relaxing atmosphere. *Held*, award affirmed. (225 C.A.2d 520.)

(3) *Uncompensated Lunch Break.* An injury on the employer's premises during an uncompensated but regular lunch hour is regarded as incidental to the employment and is compensable. (*Gutierrez v. Petoseed Co.* (1980) 103 C.A.3d 766, 769, 163 C.R. 313.)

An injury off the employer's premises during an uncompensated lunch hour is not compensable. (*Mission Ins. Co. v. Work. Comp. App. Bd.*, *supra* [employee drove to restaurant in her own automobile on her own time and was injured while returning to the employer's premises].)

In *Los Angeles v. Work. Comp. App. Bd.* (Swift) (1983) 145 C.A.3d 418, 193 C.R. 374, the employee had a half-hour uncompensated lunch break, which she usually extended to an hour by working through two compensated coffee breaks. She was injured while eating lunch at a restaurant, and the Board, relying on *Rankin v. Work. Comp. App. Bd.* (1971) 17 C.A.3d 857, 95 C.R. 275, *supra*, §222, awarded compensation. *Held*, award annulled. *Mission Ins. Co. v. Work. Comp. App. Bd.* is controlling. In *Rankin*, the employee was injured during the period in which she was working; here, she was injured during her off-duty lunch hour away from the employer's premises under circumstances unrelated

to the employment. The "course of employment" requirement is not met where the employer has merely allowed an employee to rearrange work time and off-duty time for the employee's convenience or benefit. (145 C.A.3d 422, 423.)

(3) *Compensated Lunch Break*. In *Duncan v. Work. Comp. App. Bd.* (1983) 150 C.A.3d 117, 197 C.R. 474, petitioner, manager of a Greyhound office, was paid for an 8 1/2-hour workday, during which she was entitled to two short breaks and a half-hour break for lunch. She seldom had time for the short breaks and only occasionally took time off for lunch. On the day of the accident, she had worked under extreme pressure from 8:30 a.m. until 12:45 a.m., and felt the need of "fresh air." She left to go to a restaurant a few blocks away, and was injured in a fall caused by a street defect. The Board denied compensation on the assumption that her lunch break was "uncompensated." *Held*, order annulled. It was unnecessary to determine whether the case came under the personal comfort exception, for under the facts, she was being paid at the time of the injury. Greyhound permitted about 1 hour a day of break time; petitioner usually worked through all three break periods, and there was no evidence that Greyhound disapproved of this practice, or that any company practice could have advised petitioner that her salary did not cover the break periods. "Accordingly, and particularly in view of the liberal policy of the workers' compensation law, it is a fair inference that her salary was apportioned equally over the entire eight and one-half hour work day." (150 C.A.3d 121.) (See *McFadden v. Work. Comp. App. Bd.* (1988) 203 C.A.3d 279, 281, 249 C.R. 778 [salaried employee injured while returning to work after unscheduled lunch with supervisor and coemployee; following *Duncan*].)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
4. Recreational Activity Related to Employment.
a. Judicial Rule.

2 *Witkin Sum. Cal. Law Work Comp* § 224

[§ 224] Judicial Rule.

In *Winter v. Industrial Acc. Com.* (1954) 129 C.A.2d 174, 177, 276 P.2d 689, regularly employed caddies of a golf club were allowed to play on Mondays when members were usually absent. Petitioner, a caddy, was struck with a ball while playing. The court, reversing the Commission, held the injury compensable on the following reasoning: (a) The activity was permitted and probably encouraged by the employer because the custom had prevailed for some time. (b) A New York case reached a similar result on evidence that the employer encouraged play as tending to make caddies more efficient; but, where the permitted activity is on the premises, as here, it is not necessary to show a direct benefit to the employer. (129 C.A.2d 176.) (See *McCarty v. Work. Comp. App. Bd.* (1974) 12 C.3d 677, 682, 683, 117 C.R. 65, 527 P.2d 617, *infra*, §325 [following *Winter*]; 1 Herlick 6th, §10.11; 47 A.L.R.3d 566 [injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment]; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §§264, 267, 268.)

The case is much stronger where the recreational activity is considered part of the compensation of the employee. Thus, in *Reinert v. Industrial Acc. Com.* (1956) 46 C.2d 349, 294 P.2d 713, petitioner was employed as a Girl Scout counselor in a summer camp. Her duties included riding with younger girls, and with permission she could herself ride in her free time. She was advised at the time of employment that, despite the modest wage, she would be compensated to some extent by the recreational facilities available. *Held*, an injury received on a ride by herself was compensable. Following *Winter* and distinguishing *Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1952) 39 C.2d 512, 247 P.2d 697, *supra*, §218, the court concluded that recreational horseback riding was considered by both employer and employee as part of the compensation. (46 C.2d 354, 355, 356.) In addition, recreational activity may be related to the employment even though it takes place off the employer's premises. (46 C.2d 356.)

Rausch v. Work. Comp. App. Bd. (1969) 274 C.A.2d 357, 79 C.R. 148, is another liberal application. Petitioner, a counselor at a summer camp, was injured while horseback riding at a nearby stable on her free time. The written contract of employment was silent on horseback riding, and the Board thought that this fact made the *Reinert* holding inapplicable. *Held*, order denying award annulled. Horseback riding was a risk of employment in the camp, for petitioner was required to participate in riding with her campers as part of the formal program, the stables were the closest riding facility, and she had to have permission to go riding even on her day off. (274 C.A.2d 363.)

The general rule and its applications were summarized in *United Parcel Service v. Industrial Acc. Com.* (1959) 172 C.A.2d 73, 342 P.2d 41, as follows: "An injury sustained in an athletic contest is compensable as incidental to employment and within the course of employment only when it occurs on the employer's premises during a lunch or recreation period as a regular incident of employment or in cases where the employer has expressly or impliedly required participation or attendance at the function or where the employer derives a substantial direct benefit from the employee's attendance at the function or his engagement in an athletic activity, beyond the intangible value of improvement in the employee's health or morals that is common to all kinds of recreation and social life, or where the activity is contemplated by the contract of employment and the opportunity to engage in it is a part of the consideration to the employee for entering into the contract." (172 C.A.2d 75.) The activity here was outside the rule. The employer, through its personnel department, invited employees to an annual company picnic, on Sunday; attendance was unpaid and optional; the picnic was held off the employer's premises, and transportation was not provided; no advertising, by uniforms or other means, was involved. Hence the employee, injured in a foot race, was not entitled to compensation; the employer received no benefit other than that incidental to any recreation benefiting an employee. (172 C.A.2d 76.)

In *Los Angeles v. Work. Comp. App. Bd. (Noetzel)* (1979) 91 C.A.3d 759, 154 C.R. 379, the employee was a city police officer, and the injury occurred when he was at home and off duty, exercising with his own weight-lifting equipment in preparation for a physical fitness test to be given by the police department. The test was mandatory for a "rating" report, and failure to pass it would affect his advancement. However, the department, while allowing the exercise off duty, requested that it be done at a police department facility. *Held*, the injury was not compensable. Hence, that activity was personal in the absence of some connection with employment other than hoped-for personal improvement. "Although the police department required [him] to take a physical agility test, there was no requirement that he prepare for it in any particular way or at all. The activity was not on the employer's premises, or under the employer's control, nor was there any benefit to the employer except to the extent that this particular individual might improve his proficiency." (91 C.A.3d 764.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

4. Recreational Activity Related to Employment.

b. Statutory Rule.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 225

[§ 225] In General.

In 1978, the Legislature enacted a restricted rule as part of the conditions for compensation under *Lab.C. 3600(a)* (see *supra*, §193). Thus, conditions for compensation will concur when the injury does not arise out of voluntary participation in an off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. (*Lab.C. 3600(a)(9)*.) (On required notice concerning statute, see *Lab.C. 3600(a)(9)*; 8 *Cal. Code Reg.* §9880 et seq.)

In *Ezzy v. Work. Comp. App. Bd.* (1983) 146 C.A.3d 252, 194 C.R. 90, the court, rejecting a Board decision denying compensation, gave the statute its first definitive construction. Petitioner, a law clerk in a law firm, was injured when playing in a firm-sponsored softball game. She testified that she was "drafted" to join the team, but the workers' compensation judge and Board concluded that her participation, while encouraged, was neither a requirement nor a reasonable expectancy of the job. *Held*, decision annulled.

(a) The statutory provision was intended to replace "the general foreseeability test" with that of "reasonable expectancy"; and two elements are involved in the new test: "(1) Whether the employee subjectively believes his or her participation in an activity is expected by the employer, and (2) whether that belief is objectively reasonable." (146 C.A.3d 260.)

(b) The following facts establish reasonable expectancy in this case: (1) Petitioner, a part-time law clerk still in law school, was more than usually vulnerable to pressure or suggestion, and was urged to play by the team coach; (2) a substantial benefit to the firm was generated by virtue of improved office cooperation and morale; (3) the law firm paid for all equipment and post-game refreshments, and sponsored an awards banquet. (146 C.A.3d 263.) In addition, the law firm failed to post or read the required notice. "While not a waiver of the subdivision's provisions, an employer's failure to post the required notice makes any action by the employer which tends to encourage participation in athletic events appear more coercive in effect." (146 C.A.3d 264.) (See 44 A.L.R.5th 569 [law enforcement officers' recovery for injury during exercise or physical recreation activities].) (See *Mason v. Lake Dolores Group* (2004) 117 C.A.4th 822, 835, 11 C.R.3d 914, *supra*, §194 [employee's negligence action was proper where his off-duty use of water slide at employer's

water park was neither expected nor permitted activity].)

SUPPLEMENT: [This section is current through the latest supplement]



34 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
4. Recreational Activity Related to Employment.
b. Statutory Rule.
2. Compensation Allowed.

2 Witkin Sum. Cal. Law Work Comp § 226

[§ 226] Compensation Allowed.

In *Gonzalez v. Work. Comp. App. Bd.* (1986) 186 C.A.3d 514, 230 C.R. 649, a sheriff's detective was injured during a department softball game in which he participated with the consent of his supervisor. At the time, the detective was on standby duty. He was required to be ready for duty, available for contact by telephone or radio and in close proximity to his county vehicle; he received 10% of regular salary if not called and his regularly hourly wage if called. *Held*, the injury was compensable. The statute that restricts compensation for injuries suffered during recreational activities applies by its terms only to "off-duty" activities. The facts show that defendant was not off duty but was in "a light or limited duty status" at the time of the injury, and those same facts "cause us to conclude as a matter of law that Applicant's injury arose out of and in the course of his employment." (186 C.A.3d 521.)

In *Smith v. Work. Comp. App. Bd.* (1987) 191 C.A.3d 127, 134, 236 C.R. 248, a math teacher was killed in a windsurfing accident at an end-of-the-year math club picnic. The decedent met the subjective belief prong of the test in *Ezzy v. Work. Comp. App. Bd.* (1983) 146 C.A.3d 252, 194 C.R. 90, *supra*, §225, but whether his belief was objectively reasonable presented an "extremely close" question. The court, invoking the liberal construction rule (*supra*, §§6, 7), concluded that there should be compensation. (191 C.A.3d 141, 142.)

In *Kidwell v. Work. Comp. App. Bd.* (1995) 33 C.A.4th 1130, 39 C.R.2d 540, a California Highway Patrol officer injured herself at home, off duty, while practicing the technique for the standing long jump, a required element of an annual, mandatory physical fitness test. Successfully passing the test results in eligibility for increased salary differential, promotion, and special overtime programs. *Held*, the injury was compensable. Both prongs of the *Ezzy* test were met. The facts affirmatively support a finding that practicing for the standing long jump was a reasonable expectancy of employment under *Lab.C. 3600(a)(9)*. Petitioner was neither exercising nor working out at the time of her injury. She was *practicing* the standing long jump solely to better her technique in hopes of ultimately passing that portion of the required fitness test, and practicing was the only way to perfect the technique of jumping. Further, petitioner's belief that practicing the jump was job-related was objectively reasonable. (33 C.A.4th 1138, 1139.) (See *Childers v. Shasta Livestock Auction Yard* (1987) 190 C.A.3d 792, 816, 235 C.R. 641, *supra*, §209 [employee with no memory of accident; subjective test not applied; *Ezzy* distinguished]; *Wilson v. Work. Comp. App. Bd.* (1987) 196 C.A.3d 902, 904, 239 C.R. 719 [police officer injured running while off duty to keep in shape to pass tests required to

remain in special emergency reaction team; *Ezzy* test satisfied].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Tomlin v. Work. Comp. App. Bd.* (2008) 162 C.A.4th 1423, 1431, 76 C.R.3d 672 [police department SWAT team member's injury was compensable where it occurred as he was running while on vacation but was nevertheless considered in training for employer-mandated fitness test].



35 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

B. Injury in Course of Employment.

4. Recreational Activity Related to Employment.

b. Statutory Rule.

3. Compensation Denied.

2 *Witkin Sum. Cal. Law Work Comp* § 227

[§ 227] Compensation Denied.

Meyer v. Work. Comp. App. Bd. (1984) 157 C.A.3d 1036, 204 C.R. 74, applying the test of *Ezzy v. Work. Comp. App. Bd.* (1983) 146 C.A.3d 252, 194 C.R. 90, supra, §225, held the injury noncompensable. Petitioner, a car salesman, was invited to spend a weekend at a resort area with his supervisor and coworkers, and was injured in a collision while driving to the place. Although petitioner sought to characterize the meeting as a "pep rally" for salesmen, which he "felt pressured to attend," this was insufficient to meet the objective element of the test: Because the employer "was minimally involved in the weekend outing, the potential benefit to it was marginal, and the pressure exerted was almost nonexistent," his perception was objectively unreasonable. The trip, even though initiated by a supervisor, "was not a reasonable expectancy of the employment." (157 C.A.3d 1043.)

Other cases denying compensation include the following:

Hughes Aircraft Co. v. Work. Comp. App. Bd. (1983) 149 C.A.3d 571, 574, 196 C.R. 904 [employer-subsidized Christmas party].

Aetna Cas. & Surety Co. v. Work. Comp. App. Bd. (1986) 187 C.A.3d 922, 930, 232 C.R. 257 [unusual after work gathering with beer not provided by employer].

Todd v. Work. Comp. App. Bd. (1988) 198 C.A.3d 757, 759, 243 C.R. 925 [employee injured during on-site basketball game during uncompensated lunch break].

Taylor v. Work. Comp. App. Bd. (1988) 199 C.A.3d 211, 215, 244 C.R. 643 [police officer injured while playing basketball in city gymnasium; officer's subjective belief about employer's expectation was not objectively reasonable].

Tensfeldt v. Work. Comp. App. Bd. (1998) 66 C.A.4th 116, 126, 77 C.R.2d 691 [no evidence that water department employee reasonably believed he was expected to participate in basketball games on Friday afternoons during workday with other employees, or that participation was expressly or impliedly required by employer].

SUPPLEMENT: [This section is current through the latest supplement]

Other cases denying compensation:

Stockton v. Work. Comp. App. Bd. (2006) 135 C.A.4th 1513, 1524, 38 C.R.3d 474 [off-duty police officer injured in pickup basketball game was not entitled to benefits; officer failed to show that he subjectively believed his employer expected him to engage in occasional game of basketball to stay in shape].



36 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
5. Promotional Examination.

2 Witkin Sum. Cal. Law Work Comp § 228

[§ 228] Promotional Examination.

In *Department of Water & Power v. Work. Comp. App. Bd.* (1967) 252 C.A.2d 744, 60 C.R. 829, A, employed by the city of Los Angeles Water Department as a meter reader, sought advancement to the position of cable splicer helper. He passed the written examination, and then, on his own time and at his own expense, went to the Police Academy (city property) for an agility test conducted by the city Civil Service Commission. He was injured during this test. *Held*, the injury was compensable.

The city objected that the tests were given by another department, not A's employer; that they were not held on the premises of the employer; and that they were open to all qualified applicants, not just to employees; in brief, that A's employment did not expose him to this risk. (252 C.A.2d 746.) The court, however, followed the general principle that, even though the injury is sustained outside regular working hours, it is compensable if the activity is in furtherance of the employer's business. (252 C.A.2d 746.) It was; public as well as private agencies encourage employees to seek advancement through qualifying examinations. Nor was it significant that the premises were not those of A's own department; they were premises of the city, which was the controlling entity in all the activities involved and all the departments involved. (252 C.A.2d 747.) (See 8 A.L.R.5th 798 [compensability of injury during tryout, employment test, or similar activity designed to determine employability].)

SUPPLEMENT: [This section is current through the latest supplement]



37 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
B. Injury in Course of Employment.
6. Educational Program.

2 Witkin Sum. Cal. Law Work Comp § 229

[§ 229] Educational Program.

In *Dimmig v. Work. Comp. App. Bd.* (1972) 6 C.3d 860, 101 C.R. 105, 495 P.2d 433, M Corp. hired D as a contracts administrator. The company had a policy of encouraging employees to further their education and increase their job qualifications, and also a financial assistance plan for these efforts. Reasonably believing that the company expected him to go on with his education, D enrolled in night classes at a local college to obtain an A.B. degree in economics. The company plan called for full reimbursement of the cost of tuition and books for courses directly related to the job, and 50% reimbursement where the course was not directly related but was required for the academic degree sought. Returning home from a class in money and banking, D was killed in an automobile accident, and the Board denied death benefits. *Held*, order annulled.

The Board's theory, that the benefit to the employer was not sufficiently direct, was unsound. The financial reimbursement indicated that M Corp. considered this activity to be a means of improving the employee's ability to perform his assigned tasks. "This kind of direct benefit is distinguishable from the indirect benefit received by the employer who provides a vacation or health plan for his employees. Such benefits are not directly related to the employee's actual job function, as is the case with the benefit involved here, but only serve to indirectly aid the employee's ability to perform by keeping him healthy and, hopefully, happy. The benefit, to the employer herein, coupled with the fact that the reimbursement was found to be a part of the employee's compensation, compels the conclusion that Dimmig's class attendance was contemplated by the contract of employment and was thus within the course of his employment." (6 C.3d 866.)

Dimmig was distinguished, and an award annulled, in *C.L. Pharris Sand & Gravel v. Work. Comp. App. Bd.* (1982) 138 C.A.3d 584, 187 C.R. 899. The employee's union operated an apprenticeship program, requiring attendance by all members at training classes. The employer's collective bargaining agreement with the union called for payment to the union of 4 cents per hour worked to match the union's contribution to funding of the program. The employee, after attending a class, was injured in an automobile accident while driving home. *Held*, the injury was not compensable.

(a) *Dimmig* set up a three-prong test: "(1) whether the employee was engaged in a special activity extraordinary in relation to his routine duties; (2) whether the activity was within the course of the employment; and (3) whether the activity was undertaken at the request or invitation of the employer." (138 C.A.3d 590.)

(b) Attendance at the classes was not at the request or invitation of the employer; it was at the direction of the union as a condition to union membership. (*138 C.A.3d 590.*)

(c) The employer derived a benefit from the employee's learning experience and ability, and attending classes was within the course of employment (*138 C.A.3d 590, 592*); but the going and coming rule applied to the trip to and from classes. "By virtue of the going and coming rule the risks of the ordinary commute are left to coverage by automobile insurance, and the applicant's travel to and from apprenticeship classes, required whether or not he was employed, was of no greater benefit to employer than his traveling to or from work to perform his principal duties. It would be anomalous to hold that an employee injured while traveling home from an apprentice class is, on account of the benefit to the employer, entitled to workers' compensation benefits, whereas if he were injured while traveling to or from work for the performance of the principal duties of his employment, the injury would be noncompensable under the going and coming rule." (*138 C.A.3d 593.*)

(d) The special errand exception (*supra*, §203) depends on a request or invitation to the employee to embark on the errand or mission, and there was no request or invitation here. (*138 C.A.3d 594.*)

SUPPLEMENT: [This section is current through the latest supplement]

See *Los Angeles v. Work. Comp. App. Bd. (2007) 157 C.A.4th 78, 86, 68 C.R.3d 343, Supp., supra*, §218 [city employee's death from trip and fall while attending out of state convention for certified public accountants was not compensable where attendance at convention was for employee's personal self-improvement and was neither required nor encouraged by employer; distinguishing *Dimmig v. Work. Comp. App. Bd. (1972) 6 C.3d 860, 101 C.R. 105, 495 P.2d 433, text, p. 822*].



38 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

1. In General.

a. Zone of Danger.

2 *Witkin Sum. Cal. Law Work Comp* § 230

[§ 230] Zone of Danger.

(1) *Earlier Theory: Causal Connection.* *Lab.C. 3600(a)* requires that the injury "arise out of and in the course of the employment," and adds the express condition that it be "proximately caused by the employment." (*Lab.C. 3600(a)(3).*) The early cases tended to regard the "arising out of employment" requirement as one of *causation*, and from this point of view, the specific condition added nothing to the general formula. In simple terms, even though the employee is engaged in performing assigned duties and therefore is in the course of his or her employment, compensation is not awarded unless it further appears that the injury was causally connected with the work. (See *Kimbol v. Industrial Acc. Com.* (1916) 173 C. 351, 353, 160 P. 150 [injury must be natural incident of work and employment must be contributing proximate cause]; C.E.B., 1 *Workers' Compensation Practice* 4th, §2.33; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §236 et seq.)

Later cases employing the causation terminology justified a liberal approach by explaining that the doctrine of proximate cause in compensation cases is not as narrow as that in tort cases. (See *Pacific Indem. Co. v. Industrial Acc. Com.* (1948) 86 C.A.2d 726, 729, 731, 195 P.2d 919 [compensation was proper for employee injured from explosion of chemicals illegally stored in plant across street; it was sufficient that her work brought her "within the zone of special danger" and injury need not be foreseeable or peculiar to employment].)

(2) *Contemporary Theory: Position of Danger.* The gradual liberalization of the test of "arising out of the employment" has resulted in cases discarding most of the rules associated with the proximate cause doctrine, and to interpret the causation element in the broadest sense. Thus, that element is satisfied where the employee's work brings the employee into a position of danger at the time and place of the accident. It is not essential that the risk be foreseeable, nor that it be one peculiar to the employment and not one to which the general public is also exposed. (*Employers Mut. Liab. Ins. Co. v. Industrial Acc. Com.* (1953) 41 C.2d 676, 679, 263 P.2d 4 ["the injury need not be of a kind anticipated by the employer nor peculiar to the employment in the sense that it would not have occurred elsewhere"]; *Madin v. Industrial Acc. Com.* (1956) 46 C.2d 90, 92, 292 P.2d 892, *infra*, §233; *California Comp. & Fire Co. v. Work. Comp. App. Bd.* (1968) 68 C.2d 157, 160, 65 C.R. 155, 436 P.2d 67, *infra*, §234; *McCarty v. Work. Comp. App. Bd.* (1974) 12 C.3d 677, 681, 117 C.R. 65, 527 P.2d 617, *infra*, §325 ["If the proximate cause is of industrial origin, the time and place of injury or death even if foreign to the premises does not serve to nullify recovery"]; *Industrial Indem. Co. v. Industrial Acc. Com.* (1950) 95 C.A.2d 804, 810, 214 P.2d 41, *infra*, §233; *Truck Ins. Exchange*

v. Industrial Acc. Com. (1957) 147 C.A.2d 460, 461, 305 P.2d 55; *Laines v. Work. Comp. App. Bd.* (1975) 48 C.A.3d 872, 879, 122 C.R. 139 [second injury suffered while en route to physician's office for treatment of industrial injury]; *Nash v. Work. Comp. App. Bd.* (1994) 24 C.A.4th 1793, 1809, 30 C.R.2d 454 [causation requirement is met if connection between work and injury is contributing cause of injury].) (See Cal. Civil Practice, 1 Workers' Compensation, §1:47 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §2.35; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §239; 14 *A.L.R.5th* 1 [determining causation of carpal tunnel syndrome].)

West's Key Number Digest, Workers' Compensation k.607 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Contemporary Theory: Position of Danger.* See 13 *A.L.R.6th* 209 [workers' compensation for physical injury or illness from nonsudden mental stimuli (e.g., stress)]; 39 *A.L.R.6th* 445 [workers' compensation for physical injury or illness from nonsudden mental stimuli--compensability under particular circumstances].



39 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

1. In General.

b. Burden of Proof.

2 *Witkin Sum. Cal. Law Work Comp* § 231

[§ 231] Burden of Proof.

The burden of proof on the issue of causation is on the applicant. (See *Lab.C.* 3202.5; *supra*, §6.) However, it is enough to show the reasonable probability of industrial causation.

In *McAllister v. Work. Comp. App. Bd.* (1968) 69 C.2d 408, 71 C.R. 697, 445 P.2d 313, decedent, a firefighter for 32 years, died of lung cancer. The Board denied a death benefit on the ground that death did not arise out of the employment. *Held*, order annulled.

(a) The Board thought that the petitioner had to produce detailed and "convincing" evidence of pollution in smoke inhaled as the cause of decedent's lung cancer. This position is unsound. Judicial notice can be taken of the scientific fact that smoke contains incompletely oxidized materials, and the fact that firefighters are likely to inhale smoke. (69 C.2d 414.) Moreover, petitioner produced evidence of coughing spells, together with expert evidence that smoke contains carcinogens. (69 C.2d 412.)

(b) The city's view that decedent's history as a smoker should be considered is rejected. Even if it contributed, it is enough that the employment be a contributing cause of the injury or death. (69 C.2d 418.) This does not mean that all lung cancer of firefighters is compensable; here, the city offered no evidence, and the showing made by petitioner indicated the probability of industrial death. (69 C.2d 419.)

Lundberg v. Work. Comp. App. Bd. (1968) 69 C.2d 436, 71 C.R. 684, 445 P.2d 300, takes a similar approach. Petitioner, a carpenter, developed back pain in 1967, which turned out to be a ruptured disc. He had strained his back in 1949 but had fully recovered. The two physicians who furnished reports did not state the cause of the injury: One gave no opinion, the other thought there was an equal possibility of industrial and nonindustrial cause. The Board concluded that petitioner had not met his burden of proof. *Held*, order annulled. The evidence showed substantial lifting work over a long period of time, pain symptomatic of a ruptured disc, and no evidence of other injury or preexisting back injury. The plain inference was that lifting in the course of employment was at least a contributing factor. And, with no conflicting evidence, the Board must follow the policy of liberal construction, and find industrial causation. (69 C.2d 439.) If the Board has doubts, it can resolve them by directing the taking of additional evidence. (69 C.2d 440.) (See *Turner v. Work. Comp. App. Bd.* (1974) 42 C.A.3d 1036, 1042, 117 C.R. 358 [following *McAllister* and *Lundberg*];

Nash v. Work. Comp. App. Bd. (1994) 24 C.A.4th 1793, 1810, 30 C.R.2d 454 [applicant had burden of proving industrial causation by reasonable probability rather than scientific certainty; citing *McAllister*.] (See Cal. Civil Practice, 1 Workers' Compensation, §1:47.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

1. In General.

c. Death From Unknown Cause.

2 Witkin Sum. Cal. Law Work Comp § 232

[§ 232] Death From Unknown Cause.

When the cause of an employee's death is unexplained, reasonable doubts are resolved in favor of the applicant. Thus, in *Clemmens v. Work. Comp. App. Bd.* (1968) 261 C.A.2d 1, 68 C.R. 804, decedent, an electrical engineer employed to examine control devices, was found lying dead near a high temperature furnace he had gone to inspect. There were no witnesses to the death. The coroner and physicians were in disagreement, their opinions suggesting diabetes, heart attack, and electrocution. The referee found that death was from "cause or causes which have not been determined." The Board adopted his reasons and denied compensation. *Held*, order annulled.

(a) Where the character of the harm is obviously work-related, some courts indulge a presumption or inference that it arose out of the employment. Examples are: a night watchman dead from a gunshot wound; an employee repairing his employer's car found dead enveloped in carbon monoxide. (261 C.A.2d 5.)

(b) Here, the death was neither obviously work-related nor obviously personal, so no inference of this kind was possible. However, the Board, instead of weighing the conflicting medical evidence, imposed an impossible burden of proof on petitioner. Hence, the matter was remanded to the Board to weigh the evidence and make a finding on the cause of death, resolving all reasonable doubts in favor of compensability. (261 C.A.2d 8.) (See *Fontno v. Work. Comp. App. Bd.* (1969) 273 C.A.2d 684, 692, 78 C.R. 291 [employee was killed when he had heart attack and drove car over embankment; question whether attack was based on prior condition or caused by acute mental distress over employment problems was resolved as in *Clemmens*]; 47 A.L.R.5th 801 [presumption or inference that employee's accidental death while working in manufacturing or processing arose out of and in course of employment].)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

2. Exposure to Particular Danger.

a. Risks of Street or Premises.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 233

[§ 233] In General.

(1) *Cases Denying Compensation.* In *Enterprise Foundry Co. v. Industrial Acc. Com.* (1929) 206 C. 562, 275 P. 432, the foreman of a plant running an "open shop" during a strike was killed, apparently by strikers, while going to work. *Held*, the injury was not compensable in the absence of evidence showing the existence of an industrial war or unusual danger created by the employment. (206 C. 566.) (See *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com.* (1933) 134 C.A. 131, 133, 25 P.2d 22 [injury was attributable to "risk of the street" where orange picker chose to wait near roadway for delivery of boxes before starting work and was struck by car]; *Associated Indem. Corp. v. Industrial Acc. Com.* (1941) 43 C.A.2d 292, 294, 110 P.2d 676 [ranch laborer was accidentally struck by hunter's bullet; no special risk had been created by employment].)

(2) *Cases Allowing Compensation.* In earlier cases, if the court found that the employment exposed the employee to some particular danger in the place the employee was required to be, the award was upheld. (See *General Acc., Fire & Life Assur. Corp., Ltd. v. Industrial Acc. Com.* (1921) 186 C. 653, 656, 200 P. 419 [injury resulting from shooting by employer in defense of his property]; *Frigidaire Corp. v. Industrial Acc. Com.* (1929) 103 C.A. 27, 28, 283 P. 974 [deceased was employed to travel through state on business and was killed while standing on railway platform by stray bullet fired by police officer at fleeing criminal].)

In *Zolkover v. Industrial Acc. Com.* (1939) 13 C.2d 584, 91 P.2d 106, the employee, on an errand for his employer to another store, attempted to save the proprietor from attack by a man with a knife, and was stabbed. He pursued and captured the assailant and was again stabbed. *Held*, both injuries were compensable; they were both reasonably viewed as part of a single continuing assault. (13 C.2d 586.)

In *Industrial Indem. Co. v. Industrial Acc. Com.* (1950) 95 C.A.2d 804, 214 P.2d 41, an employee of an inn, who was relieving the bartender, was killed when the wife of a customer shot at her husband. The defense, based on *Associated Indem. Corp. v. Industrial Acc. Com.*, *supra*, that the employment created no *special* danger, was rejected and the earlier case characterized as a "throwback" to a narrow interpretation of the Act, which "should be disregarded." (95 C.A.2d 813.) The court emphasized the absurdity of distinctions between compensable injuries sustained when shot in the street, and noncompensable injuries from a shooting in a barroom. The opinion criticizes the special hazard test as

unrealistic; an injury is compensable because the employment brings the employee into a position that becomes dangerous. (95 C.A.2d 813.)

In *Madin v. Industrial Acc. Com.* (1956) 46 C.2d 90, 292 P.2d 892, the employees were caretakers of 14 rental units on 24-hour duty. At 2 a.m., a runaway bulldozer started by children on neighboring property hit their unit, pushing their beds through the walls. *Held*, the injury arose out of the employment, although the factor that put the force in motion was something over which the employer had no control or connection. (46 C.2d 93.)

Injury due to an *act of God*, such as earthquake, lightning, or storm are often noncompensable. However, where an earthquake caused a defectively constructed building to fall, it was held that the act of God could be disregarded as a cause of the injury. (*London Guarantee & Acc. Co. v. Industrial Acc. Com.* (1927) 202 C. 239, 242, 259 P. 1096.) Moreover, in *Truck Ins. Exchange v. Industrial Acc. Com.* (1946) 77 C.A.2d 461, 175 P.2d 884, a distinction was drawn between storms and floods, which expose many people to similar dangers, and lightning, which strikes at a single point. After a lengthy review of lightning cases, the court held that death of a carpenter's helper, who was working on a roof near an iron pipe after a rain, was compensable because, in view of judicially noticed scientific facts, his work caused him to be peculiarly exposed to the danger. (77 C.A.2d 463.)

SUPPLEMENT: [This section is current through the latest supplement]



42 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

2. Exposure to Particular Danger.

a. Risks of Street or Premises.

2. Physical Violence Against Employee.

2 Witkin Sum. Cal. Law Work Comp § 234

[§ 234] Physical Violence Against Employee.

Cases dealing with physical violence against employees have reached different conclusions on compensability, and are difficult to reconcile.

In *California Comp. & Fire Co. v. Work. Comp. App. Bd.* (1968) 68 C.2d 157, 65 C.R. 155, 436 P.2d 67, the employee, Mrs. S, was divorced. Her ex-husband, learning of her planned remarriage, arranged to murder her as follows: Her job was measuring customers' tables for pads sold by her employer on orders placed by retail stores; she would be sent to the purchaser's home to make the measurements. Her ex-husband rented an apartment under an assumed name, telephoned a department store to order a pad, and requested that someone be sent to measure it. Mrs. S's employer sent her, and her ex-husband killed her and committed suicide. *Held*, award of death benefit affirmed.

(a) The employer contended that, where the underlying motivation for an assault is ill will against the victim as a person, rather than as an employee, it cannot be said to arise out of the employment. Some earlier cases were slanted that way. (68 C.2d 161.) However, the rule is otherwise. As pointed out in *Madin v. Industrial Acc. Com.* (1956) 46 C.2d 90, 292 P.2d 892, *supra*, §233, an injury can arise out of employment even though the employer had no connection with or control over the force; and it is compensable where the employee is brought into a position of danger by the employment, even though the risk could not have been foreseen. (68 C.2d 160.)

(b) The evidence here supported the Board's conclusion: Mrs. S's duties placed her in an isolated location; the nature of her work was a factor in the ex-husband's elaborate scheme, and at the very least, facilitated the assault. If the ex-husband had attempted to accomplish his purpose in a more public place, a rescuer might have intervened. "We cannot say that the assault upon her was so remotely connected with her employment that as a matter of law it must be held not to arise therefrom." (68 C.2d 161.)

Schick was distinguished in *Transactron v. Work. Comp. App. Bd.* (1977) 68 C.A.3d 233, 137 C.R. 142. C, a receptionist, saw B, her boyfriend, approaching her office. Fearing violence, she hid in the women's restroom, and a fellow employee unwittingly revealed this fact to B. B went to the restroom and shot and killed C. *Held*, award of death benefits annulled. (a) Unlike the situation in *Schick*, C's duties did not place her in an isolated spot; she was in constant

contact with the public, and her position would tend to deter an assailant from attacking her at her office. (68 C.A.3d 238.) (b) The fact that another employee identified the place where C was located was irrelevant; the clear inference from the evidence was that the assailant might have shot C anywhere. (68 C.A.3d 239.) "Where the nature of the employee's duties places her in no particularly dangerous or isolated position, or where the risk of harm is not limited to the place of employment and where the attack occurs on the premises not because the victim was performing the duties of employment at the time of assault but because she merely was there, and where the nature of employment was not part of an assailant's plan to isolate or trap the victim, the injury does not arise out of the employment." (68 C.A.3d 239.) (See *California State Polytechnic Univ. v. Work. Comp. App. Bd.* (1982) 127 C.A.3d 514, 518, 179 C.R. 605 [university stenographer was shot to death while at her desk in her office; evidence indicated that killer had personal motive; *Transactron* quoted and award annulled]; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1982) 133 C.A.3d 643, 654, 184 C.R. 111 [killing of two employees in bunkhouse was racially motivated and unrelated to employment].)

Transactron was distinguished, and *Schick* was followed, in *Murphy v. Work. Comp. App. Bd.* (1978) 86 C.A.3d 996, 150 C.R. 561. Mrs. M was employed as a meat wrapper in a store. Her husband was violently opposed to her employment and made unsuccessful attempts to compel her discharge. They separated, but he continuously harassed her at the store, often threatening that he would kill her if she didn't quit. Her supervisors, aware of the threats, nevertheless denied her requests for transfers or leaves of absence. The night before the shooting, Mrs. M told her supervisors that her husband was going to kill her, and the following day he shot her and then killed himself. *Held*, her injuries were compensable. "[T]he risk of harm was centered at the place of employment. It is there that the husband planned to kill her. Not only was the place of employment a focus of the assailant's scheme, but the employer knew it, knew the precise day and place that the attack would take place, failed to warn the employee of the specific threat to kill the next day, and refused to grant her repeated requests for a leave of absence or transfer. Furthermore, the fact that petitioner was employed at Market Basket and the fact that she refused to speak to the decedent on the day of the shooting because she was performing her duties contributed to the decedent's motivation and precipitated the shooting." (86 C.A.3d 1000.) Thus, this was not a mere private assault; the employment was a contributory cause. (86 C.A.3d 1002.)

In *Western Airlines v. Work. Comp. App. Bd.* (1984) 155 C.A.3d 366, 202 C.R. 74, the court examined the prior cases and stated the appropriate test. The employee, an airline flight attendant, had a layover in Honolulu, on salary, and with her hotel room paid for. She met a stranger on the beach, went for a bike ride with him, returned to his apartment to change clothes, and was forcibly raped. At no time prior to the assault did the man make sexual overtures or otherwise reveal his intentions. The workers' compensation judge concluded that the assault was motivated purely by the personal desires of an individual in no way connected with her employment. The Board disagreed, concluding that the attack was not personal because there was no evidence of a prior personal relationship or grievance. *Held*, compensation award annulled.

(a) Liability depends on the nature of the risk, and there are three kinds--industrial, personal, and neutral. (1) Where the risk is *industrial*, the injury is compensable. (2) Also, where the risk is *neutral*, i.e., is not related to either the employment or the employee, or is unknown, the employee should recover. (3) Where the risk is *personal*, i.e., related solely to the employee's person, the injury is not compensable. (155 C.A.3d 369, 370.)

(b) The Board found that the risk in this case was neutral because there was no relationship between the claimant and the assailant; i.e., he evidently selected the claimant at random. This analysis is incorrect. "At best for claimant, the Board could only find that the assailant's intent was to rape a woman. Absent evidence that he desired to rape a flight attendant, or to harm a Western Airlines employee, that motive was strictly 'personal' for purposes of workers' compensation law." (155 C.A.3d 371.) (See 52 A.L.R.4th 731 [sexual assaults as compensable].)

SUPPLEMENT: [This section is current through the latest supplement]



43 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

2. Exposure to Particular Danger.

b. Injury From Seizure and Fall.

2 Witkin Sum. Cal. Law Work Comp § 235

[§ 235] Injury From Seizure and Fall.

A heart attack or idiopathic (epileptic) seizure, not caused by a condition of the employment, is obviously not an industrial injury. (See *infra*, §237; but see *Lab.C. 3212 et seq.*, *infra*, §239 [special rules on heart trouble, hernia, pneumonia, and tuberculosis, for sheriffs, police officers, firefighters, and other specified public employees].) However, if as a result of the seizure the employee falls and strikes an object or a hard floor and suffers traumatic injury, this is compensable. (*Employers Mut. Liab. Ins. Co. v. Industrial Acc. Com.* (1953) 41 C.2d 676, 678, 263 P.2d 4; see Cal. Civil Practice, 1 Workers' Compensation, §1:51; 1 Herlick 6th, §10.23.)

Originally, it was thought that the *fall* had to be due in some part to activity connected with the employment, or the *injury* had to be a result of some special hazard incident to the employment; e.g., falling into an opening or against a machine would result in a compensable injury, while falling to an ordinary floor would not, because it presents no risk or peril that is not encountered everywhere by the general public. (See dissent, *Employers Mut. Liab. Ins. Co. v. Industrial Acc. Com.*, *supra*, 41 C.2d 681; *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1946) 75 C.A.2d 677, 681, 171 P.2d 594 [award upheld where, following epileptic seizure, employee fell and struck head on sawhorse resulting in fracture and concussion].)

However, in *Employers Mut. Liab. Ins. Co. v. Industrial Acc. Com.*, *supra*, the court, following the liberal trend, held that a fall to the concrete floor of the employer's premises resulted in a compensable injury. "[I]t is not a ground for annulling the award of compensation that the employee might have had a fall (resulting in bodily injury) caused by an idiopathic condition but occurring at home, on the street or elsewhere when he was tending to his private affairs. The fact remains that he injured himself while at work, on his employer's premises, the injury being the striking of his head against the floor, a condition incidental to the employment. His condition may have been a contributory cause but it was not the sole cause of his injury. It would not be doubted that if an employee fell to the ground or floor in the course of his employment, and as a result was injured, the injury would be compensable whether the cause of the fall was a slippery or defective floor, or was due to nothing more than his innate awkwardness or even carelessness." (41 C.2d 680.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

2. Exposure to Particular Danger.

c. Disease and Climatic Conditions.

2 Witkin Sum. Cal. Law Work Comp § 236

[§ 236] Disease and Climatic Conditions.

(1) *In General.* Disease resulting from special exposure due to the employment is compensable. (See *Lab.C.* 3208; *San Francisco v. Industrial Acc. Com.* (1920) 183 C. 273, 282, 191 P. 26; *Marsh v. Industrial Acc. Com.* (1933) 217 C. 338, 351, 18 P.2d 933; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1942) 19 C.2d 622, 626, 122 P.2d 570; *Roberts v. U.S.O. Camp Shows* (1949) 91 C.A.2d 884, 885, 205 P.2d 1116 [plaintiff employee contracted encephalitis from inoculations by employer's physicians; injury was compensable and tort action was improper]; see *Lab.C.* 3208.05 [reaction to or side effect from health care provided by employer to health care worker to prevent blood-borne disease, such as hepatitis and human immunodeficiency virus]; *Lab.C.* 3212.11 [rebuttable presumption of compensable injury for skin cancer that develops or manifests itself during employment for designated state and municipal lifeguards]; C.E.B., 1 Workers' Compensation Practice 4th, §2.52; 1 Herlick 6th, §10.30; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §305 et seq.; 19 *A.L.R.4th* 639 [cancer as compensable]; 20 *A.L.R.5th* 346 [coverage of employee's injury or death from exposure to the elements]; 22 *A.L.R.5th* 246 [Lyme disease].)

Special exposure is not established merely because an epidemic exists in a city visited in the course of the employment. (*Pattiani v. Industrial Acc. Com.* (1926) 199 C. 596, 603, 250 P. 864; see *Children's Hosp. Soc. v. Industrial Acc. Com.* (1937) 22 C.A.2d 365, 366, 71 P.2d 83 [no evidence that nurse contracted polio at her hospital where hospital did not treat any sort of contagious disease].)

It has been said that sunstroke, heat exhaustion, or freezing, resulting from exposure to unusual climatic conditions, is compensable only where the employee is specially exposed in a manner different from the rest of the community or where the employee is exposed without prior acclimatization. (*Collins v. Industrial Acc. Com.* (1928) 205 C. 727, 729, 273 P. 33.)

(2) *Occupational and Nonoccupational Disease.* A claim for injury or disability from a nonoccupational disease, i.e., a disease that is not an incident to a particular kind of occupation, and that is contracted merely because of exposure during work, is not compensable. (See *Johnson v. Industrial Acc. Com.* (1958) 157 C.A.2d 838, 840, 321 P.2d 856 [ailment does not become occupational disease simply because it is contracted on employer's premises].) An occupational disease, on the other hand, is one that results from the hazards of the particular kind of employment, such as the progressive disease silicosis. (*Associated Indem. Corp. v. Industrial Acc. Com.* (1932) 124 C.A. 378, 381, 12 P.2d

1075; *Arndt v. Work. Comp. App. Bd.* (1976) 56 C.A.3d 139, 141, 128 C.R. 250, *infra*, §373 [mesothelioma, caused by exposure to asbestos].) (See 1 Herlick 6th §10.30.)

The distinction has at least two important consequences illustrated by the silicosis cases:

(a) Proof that the employee was exposed to dust while employed by the particular employer is sufficient to show that this employment was a contributing factor, and the full award may be made against that employer, despite the fact that similar exposure took place during previous employments. (*Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 C.2d 79, 83, 172 P.2d 884; *Industrial Indem. Exchange v. Industrial Acc. Com.* (1948) 87 C.A.2d 465, 467, 197 P.2d 75; see *supra*, §168.)

(b) The statute of limitations does not begin until the employee knows, or reasonably should know, of the disability. (See *Lab.C.* 5412; *infra*, §368.)

West's Key Number Digest, Workers' Compensation k.521 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.Unusual climatic conditions:* See 81 Proof of Facts 3d 1 [lightning or electrical storm causing injury or death to employee].



45 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

3. Injury Aggravating Preexisting Disease.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 237

[§ 237] In General.

If a subsequent exertion, injury, or exposure aggravates or accelerates ("lights up") a preexisting disease, causation is established. "Industry takes the employee as it finds him. A person suffering from a preexisting disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event." (*Lamb v. Work. Comp. App. Bd.* (1974) 11 C.3d 274, 282, 113 C.R. 162, 520 P.2d 978 [employment as contributing cause of death where heart disease is aggravated by emotional or physical stress; award denying benefits annulled]; *Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1946) 73 C.A.2d 555, 559, 166 P.2d 908; see *Firestone Tire & Rubber Co. v. Industrial Acc. Com.* (1949) 93 C.A.2d 23, 26, 208 P.2d 44 [preexisting heart disease; heart attack was precipitated by strenuous work]; *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1949) 95 C.A.2d 10, 14, 212 P.2d 1 [preexisting thrombophlebitis; aggravated injury was compensable]; *Turner v. Work. Comp. App. Bd.* (1974) 42 C.A.3d 1036, 1043, 117 C.R. 358 [stress and strain of employment causing elevated blood pressure resulting in fatal stroke; order denying death benefits annulled]; *Lewis v. Work. Comp. App. Bd.* (1976) 56 C.A.3d 938, 951, 128 C.R. 752 [pain from work-related injury claimed to have caused stress that aggravated heart disease; denial of benefits affirmed]; *Perry v. Work. Comp. App. Bd.* (1977) 66 C.A.3d 887, 891, 136 C.R. 309 [industrially caused hernia was inoperative due to discovery of nonindustrial cardiac condition; benefits were available during pendency of attempt to resolve cardiac condition to permit surgery]; see Cal. Civil Practice, 1 Workers' Compensation, §1:52; C.E.B., 1 Workers' Compensation Practice 4th, §2.40; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §300 et seq.)

However, if a preexisting disease merely continues until disability results, without an injury or condition of employment contributing to it, an award cannot be sustained. (*California Cas. Indem. Exchange v. Industrial Acc. Com.* (1946) 76 C.A.2d 836, 839, 174 P.2d 680 [employee with tuberculosis nevertheless continued to work instead of going to bed].)

SUPPLEMENT: [This section is current through the latest supplement]



46 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

- C. Injury Arising Out of Employment.
 - 3. Injury Aggravating Preexisting Disease.
 - b. Heart Attack Caused by Strain or Exertion.

2 *Witkin Sum. Cal. Law Work Comp* § 238

[§ 238] Heart Attack Caused by Strain or Exertion.

Where death is caused by a heart attack, it may be held to arise out of the employment if it was precipitated by exertion or strain to which the employee was subjected at work. (*Knock v. Industrial Acc. Com.* (1927) 200 C. 456, 460, 253 P. 712; *Fogarty v. Department of Industrial Relations* (1928) 206 C. 102, 109, 273 P. 791; *Blankenfeld v. Industrial Acc. Com.* (1940) 36 C.A.2d 690, 698, 98 P.2d 584; *Bingham v. Work. Comp. App. Bd.* (1968) 261 C.A.2d 842, 848, 68 C.R. 410, *infra*, §258; *Smith v. Work. Comp. App. Bd.* (1969) 71 C.2d 588, 592, 78 C.R. 718, 455 P.2d 822; see 1 *Herlick* 6th, §§10.25, 10.26; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §§332, 333; 10 *Proof of Facts* 3d 669 [compensable heart attack].)

The strain or exertion need not be unusual. "If there was strain, even though ... usual to that type of employment, the injury or death is compensable if there is competent substantial evidence to show the causal connection between that strain and the collapse." (*Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1946) 73 C.A.2d 555, 563, 166 P.2d 908 [employee's work consisted of lifting and emptying sacks of peanuts weighing 115-125 lbs.; attack was suffered while lifting sack in usual manner]; *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com.* (1946) 29 C.2d 492, 497, 175 P.2d 823 [derrick operator, working long hours without relief, suffered attack in bed at night].)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

3. Injury Aggravating Preexisting Disease.

c. Law Enforcement Officers and Firefighters.

1. Statutory Presumptions.

2 *Witkin Sum. Cal. Law Work Comp* § 239

[§ 239] Statutory Presumptions.

Labor Code provisions give specified law enforcement and firefighting personnel a rebuttable presumption of compensable injury in the case of specified conditions (e.g., heart trouble, hernia, pneumonia, cancer, etc.), if the condition developed during the employment. The scope of the presumptions and the requirements to make them applicable differ somewhat depending on the employee and the condition involved. For some of the categories, the presumptions continue to be available for specified periods after employment is terminated. (See Cal. Civil Practice, 1 Workers' Compensation, §§1:70, 1:71; 1 Herlick 6th, §10.33; on scope and effect of presumptions, see *infra*, §240; *Lab.C. 3212.11* [skin cancer and active state and municipal lifeguards].) For purposes of these provisions, the terms "firefighter," "firefighting member," and "member of a fire department" include persons engaged in providing firefighting services who are apprentices, volunteers, or employees on a partly or fully paid basis. (*Lab.C. 3211.5*.) The principal statutes are as follows:

(1) *Lab.C. 3212* (designated law enforcement and firefighting personnel) deals with *hernia, heart trouble, and pneumonia*. (See *State Employees' Retirement System v. Work. Comp. App. Bd.* (1968) 267 C.A.2d 611, 73 C.R. 172 [firefighting includes persons performing tactical and logistic functions as well as those who physically extinguish flames; thus, Department of Forestry dispatcher was active firefighter; award was confirmed]; *Muznik v. Work. Comp. App. Bd.* (1975) 51 C.A.3d 622, 124 C.R. 407, *infra*, §242; *Taylor v. Work. Comp. App. Bd.* (1983) 148 C.A.3d 678, 196 C.R. 182 [term "active firefighting members" does not exclude persons whose job duties involve only occasional or infrequent assistance at fire sites]; *Miller v. Work. Comp. App. Bd.* (1990) 218 C.A.3d 350, 353, 266 C.R. 908 [decision denying relief was annulled; Board failed to apply *Lab.C. 3212* in concluding that firefighter's aortic valve disease was not industrially related].)

(2) *Lab.C. 3212.1* (designated active firefighters and peace officers) deals with *cancer, including leukemia*, developing or manifesting itself while the person is in the service of the department. The person must demonstrate that the exposure to a known carcinogen occurred while in the service of the department or unit, and that the carcinogen is reasonably linked to the injury. (See *Zipton v. Work. Comp. App. Bd.* (1990) 218 C.A.3d 980, 267 C.R. 431, *infra*, §240.)

(3) *Lab.C. 3212.2* (officers and employees in Department of Corrections, Youth Authority, and security officer at Atascadero State Hospital) deals with *heart trouble*. The statute is not limited to employees whose principal or primary duties are custodial, but applies to all officers and employees who have any duties that are custodial in nature. (*Reeves v. Work. Comp. App. Bd.* (2000) 80 C.A.4th 22, 27, 95 C.R.2d 74 [prison's chief engineer was entitled to presumption where some of his duties were custodial (e.g., supervising inmates making repairs or working in his work area)]; see *Stephens v. Work. Comp. App. Bd.* (1971) 20 C.A.3d 461, 464, 97 C.R. 713 [former tower officer at state prison].)

(4) *Lab.C. 3212.3* (designated California Highway Patrol peace officers) deals with *heart trouble and pneumonia*, but only after 5 years of service. (See *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1976) 61 C.A.3d 408, 411, 132 C.R. 96 [retiree was entitled to benefit of presumption].)

(5) *Lab.C. 3212.4* (University of California Fire Department) deals with *heart trouble, hernia, and pneumonia*.

(6) *Lab.C. 3212.5* (members of police department or highway patrol, sheriffs or deputies, inspectors or investigators) deals with *heart trouble and pneumonia*. (See *Hanna v. Work. Comp. App. Bd.* (1973) 32 C.A.3d 719, 720, 108 C.R. 227 [presumption applied to retired peace officer who suffered heart attack 9 years after retirement]; *San Francisco v. Work. Comp. App. Bd. (Wiebe)* (1978) 22 C.3d 103, 148 C.R. 626, 583 P.2d 151, *infra*, §241; *Johnson v. Work. Comp. App. Bd.* (1985) 163 C.A.3d 770, 774, 210 C.R. 28 [once operative, presumption cannot be rebutted by showing that heart trouble, in some undetected form, preexisted employment]; *Parish v. Work. Comp. App. Bd.* (1989) 210 C.A.3d 92, 97, 258 C.R. 287 [Board erred in concluding that evidence, amounting to battle of experts, rebutted presumption; Board was precluded from finding presumption rebutted solely on basis of attributing heart disease to preexisting disease]; *Smith v. Work. Comp. App. Bd.* (1989) 212 C.A.3d 22, 26, 260 C.R. 327 [presumption was applied to deputy sheriff even though it could not be medically determined when heart attack had occurred and despite deputy not subjectively perceiving it].)

(7) *Lab.C. 3212.6* (members of municipal police department, county sheriff's office or highway patrol, inspector or investigator in district attorney's office actively engaged in law enforcement, prison or jail guards, correctional officers, municipal fire departments and other designated firefighters) deals with *tuberculosis*.

(8) *Lab.C. 3212.7* (state safety employee in Department of Justice) deals with *heart trouble, hernia, pneumonia, and tuberculosis*.

(9) *Lab.C. 3212.8* (designated law enforcement and firefighting personnel) deals with *blood-borne infectious diseases*.

(10) *Lab.C. 3212.9* (designated law enforcement and firefighting personnel) deals with *meningitis*.

(11) *Lab.C. 3212.10* (peace officers of Department of Corrections and Department of Youth Authority) deals with *heart trouble, pneumonia, tuberculosis, and meningitis*.

(12) *Lab.C. 3212.12* (peace officers and conservation corps members) deals with *Lyme disease*.

(13) *Lab.C. 3212.85* (designated law enforcement and fire department members) deals with *exposure to biochemical substances*.

(14) *Lab.C. 3213* (member of University of California Police Department) deals with *heart trouble and pneumonia*. (See *Saal v. Work. Comp. App. Bd.* (1975) 50 C.A.3d 291, 123 C.R. 506, *infra*, §241.)

(15) *Lab.C. 3213.2* (designated law enforcement personnel employed for at least 5 years) deals with *lower back impairment*.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Lab.C. 3212*: See *California Horse Racing Bd. v. Work. Comp. App. Bd.* (2007) 153 C.A.4th 1169, 1176, 64 C.R.3d 222 [heart trouble presumption does not apply to police officers of political subdivisions and did not apply here to special investigator for Horse Racing Board].

(2) *Lab.C. 3212.1*: The material discussed in the text should read as follows: *Lab.C. 3212.1* (designated active firefighters and peace officers) deals with *cancer, including leukemia*, developing or manifesting itself while the person is in the service of the department. The person must demonstrate that the exposure to a known carcinogen occurred while in the service of the department or unit.

Lab.C. 3212.1 does not require an employee to demonstrate a "reasonable link" between the employee's cancer and exposure to a known carcinogen. The employee need only demonstrate by a preponderance of the evidence that an exposure to a known carcinogen occurred while serving as a specified firefighter or peace officer. Once shown, the burden shifts to the employer to prove that there is no reasonable link between the cancer and the exposure and to establish the primary site of the cancer. (*Long Beach v. Work. Comp. App. Bd.* (2005) 126 C.A.4th 298, 315, 23 C.R.3d 782, Supp., *infra*, §240.)

(3) *Lab.C. 3212.2*: See *Jackson v. Work. Comp. App. Bd.* (2005) 133 C.A.4th 965, 972, 35 C.R.3d 256 [Board erred in concluding that employer's evidence rebutted presumption where expert's report merely pointed out lack of specifics in correctional officer's employment that caused heart attack or put him at greater risk].(6) *Lab.C. 3212.5*: See *California Horse Racing Bd. v. Work. Comp. App. Bd.*, *supra*, 153 C.A.4th 1177 [heart trouble presumption applies only to specifically designated class of employees in specified governmental agencies who meet statutory definition of peace officer, and was not applicable here to special investigator for Horse Racing Board].



48 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
3. Injury Aggravating Preexisting Disease.
c. Law Enforcement Officers and Firefighters.
2. Scope and Effect of Presumptions.

2 Witkin Sum. Cal. Law Work Comp § 240

[§ 240] Scope and Effect of Presumptions.

(1) *Burden of Proof.* The presumption under *Lab.C. 3212* (supra, §239) is one of public policy and places the burden of proof on the employer to rebut it. (*Gillette v. Work. Comp. App. Bd. (1971) 20 C.A.3d 312, 320, 97 C.R. 542, 97 C.R. 893.*)

In *Bussa v. Work. Comp. App. Bd. (1968) 259 C.A.2d 261, 66 C.R. 204*, decedent, a city fireman, moonlighted on off days for Acme, servicing fire extinguishers. While on an Acme job, he had a heart attack and died. The Board determined that the death was caused by a previous heart condition, and denied an award against either employer. *Held*, annulled. (a) Under *Lab.C. 3212*, when a fireman has heart trouble, it is presumed to arise out of and in the course of employment, and it can in no case be attributed to a prior disease. Thus, the statute precluded an attribution to his previous heart condition. (b) The rebuttable presumption against the city could therefore be overcome only by showing that the death was caused by the Acme employment. The record was insufficient on this point, and the cause was remanded for further inquiry into it. (*259 C.A.2d 267.*) (See *Parish v. Work. Comp. App. Bd. (1989) 210 C.A.3d 92, 98, 258 C.R. 287* [error to find that presumption was rebutted without evidence of contemporaneous nonwork-related event as sole cause of deputy's heart trouble].)

The "reasonable link" requirement of *Lab.C. 3212.1* (supra, §239) places the initial burden on an employee to prove a reasonable link between a disabling cancer and industrial exposure to carcinogens. Thus, In *Zipton v. Work. Comp. App. Bd. (1990) 218 C.A.3d 980, 990, 267 C.R. 431*, the widow of a firefighter who died of metastatic cancer, primary site unknown, was denied benefits. The Board held that, without scientific evidence about the nature of the primary cancer, petitioner failed to prove that her husband's cancer was "reasonably linked" to his industrial exposure to carcinogens as required by *Lab.C. 3212.1*. *Held*, affirmed.

(a) Petitioner had the initial burden of proving by a preponderance of the evidence that her husband's disabling cancer was reasonably linked to his industrial exposure to carcinogens. There was no evidence; all of the medical evidence established that a primary tumor site could not be identified, and without this information, it was impossible for petitioner to prove a reasonable link. (*218 C.A.3d 991.*)

(b) "It is not our intention to imply that in every cancer case a primary site must be established in order to invoke the presumption of industrial causation under section 3212.1. In determining whether a reasonable link exists, sufficient to invoke the presumption, the proper inquiry should be whether it is more probable than not that a cancer is linked to the industrial exposure." Here there was no evidence from which to reasonably infer that the cancer was more likely the result of industrial exposure than nonindustrial exposure. (218 C.A.3d 993.)

(c) This case is distinguishable from *Muznik v. Work. Comp. App. Bd.* (1975) 51 C.A.3d 622, 124 C.R. 407, *infra*, §242, because *Lab.C. 3212*, the presumption statute construed in *Muznik*, does not require the additional showing of a reasonable link required by *Lab.C. 3212.1*. Thus, *Lab.C. 3212* is "much less specific regarding the requisite elements of proof, and therefore, subject to considerably more flexibility in its interpretation." (218 C.A.3d 993.) (See *Riverview Fire Protection Dist. v. Work. Comp. App. Bd.* (1994) 23 C.A.4th 1120, 1127, 28 C.R.2d 601 [firefighter established industrial exposure but no reasonable link; must show *logical connection* between exposure and cancer; citing *Zipton*].)

(2) *Condition Developing After Termination of Employment.* As long as the condition manifests itself during employment, an employee is entitled to the presumption of *Lab.C. 3212* even if it develops after employment has terminated. (*Soby v. Work. Comp. App. Bd.* (1972) 26 C.A.3d 555, 557, 102 C.R. 727; see *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1976) 61 C.A.3d 408, 411, 132 C.R. 96 [application of *Lab.C. 3212.3* where state police officer suffered heart attack year after retirement]; *Smith v. Work. Comp. App. Bd.* (1975) 45 C.A.3d 162, 169, 119 C.R. 120 [hernia condition that manifested itself when employee was on work-connected disability status was manifestation while "in the service" under *Lab.C. 3212*].)

Each of the presumptions of *Lab.C. 3212 et seq.* limits the period after termination in which the presumption may be applied to 3 calendar months for each full year of requisite service, but not exceeding 60 months, commencing with the last date actually worked in the specified capacity. (*Lab.C. 3212 et seq.*)

In *California Highway Patrol v. Work. Comp. App. Bd.* (1986) 178 C.A.3d 1016, 224 C.R. 94, C, a highway patrol officer, was employed in December 1966, and retired in August 1981; but the last day he actually worked was in March 1980, nearly 17 months before his retirement. He filed his petition for compensation in August 1984, alleging that his heart condition first manifested itself on July 20, 1984. If the extension of *Lab.C. 3212.5* dates from termination of service, C was entitled to the presumption; if it dates from the last day of actual work, he was not. *Held*, the period runs from the last day of work, and the compensation award was improper.

(a) "Ascribing identical meaning to the phrases 'last date actually worked' and 'termination of service' renders the former term meaningless and surplusage." (178 C.A.3d 1023.) The legislative intent is clearly that the two terms have different meanings. (178 C.A.3d 1024.) Hence, the only interpretation that harmonizes them is to give the employee credit for his months of service through the date of his retirement, "and compute the point from which this service credit extends the presumption from the last date he actually worked." (178 C.A.3d 1024.)

(b) This interpretation is consistent with the legislative purpose in creating the statutory presumption. The presumption of heart trouble arising out of and in the course of the employment was extended to patrol officers even after termination of service, "provided such heart trouble manifests itself within no more than 60 months after the stressful activity had ceased (i.e., last date actually worked) calculated at a rate of three months' extension for each full year of service." (178 C.A.3d 1025.)

(c) Applying this test to the facts of this case: (1) period of employment, 14 years; (2) period of extension, 42 months (14 times 3); (3) 42 months added to the last day of actual work extends operation of presumption to September 11, 1983, 10 months short of July 20, 1984, when injury first manifested itself. (178 C.A.3d 1025.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Burden of Proof.* To invoke the presumption of *Lab.C. 3212.1*, an employee need only demonstrate, by a preponderance of the evidence, an exposure to a known carcinogen that occurred while serving as a specified firefighter

or peace officer. Once shown, the burden shifts to the employer to prove that there is no reasonable link between the cancer and the exposure and to establish the primary site of the cancer. In *Long Beach v. Work. Comp. App. Bd.* (2005) 126 C.A.4th 298, 23 C.R.3d 782, G, a police officer for defendant city since 1991, was diagnosed with kidney cancer in 2002 and filed a claim for compensation benefits which defendant denied. Relying on a medical manual that showed a link between benzene, a known carcinogen contained in gasoline, and cancer, the workers' compensation judge found that G demonstrated his exposure to benzene in that G pumped gasoline into his patrol vehicle "almost" daily and, thus, the presumption of *Lab.C. 3212.1* applied. Despite the Agreed Medical Examiner's opinion that the cancer was not occupationally related because no medical study had established a positive link between benzene and kidney cancer, and that there was no established cause for kidney cancer, the judge found that defendant failed to meet its burden of showing that there was no reasonable link. *Held*, the presumption applied.

(a) The 1999 amendments to *Lab.C. 3212.1* removed the requirement that a firefighter or peace officer must prove a reasonable link between a carcinogen and the disabling cancer and instead shifted the burden to the employer to disprove the link after an employee establishes exposure during service. Here, G presented sufficient and uncontradicted evidence that he was exposed to benzene over time while pumping gasoline into his patrol vehicle. Defendant failed to disprove the link, tenuous as it might appear, and thus the presumption applied. (126 C.A.4th 320.)

(b) *Lab.C. 3212.1* requires the employer to controvert the presumption in a specific and limited way, i.e., by proof of the cancer's primary site and the absence of a reasonable link. However, the absence of a link need not be shown to a scientific certainty. Rather, an employer need "simply show no such connection is reasonable, i.e., can be logically inferred." (126 C.A.4th 316.) But an employer does not meet the burden by showing that no study shows a positive link between the exposure and the specific cancer. Although defendant attacked G's evidence as insubstantial, defendant failed to affirmatively establish that the link did not exist. (126 C.A.4th 321.)



49 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
3. Injury Aggravating Preexisting Disease.
c. Law Enforcement Officers and Firefighters.
3. Constitutionality of Statutes.

2 Witkin Sum. Cal. Law Work Comp § 241

[§ 241] Constitutionality of Statutes.

The legislative history of *Lab.C. 3212 et seq.*, with its complex classifications of persons covered and not covered, was reviewed in *Saal v. Work. Comp. App. Bd.* (1975) 50 C.A.3d 291, 123 C.R. 506. Petitioner, a policeman hired by the California State University and Colleges, did not come within the express language of *Lab.C. 3213*, covering police officers of the University of California. He contended that his employment was so similar that the statutory exclusion was an invidious discrimination and unconstitutional. The court took note of the suggestion of commentators that the various special enactments were a legislative response to demands by particular groups; that many peace officers were covered but a considerable number were not; and that the legislative classifications were difficult to understand. (50 C.A.3d 296, 297.) However, petitioner's conclusion was untenable. His major premise was that "an economic benefit which the Legislature confers upon one group of public employees must, as a matter of constitutional law, be made available to another public employee who is able to persuade the appropriate tribunal that his employment is comparable." This, however, would deny the broad legislative power to classify in the field of workers' compensation, upheld in many cases. "[T]he Legislature has proceeded step-by-step in conferring additional benefits upon certain peace officers with respect to certain employment hazards. This does not justify petitioner's demand that, by judicial amendment, his employment benefits shall be measured by what is paid to others employed elsewhere." (50 C.A.3d 300.)

Lab.C. 3212.5 (supra, §239) applies to police officers who develop heart trouble after employment for 5 or more years. As originally enacted in 1939, the statute provided a presumption subject to rebuttal. When the employer offered evidence that the heart attack was not work-related, the presumption disappeared, and the Board had to resolve the issue on a case-by-case basis. Because medical opinion was split on the question whether stress of work is a significant factor in heart attacks, the proceeding became a "battle of the experts." To meet this problem, the 1959 Legislature amended the statute to provide that an employer may not rebut the presumption on the basis of evidence attributing the "heart trouble" to a preexisting heart disease.

In *San Francisco v. Work. Comp. App. Bd. (Wiebe)* (1978) 22 C.3d 103, 148 C.R. 626, 583 P.2d 151, decedent, a city police officer for more than 25 years, died of a heart attack. His wife and daughter sought death benefits. The employer challenged the constitutionality of the amended statute, and offered a medical expert's opinion that the heart

attack was the culmination of a preexisting condition. The Board awarded death benefits. *Held*, affirmed.

(a) *Constitutional authority of Legislature*. The employer's contention that the 1959 amendment of *Lab.C. 3212.5* exceeded the grant of authority in the constitutional enabling provision (Cal. Const., Art. XIV, §4; *supra*, §2) is unsound. (22 C.3d 112.)

(1) The authority to enact workers' compensation legislation does not derive solely from the enabling provision. The California Constitution is not a grant of legislative power but a restriction on that power; and the Legislature has all power not forbidden by the federal or state *Constitution*. (22 C.3d 113; see 7 *Summary* (10th), *Constitutional Law*, §68.) Also, nothing in Cal. Const., Art. XIV, §4, limits the legislative authority to enact appropriate legislation for the protection of employees and their dependents. (22 C.3d 113, 114; see *supra*, §3.)

(2) Even if the scope of the legislative power were measured by the language of the enabling provision, the 1959 amendment would fall within its bounds. It vests the Legislature with "plenary power" to create "a complete system of workers' compensation." With this broad objective in mind, the Legislature reasonably concluded that, in the light of continuing medical dispute, evidence attributing heart trouble to a preexisting heart disease was not sufficiently reliable to justify denial of benefits to a police officer with 5 years of service. (22 C.3d 116.)

(3) There is no merit in the "overbroad" argument, i.e., that in some cases, employers may be required to pay benefits for heart attacks that are not in fact work-related. "[T]he Legislature determined, as a matter of public policy, that in all cases the medical doubt should be resolved in the disabled employees' favor and that employers should be precluded from defeating compensation by relying on evidence of preexisting disease. In numerous other contexts the Legislature has made a similar determination that, in order to accomplish a general public purpose, the benefits of legislation must be accorded to a broad class of beneficiaries, a class that may, in some instances, include individuals who may not be thought entitled to protection; the governing authorities have uniformly upheld such legislation in the face of constitutional attack." (22 C.3d 117.)

(b) *No violation of due process*. The city's additional argument that the statute creates an invalid conclusive presumption is untenable. *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752, upholding the validity of a presumption of work-related disability of miners due to black lung disease, is controlling: The court declared that resolving doubts in favor of the disabled miner did not render the enactment arbitrary. (22 C.3d 118, 119.)

Three justices joined in a dissent.

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50 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
3. Injury Aggravating Preexisting Disease.
c. Law Enforcement Officers and Firefighters.
4. What Constitutes Heart Trouble.

2 *Witkin Sum. Cal. Law Work Comp* § 242

[§ 242] What Constitutes Heart Trouble.

In *Muznik v. Work. Comp. App. Bd.* (1975) 51 C.A.3d 622, 124 C.R. 407, petitioner, a county fireman from 1940 until 1973, was retired after he became dizzy and fell while fighting a fire in a three-story apartment house. Severe hypertension was first noted in 1966, but remained asymptomatic until 1973. One of the examining physicians concluded that petitioner suffered from calcification of the iliac arteries, occlusive aortic arteriosclerosis, and chest murmurs, as well as hypertension, but that these symptoms did not suggest any cardiovascular disease. Relying on this testimony, the Appeals Board affirmed the compensation judge's finding that the presumption of *Lab.C. 3212* did not apply. *Held*, order annulled.

(a) While some of the Board's decisions employed a restrictive construction of "heart trouble," the courts have not done so. (51 C.A.3d 633, 634.) "Given these cases and the mandate that section 3212 is to be liberally construed and that statutory language is to be given its commonly understood meaning, the phrase 'heart trouble' assumes a rather expansive meaning. This result is further evidenced by the Legislature's decision not to utilize a medical term or to list or require any specific malady for the presumption of section 3212 to become operative, but rather, to employ a lay term which is not necessarily related to physical deterioration or 'disease' at all." (51 C.A.3d 635.)

(b) The Board's conclusion that "heart trouble" requires a specific heart disease is erroneous. (51 C.A.3d 635, 636.) (See *Permanente Med. Group v. Work. Comp. App. Bd.* (1977) 69 C.A.3d 770, 776, 778, 138 C.R. 373 [order denying compensation affirmed; disease was not in heart, and stroke was not caused by stress of employment; distinguishing *Muznik*]; *Hart v. Work. Comp. App. Bd.* (1978) 82 C.A.3d 619, 625, 147 C.R. 384 [hypertension was aggravated by stress of job, but heart was not affected; statutory presumption was inapplicable]; *Hamilton v. Work. Comp. App. Bd.* (1979) 93 C.A.3d 587, 592, 155 C.R. 721 [heart trouble did not develop or manifest during employment; mere hypertension may not be equated with heart trouble]; *Parish v. Work. Comp. App. Bd.* (1989) 210 C.A.3d 92, 97, 258 C.R. 287 [mitral valve prolapse: congenital disease prone to arrhythmia when aggravated by stress]; *Smith v. Work. Comp. App. Bd.* (1989) 212 C.A.3d 22, 26, 260 C.R. 327 [heart disease that is discovered by diagnostic means but has caused no symptoms perceived by patient is heart trouble "manifesting itself" under *Lab.C. 3212.5*].)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
4. Treatment Aggravating Preexisting Disease.

2 Witkin Sum. Cal. Law Work Comp § 243

[§ 243] Treatment Aggravating Preexisting Disease.

Maher v. Work. Comp. App. Bd. (1983) 33 C.3d 729, 190 C.R. 904, 661 P.2d 1058, examined an issue of first impression: "whether an injury which has been caused by an employer-required medical treatment for a preexisting, *nonindustrial* injury" is causally connected with the employment. (33 C.3d 734.)

Petitioner M obtained employment as a nurse's assistant in San Clemente General Hospital, and by law was required to undergo a physical examination that included a test for tuberculosis. Her skin test was positive (indicating that she might have contracted the disease at a prior time), and she was told that she must undergo treatment as a condition of continuing in her employment. She took the treatment (three antituberculosis drugs), and suffered severe adverse reactions resulting in disability. Her claim for workers' compensation was denied on the ground that the test was merely diagnostic and had been given before she commenced her duties. *Held*, the disability was compensable.

(a) If petitioner's tuberculosis had been an industrially caused disease, her propensity to react adversely to the medication would not have barred her claim. (33 C.3d 734.) An industrial injury is not always a prerequisite. Where an employee submits to an inoculation or vaccination at the direction of his employer and for the employer's benefit, injury resulting from an adverse reaction is compensable. (33 C.3d 735, citing *Roberts v. U.S.O. Camp Shows (1949) 91 C.A.2d 884, 205 P.2d 116, supra*, §236.) The only difference between *Roberts* and the present case is that the medical treatment in *Roberts* was preventive, while here, it was therapeutic. (33 C.3d 735.)

(b) Under some decisions from sister states, if petitioner had suffered an injury as a direct result of the legally required test, she would be denied compensation. Here, however, it was not the test but the medical treatment that caused the injury; and the treatment was required by the hospital employer as a condition of continued employment. (33 C.3d 736.)

(c) Moreover, the rule of these cases has not been adopted in California. If the requirement of a test or inoculation applied to everyone regardless of the employment (e.g., a smallpox vaccination during an epidemic), no special work-connection would exist. However, if the test is a condition of holding a particular job, the employment is a concurrent cause of the test: "the employee undergoes the test both because the employment requires it and because the state requires it if he is to occupy that job." (33 C.3d 737.) Also, the employer benefited from the treatment, for without it, petitioner would not have been permitted to come in contact with patients. (33 C.3d 737.)

In *LaTourette v. Work. Comp. App. Bd.* (1998) 17 C.4th 644, 72 C.R.2d 217, 951 P.2d 1184, the Board denied a widow's petition for reconsideration for benefits to the estate of a worker who, due to a preexisting condition, suffered a cardiac arrest while on a business trip and died from a bacterial infection developed during treatment. *Held*, affirmed.

(a) The general rule governing injury from *nonoccupational disease* differs markedly from that governing physical injury from a condition of the employment that places the employee in a position of danger. Under the broad "positional risk" theory (*supra*, §230) applicable to physical injuries in the workplace, e.g., cuts from flying glass or injury from a fall, it is sufficient if the work brings the employee within the range of peril by requiring the employee to be present when it strikes, and the employee need only establish that the employment placed the employee within the range of danger by so requiring. (17 C.4th 655.) By contrast, for nonoccupational disease, the fact that an employee contracts a disease while employed or becomes disabled from the natural progress of a nonindustrial disease during employment does not establish the necessary causal connection. (17 C.4th 656.)

(b) There are two principal exceptions to the general rule of noncompensability for nonoccupational disease or its treatment: First, if the employment subjects the employee to an increased risk compared to that of the general public. (17 C.4th 655, citing *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1942) 19 C.2d 622, 122 P.2d 570, *supra*, §236.) Second, if the immediate cause of the injury is an intervening human agency or instrumentality of the employment. (17 C.4th 655, citing *Maher*, *supra*.)

(c) Here, the injury is noncompensable. Although the fact that the cardiac arrest occurred "in the course of the employment" was not disputed, petitioner failed to establish that the bacterial infection resulting in death arose out of the employment. (17 C.4th 655.) Moreover, there is no rule or authority that supports petitioner's assertion that obtaining medical treatment for a nonoccupational disease is a reasonable expectation of the commercial traveler's needs (see *supra*, §213). Nor did petitioner establish that decedent was exposed to a special risk of infection or other medical injury because of his employment, or that the immediate cause of injury was an intervening human agency or instrumentality of that employment. Unlike *Maher*, the employer here did not require or authorize the treatment. Although it was sought during a business trip, the treatment was not a condition of employment imposed by the employer; rather, it was self-directed. (17 C.4th 655, 657.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

5. Psychiatric Injury.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 244

[§ 244] In General.

(1) *Compensability*. Psychiatric injuries are compensable. (See *Lab.C. 3208.3*, *infra*, §245 et seq.; *Burnight v. Industrial Acc. Com.* (1960) 181 C.A.2d 816, 823, 5 C.R. 786, *infra*, §234; 2 Hanna 2d (2004 ed.), §4.69; 1 Herlick 6th §10.24; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §320 et seq.; 82 A.L.R.5th 149 [workers' compensation for emotional distress or like injury as result of sudden emotional stimuli involving personnel action]; 83 A.L.R.5th 103 [workers' compensation for emotional distress or like injury as result of sudden emotional stimuli involving nonpersonnel action under particular statutory provisions]; 84 A.L.R.5th 249 [workers' compensation for emotional distress or like injury as result of sudden emotional stimuli involving nonpersonnel action under particular circumstances]; 106 A.L.R.5th 111 [workers' compensation for emotional distress or similar injury as result of nonsudden stimuli]; 108 A.L.R.5th 1 [same; particular circumstances].)

In *Albertson's v. Work. Comp. App. Bd.* (1982) 131 C.A.3d 308, 182 C.R. 304, an employee with a previous history of psychological problems claimed to have suffered injury to her psyche as a result of conflicts with her supervisor relating to scheduled hours and temporary layoff. The court found no prior California authority on the question: "whether actual, or merely perceived, job harassment must be shown to establish the requisite causal connection between an employee's work environment and resulting psychiatric injuries." (131 C.A.3d 313.) However, a 1978 Michigan case (*Deziel v. Difco Laboratories*), adopting a subjective standard crediting the claimant's honest perception, was quoted with approval (131 C.A.3d 314), subject to the qualification imposed by the Board in this case: A spurious claim, where the employment is "a mere passive element that a nonindustrial condition happened to have focused on," will not be compensated. (131 C.A.3d 310.)

In *Baker v. Work. Comp. App. Bd.* (1971) 18 C.A.3d 852, 96 C.R. 279, petitioner, a fireman since 1942, developed a disabling condition in 1953. The symptoms were chest pains, shortness of breath, expectoration of blood, etc. The Board found no compensable heart disease or industrial injury, and denied compensation. *Held*, order annulled; petitioner's testimony and the medical evidence gave rise to an inference of industrial causation. Physical accident or trauma is not a precondition of recovery for psychoneurotic injury. "In order to find a physical industrial injury, a single identifiable traumatic experience need not be shown. ... The disabling injury may be the result of the cumulative effect of each day's stresses and strains. ... We perceive no logical basis for a different requirement for a psychoneurotic injury. To one experiencing it, such an injury is as real and disabling as a physical injury." (18 C.A.3d 861.) (See

Rodriguez v. Work. Comp. App. Bd. (1994) 21 C.A.4th 1747, 1760, 27 C.R.2d 93 [employee's psychiatric injury from reaction to medical examiner's opinion and employer's reliance on that opinion during litigation was not compensable consequence of original industrial injury]; *Atascadero Unified School Dist. v. Work. Comp. App. Bd.* (2002) 98 C.A.4th 880, 885, 120 C.R.2d 239 [employee's psychiatric injury that was attributable to work-place gossip about employee's extramarital affair with coworker was not part of employee-employer relationship and thus, was noncompensable].)

(2) *Inmates Excluded.* Except as provided in *Lab.C.* 3370 (supra, §180), employees who are inmates, as well as the families of those employees, are not entitled to compensation for a psychiatric injury. (*Lab.C.* 3208.3(j).)

(3) *Psychiatric Injury Prevention.* If an employee files a psychiatric injury claim and an application for adjudication of claim is filed by the employee or the employer, the Division of Workers' Compensation must provide the employer with information about psychiatric injury prevention programs. (*Lab.C.* 3208.3(i).)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

5. Psychiatric Injury.

b. Higher Threshold Requirement.

2 *Witkin Sum. Cal. Law Work Comp* § 245

[§ 245] Higher Threshold Requirement.

Lab.C. 3208.3 governs psychiatric injuries occurring on or after January 1, 1990, with the expressed purpose of establishing a "new and higher threshold of compensability." (*Lab.C. 3208.3(c)*.) (For general overview of statute, see *Hansen v. Work. Comp. App. Bd.* (1993) 18 C.A.4th 1179, 1183, 23 C.R.2d 30; Cal. Civil Practice, 1 Workers' Compensation, §1:69.)

Psychiatric injuries are compensable if the injury is a mental disorder that causes disability or the need for medical treatment and is diagnosed according to the procedures under *Lab.C. 139.2(j)(4)* (mental disorder must be expressed using terminology and criteria of specified psychiatric manuals). (*Lab.C. 3208.3(a)*.) An employee must demonstrate by a preponderance of the evidence that actual events of employment were the *predominant* cause of the psychiatric injury. (*Lab.C. 3208.3(b)(1)*.) However, where the employee's injury resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee need only show by a preponderance of the evidence that actual events of employment were a *substantial* cause of the injury, i.e., at least 35% to 40% of all causation. (*Lab.C. 3208.3(b)(2)*.)

In *Department of Corrections v. Work. Comp. App. Bd.* (1999) 76 C.A.4th 810, 90 C.R.2d 716, the Appeals Board awarded compensation to a correctional officer for a work-related, nonviolent psychiatric injury based on its finding that the officer's employment experiences contributed at least 35% to her injury. *Held*, decision annulled. Although *Lab.C. 3208.3(b)(1)* does not define the numerical percentage of causation required to establish predominant causation, the purpose of the statute is to limit liability for psychiatric injury claims. Because the threshold for injury due to violent acts is 35% to 40%, the word "predominant" must be construed as setting a higher threshold. Thus, "predominant as to all causes" is intended to require that the work-related cause be greater than 50% of all causal factors. "Otherwise the threshold of compensability for claims of injury due for violent acts, which are reasonably expected to produce emotional trauma, would be the same or greater than the analogous threshold for claims of injury due to nonviolent acts." (76 C.A.4th 816.) (See *Sakotas v. Work. Comp. App. Bd.* (2000) 80 C.A.4th 262, 271, 95 C.R.2d 153 [*Lab.C. 3208.3(b)(1)* is constitutional]; *Lockheed Martin Corp. v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 1237, 1249, 117 C.R.2d 865 [*Lab.C. 3208.3(b)(1)* also applies to claims of psychiatric injury resulting from work-related physical injury; thus, consequential psychiatric injury is compensable only if it is more than half attributable to physical industrial injury]; *Pacific Gas & Elec. Co. v. Work. Comp. App. Bd.* (2004) 114 C.A.4th 1174, 1181, 8 C.R.3d 467 [award of

benefits was annulled where corporate downsizing and employee's fear about stock losses and solvency of his retirement funds were not events of employment contemplated by *Lab.C. 3208.3(b)(1)*.)

Lab.C. 3208.3(b)(1) does not govern whether a disability of a member of the Public Employees' Retirement System (PERS) is industrial. In determining whether an injury is industrial, the Appeals Board must apply *Govt.C. 20046*, a provision of the Public Employees' Retirement Law, which provides that disability is industrial if it results from injury or disease arising out of and in the course of employment. In *Pearl v. Work. Comp. App. Bd.* (2001) 26 C.4th 189, 109 C.R.2d 308, 26 P.3d 1044, petitioner, a state university peace officer, obtained disability retirement benefits from PERS for a job-related psychiatric injury. Pursuant to *Govt.C. 21166*, he petitioned the Board to determine whether the injury was industrial, thus entitling him to increased benefits. The Board, applying the standard under *Lab.C. 3208.3*, determined that the injury was nonindustrial. *Held*, reversed. *Govt.C. 21166* requires that, when making a determination of industrial causation involving a PERS member, the Board must use the same *procedures* as in workers' compensation hearings; it does not require the Board to apply substantive workers' compensation law. Nor does *Lab.C. 3208.3* state that it applies to claims of psychiatric injury under the Public Employees' Retirement Law, but appears to expressly limit itself to matters under workers' compensation law. (26 C.4th 194.)

SUPPLEMENT: [This section is current through the latest supplement]

A psychiatric injury satisfies the higher threshold for compensability only if the employee proves that employment events were predominant as to all causes combined of the total psychiatric disability. Thus, an employee may not isolate particular disorders for purposes of establishing compensability. In *Sonoma State University v. Work. Comp. App. Bd.* (2006) 142 C.A.4th 500, 48 C.R.3d 330, a university police dispatcher, H, alleged injury to her psyche resulting from cumulative trauma from job stress and anxiety. The agreed medical evaluator (AME) found that events in H's personal life also contributed to her psychological disability so that 35% of the injury was allocated to industrial factors. The AME identified several disorder components of H's psychiatric condition, one of which he termed an adjustment disorder and stated that it was industrially caused. The Board concluded that even though only 35% of H's permanent disability was work-related, 100% of her adjustment disorder was industrially caused and this satisfied the higher threshold requirement. *Held*, award annulled. The purpose of *Lab.C. 3208.3* is to combat abuses and fraudulent claims by requiring that industrial factors be predominant as to all causes combined of the psychiatric injury. To permit "each diagnosable psychological disorder to be analyzed separately for compensability would create a lower rather than a higher threshold for obtaining compensation, would result in more rather than fewer stress claims, and would provide more rather than less potential for fraud." (142 C.A.4th 506.)

See *Verga v. Work. Comp. App. Bd.* (2008) 159 C.A.4th 174, 186, 70 C.R.3d 871 [Board properly found that there was no objective evidence that employee's supervisor and coworkers harassed and persecuted her, and that employee herself caused coworkers' disdainful responses through her mistreatment of them; thus, because there were no actual events of employment that were predominant causes of her psychiatric injury, employee was not entitled to benefits].



54 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
5. Psychiatric Injury.
c. Time Restrictions.

2 Witkin Sum. Cal. Law Work Comp § 246

[§ 246] Time Restrictions.

A psychiatric injury is not compensable until the employee has been employed for at least 6 months. However, the 6 months need not be continuous. This limitation does not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. (*Lab.C. 3208.3(d)*.) (See *Hansen v. Work. Comp. App. Bd. (1993) 18 C.A.4th 1179, 1184, 23 C.R.2d 30* [6-month limitation of *Lab.C. 3208.3(d)* does not violate employees' rights to equal protection and due process under Fourteenth Amendment or Cal. Const., Art. I, §7(a)]; *James v. Work. Comp. App. Bd. (1997) 55 C.A.4th 1053, 1055, 64 C.R.2d 392* [employer's failure to reject claim within 90 days as required by *Lab.C. 5402* (infra, §381) did not preclude employer from raising *Lab.C. 3208.3(d)* as defense, where employee claimed psychiatric injury within 11/2 months of hire and employer provided medical treatment and temporary disability for 1 year].)

In *Wal-Mart Stores v. Work. Comp. App. Bd. (2003) 112 C.A.4th 1435, 5 C.R.3d 822*, an employee suffered an admitted orthopedic injury to her back while employed less than 6 months, had back surgery, and did not return to work. Four years later, the employee amended her claim to assert damage to her psyche resulting from the disability caused by the orthopedic injury. The Board determined that the 6-month time limitations of *Lab.C. 3208.3(d)* did not apply. *Held*, the 6-month rule was applicable.

(a) The rule applies to *all* claims for injury to the psyche, including those that arise from physical injuries. (*112 C.A.4th 1441*; following *Lockheed Martin Corp. v. Work. Comp. App. Bd. (2002) 96 C.A.4th 1237, 1249, 117 C.R.2d 865, supra*, §235.)

(b) There is no merit in the employee's contention that the rule is inapplicable here because she remained employed, although off work, until she was provided with a workers' compensation claim form. Although *Lab.C. 3208.3(d)* provides that the 6 months of employment need not be continuous, "employment" means "the performance of actual service for the employer." (*112 C.A.4th 1442*.)

SUPPLEMENT: [This section is current through the latest supplement]

"Sudden and extraordinary employment condition" exception: In *Matea v. Work. Comp. App. Bd. (2006) 144 C.A.4th 1435, 51 C.R.3d 314*, M had worked for a home supply store as a manager-trainee for less than 6 months when a load of lumber fell from a rack onto his foot and ankle resulting in a contusion and swelling. Following the injury, M could

work only in a restricted capacity. He also reported constant pain in his ankle and foot, felt depression over fear of not improving, and suffered anxiety from fear of being hurt again. One psychiatrist determined that the predominant cause of M's pain disorder and depression was the injury caused by the falling lumber. Another psychiatrist found no industrial psychiatric injury. The workers' compensation judge found that M's psychiatric injury was caused by "a sudden and extraordinary event" and was a compensable exception to the 6-month rule of *Lab. C. 3208.3(d)*. The Board rescinded the decision and award, relying on *Wal-Mart Stores v. Work. Comp. App. Bd. (2003) 112 C.A.4th 1435, 5 C.R.3d 822*, text, p. 848, which suggested that the "sudden and extraordinary" language is limited to occurrences such as gas main explosions or workplace violence. *Held*, Board's opinion and order annulled and case remanded.

(a) The "sudden and extraordinary" employment condition language of *Lab.C. 3208.3(d)* is limited to events "that would naturally be expected to cause psychic disturbances even in a diligent and honest employee." As commonly defined, an event is sudden and extraordinary if it is uncommon and totally unexpected. Although gas main explosions and workplace violence are admittedly uncommon and usually totally unexpected events, there may be other sudden and extraordinary occurrences or events contemplated by *Lab.C. 3208.3(d)*. Thus, if an employee shows by a preponderance of evidence that the event or occurrence causing the psychiatric injury was not a regular and routine employment event or condition, the injury may be compensable where the employee is employed for less than 6 months. (*144 C.A.4th 1448*.)

(b) Although the record here was sparse and there was little on why the lumber fell, M demonstrated that it fell into an aisle and on his leg, causing his injury. Because the employer submitted no evidence on how often lumber falls from racks, or that such an occurrence is regular or routine, the workers' compensation judge rightly assumed that the event was uncommon, unusual, and totally unexpected. Therefore, M "met his burden of proving that he was injured as a result of a sudden and extraordinary employment condition" as required by *Lab.C. 3208.3(d)*. (*144 C.A.4th 1450*.)



55 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

5. Psychiatric Injury.

d. Posttermination Claims.

2 Witkin Sum. Cal. Law Work Comp § 247

[§ 247] Posttermination Claims.

(1) *In General.* *Lab.C. 3208.3(e)* provides that if an employee files a claim for compensation after receiving notice of termination or layoff, including a voluntary layoff, and the claim is for a psychiatric injury that resulted before the notice issued, the injury is compensable only if the employee demonstrates by a preponderance of the evidence that actual events of employment were the predominant cause of the injury and one or more of the following conditions exist:

(a) The injury was caused by sudden and extraordinary events of employment.

(b) The employer received notice of the psychiatric injury under *Lab.C. 5400* et seq. before issuance of the notice of termination or layoff.

(c) The employee's medical records, compiled before issuance of the notice of termination or layoff, contain evidence of treatment of the psychiatric injury.

(d) There is a finding of sexual or racial harassment by a trier of fact, whether contractual, administrative, regulatory, or judicial.

(e) The date of injury under *Lab.C. 5411* or *5412* (see *infra*, §§367, 368) was after the date of the notice of termination or layoff, but before the effective date of the termination or layoff.

Lab.C. 3208.3(e) does not apply in the following instances:

(a) Where a school district that has provided a district employee notice pursuant to specified Education Code provisions has not finally decided against reemploying that person. (*Lab.C. 3208.3(f).*)

(b) Where the notice of termination or layoff is not followed by that termination or layoff within 60 days, until receipt of a later notice of termination or layoff. (*Lab.C. 3208.3(g).*)

(c) Where notices of termination or layoff are frequently issued to an employee. This is considered a bad faith

personnel action. (*Lab.C. 3208.3(g).*)

Similar provisions apply to posttermination claims not involving psychiatric injuries. (See *Lab.C. 3600(a)(10)*, supra, §193.)

In *Bray v. Work. Comp. App. Bd.* (1994) 26 C.A.4th 530, 31 C.R.2d 580, plaintiff, 61 years old, filed a claim for injury to his nerves, psyche, and internal system following his discharge as a manufacturing engineer after working for defendant employer for less than 6 months. The workers' compensation judge awarded benefits, finding that plaintiff had sustained a cumulative industrial injury based on his entire employment, but attributing the present psychiatric injury to the termination. The Board rescinded the award, determining that the injury was not industrial because an after-the-fact reaction to termination does not constitute an injury arising out of or occurring in the course of the employment. The Board denied reconsideration, asserting that neither *Shoemaker v. Myers* (1990) 52 C.3d 1, 276 C.R. 303, 801 P.2d 1054, supra, §47, nor *Gantt v. Sentry Ins.* (1992) 1 C.4th 1083, 1097, 4 C.R.2d 874, 824 P.2d 680, supra, §57, supported the view that injuries arising *after* job termination are compensable. *Held*, psychiatric injury arising after job termination by an employer, without more, cannot result in liability by way of a workers' compensation award.

(a) *Lab.C. 3208.3* reflects a legislative recognition of a need to limit compensation payments for *post-termination psychiatric injury*. (26 C.A.4th 536.) Supreme Court decisions also reflect a recent trend to restrict recovery by discharged employees complaining about the fact, manner, and consequences of their termination. (26 C.A.4th 538, citing *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C.3d 148, 233 C.R. 308, 729 P.2d 743, supra, §27, *Gantt*, supra, and *Livitsanos v. Superior Court* (1992) 2 C.4th 744, 754, 7 C.R.2d 808, 828 P.2d 1195, supra, §27.) These decisions, coupled with *Lab.C. 3208.3*, suggest that compensability of posttermination emotional stress claims not based on pretermination events is "open to serious doubt." (26 C.A.4th 539.)

(b) Thus, what bars plaintiff's claim is the need to set limits on recovery for psychiatric injuries occurring *after* termination of employment when those injuries are "caused solely by the fact of termination, where that termination does not involve employer conduct violative of statute or fundamental public policy or employer conduct which falls outside the 'compensation bargain.' The workers' compensation system, as well as the employers and insurers, cannot absorb, and should not be required to absorb, the very substantial potential cost of awards for emotional distress caused solely by a lawful job termination." (26 C.A.4th 539.)

(c) Significantly, *Lab.C. 3208.3(e)* increases the burden of proving a pretermination psychiatric injury where the claim is not filed until after a termination notice. However, the statute makes no reference to a *posttermination* injury as here. (26 C.A.4th 539.) This omission reasonably indicates a legislative assumption that posttermination injuries not resulting from pretermination events are not compensable under existing law. (26 C.A.4th 539.)

(2) *Valid Personnel Action*. An employer need not pay compensation for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The party asserting the issue bears the burden of proof. (*Lab.C. 3208.3(h).*)

In *Oakland v. Work. Comp. App. Bd.* (2002) 99 C.A.4th 261, 120 C.R.2d 873, the Board awarded temporary and permanent psychiatric disability payments to G, a supervising employee demoted during a citywide reduction in force. The Board concluded that the demotion did not qualify as a "good faith" personnel action under *Lab.C. 3208.3(h)* because management personnel misled G about the possibility of avoiding demotion when he accepted a different position. *Held*, Board's decision vacated.

(a) *Lab.C. 3208.3* does not define "lawful, nondiscriminatory, good faith personnel action." However, *Cotran v. Rollins Hudig Hall Int.* (1998) 17 C.4th 93, 69 C.R.2d 900, 948 P.2d 412, 3 Summary (10th), *Agency and Employment*, §208, a wrongful termination action, assessed an employer's *objective reasonableness* in making the factual determination of misconduct, and described the concept as an objective good faith standard that combined good faith with objectivity, and prevented an employer from discharging an employee based on subjective reasons that could be

pretextual to conceal arbitrary and unlawful motives. *Cotran* and this case involve essentially the same issue, whether a personnel decision might have favored one employee over another leading to an adverse personnel action. Thus, *Cotran*'s objective good faith standard applies here as well. (99 C.A.4th 266.)

(b) The good faith personnel action exemption provides an employer with some freedom in making regular and routine personnel decisions (e.g., discipline, evaluations, transfers, demotions, layoffs). "If a regular and routine personnel decision is made and carried out with subjective good faith and the employer's conduct meets the objective reasonableness standard," *Lab.C. 3208.3(h)* applies. (99 C.A.4th 267.)

(c) The Board misapplied the word "objective" in the objective good faith concept. In essence, the Board concluded that it was not the demotion, but giving G false hope that precluded the city's action from qualifying as a good faith personnel action because the job protection reassurances were unfounded. Under the Board's analysis, even if the city were trying to do its best by G, its action "would not be in good faith if it failed in its purpose and thereby caused psychiatric injury." (99 C.A.4th 269.) The only adverse personnel action was G's demotion, which was justified by fiscal concerns and not unlawful animus. Budgetary restraints targeted middle management and G was warned that his position was in jeopardy and that he should consider a management assistant position. G accepted and worked in the position for 5 months before he was ultimately demoted. Even if management mistakenly led G to believe that he was acquiring long-term rights to the position, this was an ordinary management mistake but nevertheless good faith personnel activity. (99 C.A.4th 269.) (See *Northrop Grumman Corp. v. Work. Comp. App. Bd.* (2002) 103 C.A.4th 1021, 1036, 127 C.R.2d 285 [award for psychiatric injury based on accusation and investigation of employee's alleged racially discriminatory practices was reversed on evidence that employer's lawfully mandated investigation into charges was conducted without deception, collusion, or unlawful design, even though investigation failed to substantiate accusation].)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
6. Skylarking or Horseplay.

2 Witkin Sum. Cal. Law Work Comp § 248

[§ 248] Skylarking or Horseplay.

California long followed the general rule that *participants* in "horseplay" or "skylarking" have no claim for injuries received. (See *Dalsheim v. Industrial Acc. Com.* (1932) 215 C. 107, 111, 8 P.2d 840 [employee, playing with others, ignited cleaning fluid to see whether it would explode or burn, and was injured when he attempted to remove flaming bucket].) It was also formerly the California rule that an innocent nonparticipating employee was unable to obtain compensation for injuries received from the acts of others engaged in horseplay that had not been permitted by the employer. (See *Great Western Power Co. v. Industrial Acc. Com.* (1921) 187 C. 295, 201 P. 931.)

In *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1945) 26 C.2d 286, 294, 158 P.2d 9, the court overruled prior cases and followed the modern view that pranks of fellow employees are expectable and constitute a hazard of the employment. Accordingly, a *nonparticipating* employee was held entitled to an award. (See Cal. Civil Practice, 1 Workers' Compensation, §1:50; 1 Herlick 6th, §10.08; 1 Hanna 2d (2004 ed.), §4.51[3]; 82 Am.Jur.2d (2003 ed.), Workers' Compensation §341 et seq.)

In *Hodges v. Work. Comp. App. Bd.* (1978) 82 C.A.3d 894, 147 C.R. 546, the court followed *Dalsheim* in denying compensation to a *participant* in a sparring match. Petitioner's attempts to bring himself within the nonparticipant exception (see *infra*, §249), and within the condoned horseplay exception (see *infra*, §251), were found to be without support in the evidence. (82 C.A.3d 900, 902.) Petitioner's additional contention that the horseplay rule was outmoded and should be revised was rejected on the ground that the appellate court was bound by *Dalsheim*. (82 C.A.3d 905.) (See *Leffler v. Work. Comp. App. Bd.* (1981) 124 C.A.3d 739, 742, 743, 177 C.R. 552 [on wager, employee dived from balcony of third floor apartment into swimming pool; this conduct could not reasonably have been anticipated].)

West's Key Number Digest, Workers' Compensation k.671 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



57 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
7. Altercation Between Employees.
a. Innocent Claimant.

2 Witkin Sum. Cal. Law Work Comp § 249

[§ 249] Innocent Claimant.

Where some employees engage in an altercation, and the claimant, an innocent nonparticipant, is injured, compensation will be given if the quarrel was concerned with the work, though not if it was a result of some personal animosity between the parties. (See *Globe Indem. Co. v. Industrial Acc. Com.* (1924) 193 C. 470, 225 P. 273; *Globe Indem. Co. v. Industrial Acc. Com.* (1934) 2 C.2d 8, 11, 37 P.2d 1039; Cal. Civil Practice, 1 Workers' Compensation, §1:49; 1 Herlick 6th, §10.06; 2 Hanna 2d (2004 ed.), §4.51[1]; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §§405, 411.) This distinction was invoked in upholding an award where one employee attempted to stop a fight between several others, so as to "permit the work of the employer to go on." (*Kaiser Co. v. Industrial Acc. Com.* (1944) 65 C.A.2d 218, 221, 150 P.2d 562.)

Later cases applied the test liberally in favor of the claimant. In *Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1955) 136 C.A.2d 600, 289 P.2d 109, the claimant was engaged by another employee in a heated argument about the claimant's dispute with the foreman over union matters. After name-calling and some fighting, they were separated; but later, the other employee pursued and struck claimant with a large rock. The court upheld the Commission's conclusion that the assault concerned the work relationship and was not the result of a purely personal quarrel. (136 C.A.2d 607.)

In *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1956) 139 C.A.2d 260, 293 P.2d 502, decedent's fellow employee, a deaf person who had feigned inability to speak, developed the delusion that decedent was spying on him, telling tales to the employer, and otherwise persecuting him. One day, without preliminary quarrel or words, he shot decedent. The employer contended that the death arose from a purely personal quarrel because there was no real dispute over the work but merely an insane delusion of the killer. However, the evidence showed that the men had no association except at work, and the court therefore concluded that the bitterness of the killer and his fancied grievance were brought about by the work relationship. "Under these circumstances it seems clear that the employment increased the risk to [decedent] that such an insane man would be likely to pick on him. The risk was far greater than that incurred by the public generally." (139 C.A.2d 266.)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

7. Altercation Between Employees.

b. Aggressor Claimant.

2 *Witkin Sum. Cal. Law Work Comp* § 250

[§ 250] Aggressor Claimant.

(1) *Former Theory Allowing Compensation.* An extraordinary expansion of liability in this field was made in *State Comp. Ins. Fund v. Industrial Acc. Com.* (1952) 38 C.2d 659, 242 P.2d 311. The employee, in an angry exchange of words with his foreman, swung at him and missed; the foreman then hit him several times. *Held*, the resulting injuries were compensable. (38 C.2d 660, 667.)

(2) *Legislative Rejection of Theory.* The rule allowing compensation was abrogated in 1961 by *Lab.C. 3600(a)(7)*, which adds, as a condition of compensation, that "the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor." (See *Lab.C. 3370(a)(1)* [state prisoner is denied compensation where injury is result of assault in which inmate is initial aggressor].)

In *Mathews v. Work. Comp. App. Bd.* (1972) 6 C.3d 719, 100 C.R. 301, 493 P.2d 1165, two truck drivers, M and C, had an altercation over M's truck blocking traffic. After exchanging obscenities, M approached C with fists clenched and crossed a warning line drawn by C. C threw a rock, M ducked, losing his hard hat, and lunged toward C. C struck him in the head with a second rock, and M died 2 months later. The Board denied death benefits. *Held*, order affirmed.

(a) To arise out of an altercation, "an injury must result from an exchange between two or more persons characterized by an atmosphere of animosity and a willingness to inflict bodily harm." (6 C.3d 726.) The evidence here amply supported the Board's finding: each intended to inflict physical harm on the other. (6 C.3d 726.)

(b) Identifying the "initial physical aggressor" is more difficult, for it is often impossible to discover who started a quarrel. However, the Legislature intended to deal with the increased risk of injury when the quarrel moves from an exchange of words and gestures to trading of physical blows. Hence, the "initial physical aggressor" is the person who first engages in physical conduct that a reasonable man would perceive to be a real, present, and apparent threat of bodily harm. (6 C.3d 726, 727.) The record supported the Board's finding that M, taller and heavier than C, advancing with clenched fists, appeared to present such a threat. It was not essential that M "throw the first punch," i.e., commit a battery. (6 C.3d 727.)

(c) There is no substance in the contention that the characterization shifts from one to another whenever either uses

excessive force. The statute refers to the *initial* aggressor, i.e., "to him who first introduces an element of physical violence into the confrontation, thus creating the risk of injury. Later acts of his opponent, which unjustifiably increase the level of violence, do not absolve the *initial* aggressor." (6 C.3d 728.)

(d) The statute is constitutional. The language of the constitutional enabling provision, "irrespective of the fault of any party" (supra, §2), was not intended to forbid conditioning compensation on the absence of intentional wrongdoing. Its purpose was to free the Legislature from strictures of common law, and it means "without regard to negligence." (6 C.3d 734, 735.) To hold otherwise would cast doubt on a vast number of other Labor Code provisions that incorporate the notion of intentional fault, e.g., denial of compensation where the injury is caused by intoxication, is wilfully self-inflicted, or is the product of deliberate suicide; reduction of an award for the employee's misconduct or increase in an award where the employer is guilty of misconduct. (6 C.3d 735.)

(e) There is no denial of equal protection in exempting enrollees in economic opportunity programs (*Lab.C. 4207*) and disaster service workers (*Lab.C. 4353*) from the bar of the statute. The Legislature has dealt specially with persons who do not fit the definition of employee, and it could determine that different conditions for compensation were appropriate. (6 C.3d 739.)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
7. Altercation Between Employees.
c. Condoned Horseplay.

2 *Witkin Sum. Cal. Law Work Comp* § 251

[§ 251] Condoned Horseplay.

Formerly, the right of a participant in horseplay to recover compensation was doubtful (see *supra*, §248), and under *Lab.C. 3600(a)(7)*, an aggressor is not entitled to an award (see *supra*, §250). Both of these objections were overcome in *Argonaut Ins. Co. v. Work. Comp. App. Bd.* (1967) 247 C.A.2d 669, 55 C.R. 810. A 16-year-old boy was employed on a ranch that trained racehorses and developed jockeys. He lived with other future jockeys in a dormitory. During recreation time on Sunday, he and others engaged in horseplay. When he threw a glass of beverage at another boy, he was chased around the place and pushed through a glass door, suffering lacerations. *Held*, the injury was compensable.

(a) He was in the course of employment under a liberal extension of the bunkhouse rule (see *supra*, §211). (247 C.A.2d 677.)

(b) The Commission suggested that the effect of the bunkhouse rule on course of employment is to make all horseplay arise out of employment. However, the court refused to go that far; it held only that injuries, even to a participant, are compensable where the horseplay is (1) closely connected with the injured employee's presence in the bunkhouse, and (2) known to and apparently condoned by the employer. (247 C.A.2d 681.) (See *Oliva v. Heath* (1995) 35 C.A.4th 926, 933, 41 C.R.2d 613 [skylarking and horseplay cases are applicable in determining whether pranks and practical jokes are within coworkers' scope of employment under *Lab.C. 3601*]; C.E.B., 1 Workers' Compensation Practice 4th, §§2.23, 2.28; 2 Hanna 2d (2004 ed.), §4.23; 1 Herlick 6th, §§10.06, 10.08; 82 Am.Jur.2d (2003 ed.), Workers' Compensation §341.)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE

C. Injury Arising Out of Employment.

7. Altercation Between Employees.

d. Exchange of Blows Without Animosity.

2 *Witkin Sum. Cal. Law Work Comp* § 252

[§ 252] Exchange of Blows Without Animosity.

In *Argonaut Ins. Co. v. Work. Comp. App. Bd.* (1967) 247 C.A.2d 669, 55 C.R. 810, *supra*, §251, the additional contention was made that the injury arose out of an "altercation" with the injured employee who was the "aggressor" within the meaning of former Lab.C. 3600(g) (now *Lab.C. 3600(a)(7)*; see *supra*, §250). The court briefly declared that horseplay, without animosity--here, the customary pranks of youngsters engaged in recreation--does not constitute an "altercation." (247 C.A.2d 682.)

The same view was taken of a sudden burst of temper in *Litzmann v. Work. Comp. App. Bd.* (1968) 266 C.A.2d 203, 71 C.R. 731. The employee, a truck driver, was in the drivers' room waiting for his driving orders. Other drivers were engaged in horseplay. D bumped into petitioner, spilling petitioner's hot drink. Petitioner threw the contents of his thermos bottle on D's pants; D retaliated by picking up a coffeepot and emptying it on petitioner, causing severe injuries. The referee found that this was an altercation in which petitioner was the initial aggressor, and the Board denied compensation. *Held*, order annulled. The evidence did not sustain a finding of willingness or intent to inflict bodily harm, and clearly showed an absence of animosity. (266 C.A.2d 208.)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
C. Injury Arising Out of Employment.
8. Altercation With Employer.

2 *Witkin Sum. Cal. Law Work Comp* § 253

[§ 253] Altercation With Employer.

Formerly, an intentional assault on an employee by the employer was not considered a "risk or condition incident to the employment," but now, injuries received in such an assault are compensable. (*Azevedo v. Industrial Acc. Com.* (1966) 243 C.A.2d 370, 376, 52 C.R. 283 [assault must not be result of "personal grievance" unrelated to employment]; see *supra*, §43.) Moreover, the compensation remedy is cumulative; a tort action may also be brought. (*Magliulo v. Superior Court* (1975) 47 C.A.3d 760, 777, 121 C.R. 621, *supra*, §43; *Lab.C. 3602(b)(1)*, *supra*, §43.) However, recovery of compensation will be barred where the employee is the initial physical aggressor. (*Lab.C. 3600(a)(7)*, *supra*, §250.) (See Cal. Civil Practice, 1 Workers'; Compensation, §1:48; 2 Hanna 2d (2004 ed.), §4.52; 1 Herlick 6th, §10.9.)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
D. Contributory Fault of Employee.
1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 254

[§ 254] In General.

Because liability for workers' compensation does not rest on negligence, the employee's contributory negligence or other fault is not a ground for denial of compensation, although serious and wilful misconduct will reduce the award by one-half (*infra*, §331). (See *State Comp. Ins. Fund v. Industrial Acc. Com.* (1952) 38 C.2d 659, 661, 242 P.2d 311; *Kaiser Co. v. Industrial Acc. Com.* (1944) 65 C.A.2d 218, 221, 150 P.2d 562; *Williams v. Work. Comp. App. Bd.* (1974) 41 C.A.3d 937, 941, 116 C.R. 607; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §222 et seq.; 12 A.L.R.5th 658 [effect on eligibility of claimant's misrepresentation of health or physical condition at time of hiring].) The only exceptions are injuries self-inflicted or arising from intoxication (*infra*, §325 et seq.).

In *Associated Indem. Corp. v. Industrial Acc. Com.* (1941) 18 C.2d 40, 112 P.2d 615, the employee, a dock superintendent, received compensation for an injury incurred while riding on a railroad company engine. The opinion rejected the defense that he had chosen an unreasonable and hazardous method of travel, and also held that the circumstance that he may have been a trespasser on the railroad company's property was immaterial to his claim against the employer. "The doctrine urged by petitioner must be applied with extreme caution for the reason that it is barely distinguishable from the rules of contributory negligence and assumption of risk which are not applicable in compensation cases." (18 C.2d 46.)

In *Hendy Iron Works v. Industrial Acc. Com.* (1946) 74 C.A.2d 191, 168 P.2d 203, the employee, in response to an inquiry by two of his superiors about the inflammable nature of a solvent, attempted to demonstrate that it would not burn, by igniting a soaked rag. Then, to quench the flames, he mistakenly drenched them with a bucket of solvent, thinking it was water. *Held*, the injury was compensable. (a) Lighting the rag was an attempt to cooperate with his superiors, and this act, though not expressly authorized, was done in their presence and with their acquiescence. (b) The thoughtless use of the bucket was a spontaneous reaction to the emergency that did not break the chain of causation. (74 C.A.2d 195.)

In *California Cas. Indem. Exchange v. Industrial Acc. Com.* (1936) 5 C.2d 185, 53 P.2d 758, a traveling salesman, staying overnight in an auto camp, was asphyxiated when he lighted a gas heater and closed the doors and windows. Answering the contention that his unreasonable conduct took him out of the course of his employment, the court said: "It is practically impossible to distinguish this contention from a claim that the death of the employee was caused by his own negligence." (5 C.2d 187.)

In *State Comp. Ins. Fund v. Industrial Acc. Com.* (1959) 176 C.A.2d 10, 1 C.R. 73, the employee, a carpenter, suffered an industrial injury to his left eye, which impaired his vision. Later, using a power saw, he amputated a finger. The employer unsuccessfully contended that the employee's negligence was a superseding cause.

In *Beaty v. Work. Comp. App. Bd.* (1978) 80 C.A.3d 397, 144 C.R. 78, the employee had previously sustained an industrial injury to his left shoulder, and subsequently fell off a ladder when engaged in a non-job-related activity (helping his father construct a swimming pool). The claim for compensation was made on the theory that the prior industrial injury was a contributing factor to the subsequent accident. The Board denied compensation; and, in reversing the decision and remanding for further proceedings, the court analyzed the problem in the light of *Wallin*.

(a) Mere carelessness of the employee does not break the chain of causation unless it is the sole cause of the injury, e.g., where he "rashly undertakes a line of action with knowledge of the risk created by the weakened member resulting from the industrial injury." (80 C.A.3d 403.)

(b) Two inquiries must be made: "First, it must be determined if the aftereffects of the disability from the Industrial Injury were a contributing factor to the Subsequent Accident. Secondly, if the Industrial Injury was a contributing factor, did the Subsequent Accident occur as a result of 'rashly' undertaking activity with knowledge of the risk created in light of the disability from the Industrial Injury." (80 C.A.3d 404.)

West's Key Number Digest, Workers' Compensation k.778

SUPPLEMENT: [This section is current through the latest supplement]



63 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
D. Contributory Fault of Employee.
2. Immoral Personal Object.

2 *Witkin Sum. Cal. Law Work Comp* § 255

[§ 255] Immoral Personal Object.

An immoral personal object does not bar compensation. In *Wiseman v. Industrial Acc. Com.* (1956) 46 C.2d 570, 297 P.2d 649, decedent, officer of a San Francisco bank, registered in a New York hotel on a business trip, with a woman purporting to be, but actually not, his wife. They were asphyxiated as a result of a fire, probably started from careless smoking by one or both, after drinking. The Commission and dissenting justices thought that the sole cause of the death was the employee's personal activity constituting a departure from the employment. However, the majority held that death benefits should be awarded. "The risk of fire was in no way increased, or any more or less related to his employment, because the employee brought his companion to his room for an immoral and unlawful rather than for a moral and lawful purpose. Accordingly, we conclude that the employee's purpose was so unrelated and collateral to the risk of fire that caused his death that it did not destroy the necessary causal connection between the employment and the death." (46 C.2d 574.)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
D. Contributory Fault of Employee.
3. Criminal Act.

2 Witkin Sum. Cal. Law Work Comp § 256

[§ 256] Criminal Act.

(1) *In General.* In *Pacific Tel. & Tel. Co. v. Work. Comp. App. Bd.* (1980) 112 C.A.3d 241, 169 C.R. 285, the applicant was employed as a directory advertising salesman. He was accused of forging signatures on advertising contracts and, after an investigation, was discharged. He applied for compensation on a showing that the stress of the charges, the investigation, and the discharge caused him severe emotional distress. The workers' compensation judge held the injury compensable without making findings on guilt or innocence of the charge, and the Board made the award. *Held*, annulled.

(a) If the applicant were innocent of the charge, the injury to his emotional state would be compensable, even though the employer acted reasonably in the accusation, investigation, and discharge. (112 C.A.3d 244.)

(b) If the applicant had merely violated instructions relating to his duties, or had even engaged in immoral or criminal conduct in performing those duties, his resulting injury might still be within the course of his employment. (See *supra*, §§200, 255.) However, the applicant could not be deemed to be serving his employer by forging of the signatures, and an injury sustained during this criminal activity would not be compensable. (112 C.A.3d 246.)

(c) Here, even though the injury was not sustained in furtherance of the alleged criminal act, it was a consequence of that act, and not incidental to the employment. (112 C.A.3d 247.) Hence, the issue of the applicant's guilt is determinative and must be resolved by the *Board*. (112 C.A.3d 247.)

(d) A further issue to be explored by the Board is whether, as a consequence of prior job stress, the applicant developed a mental disease or defect, which resulted in the forgeries. If this were the case, inquiry into guilt would be unnecessary, for the further injury to his emotional state from the accusation, investigation, and discharge would be compensable. (112 C.A.3d 247.) (See *Los Angeles v. Work. Comp. App. Bd. (Rivard)* (1981) 119 C.A.3d 355, 364, 174 C.R. 25 [issue whether police officer's psychiatric condition was sole consequence of police department's investigation of his alleged criminal activities in his capacity as private citizen (noncompensable), or was caused by stress and strain of employment (compensable); award annulled and matter remanded for consideration in light of *Pacific Tel. & Tel. Co.*].)

In *Traub v. Board of Retirement* (1983) 34 C.3d 793, 195 C.R. 681, 670 P.2d 335, a similar issue was involved:

service-connected disability as the basis for a claim of retirement allowance from a county retirement board. Following *Pacific Tel. & Tel. Co.*, and distinguishing *Rivard*, supra, the court said: "[W]hen an employee is investigated and disciplined by the employer on charges of misconduct that are unproved and therefore presumably false, and the discipline set aside, the resulting psychological stress and injury arises out of and in the course of employment." (34 C.3d 801.)

In *Westbrooks v. Work. Comp. App. Bd.* (1988) 203 C.A.3d 249, 252 C.R. 26, W, a bus driver, was convicted of reckless driving resulting in a near-accident. The employer then discharged W, but after grievance arbitration, W was reinstated. He suffered emotional disability because of the near-accident and the subsequent criminal proceedings, conviction, and disciplinary action, but the Board rescinded a compensation award, concluding that reckless driving constituted conduct outside the course of his employment. *Held*, decision annulled. *Pacific Tel. & Tel. Co. and Rockwell Int. v. Work. Comp. App. Bd.* (1981) 120 C.A.3d 291, 175 C.R. 219, infra, §257, "merely underscore that the criteria for determining whether given conduct is inside or outside the scope of employment are fluid and that the question must therefore be decided on the facts peculiar to each case." Here "we believe it justifiably conceivable that a person who drives for pay may occasionally violate a rule of the road on his journeys. It is proper, therefore, to allocate the risk for resulting injury to the employer." (203 C.A.3d 255.)

(2) *Conviction of Felony.* Conviction of a felonious act that caused the injury is a bar to compensation. (*Lab.C. 3600(a)(8).*)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
D. Contributory Fault of Employee.
4. Discipline for Noncriminal Act.

2 Witkin Sum. Cal. Law Work Comp § 257

[§ 257] Discipline for Noncriminal Act.

In *Rockwell Int. v. Work. Comp. App. Bd. (1981) 120 C.A.3d 291, 175 C.R. 219*, the employee, while a passenger on a truck being driven at a high speed on his employer's premises, attempted to dispose of a container of liquor that would have been evidence of drinking on the job. He was disciplined by a reprimand and suspension, and sought compensation for a psychiatric reaction. The Board made an award on the ground that the injury was compensable even if the employee's conduct was outside the course of his employment. *Held*, award annulled and remanded for consideration whether conduct was outside course of employment. Although *Pacific Tel. & Tel. Co. v. Work. Comp. App. Bd. (1980) 112 C.A.3d 241, 169 C.R. 285*, *supra*, §256, involved distinguishable criminal conduct, its reasoning is applicable. If the discipline was for conduct outside the course of employment, the psychiatric injury sustained was not compensable. (*120 C.A.3d 298.*)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
VIII. WHEN INJURIES ARE COMPENSABLE
D. Contributory Fault of Employee.
5. Undertaking Excessive Workload.

2 Witkin Sum. Cal. Law Work Comp § 258

[§ 258] Undertaking Excessive Workload.

In *Bingham v. Work. Comp. App. Bd.* (1968) 261 C.A.2d 842, 68 C.R. 410, decedent had two jobs--one as a field auditor in the day and another as a liquor salesman at night. He died of a heart attack one night after returning from the liquor store. The Board denied benefits, relying on the opinion of its independent medical examiner that the cause of death was decedent's personal striving for status enhancement, which led him to hold down two jobs without rest. *Held*, this conclusion was erroneous. If decedent's employment was a causative factor, it was not a defense that he had the bad judgment to take on two stressful jobs that hastened his death. (261 C.A.2d 849.)

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67 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

1. In General.

a. Purpose and Components.

2 Witkin Sum. Cal. Law Work Comp § 259

[§ 259] Purpose and Components.

In *West v. Industrial Acc. Com.* (1947) 79 C.A.2d 711, 721, 180 P.2d 972, the court said: "The purpose of the award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. ... In short the award transfers a portion of the loss suffered by the disabled employee from him and his dependents to the consuming public. ... Complete protection is not afforded the employee from disability because this would constitute an invitation to malingering or to be careless on the job as he would then lose nothing in assuming a disabled status."

The Act not only strictly limits the amount recoverable (*infra*, §§275, 303), but does not allow compensation at all for certain elements of damage that may be asserted in a tort action, such as pain and suffering. (*Jacobsen v. Industrial Acc. Com.* (1931) 212 C. 440, 447, 299 P. 66; see *West v. Industrial Acc. Com.*, *supra*, 79 C.A.2d 718 [no compensation for pain unless it raises presumption of incapacity to earn]; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §376 et seq.)

Under the Act, a compensable injury or death may make the employer liable for one or more of the following:

- (1) Medical, surgical, and hospital treatment (*infra*, §261 et seq.).
- (2) Indemnity for disability (*infra*, §275 et seq.).
- (3) Death benefit and burial expense (*infra*, §279 et seq.).
- (4) Reimbursement for certain expenses (*infra*, §264).
- (5) Rehabilitation benefits (*infra*, §282).

Penalties, consisting of percentage increases in the award, may be imposed on an employer for various illegal or wrongful acts. (See *supra*, §§151, 174 and *infra*, §§316 et seq., 412, 413.)

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68 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

1. In General.

b. Installments or Lump Sum.

2 Witkin Sum. Cal. Law Work Comp § 260

[§ 260] Installments or Lump Sum.

(1) *In General.* Following the initial payment, disability indemnity or death benefits are paid every 2 weeks on the day designated by the first payment, unless the Board orders otherwise. (*Lab.C. 4650(c), 4702* [death benefits].) Written instruments by which payment is made must be immediately negotiable and payable in cash on demand, without discount. (*Lab.C. 4651.*) (See *State Comp. Ins. Fund v. Work. Comp. App. Bd. (1998)* 66 C.A.4th 1154, 1161, 78 C.R.2d 448 [postdated annuity checks received within 3 business days of agreed on commencement date conformed with approved agreement with insurer that payments were to commence "on or about" specific date and complied with *Lab.C. 4651*].)

Where necessary or desirable, as where the employer is about to dispose of assets or is not a resident, the Board may commute the future compensation to a lump sum to be paid at once, provided that commutation avoids inequity to either party. (*Lab.C. 5100 et seq.*; see *Lab.C. 4646* [settlement and lump-sum payment for prospective vocational rehabilitation is permissible only under specified conditions]; *Lab.C. 5100.5* [no commutation permissible for award under *Lab.C. 4751*, *infra*, §299]; *Lab.C. 5100.6* [no commutation of prospective vocational rehabilitation compensation or indemnity payments]; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §627 et seq.; 26 *A.L.R.5th* 127 [reopening lump-sum compensation payment]; 1 *Herlick* 6th, §§6.18, 7.54 et seq.; 2 *Herlick* 6th, §16.25.)

(2) *Factors To Be Considered for Commutation.* The Board may commute where it appears necessary to protect the person entitled, or for the best interest of the applicant. In determining what is in the best interest of the applicant, the Board must consider the applicant's general financial condition, including the applicant's ability to live without periodic indemnity payments and to discharge debts incurred before the date of injury. (*Lab.C. 5100(a).*)

(3) *Discretion To Grant or Deny Commutation.* In *Hulse v. Work. Comp. App. Bd. (1976)* 63 C.A.3d 221, 133 C.R. 678, H was awarded permanent disability indemnity in 1973, payable in weekly installments for 8 years, with a reduced life pension payable thereafter. In 1975, H moved to have the remaining award, exclusive of the life pension, commuted. He offered to prove that he had no need for the weekly payments, and would receive an additional \$ 11,000 as an offset against inflation if the total were placed in a blocked account in a credit union. *Held*, order denying application affirmed. "If commutation of this applicant's award were to have the precedential effect which the Board majority and respondents portend, it would indeed permit--if not command--commutation of any and every permanent

disability award." (63 *C.A.3d* 229.)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 261

[§ 261] In General.

(1) *Treatment and Services.* The Board may award medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines and supplies, and orthotic and prosthetic devices and services when reasonably required to cure or relieve an employee from the effects of an industrial injury. (*Lab.C. 4600(a)*; see *Granado v. Work. Comp. App. Bd.* (1968) 69 C.2d 399, 406, 71 C.R. 678, 445 P.2d 294, *infra*, §294 [medical expenses are not apportionable]; *Cedillo v. Work. Comp. App. Bd.* (1971) 5 C.3d 450, 455, 96 C.R. 471, 487 P.2d 1039 [award of "further medical treatment" to cure or relieve effects of injury]; Cal. Civil Practice, 1 Workers' Compensation, §2:1 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §3.1 et seq.; 1 Hanna 2d (2004 ed.), §5.02 et seq.; 1 Herlick 6th, §4.01 et seq.; 63 A.L.R.5th 163 [specially equipped vans]; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §442 et seq.) (On generic drug requirement for persons or entities providing medicines under *Lab.C. 4600*, see *Lab.C. 4600.1*; on contracts between self-insured employers and pharmacies to provide medicines, see *Lab.C. 4600.2*; on provisions permitting insurers and employers to establish medical provider networks, see *Lab.C. 4616* et seq.; *infra*, §262.)

Medical treatment that is "reasonably required to cure or relieve" the effects of an industrial injury is treatment based on guidelines adopted by the Administrative Director under *Lab.C. 5307.27* (medical treatment utilization schedule). (*Lab.C. 4600(b)*.)

(2) *Physician.* "Physician" includes osteopaths, psychologists, optometrists, acupuncturists, dentists, podiatrists, and chiropractic practitioners. (*Lab.C. 3209.3*.) (See *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1977) 69 C.A.3d 884, 893, 138 C.R. 509 [definition of physician in *Lab.C. 3209.3* does not exclude physician licensed to practice in another country; where medical treatment and reports are procured from that physician in accordance with *Lab.C. 4600*, employer is responsible for reasonable expense of treatment and medical-legal costs]; *Bergental v. Work. Comp. App. Bd.* (1996) 45 C.A.4th 1272, 53 C.R.2d 266 [services by psychologist's assistant are covered where there is sufficient consultation and supervision to satisfy requirements for psychology assistants under *B. & P.C. 2913*].) (On treatment by physician assistants or nurse practitioners, see *Lab.C. 3209.10(a)*; on restrictions placed on physician referrals, see *Lab.C. 139.3*, 139.31 [exceptions].)

(3) *Inmates.* The Department of Corrections has medical control over treatment of an injured inmate of a state prison. However, in serious cases the inmate may request and is entitled to the services of a consulting physician. (

Lab.C. 3370(c).)

(4) *Health Care Organization Contract.* An employee whose employer or the employer's insurer has contracted with a health care organization to provide medical treatment for industrial injuries to the employee is entitled to the same medical treatment award as any other employee who has been injured in a work-related accident. Immediate emergency medical treatment is compensable even though it is received from a medical service or health care provider who does not belong to the health care organization. The employee must not be required to pay deductibles, copayments, or a share of the premium. (*Lab.C. 4600, 4600.3(a)(2).*) (On certification requirements for contracts between employer and health care organizations, see *Lab.C. 4600.5, 4600.6*; on Workers' Compensation Managed Care Fund created for administration of *Lab.C. 4600.3*, see *Lab.C. 4600.7*.)

Employers must notify employees of eligible service providers, and that if the employees choose to receive care from the health care organization, they must receive treatment for all occupational injuries and illnesses as provided in *Lab.C. 4600.3. (Lab.C. 4600.3(a)(3).*)

(5) *Collective Bargaining Agreement.* *Lab.C. 3201.5(b)(2)* permits private employers or groups of employers engaged in construction, construction maintenance, or specified collateral activities, and recognized labor groups with whom they have entered into collective bargaining agreements, to negotiate the delivery of medical benefits and disability compensation to employees of the employers who are eligible for group health benefits and nonoccupational disability benefits through the employer. (On similar provisions with respect to noncollective bargaining, labor-management agreements generally, see *Lab.C. 3201.7(b)(2).*)

West's Key Number Digest, Workers' Compensation k.961 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Treatment and Services.* See *Sierra Pac. Industries v. Work. Comp. App. Bd. (2006) 140 C.A.4th 1498, 1506, 45 C.R.3d 550* [2004 amendments to *Lab.C. 4600*, which resulted in adoption of guidelines for determination of reasonable medical treatment, were applicable to claimant who sustained injuries before enactment of amendments; thus, guidelines were used to annul award to chiropractor for treatment rendered prior to amendments].

In *Hodgman v. Work. Comp. App. Bd. (2007) 155 C.A.4th 44, 65 C.R.3d 687*, J sustained a catastrophic industrial injury and was confined to an assisted living facility. J's mother, P, was appointed J's guardian ad litem and trustee by the workers' compensation judge and later appointed J's conservator by the superior court. P had no medical knowledge or training but through extensive self-study became the primary person involved in monitoring and managing all of J's medical care. Following a dispute over P's entitlement to compensation for rendering medical treatment, P and J's employer executed an agreement under which they agreed to an hourly rate for P's reasonable and necessary services. At the end of 6 months the parties were to renegotiate the rate. Accordingly, P submitted monthly statements and the employer compensated her without objection for 5 years. When the employer ceased payment, P sought enforcement of the agreement, contending that it required the employer to pay for her services where necessary to secure appropriate medical care and equipment for J. *Held*, P's services as caregiver were compensable.

(a) Under *Lab.C. 4600*, an injured employee is entitled to all care reasonably required to cure or relieve the effects of the injury, and in managing and monitoring all of J's needs P provided services that qualified as medical care. When deciding on J's medical needs, P was similar to a nurse care manager, or registered nurse or physician on duty. Her purpose was to decide on appropriate treatment, regardless of whether professionals originally thought of the treatment or the need. "Concomitant to receiving medical treatment is the ability to decide what treatment to accept or refuse. ... Even though professionals make these recommendations based on their expertise, their purpose is simply to advise the patient, who must make the choice." Thus, P provided a critical service for J. (*155 C.A.4th 54.*)

(b) Although the conservatorship authorized P to make health care decisions, it did not require her to perform health care activities such as deciding what J should eat or double-checking a nurse's actions, all of which P performed.

P was careful to keep separate the duties related to medical care from those of the conservatorship. The compensation P sought was not for her duties as a conservator, but were equivalent to medical treatment for which J's employer should be responsible. Thus, the Board had jurisdiction to determine whether compensation was due, not as a conservator, but as a caregiver. (155 C.A.4th 55.)

(c) The agreement clearly provided that P's caregiving services were compensable even if duplicative of professional services such as those performed by the case manager. "By its plain language, the [agreement] was renegotiable only with regard to the rate of pay" and did not exclude duplicate services. (155 C.A.4th 55.)



70 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

b. Medical Provider Network.

2 Witkin Sum. Cal. Law Work Comp § 262

[§ 262] Medical Provider Network.

(1) *In General.* Under workers' compensation reform legislation passed in 2004 (*supra*, §4), employers or insurers may establish medical provider networks to provide medical treatment to injured employees. Once a network is established, injured employees are generally required to use network physicians for the treatment of industrial injuries. Accordingly, the network must include physicians primarily engaged in the treatment of both occupational and nonoccupational injuries. (*Lab.C. 4616(a)(1).*) Treatment must be readily available at reasonable times and readily accessible. (*Lab.C. 4616(a)(2).*) (On provisions governing choice and change of physician, see *infra*, §268 et seq.) The significant provisions are as follows:

(a) *Lab.C. 4616* [administrative and general provisions].

(b) *Lab.C. 4616.1* [filing of policies and procedures related to "economic profiling" (evaluation of medical provider based on costs of services) utilized by insurer or employer].

(c) *Lab.C. 4616.2* [continuity of care].

(d) *Lab.C. 4616.3* [procedures for treatment following employee claim]; *infra*, §266 et seq.

(e) *Lab.C. 4616.4* [independent medical reviews]; *infra*, §269.

(f) *Lab.C. 4616.5* ["employer" means self-insured employer, joint powers authority, or state].

(g) *Lab.C. 4616.6* [prohibiting appeals board from ordering additional examinations and exclusion of other reports to resolve controversies arising from *Lab.C. 4616* et seq.].

(h) *Lab.C. 4616.7* [requirements for health care organizations and service plans, and group disability insurance in order to be deemed approved under *Lab.C. 4616* et seq.].

Plans for the network must be approved by the Administrative Director. If the Administrative Director fails to act on a plan within 60 days of submission, the plan is deemed approved. (*Lab.C. 4616(b).*) Moreover, the employer or

insurer has the exclusive right to determine the members of a network, and if all other requirements are met, the Administrative Director may not withhold approval based solely on the selection of providers. (*Lab.C. 4616(d).*)

When notified of an employee injury or claim, the employer must arrange an initial medical evaluation and begin treatment as required by *Lab.C. 4600* (supra, §261). (*Lab.C. 4616.3(a).*) Treatment by network providers must be in accord with the medical treatment utilization schedule established under *Lab.C. 5307.27*. (*Lab.C. 4616(e).*)

(2) *Continuity of Care*. An employer must file a written continuity of care policy with the Administrative Director, and must provide employees with notice of the policy and furnish a copy, if requested. (*Lab.C. 4616.2(a), (c).*)

On termination of a provider's contract, injured employees who were being treated by that provider must be afforded completion of treatment by the terminated provider for the following conditions: (a) An acute condition; (b) a serious chronic condition; (c) a terminal illness; and (d) a procedure, including surgery, as part of a documented course of treatment and to occur within 180 days of termination. (*Lab.C. 4616.2(d).*) Completion of treatment need not be required by a provider whose contract was terminated because of a medical disciplinary or criminal matter. (*Lab.C. 4616.2(d)(6).*)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

c. Utilization Review.

2 *Witkin Sum. Cal. Law Work Comp* § 263

[§ 263] Utilization Review.

(1) *Nature of Process.* *Lab.C. 4610* requires employers to establish a utilization review process, either directly or through an insurer or contracted entity. The process entails prospective, retrospective, or concurrent review and approval, modification, delay, or denial of treatment recommendations by physicians prior to, retrospectively, or concurrent with *Lab.C. 4600* medical treatment services based on "medical necessity to cure and relieve." (*Lab.C. 4610(a), (b).*) The procedure must be governed by written policies and procedures, and only a licensed physician competent to evaluate the specific clinical issues involved is permitted to decide what action will be taken regarding authorization of medical treatment. (*Lab.C. 4610(c), (e).*) A licensed physician must be employed or designated as a medical director who must ensure compliance with the statutory requirements. (*Lab.C. 4610(d).*) Entities subject to the process must maintain telephone access for physicians to request authorization for health care services. (*Lab.C. 4610(h).*) (On conditions and requirements for criteria or guidelines used in process, see *Lab.C. 4610(f).*)

(2) *Timeframes and Requirements.* The review process must comply with the following timeframes and requirements:

(a) *Prospective or concurrent* decisions must be timely and appropriate for the nature of the employee's condition, but must be made no later than 5 working days from the receipt of the information reasonably necessary to make a decision, and not later than 14 days from the date a physician recommends the treatment. In *retrospective* reviews, a decision must be communicated to the party receiving services within 30 days of receipt of information reasonably necessary to the determination. (*Lab.C. 4610(g)(1).*)

(b) If an employee faces imminent and serious health threats involving the loss of major bodily functions, or if the timeframes in *Lab.C. 4610(g)(1)* are detrimental to the employee's life, health, or ability to regain maximum function, decisions must be timely made in conformity with the employee's condition, and not beyond 72 hours after receipt of information reasonably necessary to the determination. (*Lab.C. 4610(g)(2).*)

(c) Decisions approving, modifying, delaying, or denying requests by physicians for authorization prior to or concurrent with providing medical services to employees must be communicated to the requesting physician within 24 hours of the determination. Decisions modifying, delaying, or denying requested health care services must be

communicated to the physician initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for *concurrent* review, or within 2 business days of the decision for *prospective* review. Disputes involving denial of requests are resolved in accordance with *Lab.C. 4062*. (*Lab.C. 4610(g)(3)(A)*.)

(d) In *concurrent* reviews, medical care must not be discontinued until the employee's physician has been notified and an appropriate care plan agreed on. (*Lab.C. 4610(g)(3)(B)*.)

(e) Communications regarding the approval of requests by physicians must specify the medical treatment services approved. Decisions to modify, delay, or deny medical treatment services must provide a clear and concise explanation of the reasons for the decision, a description of the criteria used, and the clinical reasons for the decisions regarding medical necessity. (*Lab.C. 4610(g)(4)*.)

(f) If a decision cannot be made in the timeframes specified in *Lab.C. 4610(g)(1)* or (g)(2) because the information reasonably necessary and requested has not been received, or the employer requests consultation with an expert reviewer or additional examinations or tests, the employer must immediately notify the physician and employee in writing of the delay, specifying the reason, and of the anticipated decision date. (*Lab.C. 4610(g)(5)*.)

(3) *Penalty for Noncompliance*. The Administrative Director may assess administrative penalties for each noncompliance with the timeframes of *Lab.C. 4610*. (*Lab.C. 4610(i)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Process*.

(*New*) *Employers must utilize process*: By enacting *Lab.C. 4610*, together with the comprehensive workers' compensation reforms since 2004, the Legislature intended that an employer's review of an employee's medical treatment request is to be governed solely by the utilization review process. Thus, an employer may not use the dispute resolution process of *Lab.C. 4062* (see text, §291) to dispute an employee's treatment request as an alternative to the utilization review process. However, if an employee is dissatisfied with an employer's decision under *Lab.C. 4610*, the employee may use *Lab.C. 4062* to resolve the dispute. (*State Comp. Ins. Fund v. Work. Comp. App. Bd. (2008) 44 C.4th 230, 237, 79 C.R.3d 171, 186 P.3d 535* [employer failed to meet deadline for review in *Lab.C. 4610(g)(1)*].)



72 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

- A. Nature and Elements of Award.
- 2. Medical Treatment and Expense.
- d. Reimbursement for Examination Expenses.

2 Witkin Sum. Cal. Law Work Comp § 264

[§ 264] Reimbursement for Examination Expenses.

An employee who submits to a medical examination at the request of the employer or insurer, the Administrative Director, the Board, or a workers' compensation administrative law judge, is entitled to the reasonable expense of transportation, meals and lodging, and 1 day of temporary disability indemnity (*infra*, §275 *et seq.*) for each day of wages lost. (*Lab.C. 4600(e)(1)*; see *Caldwell v. Work. Comp. App. Bd.* (1969) 268 C.A.2d 912, 917, 74 C.R. 517 [expenses incurred in visit to employee's own physician].) The transportation reimbursement is a specified statutory amount per mile plus bridge tolls, to be paid when the employee is notified of the time and place of the examination. (*Lab.C. 4600(e)(2)*; *Govt.C. 19820*.) (See *Hutchinson v. Work. Comp. App. Bd.* (1989) 209 C.A.3d 372, 374, 257 C.R. 240 [claimant in rural area had to make 80-mile round trip to obtain prescribed medicine; order denying transportation expenses annulled]; *Avalon Bay Foods v. Work. Comp. App. Bd.* (1998) 18 C.4th 1165, 1175, 77 C.R.2d 552, 959 P.2d 1228 [right to medical treatment transportation expenses is dependent on and ancillary to medical treatment benefits; transportation benefits are not different benefit, but necessary means to ensure prompt medical treatment]; *Department of Rehabilitation v. Work. Comp. App. Bd.* (2003) 30 C.4th 1281, 1295, 135 C.R.2d 665, 70 P.3d 1076, *infra*, §276 [*Lab.C. 4600* does not create obligation to pay temporary disability indemnity as replacement for wages for employee's time away from work for medical treatment for permanent and stationary injury]; 36 A.L.R.5th 225 [reimbursement for travel expenses incurred in obtaining treatment].)

An employee who submits to a requested examination but is not proficient in English is entitled to a qualified interpreter to be provided by the employer. A "qualified interpreter" means a language interpreter certified, or deemed certified, under *Govt.C. 11435.05* or 68566. (*Lab.C. 4600(f)*.)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

e. Injury to Orthotic and Prosthetic Devices.

2 *Witkin Sum. Cal. Law Work Comp* § 265

[§ 265] Injury to Orthotic and Prosthetic Devices.

In addition to, and distinct from, the Board's power to require orthotic and prosthetic devices to be furnished as part of medical treatment (*Lab.C. 4600*), the Act defines injuries to include injuries to "artificial members." (*Lab.C. 3208*; see *Pacific Indem. Co. v. Industrial Acc. Com.* (1932) 215 C. 461, 464, 11 P.2d 1 [statute upheld and award given to employee whose wooden leg was smashed]; 2 Hanna 2d (2004 ed.), §5.02[9]; 1 Herlick 6th, §4.11 et seq.)

Also included are injuries to dentures, hearing aids, eyeglasses, and medical braces. However, eyeglasses and hearing aids are compensated for only if the injury to them is incident to an injury causing disability. (*Lab.C. 3208*.)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

f. Kinds of Treatment.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 266

[§ 266] In General.

(1) *Services and Supplies*. In addition to routine medical, surgical, and hospital care, treatment includes services and supplies provided by physical therapists, chiropractic practitioners, and acupuncturists. (*Lab.C. 3209.5*; on chiropractic and acupuncturist care under health care service plans, see *Lab.C. 4600.5(l)* and (n).)

(2) *Agreed Treatment or Therapy*. In addition to, or in place of, the services described in *Lab.C. 3209.5*, treatment may include other forms of therapy, treatment, or healing practice voluntarily agreed on in writing between the employee and the employer. (*Lab.C. 3209.7*.)

(3) *Treatment by Family Therapist or Clinical Social Worker*. Treatment reasonably required to cure or relieve the effects of an injury include the services of marriage therapists and clinical social workers if the injured person is referred to them by a licensed physician or surgeon with the approval of the employer. The requirement of employer approval, however, does not preclude reimbursement for self-procured treatment found by the Board to be otherwise compensable where the employer has refused to authorize treatment for the injury. (*Lab.C. 3209.8*.)

(4) *Limitations on Treatments*. *Lab.C. 4604.5* and 5307.27 authorize the Administrative Director to adopt a medical treatment utilization schedule that addresses the frequency, duration, intensity, and appropriateness of treatment procedures commonly utilized in workers' compensation cases. Once adopted, the recommended guidelines in the schedule are considered presumptively correct, subject to rebuttal. However, notwithstanding the schedule or guidelines, *Lab.C. 4604.5* provides that, for injuries occurring on and after January 1, 2004, an employee will be limited to 24 chiropractic, occupational therapy, and physical therapy visits per industrial injury. (*Lab.C. 4604.5(d)(1)*.)

(5) *Nursing Services by Family*. Under some circumstances, the expense of nursing services performed by an employee's spouse may be recovered. In *California Cas. Indem. Exchange v. Industrial Acc. Com.* (1948) 84 C.A.2d 417, 190 P.2d 990, the injured employee required special nursing services, and the attending physician suggested, in view of overcrowding at the hospital, that the employee's spouse take care of him. In awarding an amount to cover her claim for services, the court took note of the uncertainty in Board and court decisions on nursing charges by members of the family, but made the following distinction: (a) Where the services are not extraordinary in nature, but come within

the spouse's ordinary duties, and are rendered without the knowledge of the insurer, no claim may be made. (b) Where, as here, the services were unusual, and were rendered with the knowledge and, through its agent, the request, of the insurer, this was in legal effect a contract with the spouse to supply them. (84 C.A.2d 423.) (See *Henson v. Work. Comp. App. Bd.* (1972) 27 C.A.3d 452, 460, 103 C.R. 785 [spouse's services as practical nurse]; C.E.B., 1 Workers' Compensation Practice 4th, §3.5; 1 Herlick 6th, §4.16; 65 A.L.R.4th 142 [value of home care]; 67 A.L.R.4th 765 [services provided by spouse].)

(6) *Housekeeping Services*. The cost of housekeeping services, although not involving nursing services, may be recoverable where they are shown to be medically necessary and reasonable and have been recommended by a physician. (*Smyers v. Work. Comp. App. Bd.* (1984) 157 C.A.3d 36, 42, 203 C.R. 521.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Limitations on Treatments*. The limitation in *Lab.C. 4604.5(d)(1)* of 24 visits for chiropractic, occupational therapy, and physical therapy does not apply when an employer authorizes in writing additional visits. (*Lab.C. 4604.5(d)(2)*, as amended in 2004.) Nor does the limitation apply to visits for postsurgical physical medicine and postsurgical rehabilitation services provided in compliance with a postsurgical treatment utilization schedule established pursuant to *Lab.C. 5307.27*. (*Lab.C. 4604.5(d)(3)*, added in 2007.) (See *Facundo-Guerrero v. Work. Comp. App. Bd.* (2008) 163 C.A.4th 640, 653, 655, 77 C.R.3d 731 [provisions of *Lab.C. 4604.5(d)* imposing limitations on visits for treatment and those permitting employer to remove 24-visit cap are not unconstitutional].)



75 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

f. Kinds of Treatment.

2. Cosmetic Surgery.

2 *Witkin Sum. Cal. Law Work Comp* § 267

[§ 267] Cosmetic Surgery.

Cosmetic surgery as future medical treatment is permissible if supported by substantial evidence. In *Cano v. Work. Comp. App. Bd.* (2000) 81 C.A.4th 225, 96 C.R.2d 582, the applicant was severely burned in a workplace accident, underwent multiple surgeries and skin grafting, and then maintained a strict hygienic regime to alleviate constant pain and discomfort. Applicant requested a precautionary award of continuing medical care. Reports from three surgeons suggested cosmetic procedures that would improve applicant's facial condition, both in appearance and functionality. The Board found that applicant had a permanent disability but that he was not entitled to further medical care, holding that even if cosmetic surgery were warranted and justified, it would be for physical appearance only and would not relieve the effects of the injury. *Held*, decision annulled and matter remanded.

(a) The Board's conclusion and reasoning conflicts with *Los Angeles v. Industrial Acc. Com.* (1927) 202 C. 437, 261 P. 295, in which the court approved future cosmetic surgery where appearance was a primary factor, reasoning that it was probable that the employee's morale and self-respect would be enhanced, hence, he would be restored to a normal condition permitting restoration of his earning powers. (81 C.A.4th 231.)

(b) An employer must provide treatment that includes all medical, surgical, nursing, and hospital care reasonably required to cure or relieve the effects of an industrial accident. Although the reports by the three physicians were written several years prior to the hearing, they were based on essential facts extant at the time of the Board's decision. Applicant's facial disfigurement was a permanent, unchanged condition, and substantial evidence supported the need for future medical treatment involving cosmetic surgery. (81 C.A.4th 232.)

(c) Applicant's permanent disability rating, which presumably took into account his facial disfigurement, does not preclude future medical care for cosmetic surgery. Continuing medical treatment may be awarded even though an injury has been rated as a permanent disability, e.g., an irreversible disease requiring treatment and necessary medication for blisters, abrasions, or skin grafts that break down periodically. (81 C.A.4th 232.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

g. Selection of Physician.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 268

[§ 268] In General.

The employer is obligated to provide medical treatment "reasonably required to cure or relieve" an injured employee from the effects of the industrial injury. (*Lab.C. 4600(a)*, supra, §261.) An injured employee may of course engage a personal physician at the employee's own expense. (*Lab.C. 4605*.) Also, under certain circumstances, the employee may select the treating physician and be entitled to reimbursement from the employer. (See *infra*, §269.) (On selection of physician where employer or insurer has established medical provider network, see *supra*, §262.)

Where the employee selects a physician under *Lab.C. 4600*, the employee or the physician must promptly notify the employer of the physician's name and address, and the physician must furnish prescribed periodic reports. (*Lab.C. 4603.2(a)*.)

The employer must pay for medical treatment provided or authorized by the treating physician selected by the employee within 45 days after receipt of each separate itemization of medical services, required report, and written authorization for services received by the physician. A penalty of 15% plus interest is added to unpaid amounts retroactive to the date of receipt of the itemization, unless the employer makes a timely payment of the rates in effect within the 45-working day period, and follows the stated procedure to request an audit of the bill. An employer contesting the charges must notify the physician in writing of the dispute within 30 working days after receiving the bill. (*Lab.C. 4603.2(b)(1)*.) A governmental entity employer has 60 working days from receipt of billings and reports to pay for authorized medical treatment. (*Lab.C. 4603.2(b)(2)*.) (See *Avalon Bay Foods v. Work. Comp. App. Bd.* (1998) 18 C.4th 1165, 1179, 77 C.R.2d 552, 959 P.2d 1228 [60-day time limit is applicable in deciding whether medical treatment transportation expenses, part of class of medical treatment benefits, is timely paid]; *Boehm & Associates v. Work. Comp. App. Bd.* (1999) 76 C.A.4th 513, 516, 90 C.R.2d 486 [interest begins to accrue 60 days after proper bill is received but not paid by employer].) (On duties of employer using entity to review workers' compensation physician billings and corresponding duties of reviewing entity, see *Lab.C. 4603.2(d)*.)

If the employer has established a medical provider network under *Lab.C. 4616* (supra, §262), the employer must notify an injured employee of the right to be treated by a physician of choice from the network, and inform the employee how to access the list of participating providers. (*Lab.C. 4616.3(b)*.) (On procedures when employee disputes

diagnosis or treatment by network provider, see *infra*, §269.)

Controversies relating to the selection of physicians are determined by the Board at the request of either the employer or employee. (*Lab.C. 4604.*) (See Cal. Civil Practice, 1 Workers' Compensation, §2:28 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §3.9 et seq.; 1 Herlick 6th, §4.18.)

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77 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

g. Selection of Physician.

2. Selection by Employee.

2 *Witkin Sum. Cal. Law Work Comp* § 269

[§ 269] Selection by Employee.

(1) *Written Notification Prior to Injury.* If an employee has notified the employer in writing prior to the date of injury of a personal physician, the employee has the right to be treated by that physician if either of the following conditions exist: (a) The employer provides nonoccupational group health coverage in a health care service plan licensed under *Health & Saf.C. 1340* et seq., or (b) the employer provides nonoccupational health coverage in a group health plan or a group health insurance policy, as described in *Lab.C. 4616.7* (medical provider network; supra, §262). (*Lab.C. 4600(d)(1).*)

In order to qualify, the employee's personal physician must agree to be predesignated and must be (a) the employee's regular physician and surgeon, licensed under *B. & P.C. 2000* et seq., and (b) the employee's primary care physician who has previously directed the employee's medical treatment and has retained the employee's medical records. (*Lab.C. 4600(d)(2).*)

If the nonoccupational health care is provided under *Health & Saf.C. 1340* et seq., medical treatment and attendant issues are governed by *Govt.C. 1340* et seq. Disputes regarding medical treatment are governed by *Health & Saf.C. 1374.30* et seq. (appeals seeking independent medical reviews). (*Lab.C. 4600(d)(3).*) However, if the nonoccupational health care is provided under *Lab.C. 4616.7* (medical provider network; supra, §262), medical treatment issues are "governed by the applicable provisions of the Insurance Code." (*Lab.C. 4600(d)(4).*)

Lab.C. 4600(d)(6) limits the number of employees that may predesignate to 7% of all employees.

(2) *Thirty Days After Injury.* Unless the employer or insurer has established a medical provider network (supra, §262), an employee may obtain treatment by the employee's physician of choice, or at a facility of choice within a reasonable geographic area, when 30 days have elapsed from the date the injury was reported. (*Lab.C. 4600(c).*) (See *Ordorica v. Work. Comp. App. Bd. (2001) 87 C.A.4th 1037, 1046, 105 C.R.2d 123* [employee's initiation of treatment by own physician rather than one chosen by employer *within* 30-day period immediately following injury violated *Lab.C. 4600* and was deemed refusal of care by employer's physician].)

In *Braewood Convalescent Hosp. v. Work. Comp. App. Bd.* (1983) 34 C.3d 159, 193 C.R. 157, 666 P.2d 14, a chronically overweight applicant was injured by a slip and fall. The physicians recommended that he lose weight to facilitate recovery, but did not suggest a specific program. Applicant, who had unsuccessfully undertaken weight reduction programs throughout his life, enrolled in a course in a North Carolina clinic, which produced a substantial weight loss. The Board awarded reimbursement for the costs of past and future treatment of this type. *Held*, affirmed.

(a) "[W]hile employer initially had the right to direct applicant to a specific program, that right was lost as a result of employer's failure to act by identifying and offering such an alternative program. At that point applicant acquired the right to choose for himself what program he reasonably might undertake. The right to appropriate reimbursement was a part and parcel of the proper exercise of applicant's right to choose." (34 C.3d 166.)

(b) *Lab.C. 4600* limits an employee's choice to "a reasonable geographic area." To support a finding that the applicant's geographic location is unreasonable, the employer must show the availability of a similar or equally effective program closer to appellant's domicile. (34 C.3d 166, 167.)

(3) *Where Employer Has Contracted With Health Care Organization.* Where a self-insured employer or its insurer has contracted with a certified health care organization, employees subject to the contract must receive the prescribed medical services. However, an employee may still be treated by a personal physician designated prior to the injury. Moreover, every employee must be given an affirmative choice at the time of hire, and at least annually, to designate a health care organization or a personal physician. The choice must be made in writing and included in the employee's personnel records. An employee who fails to choose must be treated by the organization selected by the employer. (*Lab.C. 4600.3(a)(1).*) (On detailed provisions permitting employee to control treatment after accepting treatment from health care organization, see *Lab.C. 4600.3(c)*; Cal. Civil Practice, 1 Workers' Compensation, §2:52 et seq.)

If an employer or its insurer ceases to contract with the health care organization that has been treating an injured employee, the employee may continue the treatment provided or arranged by the organization. If the employee does not so choose, the employer may control the employee's treatment for 30 days from the date the injury was reported, after which the employee may be treated by a physician or at a facility of his or her choice. (*Lab.C. 4600.3(g).*)

(4) *Where Employee Disputes Diagnosis of Network Physician.* The following procedures govern choice of physician where an injured employee disputes the diagnosis or treatment by a medical provider network physician (supra, §262):

An employer must notify an injured employee of the right to be treated by a physician of the employee's choice from the list of participating providers. An employee who disputes the diagnosis or treatment may seek the opinion of another physician in the network. If the employee disputes the second opinion, the employee may seek a third opinion from another network physician. (*Lab.C. 4616.3(c).*)

If the third opinion fails to resolve the dispute, the employee may request independent medical review by submitting an application to the Administrative Director. Once a reviewer is assigned, medical records and information relevant to the diagnosis and treatment are submitted to the reviewer who may then conduct a physical examination of the employee at the employee's discretion. Using either a medical treatment utilization schedule established under *Lab.C. 5307.27*, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, together with the information furnished, the reviewer determines whether the disputed service was consistent with the utilization schedule or guidelines. (*Lab.C. 4616.4.*) (On nature and content of independent medical reviewer's report, see *Lab.C. 4616.4(f).*)

If the reviewer determines that the disputed treatment or diagnosis is consistent with the schedule or guidelines, the employee may seek the disputed treatment or services from a physician of choice from within or outside the medical provider network. (*Lab.C. 4616.4(i).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Written Notification Prior to Injury.* *Lab.C. 4600(d)(2)* was amended in 2006 to provide that "personal physician" includes a medical group if (a) the group consists of a single corporation or partnership composed of licensed medical or osteopathy doctors, and (b) it operates as an integrated multispeciality medical group that provides comprehensive medical services predominantly for nonoccupational illnesses and injuries.

Lab.C. 4600(d)(6) was amended in 2006, and the provision limiting the number of employees who may predesignate was deleted. The statute was further amended to provide that an employee is entitled to (a) all medically appropriate referrals by the personal physician to other physicians or medical providers in the nonoccupational health care plan, and (b) treatment by physicians or other medical providers outside the nonoccupational health care plan, as specified.



78 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

g. Selection of Physician.

3. Change of Physician.

2 *Witkin Sum. Cal. Law Work Comp* § 270

[§ 270] Change of Physician.

(1) *Change on Request of Employee.* An employee is entitled to one change of physician at any time, provided the employee gives notice to the employer. (*Lab.C. 4601(a)*; *Sun Indem. Co. v. Industrial Acc. Com.* (1948) 85 C.A.2d 171, 179, 192 P.2d 765; *Ralphs Grocery Co. v. Work. Comp. App. Bd.* (1995) 38 C.A.4th 820, 827, 45 C.R.2d 197.) When a change is requested, the employer or insurer must provide the employee with another physician or, if requested, with a chiropractor or acupuncturist, within 5 working days of the request. (*Lab.C. 4601(a)*.) Moreover, if the employee has notified the employer before the injury that the employee has a personal chiropractor or acupuncturist, the alternative physician tendered by the employer must be the practitioner designated by the employee. (*Lab.C. 4601(b), (c)*.) (See Cal. Civil Practice, 1 Workers' Compensation, §2:36; 2 Hanna 2d (2004 ed.), §5.05[7]; 1 Herlick 6th, §4.25.)

The employee is also entitled, on request "in any serious case," to the services of a consulting physician, chiropractor, or acupuncturist of choice, at the employer's expense. (*Lab.C. 4601(a)*.)

The sufficiency of an employer's notice that the employer's selected physician would be the injured employee's primary treating physician following an employee's request for change, was considered in *Pinkerton v. Work. Comp. App. Bd.* (2001) 89 C.A.4th 1019, 107 C.R.2d 787. The employer prepared a preprinted document entitled "Notice to Doctor" to refer the injured employee to a physicians' group. The first line stated "To: Treating Doctor (PTP)," but neither named nor identified a specific physician. Dr. E examined the employee, submitted a first report of work injury, and the employee received further treatment from the same physicians' group, but from a different physician. The employee retained counsel, and within 30 days of the injury counsel sent a letter to the employer requesting a change to a treating physician in a specified medical group. A week later, the employer prepared a preprinted "Notice to Doctor" for an appointment to a medical group different from the one requested by counsel, and the form neither indicated whether the appointment was in response to the request for a change of physician, nor specified a person or entity as a recipient. At this facility, the employee was examined by Dr. N who discharged the employee from further treatment and ordered her return to work. The employer notified the employee of the discharge, and advised her that if she disagreed she would need an expert medical evaluation. The employee then was examined by Dr. G of the medical group originally requested by her counsel, and was found to require further treatment. The workers' compensation judge found that Dr. G was the primary physician because, although the employee received Dr. N's report together with the

employer's letter, the report did not identify Dr. N as the primary physician. The employer offered no evidence that the referral to Dr. N was in response to the employee's request for a change of treating physician. The Board adopted the judge's findings. *Held*, affirmed.

(a) *Lab.C. 4601* requires an employer to provide an employee requesting a change of physician with an alternative, and *8 Cal. Code Reg. §9781*, the regulation implementing *Lab.C. 4601*, requires the employer to advise the employee of the name and address of the alternative physician. The employer's "Notice to Doctor" does not satisfy the notice requirements. Because no recipient was designated, it was not clear to whom the notice was to be provided; it only purported to send the employee to an unidentified "treating Doctor (PTP)." The fact that the employee appeared and was examined by Dr. N did not make the notice sufficient. (*89 C.A.4th 1027*.)

(b) The notice said nothing about being in response to the employee's request for a change of treating physician. Thus, the Board properly concluded that Dr. N was not provided in response to the employee's request for a change and she was entitled to treatment from a physician of her choosing. (*89 C.A.4th 1027*.)

(c) Although *Lab.C. 4601* does not provide procedural guidelines for notification of the change of treating physician, *8 Cal. Code Reg. §9781* requires the employer to respond promptly in the manner best calculated to reach the employee. Fairness and efficiency dictate that an employee, and employee's counsel, be served with the notice. Because designation of the primary treating physician is of substantial legal significance in a case, the notice must clarify that the designated alternative physician is the primary treating physician. This notice did not and was thus deficient. (*89 C.A.4th 1028*.)

(2) *Employer Contract With Health Care Organization*. An employee who has enrolled in a health care organization (see *supra*, §261) has the right to no less than one change of physician on request, and must be given a choice of physicians affiliated with the health care organization. The organization must provide the employee a choice of participating physicians within 5 days of receiving the employee's request. The employee is also entitled to a second opinion from a participating physician regarding the diagnosis or treatment from a participating physician. (*Lab.C. 4600.3(e)*.)

(3) *Change on Request of Employer*. An employer who desires a change of physicians may petition the Administrative Director. On a showing of good cause, the Director may order the employer to provide a panel of five physicians, or, on request of the employee, four physicians and one chiropractor, competent to treat the case. The employee must select one of these. (*Lab.C. 4603*.) (See *Derrick v. Work. Comp. App. Bd. (1984) 159 C.A.3d 451, 454, 205 C.R. 595* [employer must follow statutory procedure]; *Cal. Civil Practice, 1 Workers' Compensation*, §2:37; *C.E.B., 1 Workers' Compensation Practice 4th*, §3.20 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

2. Medical Treatment and Expense.

h. Neglect or Refusal To Furnish Treatment.

2 *Witkin Sum. Cal. Law Work Comp* § 271

[§ 271] Neglect or Refusal To Furnish Treatment.

If the employer neglects or refuses to reasonably furnish treatment, the employee may obtain treatment and the employer is liable for reasonable expenses. (*Lab.C. 4600(a)*; see *Draney v. Industrial Acc. Com.* (1949) 95 C.A.2d 64, 66, 212 P.2d 49 [after some treatment, employer's clinic closed and employee went elsewhere]; *Noe v. Travelers Ins. Co.* (1959) 172 C.A.2d 731, 733, 342 P.2d 976, *supra*, §34; *Voss v. Work. Comp. App. Bd.* (1974) 10 C.3d 583, 589, 111 C.R. 241, 516 P.2d 1377 [insurer may lose control over medical treatment by continually referring injured employee to physicians who indicate that no treatment is necessary; insurer's action is tantamount to denial of medical treatment]; 2 Hanna 2d (2004 ed.), §5.05[5]; 1 Herlick 6th, §4.22.)

The employee has the burden of proving entitlement to reimbursement, i.e., that treatment was sought elsewhere because of the employer's neglect. If that is not the reason for procuring treatment elsewhere, reimbursement will be denied. (See *Boyles v. Work. Comp. App. Bd.* (1966) 244 C.A.2d 821, 826, 53 C.R. 541 [employee received medical treatment by employer's physician, then terminated it because of personality conflict, and consulted other physicians without invoking remedy under *Lab.C. 4601*; see *supra*, §§269, 270].)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

- A. Nature and Elements of Award.
- 2. Medical Treatment and Expense.
- i. Offer by Employer After Refusal.

2 Witkin Sum. Cal. Law Work Comp § 272

[§ 272] Offer by Employer After Refusal.

(1) *Demand Need Not Be Renewed.* An employer, after an initial neglect or refusal, is not entitled to an additional opportunity when the employee's own physician recommends treatment. In *McCoy v. Industrial Acc. Com.* (1966) 64 C.2d 82, 48 C.R. 858, 410 P.2d 362, petitioner hurt her back, neck, hip, and arm. Her employer provided medical treatment for about 6 months. Then, after examinations by the employer's physicians and an independent physician, who reported that there was no further need, treatment was stopped. Still in pain, petitioner consulted another physician who accepted her as a patient on consideration that she submit to surgery if necessary. He diagnosed her condition as a ruptured disc, the operation confirmed the diagnosis, and the surgery was successful. *Held*, the employer was liable for reimbursement.

(a) Whether the refusal is to furnish treatment at all, or necessary further treatment (as here), the same rule applies. The employee would be placed at a serious disadvantage if compelled to renew the demand; the dilatory process of request and submission to further examination could result in delaying necessary medical care. Moreover, the employer is not absolved because of a mistaken diagnosis of the employer's physician any more than the employer is absolved when refusing treatment on the mistaken assumption that the injury is not industrial. (64 C.2d 87.)

(b) However, the employee's right depends on (1) treatment given within a reasonable time after the employer's refusal, (2) no substantial change in the employee's condition before independent medical advice is rendered, and (3) treatment reasonably required to cure or relieve the effects of the injury. (64 C.2d 89.) (See *Brotherton v. Work. Comp. App. Bd.* (1969) 273 C.A.2d 451, 452, 78 C.R. 70 [following *McCoy*].)

(2) *Employee May Retain Own Physician.* An employer may not resume control over the medical treatment by offering to provide it after the employer has once refused to provide treatment, the employee has obtained private treatment, and in the absence of a substantial change of condition wishes to continue treatment with the same physician. (*Zeeb v. Work. Comp. App. Bd.* (1967) 67 C.2d 496, 500, 62 C.R. 753, 432 P.2d 361.) One purpose of the rule allowing the employer to control medical treatment is to minimize expense by avoiding extravagant or unnecessary treatment; the other purpose is to return the employee to productive labor. Where these conflict, the purpose of securing proper medical care and speedy recovery must take precedence over minimization of cost. Moreover, medical considerations and the purposes of *Lab.C. 4600* dictate that a physician-patient relationship that will inspire confidence in the patient

"is an ingredient aiding in the success of the treatment, and that, once such a relationship has been established, treatment should continue with the same doctor in the absence of a change of condition or evidence that the treatment is defective or additional treatment is necessary." (*Zeeb v. Work. Comp. App. Bd.*, *supra*, 67 C.2d 500, 502.)

A change in the circumstances concerning the cost of treatment is not the kind of change of condition justifying restoration of control to the employer; under *Zeeb*, the change must be in the physical condition of the employee. (*Voss v. Work. Comp. App. Bd.* (1974) 10 C.3d 583, 590, 111 C.R. 241, 516 P.2d 1377 [no change shown, and order directing that insurer had authority to control further medical treatment annulled].)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

3. Medical-Legal (Litigation) Expenses.

a. Reimbursable Expenses.

2 *Witkin Sum. Cal. Law Work Comp* § 273

[§ 273] Reimbursable Expenses.

(1) *Expenses Reasonable and Necessary in Contested Claim.* Injured employees, or dependents of a deceased employee, are entitled to reimbursement for medical-legal expenses "reasonably, actually, and necessarily incurred" in a contested claim, except as provided in *Lab.C. 4064* (infra, §274). The reasonableness and necessity are determined with respect to the time the expenses were actually incurred. (*Lab.C. 4621(a)*.) The employee is also entitled to transportation, meals, and lodging expenses to the same extent as under *Lab.C. 4600* (supra, §264). (*Lab.C. 4621(d)*.)

Medical-legal expenses include costs and expenses for diagnostic tests (e.g., X-rays, laboratory fees), medical reports, medical records, medical testimony, and interpreter's fees, for the purpose of proving or disproving a contested claim. (*Lab.C. 4620(a)*.) However, costs of medical evaluations, diagnostic tests, and interpreters incidental to the production of a medical report do not constitute medical-legal expenses unless the medical report is capable of proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the employee's claim for benefits. (*Lab.C. 4620(c)*.) (See C.E.B., 1 Workers' Compensation Practice 4th, §3.45 et seq.)

A "contested claim" exists when the employer, knowing that the employee is claiming entitlement to a benefit arising out of an industrial injury, either (a) rejects liability, (b) fails to accept liability for benefits after expiration of a reasonable time period in which to decide to contest the claim, or (c) fails to respond to a demand for payment of benefits following expiration of a statutory time period for payment of indemnity. (*Lab.C. 4620(b)*.)

Fee schedules for medical-legal expenses, as adopted and revised by the Administrative Director, are prima facie evidence of the reasonableness of fees charged for medical-legal expenses. (*Lab.C. 5307.6(a)*; see 8 *Cal. Code Reg.* §9793 et seq.)

(2) *Procedure.* The employer must, within 60 days after receipt, pay each bill for medical-legal expenses. If payment is unreasonably withheld, a penalty of 10% is added, plus interest. (*Lab.C. 4622(a), (b)*.)

All charges for medical-legal expenses for which the employer is liable that are not in excess of those set forth in the official medical-legal fee schedule must be paid promptly under *Lab.C. 4622*. (*Lab.C. 4625*.) (See *American Psychometric Consultants v. Work. Comp. App. Bd.* (1995) 36 C.A.4th 1626, 1645, 43 C.R.2d 254 [*Lab.C. 4625*,

standing alone, does not permit reimbursement where medical-legal fees have been generated in cases involving uncontested claims and have been paid without protest[.])

SUPPLEMENT: [This section is current through the latest supplement]



82 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

3. Medical-Legal (Litigation) Expenses.

b. Conditions for Reimbursement.

2 Witkin Sum. Cal. Law Work Comp § 274

[§ 274] Conditions for Reimbursement.

Costs for medical evaluations, diagnostic tests, and interpreters' services incidental to the production of medical reports may not be incurred before all required reports and documents incidental to those services are received by the employer, the insurer, or the attorney of record. (*Lab.C. 4621(a)*.) Moreover, *Lab.C. 4620* makes it clear that an applicant may not seek medical-legal evaluations for which the employer would be financially responsible *before* the employer has received notice of a claim for injury and had an opportunity to respond. (See *American Psychometric Consultants v. Work. Comp. App. Bd.* (1995) 36 C.A.4th 1626, 1641, 43 C.R.2d 254 [discussing 1993 amendments to *Lab.C. 4620* et seq.].)

No comprehensive medical-legal evaluations, except those at an employer's request, may be performed during the first 60 days after the notice of claim has been filed under *Lab.C. 5401*, and neither the employer nor the employee is liable for expenses incurred for evaluations performed within that time period. (*Lab.C. 4621(b)*.) However, evaluations may be performed at any time after the employer has rejected the filed claim. (*Lab.C. 4621(c)*.)

When there is a dispute over the compensability of an injury, neither the employer nor the employee is liable for comprehensive medical-legal evaluations performed by someone other than the treating physician, except as specified in *Lab.C. 4060*. (*Lab.C. 4060(b)*.) If a medical evaluation is required to determine compensability after a claim form is filed, the procedure to be followed depends on whether the employee is represented. If represented, a medical evaluation may only be obtained under the procedure provided in *Lab.C. 4062.2*. If not represented, the employer must provide the employee with notice that the employer (1) requests a comprehensive medical evaluation, or (2) has not accepted liability and the employee may request the evaluation. If either party requests the evaluation, *Lab.C. 4062.1* governs the procedure. (*Lab.C. 4060(c)*, (d).) (On detailed procedures for selection of medical evaluator, see *Lab.C. 4062.1*, *4062.2*, and *4062.3*; on information that parties may provide to qualified medical evaluator, see *Lab.C. 4062.3*.) (See *Hand Rehabilitation Center v. Work. Comp. App. Bd.* (1995) 34 C.A.4th 1204, 1211, 40 C.R.2d 734 [where parties agree under *Lab.C. 4060(c)* on medical examiner to evaluate disputed issues, no authority exists that allows lien claimants to participate in selection or designation of medical examiner].)

For injuries occurring on or after January 1, 2003, an unrepresented employee who obtains an attorney following an evaluation under *Lab.C. 4061(d)* or *4062(b)* is entitled to the same reports at employer expense as if represented by

counsel from the outset of the dispute. (*Lab.C. 4064(b).*)

Medical reports are reimbursable only if they comply with the requirements imposed on the examining physician under *Lab.C. 4628*. (*Lab.C. 4628(e).*) Thus, a physician who signs a medical-legal report must examine the injured employee and participate in the nonclerical preparation of the report, including taking the complete history, reviewing and summarizing prior medical records, and preparing the conclusions. (*Lab.C. 4628(a), (c).*)

Physicians may charge only for professional services, which may include medical tests, reasonable costs of laboratory examinations, diagnostic studies, necessary clerical expenses, and overhead. (*Lab.C. 4628(d).*) *Lab.C. 4628(d)* is not a fee regulating statute but was enacted to ensure the reliability of the medical evaluation by prohibiting ghostwriting of medical-legal reports. *Lab.C. 4628(d)* furthers the anti-ghostwriting intent by enumerating the permissible types of charges, all related and limited to the physician's responsibilities listed in *Lab.C. 4628(a), (b), (c)*. (See *Ameri-Med. Corp. v. Work. Comp. App. Bd.* (1996) 42 C.A.4th 1260, 1282, 50 C.R.2d 366 [medical clinic petitions for fees and charges in preparing medical-legal reports for claimants].) (On inadmissibility of medical reports that fail to comply with *Lab.C. 4628*, see *infra*, §399.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

4. Indemnity for Disability.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 275

[§ 275] In General.

The disability may be temporary or permanent, and in either case, may be partial or total. The Act contains detailed provisions on this subject. (*Lab.C. 4650 et seq.*; see *C.E.B., 1 Workers' Compensation Practice* 4th, §4.1 et seq.; 1 *Herlick* 6th, §§6.01 et seq., 7.1 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §§376 et seq., 405 et seq.)

The principal rules are as follows:

(1) A waiting period usually precedes disability payments. (*Lab.C. 4650, 4652*; see *infra*, §277.)

(2) The ordinary temporary total disability payment is two-thirds of average weekly earnings (*Lab.C. 4653*; see *infra*, §§285, 303), and the temporary partial disability payment is two-thirds of the loss in wages, less unemployment compensation and extended duration benefits received by the employee during the period of temporary partial disability. (*Lab.C. 4654, 4657*; see *infra*, §286.)

(3) The duration of payments for temporary disability depend on when the injury occurred and the extent or nature of the disability. Thus, the following provisions apply:

(a) Aggregate disability payments for *temporary disability* arising from a single injury before January 1, 1979, may extend only up to 240 weeks within a 5-year period from the date of injury. (*Lab.C. 4656(a)*.)

(b) Aggregate disability payments for *temporary partial disability* from an injury on or after January 1, 1979, and before April 19, 2004, may extend only up to 240 weeks within a 5-year period from the date of injury. (*Lab.C. 4656(b)*.)

(c) Aggregate disability payments for *temporary disability* from an injury occurring on or after April 19, 2004, may extend only up to 104 weeks within a 2-year period from the date of injury. (*Lab.C. 4656(c)(1)*.)

(d) Aggregate disability payments for *temporary disability* from certain specified conditions that typically take more than 2 years to heal (e.g., acute and chronic hepatitis, human immunodeficiency virus (HIV), chronic lung disease) may extend up to 240 weeks within a 5-year period from the date of injury. (*Lab.C. 4656(c)(2)*.)

(4) Permanent disability payments are determined according to schedules set by statutes and by the Administrative Director. (*Lab.C. 4658 et seq.*; see *infra*, §287 et seq.)

(5) An employee may receive compensation payments for both temporary and permanent disabilities resulting from the same injury. (*Lab.C. 4661*; see *infra*, §287.)

(6) Death of an injured employee does not affect the liability of the employer for disability payments. Unpaid compensation is payable to dependents or, if none, to the decedent's personal representative. However, "[n]either temporary nor permanent disability payments shall be made for any period of time subsequent to the death of the employee." (*Lab.C. 4700*.) When there is no surviving dependent or other person entitled to receive it, unpaid compensation must be paid to the Department of Industrial Relations and credited to the subsequent injuries fund. (*Lab.C. 4706.5(c)*; see *infra*, §298.)

(7) Disability indemnity is not deducted from a death benefit, but is paid in addition to it. (*Lab.C. 4702*; see *infra*, §280.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Duration of payments:(c) Aggregate payments for temporary disability:* Where independent injuries result in concurrent periods of temporary disability, the 104 week, 2-year limitations period of *Lab.C. 4656(c)(1)* also runs concurrently. In *Foster v. Work. Comp. App. Bd. (2008) 161 C.A.4th 1505, 75 C.R.3d 272*, F was injured in two separate incidents in February and April, 2005, and became unable to work on April 14, 2005, the date on which F was entitled to recover temporary disability indemnity (TDI) for both injuries. The insurer began TDI payments on April 26, 2005, and stopped payments after April 14, 2007, based on time limitations in *Lab.C. 4656(c)(1)*. The workers' compensation judge concluded F was entitled to two periods of TDI -- the first from April 14, 2005 until September 25, 2006 when the first injury became permanent and stationary, and the second to begin in September 2006, after the period for the first injury ended. The Board agreed that F was entitled to two periods of TDI, but concluded that the two should run concurrently. *Held*, Board decision affirmed.

(a) The purpose of TDI is to replace lost earnings, not to compensate for an incapacity to work and for physical impairment; that is the function of permanent disability indemnity. Thus, F was entitled to only one amount to substitute for his lost wages. The TDI he received was for each injury because they both caused the same temporary disability period. Therefore, the limitations period under *Lab.C. 4656(c)(1)* began for both injuries on April 26, 2005 when the insurer began payments. (*161 C.A.4th 1511*.)

(b) Nothing in the language of *Lab.C. 4656(c)(1)* suggests that the limitations period for a single injury causing temporary disability should be tolled during a period an employee is entitled to temporary disability benefits based on another injury. Nor is there anything in the statute suggesting that the limitations period will not run concurrently "where multiple injuries cause an overlap, either partial or complete, during periods of temporary disability." (*161 C.A.4th 1512*.)

(New) *Relationship to other compensation statutes:* The 2-year limitation under *Lab.C. 4656(c)(1)* incorporates benefits paid to state employees under *Govt.C. 19869 et seq.* In *Brooks v. Work. Comp. App. Bd. (2008) 161 C.A.4th 1522, 75 C.R.3d 277*, state correctional officer B sustained an industrial injury in October 2004 that rendered her temporarily disabled. *Govt.C. 19871* provides injured state employees with up to 52 weeks of industrial disability leave benefits (IDL), which are calculated at full salary for the first 22 days, and then at two-thirds the employee's salary for the remainder of the 52 weeks. B was subject to these provisions, and received IDL through October 2005, after which the state's insurer paid TDI under *Lab.C. 4656(c)(1)* until October 2006. B sought TDI through October 2007, arguing that IDL, paid under different rules to a limited class of employees, is not TDI and that the 2-year limitation under *Lab.C. 4656(c)(1)* did not begin running until October 2005 when her IDL payments stopped, and thus, she was entitled to an additional 104 weeks of TDI. The Board concluded that under the current statutory scheme, state employees are limited to a maximum of 2 years of combined temporary disability indemnity. *Held*, affirmed. IDL and TDI are not

distinct classes of benefits. *Govt.C. 19870* expressly provides that IDL means temporary disability as defined in the Labor Code. Thus, because IDL is statutorily defined as the equivalent of temporary disability, the 2-year limitation under *Lab.C. 4656(c)(1)* necessarily must apply to both IDL and TDI. Moreover, the 2-year limitation under *Lab.C. 4656(c)(1)* is not restricted to TDI paid under the Workers' Compensation Act or the Labor Code, as it broadly applies to *aggregate* disability payments for a single injury. (*161 C.A.4th 1532.*) (See *Mt. Diablo Unified School Dist. v. Work. Comp. App. Bd.* (2008) *165 C.A.4th 1154, 1158, 81 C.R.3d 597* [because wages paid to injured school employees under *Ed.C. 44043* are in part temporary disability benefits under workers' compensation laws, 104-week limit on temporary disability benefits began when injured school employee received first payment pursuant to that statute].)



84 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IX. THE AWARD

A. Nature and Elements of Award.

4. Indemnity for Disability.

b. Distinct Functions of Temporary and Permanent Disability Indemnity.

2 Witkin Sum. Cal. Law Work Comp § 276

[§ 276] Distinct Functions of Temporary and Permanent Disability Indemnity.

Temporary and permanent disability indemnity serve entirely distinct functions. Temporary disability indemnity (TDI) serves as wage replacement during an injured employee's healing period following a compensable injury, whereas permanent disability indemnity (PDI) compensates for permanent impairment after maximum recovery, i.e., when the injury is deemed permanent and stationary or the employee returns to work. In *Department of Rehabilitation v. Work. Comp. App. Bd.* (2003) 30 C.4th 1281, 135 C.R.2d 665, 70 P.3d 1076, employee L claimed benefits based on work-related stress and depression, and was diagnosed with a brain lesion that caused learning disabilities. The condition responded well to medication and was determined to be permanent and stationary. L and the employer stipulated that the injury was a compensable industrial injury to L's psyche causing temporary disability, that the injury produced a permanent disability of 23%, and that continued medical treatment was needed, and agreed on a compensable weekly benefit amount. L returned to work and later sought TDI as reimbursement for sick and vacation leave he was required to take for poststipulation treatments, and for penalties for discrimination under *Lab.C. 132a*. The Board determined that under *Lab.C. 4600* (supra, §261 et seq.), L was entitled to 1 day of TDI for each day of lost wages, and also ordered the employer to pay a penalty of 10% of the cost of all past, present, and future medical treatment, plus a lump sum payment to L for violation of *Lab.C. 132a* (supra, §17 et seq.). *Held*, reversed.

(a) The Legislature intended that TDI serve as wage replacement during an employee's period of convalescence. When the replacement is no longer necessary, an employer's obligation to pay TDI ceases. Thus, the obligation ends "when the injured employee either returns to work or is deemed able to return to work, or when the employee's medical condition achieves permanent and stationary status." (30 C.4th 1292.) Here, L's injury was permanent and stationary and he returned to work. Under these circumstances he was not entitled to further TDI to compensate for wages lost while attending medical appointments during the work day. (30 C.4th 1292.)

(b) The benefit under *Lab.C. 4600* is not a broad obligation to pay TDI as replacement for employees' wages for time away from work for medical treatment for a permanent and stationary injury. "Rather, this benefit is in the nature of a medical-legal benefit, reimbursing the employee for his time when requested to submit to a medical examination to resolve a compensation claim," and L's treatments do not fall into this species of benefit. (30 C.4th 1295.)

(c) *Lab.C. 132a* remedies are for discriminations that are essentially retaliatory because an employee has filed a

claim. To qualify, an employee must have suffered some adverse effect from an action or inaction by the employer that was triggered by the industrial injury, and must have been deprived of a legal benefit the employer was obligated to provide. Here, nothing suggested that L's employer targeted him for disparate treatment or deprived him of a benefit because of his industrial injury. (30 C.4th 1300.)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

4. Indemnity for Disability.

c. Waiting Period and Exceptions.

2 *Witkin Sum. Cal. Law Work Comp* § 277

[§ 277] Waiting Period and Exceptions.

(1) *General Rule.* Generally, temporary disability indemnity payment begins on the fourth day after the employee leaves work because of an injury. However, if temporary disability continues for more than 14 days, or the employee is hospitalized as an inpatient because of the injury, temporary disability indemnity is payable from the date of disability. For purposes of calculating the waiting period, the day of the injury is included unless the employee was paid full wages for that day. (*Lab.C. 4652*; see 1 Herlick 6th, §6.03.)

The purpose of the waiting period is to motivate the employee to return to work when the injury is not serious, to reduce the opportunity for false claims, to decrease the costs of administration, and to enable a greater proportion of funds to be used for serious injuries. (*Burns v. Work. Comp. App. Bd. (1969) 2 C.A.3d 539, 542, 82 C.R. 678.*)

(2) *Temporary Disability Payments.* The first temporary disability indemnity payment must be made not later than 14 days after knowledge of the injury and disability, on which date all indemnity due must be paid. (*Lab.C. 4650(a)*; see 2 Hanna 2d (2004 ed.), §7.03[1].)

(3) *Permanent Disability Payments.* The first payment must be made within 14 days after the date of the last payment of temporary disability indemnity. Regardless of whether the extent of permanent disability can be determined at that date, the employer must nevertheless begin and continue timely payment of permanent disability indemnity until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid. (*Lab.C. 4650(b)*.)

(4) *Injuries to University Employees From Criminal Act.* *Lab.C. 4650.5* creates an exception to *Lab.C. 4650* for civil service employees of the University of California and California State University: If they are injured from a violent criminal act against them, payment commences from the first day they leave work.

SUPPLEMENT: [This section is current through the latest supplement]



86 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

4. Indemnity for Disability.

d. Payment Reduction Incentive.

2 Witkin Sum. Cal. Law Work Comp § 278

[§ 278] Payment Reduction Incentive.

A 15% reduction in permanent disability indemnity payments is allowed if, within 60 days of a disability becoming permanent and stationary, an employer brings the employee back to work at the same job and pay, or accommodates the employee with modified work, as specified. (*Lab.C. 4658(d)(3)(A)*.) However, if the employer then fails to offer regular or modified work for a 12-month period, or if the work is terminated by the employer before the disability payment period ends, the employee is entitled to a 15% increase, as specified. (*Lab.C. 4658(d)(2), (d)(3)*.) Employers with fewer than 50 employees are exempt from these provisions. (*Lab.C. 4658(d)*.) (On definitions of "regular work," "modified work," and "alternative work," and procedures for determining equivalency of wages and compensation, see *Lab.C. 4658.1*.)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

5. Death Benefits and Burial Expenses.

a. Nature of Award.

2 *Witkin Sum. Cal. Law Work Comp* § 279

[§ 279] Nature of Award.

(1) *In General.* The dependents of a deceased employee may receive a death benefit. The benefit is payable in installments in the same manner and amounts as temporary total disability indemnity would have been paid to the employee unless otherwise ordered by the Board. (*Lab.C. 4701(b), 4702(b)*; see *L.B. Price Mercantile Co. v. Industrial Acc. Com.* (1957) 49 C.2d 13, 14, 313 P.2d 860 [*Lab.C. 4702* gives Board (formerly commission) discretion to fix both manner and amount of payments].) The employer is also liable for reasonable burial expenses. (*Lab.C. 4701(a)*, *infra*, §280.) (See Cal. Civil Practice, 1 Workers' Compensation, §3:11 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §7.2 et seq.; 2 Hanna 2d (2004 ed.), §9.01 et seq.; 1 Herlick 6th, §9.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §161 et seq.)

In *San Francisco v. Work. Comp. App. Bd. (Medrano)* (1973) 36 C.A.3d 412, 111 C.R. 387, the burial expenses of an employee killed in an industrial accident were paid by the employee's mother-in-law, even though there was a surviving spouse. The Board awarded reimbursement of the burial expenses directly to the mother-in-law. *Held*, this was improper. The correct procedure is to make the award to the surviving heir, and allow a lien in favor of the third party on the award (see *infra*, §408). (36 C.A.3d 415.)

(2) *Assassinated Public Official.* *Lab.C. 4720* et seq. provide for a special death benefit, in addition to other compensation, for dependents of an assassinated "elected public official."

(3) *No Surviving Dependent or Heir.* If the sole remaining dependent dies, accrued benefits must be paid to the heirs of the dependent, or if none, to the heirs of the deceased employee, without administration. (*Lab.C. 4706(a)*.) If there is no surviving dependent or heir, the Board may order burial expenses paid to the proper person. (*Lab.C. 4706(b)*.) (On payment to Department of Industrial Relations' Subsequent Injuries Benefits Trust Fund where there is no one entitled to death benefit, see *Lab.C. 4706.5*, *infra*, §298.)

(4) *No Apportionment.* A death benefit cannot be apportioned. In *Pacific Gas & Elec. Co. v. Industrial Acc. Com.* (1961) 56 C.2d 219, 14 C.R. 548, 363 P.2d 596, decedent had cancer, but an industrial accident hastened his death by about a year. The employer contended that the death benefit, like a disability award, should be apportioned when the death is brought about by both industrial and nonindustrial causes (see *infra*, §294). *Held*, no limitation applies to death

benefits.

The holding of *Pacific Gas & Elec. Co.* was unaffected by the enactment of *Lab.C. 3208.2* (infra, §292), which refers to sharing of loss by successive employers, not apportionment of benefits. (*Zenith Ins. Co. v. Work. Comp. App. Bd.* (1981) 124 C.A.3d 176, 181, 184, 176 C.R. 920.)

West's Key Number Digest, Workers' Compensation k.908 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



88 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

5. Death Benefits and Burial Expenses.

b. Maximum Amounts.

2 Witkin Sum. Cal. Law Work Comp § 280

[§ 280] Maximum Amounts.

(1) *Death Benefit. Lab.C. 4702* has been revised many times to increase the maximum amount of the death benefit. (See C.E.B., 1 Workers' Compensation Practice 4th, §7.17 et seq.; 2 Hanna 2d (2004 ed.), §9.02; 1 Herlick 6th, §9.05.) The statute provides for benefits based on type of dependents and date of injury as follows:

(a) *Two total dependents, regardless of number of partial dependents:* for injuries occurring before January 1, 1991, \$ 95,000; for injuries occurring on or after January 1, 1991, \$ 115,000; for injuries occurring on or after July 1, 1994, \$ 135,000; for injuries occurring on or after July 1, 1996, \$ 145,000; for injuries occurring on or after January 1, 2006, \$ 290,000. (*Lab.C. 4702(a)(1).*)

(b) *One total dependent and one or more partial dependents:* for injuries occurring before January 1, 1991, \$ 70,000; for injuries occurring on or after January 1, 1991, \$ 95,000; for injuries occurring on or after July 1, 1994, \$ 115,000; for injuries occurring on or after July 1, 1996, \$ 125,000; for injuries occurring on or after January 1, 2006, \$ 250,000, plus four times the amount annually devoted to the support of the partial dependents but not more than the following: for injuries occurring before January 1, 1991, \$ 95,000; for injuries occurring on or after January 1, 1991, \$ 115,000; for injuries occurring on or after July 1, 1994, \$ 125,000; for injuries occurring on or after July 1, 1996, \$ 145,000; for injuries occurring on or after January 1, 2006, \$ 290,000. (*Lab.C. 4702(a)(2).*)

(c) *One total dependent and no partial dependents:* for injuries occurring before January 1, 1991, \$ 70,000; for injuries occurring on or after January 1, 1991, \$ 95,000; for injuries occurring on or after July 1, 1994, \$ 115,000; or, for injuries occurring on or after July 1, 1996, \$ 125,000; for injuries occurring on or after January 1, 2006, \$ 250,000. (*Lab.C. 4702(a)(3).*)

(d) *No total dependents and one or more partial dependents:* for injuries occurring before January 1, 1991, four times the amount annually devoted to support of the partial dependents, but not more than \$ 70,000; for injuries occurring on or after January 1, 1991, \$ 95,000; for injuries occurring on or after July 1, 1994, \$ 115,000; for injuries occurring on or after July 1, 1996, \$ 125,000; for injuries occurring on or after January 1, 2006, eight times the amount annually devoted to support of the partial dependents, but not more than \$ 250,000. (*Lab.C. 4702(a)(4).*)

(e) *Three or more total dependents, regardless of number of partial dependents*: for injuries occurring on or after July 1, 1994, \$ 150,000; for injuries occurring on or after July 1, 1996, \$ 160,000; for injuries occurring on or after January 1, 2006, \$ 320,000. (*Lab.C. 4702(a)(5).*)

(f) *No total dependents and no partial dependents*: for injuries occurring on or after January 1, 2004, \$ 250,000 to the estate of the deceased employee. (*Lab.C. 4702(a)(6)(B).*) In the case of a police officer, for injuries occurring on or after January 1, 2003, and prior to January 1, 2004, \$ 250,000 to the estate of the deceased officer. (*Lab.C. 4702(a)(6)(A).*)

In *Chevron U.S.A. v. Work. Comp. App. Bd.* (1990) 219 C.A.3d 1265, 268 C.R. 699, decedent retired from his work as an insulator in 1977 because of shortness of breath and heart disease. In 1981, the Board found that as a result of occupational exposure to asbestos from 1951 to 1977, decedent sustained an industrial injury on September 28, 1976, to his lungs, and awarded him permanent disability. On August 12, 1987, decedent was hospitalized and diagnosed with mesothelioma, an asbestos-related disease of the chest and stomach, from which he died on November 13, 1987. Medical testimony established that decedent's mesothelioma did not progress from his asbestosis lung disease, but was an entirely separate and distinct injury and disability. The Board awarded decedent's widow and children death benefits based on an August 12, 1987, date of injury. *Held*, affirmed. "Where two separate and distinct occupational disease processes resulting from a single period of exposure to asbestos manifest themselves at different times, each is entitled to a different date of injury," consistent with *Lab.C. 5412* (infra, §368), for purposes of calculating the death benefit payable under *Lab.C. 4702*. (219 C.A.3d 1267.)

Disability indemnity is not deducted, but is paid in addition to the death benefit if the original injury resulting in death occurred after September 30, 1949. (*Lab.C. 4702(c).*)

(2) *Totally Dependent Minor Children*. Where there is one or more totally dependent minor child, as defined in *Lab.C. 3501* (infra, §312), in addition to payment of the amount specified in *Lab.C. 4702*, supra, and notwithstanding the maximum limitations specified in *Lab.C. 4702* and *4703* (infra, §315), payment of death benefits continues until the youngest child attains age 18, or until death, if the child is physically or mentally incapacitated from earning, in the same manner and amount as temporary total disability indemnity would have been paid to the employee, except that no payment may be made at a weekly rate of less than \$ 224. (*Lab.C. 4703.5.*) (See *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1993) 19 C.A.4th 1645, 1651, 24 C.R.2d 67 [decedent's minor grandchild totally dependent on decedent at time of decedent's death is "dependent minor child" within meaning of *Lab.C. 4703.5*].)

Lab.C. 4703.5 is applicable to totally dependent minor children of local safety and patrol members, as specified, if the member was killed in the line of duty prior to January 1, 1990, and the child is otherwise entitled to benefits under *Lab.C. 4703.5*. (*Lab.C. 4703.6.*)

(3) *Burial Expense*. The maximum allowed for reasonable burial expenses for injuries occurring on or after January 1, 1992, is \$ 5,000. (*Lab.C. 4701(a).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Death Benefit*. *Lab.C. 4702(a)* was amended in 2006 to provide that the statutory death benefit amounts are payable "notwithstanding any amount of compensation paid or otherwise owing to the surviving dependent, personal representative, heir, or other person entitled to a deceased employee's accrued and unpaid compensation." (f) *No total dependents and no partial dependents*: *Lab.C. 4702(a)(6)(B)*, permitting payment of death benefits to a decedent's estate where there are no dependents, was held unconstitutional in *Six Flags v. Work. Comp. App. Bd.* (2006) 145 C.A.4th 91, 51 C.R.3d 377. Cal. Const., Art. XIV, §4 identifies only three classes of beneficiaries entitled to receive workers' compensation benefits: (1) workers, (2) dependents, and (3) the state. Thus, *Lab.C. 4702(a)(6)(B)*, by creating a fourth beneficiary in an estate, is unconstitutional. (145 C.A.4th 95, 99.)



89 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

5. Death Benefits and Burial Expenses.

c. Determination of Partial Dependency.

2 *Witkin Sum. Cal. Law Work Comp* § 281

[§ 281] Determination of Partial Dependency.

Under *Lab.C. 4702(a)(4)* (supra, §280), death benefits to one or more partial dependents are to be computed on the basis of "four times the amount annually devoted to the support of the partial dependents." Thus, "the appropriate method for determining partial dependency when both surviving and deceased spouses were employed is to require that the survivor establish the actual 'amount annually devoted to' his or her support from the earnings of the decedent. Expenses related to the standard of living of the community are relevant. Expenses which are personal to the decedent are not." (*Atlantic Richfield Co. v. Work. Comp. App. Bd.* (1982) 31 C.3d 715, 723, 182 C.R. 778, 644 P.2d 1257.) (See *Lynch v. Work. Comp. App. Bd.* (1985) 164 C.A.3d 594, 596, 210 C.R. 589 [observing that personal use expenditures will usually be nominal because virtually all expenditures are for benefit of community].)

In addition, *Lab.C. 4702(a)(4)* does not require that a surviving spouse's partial dependency death benefit be based solely on the amount of support lost by the death of the other spouse. The calculation may include income and investments that did not terminate or change on death. In *Chevron U.S.A. v. Work. Comp. App. Bd.* (1999) 19 C.4th 1182, 81 C.R.2d 521, 969 P.2d 613, decedent died from employment-related asbestosis after retirement. The Board determined that decedent's widow was partially dependent on decedent at the time of injury and entitled to a death benefit based on all of the decedent's income at that time, including Social Security, Army pension, interest from a savings account, and other investment income. Chevron argued that partial dependency benefits should be based on the amount of support decedent's spouse lost as a result of decedent's death, pointing out that some of the support contributed by decedent at the time of injury continued after decedent's death. The Board rejected the argument. *Held*, affirmed.

(a) *Dependency*. The question of dependency does not turn on whether the dependent relied on the decedent for life's necessities, but rather whether the dependent looked to the contributions of the decedent for support according to the dependent's accustomed mode of living. For a partially dependent surviving spouse, the death benefit calculation involves the actual amount that the decedent devoted to the community and to the surviving spouse. (19 C.4th 1190.)

(b) *Determination of amount*. *Lab.C. 4702(a)(4)* does not place a limitation on the type of income on which the amount devoted to the support of the partial dependent could be based. Thus, the benefit here was not limited to the amount of support the widow lost as a result of decedent's death. The statute provides a death benefit for partial

dependents of "four times the amount annually devoted to the support of the partial dependents" and places no further qualifications on the type of income to consider. Nor does the statute require a postdeath inquiry into whether income terminated with the decedent's death. The death benefit was designed to mitigate hardship for dependents of employees. Thus, the statute is not limited only to an employee's earnings from employment, but includes income from investments or savings. (19 C.4th 1191.)

One justice dissented, arguing that in a case of partial dependency, *Lab.C. 4702(a)(4)* provides for a death benefit of four times the amount of earnings from employment annually devoted to the support of the partial dependent at the time of the decedent's injury, not four times the amount of all income from all sources. (19 C.4th 1199.)

Payments made by an adult child to assist the family in paying bills, buying a home, or maintaining a lifestyle qualify as support and may be considered in assessing whether the parents are partial dependents only if the payments contribute to maintaining the standard of living. In *Smith v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 560, 117 C.R.2d 420, J was living at home prior to his death, and was paying his parents \$ 150 a month. J made his own car payments but reimbursed his parents for car insurance. He was covered by his parents' health insurance, and they paid his copayments. The parents took J's rent into consideration when they decided to purchase the house, and counted on the money to assist in the mortgage payments. However, their standard of living did not change financially when they stopped receiving his payments. After J was injured and hospitalized, the household food bill decreased by \$ 50 to \$ 75. The Board found that J's payments made the parents his dependents and awarded the parents a partial dependency award based on four times the annual rent. *Held*, decision annulled.

(a) In order for parents as "landlords" to qualify for partial dependency, the amount of rent must exceed the cost of food and other necessities provided. Here, once J was hospitalized, the household food bill decreased. Moreover, J was not fully reimbursing his parents for the food and medical copayments. The \$ 150 a month he paid merely made him less dependent on them; it did not make them dependent on him. That the parents could easily maintain their standard of living after J's death demonstrated they were not financially dependent on him. (96 C.A.4th 567.)

(b) The parents' reliance on the \$ 150 in deciding to purchase the house did not demonstrate dependency to maintain their standard of living. At most, it shows that J's dependency on the parents was a strain on their finances before they started charging him rent. After his death, the parents continued to afford the house, primarily because the food bill and other costs decreased more than \$ 150. (96 C.A.4th 569.)

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90 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

6. Rehabilitation Benefits.

a. Vocational Rehabilitation.

2 *Witkin Sum. Cal. Law Work Comp* § 282

[§ 282] Vocational Rehabilitation.

(1) *In General.* *Lab.C. 139.5* was enacted in 1965 to provide rehabilitation programs to restore injured workers to suitable gainful employment. (See *LeBoeuf v. Work. Comp. App. Bd.* (1983) 34 C.3d 234, 242, 193 C.R. 547, 666 P.2d 989 ["statutory provision vests in injured employees a right to receive rehabilitation benefits"]; *Bussear v. Work. Comp. App. Bd.* (1986) 181 C.A.3d 186, 189, 226 C.R. 242 ["statutory objective ... is to get the injured worker from 'the bed to the job' "; Cal. Civil Practice, 2 Workers' Compensation, §14:1 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §6.1 et seq.; 2 Hanna 2d (2004 ed.), §35.03; 2 Herlick 6th, §21.01; 67 A.L.R.4th 612 [retraining and compensation under vocational rehabilitation statutes].)

Under the reform legislation of 2004, *Lab.C. 139.5* is applicable only to injuries occurring before January 1, 2004 (*Lab.C. 139.5(k)*), and will remain in effect only until January 1, 2009, unless extended by later legislation (*Lab.C. 139.5(l)*). (On supplemental job displacement benefit, see *infra*, §283.)

(2) *Entitlements.* A medically eligible employee who chooses to participate in a vocational rehabilitation program continues to receive temporary disability indemnity until the medical condition becomes permanent and stationary, after which the employee may receive a maintenance allowance. The maintenance allowance may not exceed 52 weeks in the aggregate. However, the employee also receives living expenses "necessitated by the vocational rehabilitation services, together with all reasonable and necessary vocational training, at the expense of the employer," the total amount not to exceed \$ 16,000. Continued eligibility requires the employee's regular and consistent attendance and participation in the applicable vocational rehabilitation program. (*Lab.C. 139.5(c)*.) (On determining amount of maintenance allowance, see *Lab.C. 139.5(d)*.)

(3) *Illustrations.* The following cases have dealt with issues arising under *Lab.C. 139.5*:

Laird v. Work. Comp. App. Bd. (1983) 147 C.A.3d 198, 202, 195 C.R. 44 [unilateral termination of vocational rehabilitation temporary disability indemnity permits Board to assess 10% penalty under *Lab.C. 5814*]; *Veilleux v. Work. Comp. App. Bd.* (1985) 175 C.A.3d 235, 240, 220 C.R. 568 [same].

Gill v. Work. Comp. App. Bd. (1985) 167 C.A.3d 306, 310, 311, 213 C.R. 140 [evidence that employee is unable to

participate in rehabilitation plan is relevant as to employee's permanent disability; however, if employee subsequently applies for rehabilitation benefits, eligibility would require showing that benefits would enable employee to return to labor market, and if rehabilitation is permitted, employer may challenge prior permanent disability award].

Rodgers v. Work. Comp. App. Bd. (1985) 168 C.A.3d 567, 573, 214 C.R. 303 [injury sustained in rehabilitation program is one for which employer is obligated to provide ordinary compensation].

Pereira v. Work. Comp. App. Bd. (1987) 196 C.A.3d 1, 6, 241 C.R. 302 [entitlement to temporary disability indemnity commences when qualified employee requests rehabilitation services].

Armodia v. Work. Comp. App. Bd. (1988) 202 C.A.3d 554, 559, 249 C.R. 156 [employee who prevailed on appeal to reopen rehabilitation was entitled to temporary disability benefits from date Rehabilitation Bureau found entitlement to further rehabilitation services].

Save Mart Stores v. Work. Comp. App. Bd. (1992) 3 C.A.4th 720, 726, 4 C.R.2d 597 [employee suffering from psychoneurotic injury caused by particular supervisor was not "qualified injured worker" under former statutory requirement where, although unable to return to same position, she could return to same type of work].

Belmontez v. Work. Comp. App. Bd. (1992) 7 C.A.4th 786, 795, 9 C.R.2d 405 [duty to provide vocational rehabilitation temporary disability arises on earlier of date employee requests rehabilitation benefits or date employer breaches duty to notify employee of right to benefits].

Johnson v. Work. Comp. App. Bd. (1998) 65 C.A.4th 197, 201, 76 C.R.2d 422 [employee was entitled to benefits for period between application for benefits and date workers' compensation judge ruled that entitlement began; *Lab.C. 139.5* does not require formal adjudication that employee is qualified injured worker before vocational rehabilitation temporary disability benefits are provided].

Rucker v. Work. Comp. App. Bd. (2000) 82 C.A.4th 151, 156, 97 C.R.2d 852 [applicant established that she had properly requested and was entitled to advances against permanent disability under *Lab.C. 139.5(d)*].

Martinez v. Work. Comp. App. Bd. (2001) 85 C.A.4th 601, 617, 102 C.R.2d 588 [police officer was entitled to remainder of *Lab.C. 4850* benefits in lieu of maintenance allowance under *Lab.C. 139.5* for period she was engaged in vocational rehabilitation].

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Illustrations.* See *Gamble v. Work. Comp. App. Bd.* (2006) 143 C.A.4th 71, 91, 49 C.R.3d 36 [primary employer is not entitled to credit for wages earned by employee at alternate employment while employee is also receiving vocational rehabilitation maintenance allowance benefits]; *Medrano v. Work. Comp. App. Bd.* (2008) 167 C.A.4th 56, 70, 83 C.R.3d 802 [insurer was not entitled to credit for employee's earnings from supplemental employment necessary to support self and family while employee was also receiving vocational rehabilitation maintenance allowance; following *Gamble*]. *Correction:* Page 892, last paragraph of section, "*Martinez v. Work. Comp. App. Bd.* (2001)" should be "*Martinez v. Work. Comp. App. Bd.* (2000)".



91 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

A. Nature and Elements of Award.

6. Rehabilitation Benefits.

b. Supplemental Job Displacement Benefit.

2 *Witkin Sum. Cal. Law Work Comp* § 283

[§ 283] Supplemental Job Displacement Benefit.

(1) *In General.* *Lab.C.* 4658.5 and 4658.6 provide for a supplemental job displacement benefit for injuries occurring on and after January 1, 2004. The provisions essentially replace former law dealing with rehabilitation benefits and vocational rehabilitation offered under *Lab.C.* 139.5 (*supra*, §282).

(2) *Retraining or Skill Enhancement.* Except as specified in *Lab.C.* 4658.6, injured employees who do not return to work within 60 days following termination of temporary disability are eligible for a supplemental job displacement benefit to facilitate education-related retraining or skill enhancement, or both, at state approved schools. (*Lab.C.* 4658.5(a).) The employer must notify the employee of eligibility within 10 days of the last temporary disability payment. (*Lab.C.* 4658.5(c).)

(3) *Maximum Amount.* The employee is provided a nontransferable voucher, the amount of which is determined as follows:

- (a) Up to \$ 4,000 for permanent partial disability awards of less than 15%. (*Lab.C.* 4658.5(a)(1).)
- (b) Up to \$ 6,000 for permanent partial disability awards between 15% and 25%. (*Lab.C.* 4658.5(a)(2).)
- (c) Up to \$ 8,000 for permanent partial disability awards between 26% and 49%. (*Lab.C.* 4658.5(a)(3).)
- (d) Up to \$ 10,000 for permanent partial disability awards between 50% and 99%. (*Lab.C.* 4658.5(a)(4).)

(4) *Permissible Uses.* The voucher may be used to pay for school expenses required for retraining or skill enhancement. No more than 10% of the voucher may be used for vocational or return to work counseling. (*Lab.C.* 4658.5(b).)

(5) *When Employer Is Not Liable For Benefit.* An employer is not liable for the supplemental job displacement benefit if, within 30 days of termination of temporary disability payments, the employer offers, and the employee rejects, either (a) modified work that accommodates the employee's work restrictions, lasting at least 12 months (*Lab.C.* 4658.6(a)), or (b) alternative work that meets all of the following conditions:

- (a) The employee has the ability to perform the essential functions of the job. (*Lab.C. 4658.6(b)(1).*)
- (b) The job is a regular position for at least 12 months. (*Lab.C. 4658.6(b)(2).*)
- (c) The job offers wages and compensation within 15% of those paid to the employee at the time of injury. (*Lab.C. 4658.6(b)(3).*)
- (d) The job is within a reasonable commuting distance of the employee's residence at the time of injury. (*Lab.C. 4658.6(b)(4).*)

SUPPLEMENT: [This section is current through the latest supplement]



92 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

1. Temporary Disability.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 284

[§ 284] In General.

Temporary disability is a physical incapacity which, though curable, impairs earning capacity so as to entitle an employee to indemnity payments as well as medical treatment. (See *Huston v. Work. Comp. App. Bd.* (1979) 95 C.A.3d 856, 868, 157 C.R. 355 [temporary disability indemnity is generally payable during injured employee's healing period until employee returns to work or condition is permanent and stationary]; C.E.B., 1 Workers' Compensation Practice 4th, §4.1 et seq.; 1 Hanna 2d (2004 ed.), §7.01 et seq.; 1 Herlick 6th, §6.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §§381, 382; *infra*, §§285, 286; on computation of temporary disability, see Cal. Civil Practice, 1 Workers' Compensation, Computation of Temporary and Permanent Disability, Chap. 4.)

Temporary disability payments cannot be apportioned between industrial injuries and preexisting nonindustrial injuries. (*Granado v. Work. Comp. App. Bd.* (1968) 69 C.2d 399, 402, 71 C.R. 678, 445 P.2d 294, *infra*, §294.)

West's Key Number Digest, Workers' Compensation k.863

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93 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

1. Temporary Disability.

b. Temporary Total Disability.

2 Witkin Sum. Cal. Law Work Comp § 285

[§ 285] Temporary Total Disability.

Temporary total disability exists when the employee is substantially incapacitated for gainful employment, "consideration being given to the ability of the injured employee to compete in an open labor market." (*Lab.C. 4653*.) Thus, in *Transport Indem. Co. v. Industrial Acc. Com. (1958) 157 C.A.2d 542, 321 P.2d 21*, a truck driver sustained a back injury. After considerable medical treatment, first in a cast and then with a truss belt and chairback brace, the physicians testified that he was able to do "light work." However, he could find no work that did not involve truck driving with heavy lifting. *Held*, an award for temporary total disability was proper. (*157 C.A.2d 543*.) (See *C.E.B.*, 1 *Workers' Compensation Practice* 4th, §4.2; 1 *Hanna* 2d (2004 ed.), §7.01[3]; 1 *Herlick* 6th, §6.09 et seq.)

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Under *Lab.C. 4653*, a seasonal employee who voluntarily or by necessity is unavailable for employment the remainder of the year is not entitled to temporary disability payments during the employee's regular off-season of unemployment during which no income would be earned. (*Signature Fruit Co. v. Work. Comp. App. Bd. (2006) 142 C.A.4th 790, 801, 47 C.R.3d 878* [employee and employer stipulated to seasonal employment only].)



94 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

1. Temporary Disability.

c. Temporary Partial Disability.

2 *Witkin Sum. Cal. Law Work Comp* § 286

[§ 286] Temporary Partial Disability.

Temporary partial disability exists when the employee is able to do some work. However, under the "odd-lot" doctrine, if the employee is only able to do odd or specialized jobs, the burden is on the employer to show that this work is available. (See *Myers v. Industrial Acc. Com.* (1940) 39 C.A.2d 665, 667, 103 P.2d 1025; *California Comp. Ins. Co. v. Industrial Acc. Com.* (1954) 128 C.A.2d 797, 813, 276 P.2d 148, 277 P.2d 442; *Transport Indem. Co. v. Industrial Acc. Com.* (1958) 157 C.A.2d 542, 546, 321 P.2d 21; *Huston v. Work. Comp. App. Bd.* (1979) 95 C.A.3d 856, 868, 157 C.R. 355; C.E.B., 1 Workers' Compensation Practice 4th, §4.2; 1 Hanna 2d (2004 ed.), §7.01[3]; 1 Herlick 6th, §6.09 et seq.)

In cases of temporary partial disability, the weekly loss in wages consists of the difference between the average weekly earnings and the weekly amount that the employee will probably be able to earn. "In computing such probable earnings, due regard shall be given to the ability of the injured employee to compete in an open labor market. If evidence of exact loss of earnings is lacking, such weekly loss in wages may be computed from the proportionate loss of physical ability or earning power caused by the injury." (*Lab.C. 4657*.)

The suggestion in *California Comp. Ins. Co. v. Industrial Acc. Com.*, *supra*, 128 C.A.2d 813, that *Lab.C. 4657* necessitates detailed findings in all cases of temporary partial disability, was disapproved in *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 C.2d 417, 422, 340 P.2d 622, a case involving a carpenter's back injury. Payments were made and then terminated on February 17 when the physician advised that the carpenter could return to work. However, his back was still weak, and he could no longer do rough carpentering that required lifting, walking, crouching, etc. He was unable to find suitable light work until July 7, and a maximum temporary partial disability award during the intervening period was affirmed. For *practical purposes*, the disability was temporary total, because the wage loss was total, and in such a case, there was no need for a finding on whether he was or was not an "odd lot." On the effect of the statute, the court said:

"[I]n cases of temporary partial disability the employee is expected to be willing to earn such wages as he is able considering his injury, and ... if some other ascertainable cause other than the injury substantially contributes to his inability to earn wages, such separate cause must be separately evaluated, and only the proportion chargeable to the industrial injury allowed as compensation. In such a case specific findings are required. But where, as here, it appears

that no other separate cause contributed to the employee's inability to earn wages during the period he was temporarily partially disabled, the wage loss is obviously 100 per cent, and that is the only ultimate fact that need be found. There can be no question but that, in such a case, keeping in mind the fact that the employee is entitled, of course, to full compensation, the award must be the same as would have been payable for total temporary disability. This is so because, in such a case, the entire wage loss is caused by the industrial injury." (52 C.2d 420.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

2. Permanent Disability.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 287

[§ 287] In General.

(1) *Stationary Condition*. A permanent disability exists where the condition becomes substantially stationary, even though further medical treatment may be required. (See *United States Fidelity & Guaranty Co. v. Department of Industrial Relations* (1929) 207 C. 144, 146, 277 P. 492 [award for future medical treatment for total permanent disability is valid]; *Postal Tel. Cable Co. v. Industrial Acc. Com.* (1931) 213 C. 544, 551, 3 P.2d 6 [mental impairment following skull fracture considered permanent and stationary]; *Sweeney v. Industrial Acc. Com.* (1951) 107 C.A.2d 155, 159, 236 P.2d 651 ["where further change--for better or worse--is not reasonably to be anticipated under usual medical standards"]; *Subsequent Injuries Fund v. Industrial Acc. Com.* (1964) 226 C.A.2d 136, 143, 37 C.R. 844 ["Either no further medical treatment is possible or the success of that which is suggested is so problematical as to warrant refusal to undergo it"]; *Bstandig v. Work. Comp. App. Bd.* (1977) 68 C.A.3d 988, 995, 137 C.R. 713 [evidence was insufficient to support finding that psychiatric disability had become permanent and stationary]; C.E.B., 1 Workers' Compensation Practice 4th, §5.1; 2 Hanna 2d (2004 ed.), §8.01 et seq.; 1 Herlick 6th, §7.01 et seq.; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §§382, 383.) (On computation of permanent disability, see Cal. Civil Practice, 1 Workers' Compensation, Computation of Temporary and Permanent Disability, Chap. 4; on determining permanent disability in progressive disease cases, see *General Foundry Service v. Work. Comp. App. Bd.* (1986) 42 C.3d 331, 228 C.R. 243, 721 P.2d 124, *infra*, §290.)

(2) *Total or Partial*. Permanent disability may be either total (rated 100%), or partial (rated lower than 100%). (See *Lab.C. 4452.5*; C.E.B., 1 Workers' Compensation Practice 4th, §5.5.)

A worker cannot at a given time suffer more than total, or 100%, permanent industrial disability. However, if the worker is rehabilitated after receiving a disability rating and then suffers another separate injury, the total rating may exceed 100%. (*State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1977) 70 C.A.3d 599, 603, 139 C.R. 41.)

(3) *Determining Total or Partial Disability*. Except for specified injuries conclusively presumed to be permanent total disabilities (*infra*, this section), the determination whether a permanent disability is total, or as to the extent of partial disability, is not made by a consideration of the probable effects of the injury in each individual case, but on the basis of two general schedules, one statutory (*Lab.C. 4658 et seq.*), and the other established by the Administrative Director (see *infra*, §288). (On application of *Lab.C. 4658*, see *Fuentes v. Work. Comp. App. Bd.* (1976) 16 C.3d 1, 4,

128 C.R. 673, 547 P.2d 449, *infra*, §293.)

When an injury involves temporary disability as well as permanent disability, the employee is entitled to compensation for both. (*Lab.C. 4661.*)

Under *Lab.C. 4662*, the following permanent disabilities are conclusively presumed to be total in character:

- (a) Loss of both eyes or sight.
- (b) Loss of both hands or of their use.
- (c) An injury resulting in a practically total paralysis.
- (d) An injury to the brain resulting in incurable imbecility or insanity.

In all other cases, permanent total disability is determined in accordance with the facts. (*Lab.C. 4662*; see C.E.B., 1 Workers' Compensation Practice 4th, §5.5; 1 Herlick 6th, §7.03.)

West's Key Number Digest, Workers' Compensation k.864 et seq.

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96 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

2. Permanent Disability.

b. Determination of Percentage of Permanent Disability.

2 Witkin Sum. Cal. Law Work Comp § 288

[§ 288] Determination of Percentage of Permanent Disability.

(1) *California System, Former Law, and Revision.* California's permanent disability rating system utilizes a schedule based on the assumption that a benefit should bear a measurable relationship to an injured employee's age and occupation as well as a loss of earning capacity. Prior to the reform legislation of 2004, the Administrative Director was authorized to prepare, adopt, and amend a schedule for the determination of the percentage of permanent disability. In determining the percentage of permanent disability, in addition to other factors, the "diminished ability" of the injured employee "to compete in an open labor market" was taken into account. Under the reform legislation, the Administrative Director must amend the schedule, and the requirement to consider "diminished ability" to compete in the labor market must be revised. (See Legislative Counsel's Digest, Stats. 2004, Chap. 34.) (On cases decided under former statute, see *Postal Tel. Cable Co. v. Industrial Acc. Com.* (1931) 213 C. 544, 547, 3 P.2d 6 [minor employee who sustained fractured skull resulting in mental derangement, but who returned to his work at regular wage was entitled to award for permanent disability, with no deduction for wages paid]; *Department of Motor Vehicles v. Industrial Acc. Com.* (1939) 14 C.2d 189, 192, 93 P.2d 131 ["It is the prospective loss of future earning power under the existing handicap of physical impairment that is to be considered; and ability to do the exact work formerly done by the employee is not the sole measure of disability"]; *Myers v. Industrial Acc. Com.* (1940) 39 C.A.2d 665, 668, 103 P.2d 1025 [foot injury to laborer causing him to be "practically one legged" and no vacant jobs for person in that condition]; *Sweeney v. Industrial Acc. Com.* (1951) 107 C.A.2d 155, 158, 236 P.2d 651 [burden of proof on petitioning employee]; *Vincent v. Industrial Acc. Com.* (1955) 136 C.A.2d 679, 680, 289 P.2d 246 [same]; *Dalen v. Work. Comp. App. Bd.* (1972) 26 C.A.3d 497, 503, 103 C.R. 128 [employee was entitled to show that his actual duties did not conform to duties contemplated under generic term "house wrecker"]; *Duke v. Work. Comp. App. Bd.* (1988) 204 C.A.3d 455, 461, footnote 3, 251 C.R. 185 [measure of diminished capacity is how much of labor market is closed to worker].) (See 2 Hanna 2d (2004 ed.), §§ 8,02[4], 32.01[3] et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §5.36 et seq.; Cal. Civil Practice, 1 Workers' Compensation, §§4.45, 4.46.)

(2) *Criteria.* Under the reform legislation of 2004, the Administrative Director is charged with formulating an official rating schedule "based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice," and on other empirical studies. (*Lab.C. 4660(b)(2).*) In determining the percentage of permanent disability, account is taken of (a) the

nature of the injury or disfigurement, (b) the employee's occupation and age at the time of injury, and (c) the employee's diminished future earning capacity. (*Lab.C. 4660(a)*.)

(3) *Physical Injury and Earning Capacity*. For purposes of *Lab.C. 4660*, "nature of the physical injury or disfigurement" incorporates the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition). An employee's "diminished future earning capacity" is a numeric formula based on empirical data that aggregates the average percentage of long-term loss of income resulting from the type of injury for similarly situated employees. (*Lab.C. 4660(b)*.)

(4) *Amendment and Evidentiary Value*. The Director must amend the schedule at least once every 5 years according to the criteria in *Lab.C. 4660*. The schedule must be available for public inspection, and its standard ratings are prima facie evidence of the percentage of permanent disability attributed to covered injuries. (*Lab.C. 4660(c)*.) (See 2 Hanna 2d (2004 ed.), §32.01[3][a].)

(5) *Nonscheduled Disabilities*. Because it is impossible to foresee every type of injury, not all disabilities are scheduled. Thus, nonscheduled or "judgment" ratings are an accepted part of the permanent disability rating process, and nonscheduled injuries may be evaluated by comparison and analogy to the nearest scheduled disability. (*Glass v. Work. Comp. App. Bd. (1980) 105 C.A.3d 297, 306, 164 C.R. 312.*) (See Hanna 2d (2004 ed.), §§8.02[4], 32.01[3][b].)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 153 DOCUMENTS

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CHAPTER III - Workers' Compensation

Witkin Summary of California Law
IX. THE AWARD

B. Determination of Disability.

2. Permanent Disability.

b-1. (New) Application of Appropriate Schedule.

2 *Witkin Sum. Cal. Law Work Comp* § 288A

[§ 288A] (New) Application of Appropriate Schedule.

(1) *Governing Statute.* *Lab.C. 4660(d)* provides that, for compensable claims arising *before* January 1, 2005, the revised rating schedule (revised schedule) adopted pursuant to *Lab.C. 4660* will apply in determining permanent disabilities when (a) there has been either no comprehensive medical-legal report or no report required by a treating physician indicating the existence of permanent disability, or (b) an employer is not required to provide notice with the final temporary disability payment as required by *Lab.C. 4061* (text, §291). Thus, if before January 1, 2005, a qualifying medical report was prepared or notice under *Lab.C. 4061* was required, "the percentage of permanent disability is to be calculated using the earlier schedule that was in effect on the date of the injury." (*Zenith Ins. Co. v. Work. Comp. App. Bd.* (2007) 153 C.A.4th 461, 464, 62 C.R.3d 683.) (See *Chang v. Work. Comp. App. Bd.* (2007) 153 C.A.4th 750, 756, 63 C.R.3d 219 [exceptions to retroactivity in *Lab.C. 4660(d)* are "logical and internally consistent as the cases would have started the medical-legal evaluation process under the old" permanent disability rating schedule]; *Vera v. Work. Comp. App. Bd.* (2007) 154 C.A.4th 996, 1004, 65 C.R.3d 151 [although not specifically set forth in *Lab.C. 4660(d)*, January 1, 2005, is cutoff date for issuance of treating physician's or medical-legal report or for existence of requirement that employer give notice required by *Lab.C. 4061*].)

(2) *Medical Reports.* In *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (2007) 146 C.A.4th 1311, 53 C.R.3d 568, E was injured in 2004 and the injuries became permanent and stationary in June 2005. In November 2004, E's attorney faxed a letter to E's treating physician, M, advising of changes in California's workers' compensation system, and requesting M to verify E's injury by M's signature under the statement "I believe permanent disability is within reasonable medical probability emanating from this injury." M did so, dating his signature December 15, 2004, and the Board found that the sentence, read in light of M's other reports, constituted a report by a treating physician in accord with *Lab.C. 4660(d)*, and the award was calculated using the 1997 schedule in effect before January 1, 2005. *Held*, Board's order annulled. Although M's reports described E's injuries, nothing in the reports connected the restricted range of motion and pain symptoms to M's December 15 prediction of permanent disability. Thus, *Lab.C. 4660(d)* requires that the disability rating schedule effective January 1, 2005, be applied. (146 C.A.4th 1315.)

The phrase "indicating the existence of permanent disability" in *Lab.C. 4660(d)* applies to both a medical-legal report and a report by a treating physician. (*Costco Wholesale Corp. v. Work. Comp. App. Bd.* (2007) 151 C.A.4th 148, 153, 59 C.R.3d 611 [2004 medical-legal report by qualified medical examiner that did not indicate permanent disability

required application of revised schedule].) (See *Vera v. Work. Comp. App. Bd.*, *supra*, 154 C.A.4th 1006 [revised schedule applied where physician's 2004 report did not indicate that employee's disability was permanent and stationary]; *Tanimura & Antle v. Work. Comp. App. Bd.* (2007) 157 C.A.4th 1489, 1497, 69 C.R.3d 127 [revised schedule applied where employee was injured in 2004 but agreed medical examiner's report declared employee was permanent and stationary as of January 2006, and last temporary disability payment was in March 2006; following *Costco Wholesale Corp.* and *Vera*].)

Genlyte Group, LLC v. Work. Comp. App. Bd. (2008) 158 C.A.4th 705, 69 C.R.3d 903, agreed with the reasoning of *Costco Wholesale Corp.* and concluded that "a comprehensive medical-legal report, like a treating physician's report, must contain an indication of the existence of permanent disability to trigger use of the pre-2005 rating schedule." (158 C.A.4th 718.) However, *Genlyte Group, LLC* disagreed with *Vera* and determined that *Lab.C. 4660(d)* does not require that an employee's condition be both "permanent" and "stationary," for the purpose of indicating permanent disability, and that the broad wording of the statute is not limited to the typical final or permanent and stationary report. Thus, in an appropriate case a physician may report that permanent disability exists before the condition has reached permanent and stationary status. (158 C.A.4th 720.) (See *Zenith Ins. Co. v. Work. Comp. App. Bd.* (2008) 159 C.A.4th 483, 496, 71 C.R.3d 724 [employee's condition need not be permanent and stationary for comprehensive medical-legal or treating physician's report to indicate existence of permanent disability; remand was necessary to determine if December 2004 report qualified; following *Genlyte Group, LLC*].)

(3) *Lab.C. 4061 Notice Requirement.* In *Zenith Ins. Co. v. Work. Comp. App. Bd.*, 153 C.A.4th 461, *supra*, an employee incurred a compensable injury in October 2004. The employer's insurer paid temporary disability indemnity from October 2004 to August 2005, when the employee's condition was declared permanent and stationary. A workers' compensation judge awarded permanent disability based on the rating schedule that was effective January 1, 2005. The employee sought reconsideration, and the Board concluded that the 1997 schedule should have been used because notice was required under *Lab.C. 4061* prior to January 1, 2005. *Held*, award applying 1997 schedule annulled. The Board misinterpreted the notice requirement. The notice required under *Lab.C. 4061* advising of future payment or nonpayment of permanent disability must be given with the last payment of temporary disability. Thus, because here that notice was not required until after January 1, 2005, the 2005 permanent disability rating schedule applied. (153 C.A.4th 464; following *Costco Wholesale Corp.*) (See *Energetic Painting & Drywall v. Work. Comp. App. Bd.* (2007) 153 C.A.4th 633, 639, 63 C.R.3d 210 [Board should have applied schedule effective January 1, 2005, where employee was injured in July 2004 but employer was not required to give notice until March 2005 when employee's temporary disability benefits ended]; *Vera v. Work. Comp. App. Bd.*, *supra*, 154 C.A.4th 1010 [where employee continued to receive temporary disability payments through February 2005, employer was not required to provide notice prior to January 1, 2005, and revised schedule governed]; *Zenith Ins. Co. v. Work. Comp. App. Bd.*, *supra*, 159 C.A.4th 494 [Board erred in ruling that notice requirement arose with first payment of temporary disability in 2004; requirement did not arise until last payment, which was after January 1, 2005].)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

2. Permanent Disability.

c. Overlapping Disabilities.

2 Witkin Sum. Cal. Law Work Comp § 289

[§ 289] Overlapping Disabilities.

Where overlapping disabilities arise from the same industrial accident, the Board must, for rating purposes, fully describe each separate factor of disability. Overlapping or pyramiding is avoided by the application of the multiple disabilities rating schedule. (*Hegglin v. Work. Comp. App. Bd.* (1971) 4 C.3d 162, 174, 93 C.R. 15, 480 P.2d 967; see *Frierson v. Work. Comp. App. Bd.* (1971) 22 C.A.3d 164, 166, 99 C.R. 335 [following *Hegglin*]; *Abril v. Work. Comp. App. Bd.* (1976) 55 C.A.3d 480, 487, 127 C.R. 483 [rating limited to possible loss of total vision in one eye, on assumption that recommended work restrictions would not be heeded, annulled]; *Mihesuah v. Work. Comp. App. Bd.* (1976) 55 C.A.3d 720, 731, 127 C.R. 688 [combined rating of 70%, where knee and chest injuries rated 69% and 56% separately, affirmed]; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1977) 72 C.A.3d 13, 17, 139 C.A.3d 802 [rating annulled and remanded for consideration of unresolved issue of possible overlap of prior back disability and later heart disability]; C.E.B., 1 Workers' Compensation Practice 4th, §5.22; 1 Herlick 6th, §7.37.) (On disabilities arising from separate industrial accidents, see *infra*, §293.)

In *Franklin v. Work. Comp. App. Bd.* (1978) 79 C.A.3d 224, 145 C.R. 22, *infra*, §295, the court said: "For the purposes of clarity, the term 'overlap' should only be used in the apportionment of successive injuries ... and the term 'pyramiding' or 'duplication' should be used to describe the situation of multiple disabilities flowing from a single industrial injury." (79 C.A.3d 249, footnote 10.)

This suggestion was applied in *Morgan v. Work. Comp. App. Bd.* (1978) 85 C.A.3d 710, 149 C.R. 736, where multiple disabilities--hypertension and a hernia--arose from a single industrial injury. M was first found 74% permanently disabled from his hypertension. On petition to reopen to consider the hernia, he was found 76% permanently disabled, based on the rating specialist's conclusion that the two disabilities "overlapped." *Held*, rating and award annulled, and cause remanded.

(a) A review of the cases on multiple disabilities from successive injuries (see *infra*, §§293, 294) and from a single injury, as here, demonstrate that use of the method of apportionment of "overlapping" disabilities from successive injuries in cases of "duplication" of disabilities from single injuries is improper. (85 C.A.3d 723, 726.)

(b) In the duplication case, the rater must first determine if the multiple disabilities table can be applied, because it

applies only to disabilities to different organs or members of the body. (85 C.A.3d 724.) If the table can be applied, then the rater must determine if it should be applied, but may disregard the rating achieved from the table only if the rater's independent expert opinion justifies rating the disabilities in a different manner. There must, moreover, be some factual basis for the departure, rather than an arbitrary decision. (85 C.A.3d 724, 725.)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

2. Permanent Disability.

d. Progressive Occupational Disease.

2 *Witkin Sum. Cal. Law Work Comp* § 290

[§ 290] Progressive Occupational Disease.

General Foundry Service v. Work. Comp. App. Bd. (1986) 42 C.3d 331, 228 C.R. 243, 721 P.2d 124, examines the problem of determining permanent disability where the employee has the progressive lung disease of asbestosis. J, a molder employed by G for 29 years, developed asbestosis and stopped working in 1981. The Board gave him a temporary total disability indemnity rating to continue indefinitely. *Held*, the Board may tentatively rate the permanent disability of such an employee and reserve jurisdiction for a final determination when the condition is stationary or the disability is total.

(a) *Reservation of jurisdiction.*

(1) The Labor Code does not define "permanent disability"; and the administrative rule definition (after employee has reached maximum improvement or the condition has been stationary), formulated for ordinary injury, is inadequate for progressive occupational diseases. If the Board makes a permanent disability rating too early, the employee faces the risk that the 5-year period of *Lab.C. 5410* and *5804* (infra, §383) will preclude seeking full compensation. Moreover, rating of the future path of a progressive disease is not practical. (42 C.3d 334, 336.)

(2) The practical solution is to allow the Board to reserve jurisdiction to make its final determination once the disease is permanent and stationary. This is in accord with the directive that the Workers' Compensation Act be liberally construed, and is consistent with cases holding that the Board may continue its jurisdiction beyond the 5-year period in a number of situations. (42 C.3d 336, 337.)

(3) "We conclude that the Board's reservation of jurisdiction on the issue of permanent disability in the case of insidious, progressive diseases serves to further the compensatory goals of the workers' compensation system. On remand, the Board may tentatively rate J's known permanent disability and order advances based on that tentative rating. It may then reserve its jurisdiction for a final determination of permanent disability when either: (1) his condition becomes permanent and stationary, or (2) his permanent disability is total (100 percent) and further deterioration would be irrelevant for rating purposes." (42 C.3d 338.)

(b) *Vocational rehabilitation program.* Before the Board makes a determination on permanent disability, it should

consider J's potential eligibility for rehabilitation benefits under *Lab.C. 139.5* (supra, §282). (42 C.3d 340, citing *Le Boeuf v. Work. Comp. App. Bd.* (1983) 34 C.3d 234, 193 C.R. 547, 666 P.2d 989, infra, §427.) While J's health precludes him from returning to his former job, he may be able to pursue another occupation. If the rehabilitation unit determines that he is qualified under *Lab.C. 139.5*, G will have to develop a rehabilitation plan for him; if he is not so qualified, the Board should take that fact into account in determining his permanent disability rating. (42 C.3d 340.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

2. Permanent Disability.

e. Dispute Involving Permanent Disability.

2 Witkin Sum. Cal. Law Work Comp § 291

[§ 291] Dispute Involving Permanent Disability.

(1) *In General.* *Lab.C. 4061* et seq. provide a procedure for determining permanent disability and other medical issues when these matters are in dispute. Accordingly, with the last temporary disability indemnity payment, the employer must inform the employee, on a prescribed form, that the employer will pay permanent disability indemnity, or will not pay in the belief there is no permanent impairment, or that indemnity may be payable when the condition is permanent and stationary. The notice must describe the procedures available to the employee and the employee's right to consult an information and assistance officer or an attorney. The procedure then followed depends on whether the employee is represented. (*Lab.C. 4061.*) (On medical-legal expenses, see *supra*, §§273, 274.)

(2) *Procedure.* *Lab.C. 4062* sets forth procedures when an employee or employer objects to medical determinations made by the treating physician concerning medical issues not covered by *Lab.C. 4061* and not subject to utilization review under *Lab.C. 4610* (*supra*, §263). (*Lab.C. 4062(a).*)

The objecting party must notify the other party in writing within 20 days of receipt of the physician's report, if the employee is represented by an attorney, or within 30 days, if not represented. If the employee is represented, the disputed issue is subject to determination by a medical evaluation under *Lab.C. 4062.2*, and no other medical evaluation may be obtained. If the employee is not represented, the employer must furnish the employee with a prescribed form to request assignment of a panel of three qualified medical evaluators, and the evaluation is obtained exclusively under *Lab.C. 4062.1*. (*Lab.C. 4062(a).*) An employer may, within 10 days of receiving a report, object to a treating physician's recommendation that spinal surgery be performed. If so, *Lab.C. 4062(b)* governs the procedures. (*Lab.C. 4062(b).*) (On information party may provide to qualified medical evaluator, see *Lab.C. 4062.3*; on procedure when qualified medical evaluator fails to comply with specified timeframes, see *Lab.C. 4062.5*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Nunez v. Work. Comp. App. Bd.* (2006) 136 C.A.4th 584, 591, 38 C.R.3d 914 [where employer disputed nature and extent of injury that occurred prior to January 1, 2005, former version of *Lab.C. 4061* and 4062 applied and employer properly chose his own medical evaluator]; *Cortez v. Work. Comp. App. Bd.* (2006) 136 C.A.4th 596, 601, 38 C.R.3d 922 [same; companion case to *Nunez*].



101 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

3. Specific and Cumulative Injuries.

2 Witkin Sum. Cal. Law Work Comp § 292

[§ 292] Specific and Cumulative Injuries.

(1) *In General.* Injuries are classified as follows: (a) A specific injury is one occurring as a result of one incident or exposure that causes disability or the need for medical treatment. (b) A cumulative injury is one occurring as a result of repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes a disability or the need for medical treatment. The date of a cumulative injury is determined under *Lab.C. 5412* (infra, §369). (*Lab.C. 3208.1.*) (See C.E.B., 1 Workers' Compensation Practice 4th, §§2.52, 11.51, 11.52; 2 Hanna 2d (2004 ed.), §4.01[2][c]; 2 Herlick 6th, §16.16.)

(2) *Separate Consideration.* When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law must be separately determined with respect to each injury, including the apportionment between the injuries of liability for disability benefits, the cost of medical treatment, and death benefits. (*Lab.C. 3208.2*; see *Savage Plumbing Co. v. Work. Comp. App. Bd.* (1982) 131 C.A.3d 517, 526, 182 C.R. 485 [earlier injury in California, later injury in Pennsylvania; statute "mandates apportionment between successive employers, wherever located, for combined effects of the injuries"].)

Lab.C. 3208.2, by requiring the separate consideration of injuries, precludes the accumulation of injuries subject to separate statutory remedies in a single claim so as to escape the bar of the statute of limitations. However, "[i]t does not limit an employer's joint and several liability to its employee for the full award of present and future medical treatment made necessary in whole or in part by the industrial injury occurring in its employ." (*Buhlert Trucking v. Work. Comp. App. Bd.* (1988) 199 C.A.3d 1530, 1539, 1540, 247 C.R. 190 [disapproving assumption of *Savage Plumbing Co.* that *Lab.C. 3208.2* established new substantive rule requiring apportionment of benefits between employer and employee]; see infra, §294.)

In *Western Growers Ins. Co. v. Work. Comp. App. Bd.* (1993) 16 C.A.4th 227, 20 C.R.2d 26, an employee who was unable to cope with the increased technological demands of his job was hospitalized for depression in 1985. The employee was released and returned to work while remaining under his physician's care and on medication. However, the employee's depression was not fully resolved, and the same stress that resulted in his initial hospitalization caused his symptoms to return. He obtained a work release from his physician in 1987, and was again hospitalized for depression in 1988. In 1991 his condition became permanent and stable. The workers' compensation judge and the Board determined that the employee suffered from a single cumulative injury. *Held*, finding a single cumulative injury

did not impermissibly merge two separate periods of injury.

(a) The antimerger doctrine of *Lab.C. 3208.2* requires a finding that there are two separate injuries. The intent of the antimerger legislation was to prevent the merger of past specific injuries with later cumulative injuries in a way that allowed employees to avoid the statute of limitations and exposed insurers and employers to risk for lengthy time periods. (*16 C.A.4th 236, 237.*)

(b) The determination that the employee suffered from a single cumulative injury was supported by substantial evidence. The employee remained on medication and under a physician's care from 1985 onward. The same stress that caused his hospitalization in 1985 exacerbated his depression when he returned to work, and the depressive episode that began in 1985 was never fully resolved. (*16 C.A.4th 235.*)

(c) The antimerger doctrine applies to the combination of injuries, not to periods of disability. Thus, even though the employee had two separate periods of disability, because they were linked by a continuous need for medical treatment caused by a single work-related cumulative depression, the antimerger doctrine did not apply. (*16 C.A.4th 236; distinguishing Aetna Cas. & Surety Co. v. Work. Comp. App. Bd. (1973) 35 C.A.3d 329, 110 C.R. 780, infra, §371, which involved distinct periods of temporary disability instigated by separate specific incidents.*)

(3) *Merger of Injuries Prohibited. Lab.C. 5303*, stating the rule of one cause of action (*infra, §348*), adds the proviso that "no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death." (See *infra, §369.*)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

a. Former Law.

1. In General.

2 Witkin Sum. Cal. Law Work Comp § 293

[§ 293] In General.

Under former law, permanent disability was apportioned either under *Lab.C. 4663* (aggravation cases) or *Lab.C. 4750* (preexisting disability cases). Both statutes sought to avoid an employer being charged with a permanent disability unrelated to the industrial injury. (See C.E.B., 1 Workers' Compensation Practice 4th, §5.15 et seq.; 2 Hanna 2d (2004 ed.), §8.05 et seq.; 1 Herlick 6th, §7.44.) A stated purpose of the apportionment statutes was to encourage the employment of physically disabled persons by assuring employers of liability only for a disability that is attributable to a subsequent industrial injury. (*Wolski v. Industrial Acc. Com.* (1945) 70 C.A.2d 427, 432, 161 P.2d 283; *State Compensation Ins. Fund. v. Industrial Acc. Com.* (1963) 59 C.2d 45, 49, 27 C.R. 702, 377 P.2d 902, *infra*, §295.)

Under former *Lab.C. 4663*, if an employee had a preexisting disease and then suffered a compensable injury, compensation was allowed only for that proportion of the disability due to the aggravation of the prior disease by the injury. (See *Tanenbaum v. Industrial Acc. Com.* (1935) 4 C.2d 615, 618, 52 P.2d 215 [preexisting arthritis and injury from collision with another employee; apportionment proper]; *Peterson v. Work. Comp. App. Bd.* (1968) 266 C.A.2d 818, 822, 72 C.R. 545 [preexisting cerebral condition and industrial head injury; apportionment proper].)

Under former *Lab.C. 4750*, if an employee had an existing disability and suffered a later permanent injury, compensation was given only for the second injury, considered alone. (See *Gardner v. Industrial Acc. Com.* (1938) 28 C.A.2d 682, 684, 83 P.2d 295 ["[I]ndustry is to be charged only for those injuries arising out of and in the course of employment and only for the result of that particular injury when considered by itself and not in conjunction with or in relation to a previous injury"]; *Fuentes v. Work. Comp. App. Bd.* (1976) 16 C.3d 1, 128 C.R. 673, 547 P.2d 449 [interplay between *Lab.C. 4750* and *4658* (exponential increases in weekly benefits in proportion to percentage of disability)].)

The reform legislation of 2004 repealed both apportionment statutes. Permanent disability is now apportioned based solely on causation. Thus, an employer's liability is limited only to the percentage of permanent disability directly caused by industrial injury. (*Lab.C. 4663, 4664; infra*, §296.)

SUPPLEMENT: [This section is current through the latest supplement]



103 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

a. Former Law.

2. Aggravation Cases.

2 *Witkin Sum. Cal. Law Work Comp* § 294

[§ 294] Aggravation Cases.

Issues and cases that arose under former Lab.C. 4663 include the following:

(1) If the subsequent injury aggravated or accelerated a preexisting injury or disease, the award could include compensation for the aggravation on the theory that the aggravation or "lighting up" of a preexisting injury or disease was itself an industrial injury. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 C.2d 615, 617, 52 P.2d 215; *Hendrickson v. Industrial Acc. Com.* (1932) 215 C. 82, 86, 8 P.2d 833; *Mullane v. Industrial Acc. Com.* (1931) 118 C.A. 283, 286, 5 P.2d 483; *Gledhill Chevrolet v. Industrial Acc. Com.* (1964) 62 C.2d 59, 61, 41 C.R. 170, 396 P.2d 586; *Kiewit Sons v. Industrial Acc. Com.* (1965) 234 C.A.2d 831, 837, 44 C.R. 813; *Berry v. Work. Comp. App. Bd.* (1968) 68 C.2d 786, 789, 69 C.R. 68, 441 P.2d 908; *Zemke v. Work. Comp. App. Bd.* (1968) 68 C.2d 794, 799, 69 C.R. 88, 441 P.2d 928; *Ballard v. Work. Comp. App. Bd.* (1971) 3 C.3d 832, 837, 92 C.R. 1, 478 P.2d 937; *Fowler v. Work. Comp. App. Bd.* (1972) 22 C.A.3d 756, 760, 99 C.R. 609.)

(2) Temporary disability or medical expense was not apportionable. (*Granado v. Work. Comp. App. Bd.* (1968) 69 C.2d 399, 405, 71 C.R. 678, 445 P.2d 294; *McGlenn v. Work. Comp. App. Bd.* (1977) 68 C.A.3d 527, 535, 137 C.R. 326; *Buhlert Trucking v. Work. Comp. App. Bd.* (1988) 199 C.A.3d 1530, 1536, 247 C.R. 190; *Rouseyrol v. Work. Comp. App. Bd.* (1991) 234 C.A.3d 1476, 1485, 286 C.R. 250; *Fisk v. Work. Comp. App. Bd.* (1993) 20 C.A.4th 1078, 1085, 25 C.R.2d 174.)

(3) Normal progression of a disease could not be considered in determining compensation for the aggravation resulting from the later injury. (*Tanenbaum v. Industrial Acc. Com.*, *supra*, 4 C.2d 618; *Peterson v. Work. Comp. App. Bd.* (1968) 266 C.A.2d 818, 822, 72 C.R. 545.)

(4) Apportionment was improper without substantial evidence that a prior disability contributed to the subsequent disability. (*Amico v. Work. Comp. App. Bd.* (1974) 43 C.A.3d 592, 606, 117 C.R. 831; *Gross v. Work. Comp. App. Bd.* (1975) 44 C.A.3d 397, 402, 118 C.R. 609; cf. *Bstandig v. Work. Comp. App. Bd.* (1977) 68 C.A.3d 988, 997, 137 C.R. 713 [finding was premature where evidence was inconclusive].)

(5) The same rules of apportionment applied in cases of psychiatric injuries. (*Callahan v. Work. Comp. App. Bd.* (1978) 85 C.A.3d 621, 627, 149 C.R. 647; *Gay v. Work. Comp. App. Bd.* (1979) 96 C.A.3d 555, 561, 158 C.R. 137; *Schmidt v. Work. Comp. App. Bd.* (1994) 28 C.A.4th 1458, 1463, 35 C.R.2d 279; *Martins v. Work. Comp. App. Bd.* (1995) 40 C.A.4th 1090, 1094, 47 C.R.2d 386.)

(6) Occupational disease cases (e.g., silicosis) called for the following distinction: (1) Where a preexisting disease had already resulted in a partial disability that was not attributable to the employment, *Lab.C.* 4663 applied to the aggravating injury. (2) However, where the employee becomes disabled as a result of a progressive occupational disease, contracted during the employment, there is no preexisting disease or disability, and liability for the full disability without proration was imposed. (*Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 C.2d 79, 84, 172 P.2d 884; *Globe Indem. Co. v. Industrial Acc. Com.* (1954) 125 C.A.2d 763, 768, 271 P.2d 149.)

(7) *Lab.C.* 4663 applied whether a preexisting condition was symptomatic or asymptomatic. (*Bowler v. Industrial Acc. Com.* (1955) 135 C.A.2d 534, 538, 287 P.2d 562.)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

a. Former Law.

3. Preexisting Disability and Subsequent Nonindustrial Injury Cases.

2 Witkin Sum. Cal. Law Work Comp § 295

[§ 295] Preexisting Disability and Subsequent Nonindustrial Injury Cases.

Issues and cases that arose under former Lab.C. 4750 and 4750.5 include the following:

(1) Proper apportionment in cases of overlapping injuries. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1963) 59 C.2d 45, 53, 27 C.R. 702, 377 P.2d 902; *Avila v. Work. Comp. App. Bd.* (1970) 14 C.A.3d 33, 39, 91 C.R. 853; *Argonaut Ins. Co. v. Work. Comp. App. Bd.* (1971) 15 C.A.3d 436, 439, 93 C.R. 65; *Mercier v. Work. Comp. App. Bd.* (1976) 16 C.3d 711, 129 C.R. 161, 548 P.2d 361; *Bookout v. Work. Comp. App. Bd.* (1976) 62 C.A.3d 214, 222, 132 C.R. 864, *infra*, §299; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1977) 72 C.A.3d 13, 16, 139 C.R. 802; *Johns-Manville Products Corp. v. Work. Comp. App. Bd.* (1978) 87 C.A.3d 740, 749, 151 C.R. 215; *Newman v. Work. Comp. App. Bd.* (1984) 152 C.A.3d 219, 223, 199 C.R. 422; *Sidders v. Work. Comp. App. Bd.* (1988) 205 C.A.3d 613, 630, 252 C.R. 304.)

(2) An evaluating physician must describe in detail the exact nature of the preexisting disability and the basis for the opinion. (*Ditler v. Work. Comp. App. Bd.* (1982) 131 C.A.3d 803, 811, 182 C.R. 839.)

(3) The preexisting disability must have been labor-disabling. (*Ditler v. Work. Comp. App. Bd.*, *supra*, 131 C.A.3d 813.)

(4) Evidence of a preexisting disability could consist of complaints to coworkers or physicians before the industrial injury, treatment to the same part of the body before the industrial injury, or measurable preexisting loss of functioning. (*Ditler v. Work. Comp. App. Bd.*, *supra*, 131 C.A.3d 813.)

(5) The preexisting condition need not have caused disability in the occupation in which the worker was employed. (*Franklin v. Work. Comp. App. Bd.* (1978) 79 C.A.3d 224, 238, 145 C.R. 22.)

(6) A finding of preexisting disability could be based on evidence that the condition would have interfered with other work activity before the industrial injury. However, a prophylactic work restriction could not be applied retrospectively to create a factual or legal fiction of preexisting disability. (*Franklin v. Work. Comp. App. Bd.*, *supra*, 79

C.A.3d 238; Ditley v. Work. Comp. App. Bd., supra, 131 C.A.3d 813; Robinson v. Work. Comp. App. Bd. (1981) 114 C.A.3d 593, 602, 171 C.R. 48.)

(6) Apportionment could not be based merely on pathology. (*Callahan v. Work. Comp. App. Bd. (1978) 85 C.A.3d 621, 627, 149 C.R. 647; Gay v. Work. Comp. App. Bd. (1979) 96 C.A.3d 555, 561, 158 C.R. 137; King v. Work. Comp. App. Bd. (1991) 231 C.A.3d 1640, 1647, 283 C.R. 98.)*

(7) *Lab.C. 4750* did not apply when successive injuries became permanent at the same time. (*Wilkinson v. Work. Comp. App. Bd. (1977) 19 C.3d 491, 499, 138 C.R. 696, 564 P.2d 848; Rumbaugh v. Work. Comp. App. Bd. (1978) 87 C.A.3d 907, 915, 151 C.R. 563; Parker v. Work. Comp. App. Bd. (1992) 9 C.A.4th 1636, 1645, 12 C.R.2d 370; Stoiber v. Work. Comp. App. Bd. (1992) 5 C.A.4th 1403, 1408, 7 C.R.2d 470.)*

(8) When rates changed between several injuries, benefits were determined exclusively by the scheduled rates in effect when the injuries became permanent and stationary. (*Nuelle v. Work. Comp. App. Bd. (1979) 92 C.A.3d 239, 248, 154 C.R. 707; Taylor v. Work. Comp. App. Bd. (1979) 95 C.A.3d 139, 150, 156 C.R. 906; Fullmer v. Work. Comp. App. Bd. (1979) 96 C.A.3d 164, 168, 171, 157 C.R. 735; Harold v. Work. Comp. App. Bd. (1980) 100 C.A.3d 772, 781, 787, 161 C.R. 508; Norton v. Work. Comp. App. Bd. (1980) 111 C.A.3d 618, 625, 629, 169 C.R. 33; Trevino v. Work. Comp. App. Bd. (1989) 207 C.A.3d 1012, 1015, 1017, 255 C.R. 162; Fremont Indem. Co. v. Work. Comp. App. Bd. (1989) 208 C.A.3d 914, 916, 918, 256 C.R. 413.)*

SUPPLEMENT: [This section is current through the latest supplement]



105 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

b. Apportionment Based on Causation.

2 *Witkin Sum. Cal. Law Work Comp* § 296

[§ 296] Apportionment Based on Causation.

(1) *In General.* Under the reform legislation of 2004, apportionment of permanent disability must be based on causation. (*Lab.C. 4663(a).*) Moreover, an employer will only be liable for the percentage of permanent disability "directly caused by the injury arising out of and occurring in the course of employment." (*Lab.C. 4664(a).*) Hence, employees claiming an industrial injury must, on request, disclose all previous permanent disabilities or physical impairments. (*Lab.C. 4663(d).*)

(2) *Physician Report Must Address Causation.* Physicians preparing reports that address permanent disability due to a claimed industrial injury must address the issue of causation. (*Lab.C. 4663(b).*) To be considered complete, the report must include an apportionment determination based on (a) what approximate percentage of the permanent disability was caused by the direct result of injury "arising out of and occurring in the course of employment," and (b) what percentage was caused by other factors, both before and after to the industrial injury, including prior industrial injuries. (*Lab.C. 4663(c).*)

A physician who is unable to include the apportionment determination in the report must specify why it was not possible to determine the effect of a prior condition. The physician must then consult with other physicians, or refer the employee to another authorized physician for a final determination. (*Lab.C. 4663(c).*)

(3) *Presumptive Effect of Prior Award.* If an employee has received a prior award of permanent disability, it will be conclusively presumed that the prior permanent disability exists at the time of a subsequent industrial injury. This presumption affects the burden of proof. (*Lab.C. 4664(b).*)

(4) *Limit on Awards.* The accumulation of permanent disability awards for regions of an employee's body, as specified, must not exceed 100% over the employee's lifetime, except where the injury is conclusively presumed to be total under *Lab.C. 4662* (supra, §287). (*Lab.C. 4664(c)(1).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Lab.C. 4663* and *4664* apply prospectively to cases pending at the time the new legislation was enacted (i.e., April 19, 2004), except to those cases that were final at the time of enactment but subject to the Board's continuing

jurisdiction under *Lab.C. 5803 and 5804*, regardless of the date of injury. (*Kleemann v. Work. Comp. App. Bd. (2005) 127 C.A.4th 274, 285, 25 C.R.3d 448* [new statutes were applicable where, at date of enactment, matter had been tried but was pending with workers' compensation judge for decision]; *Marsh v. Work. Comp. App. Bd. (2005) 130 C.A.4th 906, 910, 30 C.R.3d 598* [on employer's petition for reconsideration, Board properly remanded case to workers' compensation judge to determine applicability of new statute to matter pending at time of statute's enactment; following *Kleeman*]; *Rio Linda Union School Dist. v. Work. Comp. App. Bd. (2005) 131 C.A.4th 517, 531, 31 C.R.3d 789* [new apportionment provisions should have been applied where case was pending at time provisions were enacted but award was issued 4 days after enactment; Board's contrary finding was annulled].)

(*New*) *Method of calculating compensation for permanent disability after apportionment based on causation:* Following the reform legislation of 2004, in cases where an employee's injury resulted in permanent disability, disagreement arose on how to "discount" the compensation owed for the current level of permanent disability for either previous industrial injury or nonindustrial disability. For example, in *E & J Gallo Winery v. Work. Comp. App. Bd. (2005) 134 C.A.4th 1536, 37 C.R.3d 208*, D's first back injury while working for G resulted in a 20.5% permanent disability award of \$ 11,680. Six years later, while still employed by G, D again injured his back and became 73% permanently disabled. Adjusting for D's age and occupation, a 73% disability award translated to \$ 230 a week over 453.50 weeks for a total of \$ 104,305. From the award, the workers' compensation judge deducted the \$ 11,680 previously paid. G argued that the percentage, not the dollar amount, of the prior award should have been deducted, which would have resulted in D being found 52.5% permanently disabled and hence, a diminished award. *Held*, affirmed. The approach urged by G is essentially the formula adopted by *Fuentes v. Work. Comp. App. Bd. (1976) 16 C.3d 1, 128 C.R. 673, 547 P.2d 449*, and used prior to the passage of the reform legislation of 2004. Here, the court held that neither the current statutes nor the legislative intent behind them requires the continued application of that formula. (*134 C.A.4th 1546, 1553.*) (See *Nabors v. Work. Comp. App. Bd. (2006) 140 C.A.4th 217, 228, 44 C.R.3d 312* [lumber company employee with two injuries; applying formula adopted by *E & J Gallo Winery*].)

The disagreement was resolved in *Brodie v. Work. Comp. App. Bd. (2007) 40 C.4th 1313, 57 C.R.3d 644, 156 P.3d 1100*, which involved five consolidated cases. In each case, the injured worker's current permanent disability level could be attributed in part to one or more previous industrial injuries or nonindustrial causes, and the workers' compensation judge applied the *Fuentes* apportionment method. *Held*, the *Fuentes* approach has not been superseded by passage of the reform legislation and is still the correct method for calculating apportionment.

(a) Although *Fuentes* involved apportionment between industrial and nonindustrial disabilities, Courts of Appeal and the Workers' Compensation Appeals Board have routinely applied *Fuentes* in apportioning between industrial disabilities as well. (*40 C.4th 1323.*)

(b) There is nothing in the repeal of former *Lab.C. 4750* or in the enactment of current *Lab.C. 4663 and 4664* to suggest any legislative intent to change how disability percentages are converted to compensation awards. The reform legislation, by focusing on causation, affects "how one goes about identifying the percentage of permanent disability an employer is responsible for, but not how one calculates the compensation due for that disability once a percentage is determined." Thus, the formula for computing an apportioned award after the employer's percentage liability has been determined remains the same. (*40 C.4th 1328, 1332*; disapproving *E & J Gallo Winery* and *Nabors*, to the extent they are inconsistent with this opinion.)

(2) *Physician Report Must Address Causation.* See *E.L. Yeager Const. v. Work. Comp. App. Bd. (2006) 145 C.A.4th 922, 929, 52 C.R.3d 133* [Board erred in rejecting medical examiner's opinion that apportioned 20% of disability to chronic lumbar spine degeneration where opinion was based on MRI, which clearly showed degenerative disc disease, and on fact that employee suffered earlier back problems; although examiner did not state in his report that apportionment was based on reasonable medical probability, he did so in his deposition, which was sufficient for apportionment under revised law]; *Andersen v. Work. Comp. App. Bd. (2007) 149 C.A.4th 1369, 1382, 57 C.R.3d 839* [physician's lengthy medical report and deposition testimony discussing examination of employee, medical history, job activity and tenure, and consideration of chiropractic reports, provided proper basis for apportionment of employee's

permanent disability to industrial and nonindustrial factors].(3) *Presumptive Effect of Prior Award*. See *Kopping v. Work. Comp. App. Bd.* (2006) 142 C.A.4th 1099, 1114, 48 C.R.3d 618 [presumption in *Lab.C. 4664(b)* is conclusive, not rebuttable, and employer has burden of proving overlap between current and previous disability].

(5) *(New) Exclusions*. *Lab.C. 4663* does not apply to hernia, heart trouble, and pneumonia involving specified public safety members. (*Lab.C. 4663(e)*, added in 2006.) (See *Department of Corrections & Rehabilitation v. Work. Comp. App. Bd.* (2008) 166 C.A.4th 911, 920, 82 C.R.3d 920) [*Lab.C. 4663(e)* was declaratory of existing law at time of its enactment; thus Board properly declined to apportion correctional officer's heart injury for which he received permanent disability compensation prior to statute's enactment].



106 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

c. Compensation From Subsequent Injuries Benefits Trust Fund.

1. Nature of Legislation.

2 *Witkin Sum. Cal. Law Work Comp* § 297

[§ 297] Nature of Legislation.

The objectives of the subsequent injuries statutes (*Lab.C. 4751* et seq., *infra*, §299 et seq.) are to limit the liability of an employer for subsequent injuries and thus facilitate the rehabilitation and encourage the employment of disabled employees. (See *Subsequent Injuries Fund v. Industrial Acc. Com.* (1952) 39 C.2d 83, 86, 244 P.2d 889; *Dahlbeck v. Industrial Acc. Com.* (1955) 135 C.A.2d 394, 397, 287 P.2d 353; *Pacific Gas & Elec. Co. v. Industrial Acc. Com.* (1954) 126 C.A.2d 554, 558, 272 P.2d 818; C.E.B., 1 *Workers' Compensation Practice* 4th, §5.25 et seq.; 1 *Hanna* 2d (2004 ed.), §8.09; 1 *Herlick* 6th, §8.01 et seq.)

As the court said in *Subsequent Injuries Fund v. Industrial Acc. Com.*: "Workmen's compensation laws of various states and the federal government contain provisions for additional compensation to be paid from a fund (rather than by the employer or his workmen's compensation insurance carrier) to the already handicapped worker who sustains an industrial injury which causes increased permanent disability. The purpose of such subsequent injuries legislation is manifestly sound and, we think ... is encompassed within the purview of the 'complete system of workmen's compensation' contemplated by our Constitution. ... For example, the one-eyed worker who sustains an industrial injury which results in loss of the sight of his remaining eye is in need of more compensation to enable him to rehabilitate himself than is the worker with two good eyes who sustains an industrial injury which results in loss of the sight of one. Yet it seems unfair to place upon the employer who is willing to hire handicapped workmen the burden of furnishing such additional compensation; indeed, in states which have held that the employer of a one-eyed workman is liable for total disability when the workman loses his second eye as a result of an industrial injury, employers as a consequence of such decisions have refused to employ the handicapped." (39 C.2d 85.)

In 2003, the Subsequent Injuries Benefits Trust Fund was created as a "special trust fund account in the State Treasury ... continuously appropriated for the nonadministrative expenses of the workers' compensation program for workers who have suffered serious injury and who are suffering from previous and serious permanent disabilities or physical impairments." (*Lab.C. 62.5(d)(1)*.) Commencing January 1, 2004, references to the "Subsequent Injuries Fund" mean the "Subsequent Injuries Benefits Trust Fund." (*Lab.C. 62.5(d)(2)*.)

SUPPLEMENT: [This section is current through the latest supplement]

Subsequent Injuries Benefits Trust Fund: Lab.C. 62.5(d) was relettered Lab.C. 62.5(c) in 2008.



107 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

c. Compensation From Subsequent Injuries Benefits Trust Fund.

2. Death of Employee Without Dependents.

2 Witkin Sum. Cal. Law Work Comp § 298

[§ 298] Death of Employee Without Dependents.

Lab.C. 4706.5 provides for contributions to the Fund by employers where an employee dies without surviving dependents to whom death benefits would otherwise be paid. However, when the Board finds that there is a person entitled to the dependency death benefit, the employer's contribution must be refunded. (*Lab.C. 4706.5(g).*) (See *7 A.L.R.5th* 969 [right of insurer or employer paying into special fund on death of employee without dependents to indemnity or subrogation from recovery in wrongful death action against third party].)

In *Department of Industrial Relations v. Work. Comp. App. Bd.* (1979) 94 C.A.3d 72, 156 C.R. 183, a woman who had lived with decedent employee was held entitled to a death benefit as a member of his household (see *infra*, §314). However, instead of claiming the full statutory amount of \$ 40,000, she entered into a compromise and release for \$ 10,000, which was approved by the Board (see *infra*, §364). The state then claimed the balance of \$ 30,000. The employer and insurer argued that, because *Lab.C. 4706.5* did not expressly cover the situation of payment of a portion of the sum to a partial dependent, they were entitled to keep the balance. *Held*, the state was entitled to the \$ 30,000. Giving the statute a reasonable interpretation to carry out its purpose, the employer was obligated for the full amount of the death benefit. "[T]he legislative objective was that workers' job-related death benefits be paid in satisfaction of their dependents' lawful claims, if any, and that such sums as then remain undisbursed be paid to the State." (94 C.A.3d 80.) A contrary construction would encourage an employer or insurer to settle doubtful claims for small amounts, and then obtain Board confirmation and avoid the full liability imposed by the statute. (94 C.A.3d 79.)

In *Atlantic Richfield Co. v. Work. Comp. App. Bd.* (1982) 31 C.3d 715, 182 C.R. 778, 644 P.2d 1257, the court, disapproving *Tessler*, came to the opposite conclusion: An employer is required to make payment to the Department of Industrial Relations under *Lab.C. 4706.5* "only when the deceased employee left no dependents, total or partial." (31 C.3d 727.) However, in view of numerous settlements and awards made in reliance on the *Tessler* interpretation of *Lab.C. 4706.5*, the decision was made nonretroactive. (31 C.3d 728.) (See *Travelers Ins. Co. v. Work. Comp. App. Bd.* (1982) 138 C.A.3d 244, 252, 253, 187 C.R. 838 [following *Atlantic Richfield*]; *Smith v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 560, 563, 117 C.R.2d 420, *supra*, §281 [where parents of deceased, unmarried son with no dependents were improperly awarded partial dependency payment, decision was annulled with directions to make appropriate award to Department of Industrial Relations].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Exception: *Lab.C. 4706.5* does not apply where the employer has paid a death benefit to the estate of a deceased employee as specified in *Lab.C. 4702(a)(6)* (text, §280). (*Lab.C. 4706.5(h)*, added in 2006.)



108 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

c. Compensation From Subsequent Injuries Benefits Trust Fund.

3. Basic Provisions for Compensation.

2 Witkin Sum. Cal. Law Work Comp § 299

[§ 299] Basic Provisions for Compensation.

Lab.C. 4751, providing for compensation for subsequent injuries, was enacted in 1945. However, because the statute was so frequently and liberally applied, limiting amendments were added in 1955 and 1959 to safeguard the Fund. (On application of *Lab.C. 4751* prior to limiting amendments, see *Smith v. Industrial Acc. Com.* (1955) 44 C.2d 364, 365, 282 P.2d 64; *Subsequent Injuries Fund v. Industrial Acc. Com.* (1955) 44 C.2d 604, 607, 283 P.2d 1039; *Dahlbeck v. Industrial Acc. Com.* (1955) 135 C.A.2d 394, 397, 287 P.2d 353; *Ferguson v. Industrial Acc. Com.* (1958) 50 C.2d 469, 474, 326 P.2d 145.)

Under *Lab.C. 4751*, if an employee who is permanently partially disabled receives a subsequent compensable injury that results in additional permanent partial disability so that (a) the disability caused by the combined disabilities is greater than one resulting from the subsequent injury alone, and (b) the combined effect of the subsequent injury and previous disability is a permanent disability of 70% or more, the employee may be entitled to additional compensation for the remainder of the combined permanent disability existing after the last injury. However, eligibility depends on the existence of one of the following conditions:

(1) The previous disability or impairment affected the employee's hand, arm, foot, leg, or eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and the latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5% or more of the total.

(2) The permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or age of the employee, is equal to 35% or more of the total. (See *Subsequent Injuries Fund v. Industrial Acc. Com.* (1961) 56 C.2d 842, 846, 17 C.R. 144, 366 P.2d 496.)

In *Bookout v. Work. Comp. App. Bd.* (1976) 62 C.A.3d 214, 132 C.R. 864, petitioner, who suffered from a preexisting heart condition of nonindustrial origin that required job restrictions, sustained an industrial back injury that also required job restrictions. The referee found a permanent disability of 65%, but reduced it to 30.5% because of the preexisting heart condition, and denied recovery from the Fund because there was not an industrial disability of 35% or

more. The Board adopted these findings and made its award accordingly. *Held*, annulled. (a) Proper application of the ratings submitted to the referee concerning the overlapping disabilities results in an adjusted rating of 65% for the back injury, an adjusted rating of 12% for the heart condition, and a combined disability of 77% adjusted to 70.5%. (62 C.A.3d 225.) (b) All requirements of *Lab.C. 4751* were met: There is a 60% unadjusted rating for the back injury, and a combined disability rating of more than 70%. (62 C.A.3d 228, 229.) The Fund, therefore, is responsible for 46.5% of the combined rating (77% less 30.5%). (62 C.A.3d 229, 230.)

In *Baias v. Work. Comp. App. Bd.* (1990) 217 C.A.3d 790, 266 C.R. 103, petitioner, having suffered several strokes, was nevertheless employed by R to perform household chores and other simple tasks. During his work he drank what he believed was lemonade, but what actually was swimming pool chlorine. He sustained burns and another stroke and became physically and mentally disabled. The medical examiner concluded that petitioner was 100% totally disabled prior to the last injury because, although he could perform limited tasks, he could not have found employment in the open labor market. The Board agreed and denied compensation. *Held*, order annulled.

(a) In *Smith v. Industrial Acc. Com.*, *supra*, the court distinguished between a formula or rule-established 100% disability for rating purposes, and actual total disability insofar as productive work is concerned; and the court held that an employee may receive a 100% disability rating with entitlement to appropriate disability payments although he is able to return to work. (217 C.A.3d 792, 793.)

(b) Here, applicant, despite being theoretically unable to compete in the open labor market prior to sustaining the industrial injury, actually performed remunerative work as an employee of R and sustained a subsequent industrial injury. "In the circumstances, the WCJ and Board erred in relying on the fiction that applicant was totally disabled and thus theoretically unable to work in the open labor market prior to the injury. This may not be a reason for refusing to award permanent disability indemnity. Instead, the WCJ and the Board must look at reality. Applicant was in fact performing remunerative work when he sustained the injury." (217 C.A.3d 794.)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

c. Compensation From Subsequent Injuries Benefits Trust Fund.

4. No Double Recovery.

2 *Witkin Sum. Cal. Law Work Comp* § 300

[§ 300] No Double Recovery.

Lab.C. 4753, designed to avoid double recovery, provides for the reduction of payments to the extent of other payments received "from any source whatsoever, for or on account of such preexisting disability or impairment," excepting disability payments from the United States armed forces and payments made under various public social services programs designated in the Welfare and Institutions Code, and excluding the amount reasonably and necessarily expended by the employee for attorneys' fees, costs, and expenses. (See *C.E.B.*, 1 *Workers' Compensation Practice* 4th, §5.28; 1 *Hanna* 2d (2004 ed.), §8.09[4]; 1 *Herlick* 6th, §8.04.)

The language of *Lab.C. 4753*, referring to payments "from any source whatsoever," was broadly interpreted in *Subsequent Injuries Fund v. Industrial Acc. Com.* (1963) 217 *C.A.2d* 322, 31 *C.R.* 508, to require a reduction for Social Security disability payments. After an extensive review of the history of the statute, the court said: "[T]he Legislature was aware that workmen were getting double compensation for their preexisting disabilities from various sources, including tort damages. To arrive at any sort of consistency in accomplishing the purpose of the statute, the Legislature intended to prevent double recoveries of any sort, resulting in a more equitable outlay of public monies." (217 *C.A.2d* 331.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

c. Compensation From Subsequent Injuries Benefits Trust Fund.

5. Application and Award.

2 Witkin Sum. Cal. Law Work Comp § 301

[§ 301] Application and Award.

(1) *Application, Service, and Hearing.* A written claim is filed pursuant to the Board's rules. (See 8 Cal. Code Reg. §10940 et seq.) At the hearing, the state is represented by attorneys of the Department of Industrial Relations, the office of the Attorney General, or by the Division of Workers' Compensation (*Lab.C.* 4753.5), who may, with the approval of the Board, release or compromise a claim (*Lab.C.* 4754.5).

(2) *Stipulation and Burden of Proof.* In *California v. Work. Comp. App. Bd.* (*Butterworth*) (1980) 101 C.A.3d 673, 161 C.R. 821, parents of the deceased entered into stipulations with the employer and the insurer stating that they were partially dependent. In the proceeding before the Board, the state contended that, because it was not a party to the stipulations, it was not bound by them, that the burden was on the parents to prove dependency, and that the parents' failure to meet that burden precluded an award. *Held*, award to parents affirmed. Although the stipulations were not binding and did not constitute evidence against the state, they could be utilized to determine which of the parties with the burden of proof on the issue of dependency should lose in the absence of proof. Hence, the burden to show absence of dependency was properly placed on the state, and, when it failed to present affirmative evidence, an award to the parents was justified. (101 C.A.3d 678, 679.)

(3) *Award.* The Board makes the award of additional compensation, and directs the State Compensation Insurance Fund to pay it out of the special funds appropriated for that purpose. (See *Lab.C.* 4754, 4755; *Smith v. Subsequent Injuries Fund* (1959) 52 C.2d 751, 753, 344 P.2d 293 [where award vests, subsequent death of employee requires payment to estate].)

The employee is entitled to reimbursement for expenses under *Lab.C.* 4600 (*supra*, §264). (*California v. Industrial Acc. Com.* (1954) 126 C.A.2d 740, 742, 273 P.2d 342; *Subsequent Injuries Fund v. Industrial Acc. Com.* (1963) 59 C.2d 842, 844, 31 C.R. 477, 382 P.2d 597 [reimbursement may be given to unsuccessful claimant].) An award of a lien for attorneys' fees against the fund is also proper. (*Garcia v. Industrial Acc. Com.* (1958) 162 C.A.2d 761, 765, 328 P.2d 561.)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

B. Determination of Disability.

4. Prior Disability or Disease and Subsequent Injury.

c. Compensation From Subsequent Injuries Benefits Trust Fund.

6. Statute of Limitations.

2 *Witkin Sum. Cal. Law Work Comp* § 302

[§ 302] Statute of Limitations.

If no application for normal compensation has been made, the limitation period is the same as that governing claims against the employer, i.e., the 1-year period of *Lab.C. 5405*. (*Subsequent Injuries Fund v. Industrial Acc. Com.* (1960) 178 C.A.2d 55, 61, 2 C.R. 646.) If an application was previously made, the claim against the Fund is for new and further disability, with the 5-year period of *Lab.C. 5410* (infra, §430). (See *Sprague v. Industrial Acc. Com.* (1956) 46 C.2d 414, 415, 296 P.2d 548; C.E.B., 1 Workers' Compensation Practice 4th, §12.43; 1 Herlick 6th, §§8.09, 14.10.)

A difficult practical problem arises where the employee makes a compensation claim within the 1-year period, and receives either a temporary award or a voluntary payment. Whether the injury caused permanent disability cannot be determined until the condition has become stable, sometimes years after occurrence of the injury, and even more than the 5 years permitted by *Lab.C. 5410*. To solve this problem, the Supreme Court, in *Subsequent Injuries Fund v. Work. Comp. App. Bd.* (1970) 2 C.3d 56, 84 C.R. 140, 465 P.2d 28, announced a delayed accrual rule for undiscovered disability: "[W]here, prior to the expiration of five years from the date of injury, an applicant does not know and could not reasonably be deemed to know that there will be substantial likelihood he will become entitled to subsequent injuries benefits, his application against the Fund will not be barred--even if he has applied for normal benefits against his employer--if he files a proceeding against the Fund within a reasonable time after he learns from the Board's findings on the issue of permanent disability that the Fund has probable liability." (2 C.3d 65.) (See critical dissent, 2 C.3d 67.)

The court added this practice suggestion: "Out of an excess of caution, future applicants would be well advised to join the Fund with the employer in every proceeding seeking permanent disability benefits on the remote possibility that some unknown prior disabling condition will be discovered entitling them to benefits from the Fund or a known prior condition might be held to have contributed to the total disability even though a reasonable person would believe otherwise." (2 C.3d 65.)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

1. Basic Factor in Compensation Award.

2 *Witkin Sum. Cal. Law Work Comp* § 303

[§ 303] Basic Factor in Compensation Award.

(1) *Actual Wages and Benefits*. The basic factor in determining the sum payable as compensation is the "average earnings" of the employee. Ordinarily, this figure consists of 100% of the actual wages payable (number of working days a week times daily earnings). (*Lab.C. 4453(c)*; see *Thrifty Drug Stores v. Work. Comp. App. Bd.* (1979) 95 C.A.3d 937, 157 C.R. 459, *infra*, §307; C.E.B., 1 Workers' Compensation Practice 4th, §4.17 et seq.; 1 Hanna 2d (2004 ed.), §6.01 et seq.; 1 Herlick 6th, §5.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §425 et seq.; 16 *A.L.R.5th* 191 [tips or gratuities as factor in determining amount of compensation].)

Average weekly earnings include overtime, the market value of board, lodging, fuel, and other advantages received by the employee that can be estimated in money. (*Lab.C. 4454.*) However, the following should *not* be included: (a) sums that the employer pays to or for the injured employee to cover special expenses entailed by the nature of the employment; (b) the cost or market value of savings, wage continuation, wage replacement, or stock acquisition programs or of employee benefit programs for which the employer pays or contributes to persons other than the employee or the employee's family. (*Lab.C. 4454.*)

(2) *Earning Capacity*. The nature of the weekly earnings factor was carefully considered in *West v. Industrial Acc. Com.* (1947) 79 C.A.2d 711, 180 P.2d 972, *infra*, §310. After pointing out that the award is not intended to make an employee whole for *all* the loss (because it might induce carelessness or malingering if disability brought in as large an amount as work), and that the money payment represents only a specified portion of the employee's loss of earning capacity, the court said: " 'Average Earnings' is our statutory term for the basis upon which actual past earnings are computed in order to arrive at such earning capacity. The computation of this earning capacity is, of course, not independent of the fundamental purpose of the award just set out. As a consequence there is provided a maximum and minimum for all average earnings. Exact ascertainment of earning capacity is further departed from by providing certain specific computation formulae for the purpose of taking care of the ordinary run of cases in speedy and uniform fashion. But earning capacity at the time disability began remains as the base upon which the money payment is computed. By 'Average Earnings' nothing more is meant than earning capacity. ... Consequently the various statutory methods of computation of average weekly earnings ... possess validity only to the extent they truly reflect actual earning capacity at the time of injury." (79 C.A.2d 721.) Earning capacity is composed of three factors: (a) ability to work; (b) willingness to work; and (c) with respect to intermittent employment, opportunity to work. (79 C.A.2d 722.) (On intermittent employment, see *infra*, §310.)

West's Key Number Digest, Workers' Compensation k.811

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113 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

2. Minimum and Maximum Amounts.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 304

[§ 304] In General.

Lab.C. 4453 fixes the following minimum and maximum weekly amounts:

(1) *Temporary Disability and Permanent Total Disability.*

(a) *Injuries on or after January 1, 1983:* Not less than \$ 126 nor more than \$ 294. (*Lab.C. 4453(a)(1).*)

(b) *Injuries on or after January 1, 1984:* Not less than \$ 168 nor more than \$ 336. (*Lab.C. 4453(a)(2).*)

(c) *Injuries on or after January 1, 1990:* Not less than \$ 168 for permanent total disability, and, for temporary disability, not less than the lesser of \$ 168 or 1.5 times the employee's average weekly earnings from all employers, but in no event less than \$ 147, nor more than \$ 399. (*Lab.C. 4453(a)(3).*)

(d) *Injuries on or after January 1, 1991:* Not less than \$ 168 for permanent total disability, and for temporary disability, not less than the lesser of \$ 189 or 1.5 times the employee's average weekly earnings from all employers, nor more than \$ 504. (*Lab.C. 4453(a)(4).*)

(e) *Injuries on or after July 1, 1994:* Not less than \$ 168 for permanent total disability, and for temporary disability, not less than the lesser of \$ 189 or 1.5 times the employee's average weekly earnings from all employers, nor more than \$ 609. (*Lab.C. 4453(a)(5).*)

(f) *Injuries on or after July 1, 1995:* Not less than \$ 168 for permanent total disability, and for temporary disability, not less than the lesser of \$ 189 or 1.5 times the employee's average weekly earnings from all employers, nor more than \$ 672. (*Lab.C. 4453(a)(6).*)

(g) *Injuries on or after July 1, 1996:* Not less than \$ 168 for permanent total disability, and for temporary disability, not less than the lesser of \$ 189 or 1.5 times the employee's average weekly earnings from all employers, nor more than \$ 735. (*Lab.C. 4453(a)(7).*)

(h) *Injuries on or after January 1, 2003:* Not less than \$ 189, nor more than \$ 903. (*Lab.C. 4453(a)(8).*)

(i) *Injuries on or after January 1, 2004*: Not less than \$ 189, nor more than \$ 1,092. (*Lab.C. 4453(a)(9).*)

(j) *Injuries on or after January 1, 2005*: Not less than \$ 189, nor more than \$ 1,260. (*Lab.C. 4453(a)(10).*)

(k) *Injuries on or after January 1, 2006*: Not less than \$ 189, nor more \$ 1,260 or 1.5 times the state average weekly wage, whichever is greater. (*Lab.C. 4453(a)(10).*)

Beginning January 1, 2007, and each subsequent January 1, the limits specified in *Lab.C. 4453(a)(10)* are to be increased by an amount equal to the percentage increase in the state average weekly wage, as defined, compared to the prior year. (*Lab.C. 4453(a)(10).*)

(2) *Permanent Partial Disability*. (a) Not less than \$ 75, nor more than \$ 195, for injuries occurring on and after January 1, 1983 (*Lab.C. 4453(b)(1)*); (b) not less than \$ 105, nor more than \$ 210, for injuries occurring on and after January 1, 1984. (*Lab.C. 4453(b)(2)*). However, if the disability is 70% or more, the employee is entitled to a lifetime pension. (*Lab.C. 4659.*)

Under 1993 amendments to *Lab.C. 4453*, final adjusted permanent disability ratings together with the date of injury are used in determining the following minimum and maximum amounts:

(a) A final rating of at least 15%, but not more than 24.75%: (1) Not less than \$ 105, nor more than \$ 222, for injuries occurring on and after July 1, 1994; (2) not less than \$ 105, nor more than \$ 231 for injuries occurring on and after July 1, 1995; and (3) not less than \$ 105, nor more than \$ 240, for injuries occurring on and after July 1, 1996. (*Lab.C. 4453(b)(3).*)

(b) A final rating of at least 25% or greater: not less than \$ 105, nor more than \$ 222, for injuries occurring on and after January 1, 1991. (*Lab.C. 4453(b)(4).*)

(c) A final rating of at least 25% but not more than 69.75%: (1) Not less than \$ 105, nor more than \$ 237, for injuries occurring on and after July 1, 1994; (2) not less than \$ 105, nor more than \$ 246, for injuries occurring on and after July 1, 1995; and (3) not less than \$ 105, nor more than \$ 255, for injuries occurring on and after July 1, 1996. (*Lab.C. 4453(b)(5).*)

(d) A final rating of less than 70%: (1) not less than \$ 150, nor more than \$ 277.50, for injuries occurring on or after January 1, 2003; (2) not less than \$ 157.50, nor more than \$ 300, for injuries occurring on or after January 1, 2004; (3) not less than \$ 157.50, nor more than \$ 330, for injuries occurring on or after January 1, 2005; and (4) not less than \$ 195, nor more than \$ 345, for injuries occurring on or after January 1, 2006. (*Lab.C. 4453(b)(6).*)

(e) A final rating of at least 70%, but less than 100%: (1) Not less than \$ 105, nor more than \$ 252, for injuries occurring on or after July 1, 1994; (2) not less than \$ 105, nor more than \$ 297, for injuries occurring on or after July 1, 1995; (3) not less than \$ 105, nor more than \$ 345, for injuries occurring on or after July 1, 1996; (4) not less than \$ 150, nor more than \$ 345, for injuries occurring on or after January 1, 2003; (5) not less than \$ 157.50, nor more than \$ 375, for injuries occurring on or after January 1, 2004; (6) not less than \$ 157.50, nor more than \$ 405, for injuries occurring on or after January 1, 2005; and (7) not less than \$ 195, nor more than \$ 405, for injuries occurring on or after January 1, 2006. (*Lab.C. 4453(b)(7).*)

Computations under *Lab.C. 4453* beginning January 1, 1990, apply only to temporary or permanent disability from an original injury sustained after January 1, 1990. (*Lab.C. 4453(d).*)

Normally, disability indemnity benefits are calculated according to the limits in *Lab.C. 4453* in effect on the date of injury and remain in effect for the duration of the disability. (*Lab.C. 4453(d).*) However, when a temporary total disability indemnity payment is not made until 2 years or more from the date of injury, the amount of the payment is based on the temporary disability indemnity average weekly earnings specified in *Lab.C. 4453* in effect on the date each

temporary total disability payment is made, unless this results in a lower payment due to reduced minimum average weekly earnings applicable under *Lab.C. 4453*. (*Lab.C. 4661.5*.) (See *Hofmeister v. Work. Comp. App. Bd.* (1984) 156 C.A.3d 848, 853, 203 C.R. 100 [injured firefighter's right to temporary disability was not determined until almost 4 years after his injury; thus, he was entitled to rate in effect at time of award]; *Midas Recovery Services v. Work. Comp. App. Bd.* (1997) 55 C.A.4th 1321, 1325, 64 C.R.2d 574 [*Lab.C. 4661.5* is not limited to injured worker; lien claimant having previously made disability payments to injured worker stands in shoes of that worker for purposes of collecting reimbursement from employer].) (For statutory definitions of permanent partial and permanent total disability, see *supra*, §287.)

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114 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

2. Minimum and Maximum Amounts.

b. Particular Employees.

2 *Witkin Sum. Cal. Law Work Comp* § 305

[§ 305] Particular Employees.

(1) *Minor*. The average weekly earnings of a minor permanently incapacitated are what the minor would probably earn at the age of 18; but if this cannot reasonably be determined, the sum is fixed at the maximum limit under *Lab.C. 4553* (supra, §304). (*Lab.C. 4455*.)

(2) *Employee Engaged in Unemployment Relief Program*. The disability payments are determined solely on the monthly earnings from the program with payments conforming to the minimum and maximum limits under *Lab.C. 4453* (supra, §304). (*Lab.C. 4456*.)

(3) *Partner*. The average weekly earnings of partners performing labor on a particular piece of work, if not otherwise ascertainable, are \$ 40. (*Lab.C. 4457*.)

(4) *Volunteer Firefighters and Persons Engaged in Fire Suppression*. For the purposes of temporary disability indemnity and permanent disability indemnity, the average weekly earnings for volunteer firefighters and persons engaged in fire suppression (see supra, §177) are taken at the maximums fixed in *Lab.C. 4453*. (*Lab.C. 4458*.)

In *Dickey v. Work. Comp. App. Bd.* (1990) 224 C.A.3d 1460, 274 C.R. 620, D suffered three injuries, the first while employed by a city as a volunteer firefighter and the second two while working for a private employer. The workers' compensation judge found that the three injuries combined to cause temporary disability payable at the rate in effect at the time of the latter two injuries (\$ 120.68 a week), and that each of the injuries was responsible for one-third of the benefits awarded. The judge rejected D's contention that under *Lab.C. 4458* he should be paid at the maximum rate (\$ 224 a week), and the Board denied reconsideration. *Held*, order denying reconsideration annulled, and the matter remanded. The Board properly determined that payment at the maximum rate was not required for the two-thirds of the temporary disability attributable to the latter two injuries. *Lab.C. 4458* does not require that maximum temporary disability indemnity be paid for injuries sustained in employment not described in *Lab.C. 4458*. "[T]he Board erred, however, in awarding temporary disability indemnity at less than the maximum rate for the injury sustained during applicant's employment as a volunteer fire fighter." (224 C.A.3d 1465.)

(5) *Convict*. The minimum indemnity for convicts is the minimum under *Lab.C. 4453*. (*Lab.C. 3370(a)(5)*.)

(6) *Juvenile Court Ward*. In *Leroy T. v. Work. Comp. App. Bd.* (1974) 12 C.3d 434, 115 C.R. 761, 525 P.2d 665, petitioner, 16 years old, was adjudicated a ward of the juvenile court following his criminal act. He was assigned to a forestry camp, worked as a firebreaker, and contracted a disabling lung infection (valley fever). The referee found him 21 1/2% permanently disabled. He sought compensation pursuant to Welf.C. 883 and *Lab.C. 4455*, but was instead awarded the minimum sum that former *Lab.C. 4458(b)* prescribed for adult prison inmates. *Held*, he was entitled to the higher amount.

(a) Welf.C. 883 provides that a ward committed to a forestry camp must receive benefits "to the same extent as a county employee." This plain language entitles the ward to compensation under *Lab.C. 4455*, i.e., probable earnings at the age of majority, or the statutory average sum. (12 C.3d 437.)

(b) The Board's contention that wards committed to forestry camps should be treated in the same manner as adult-prisoner firefighters is contrary to the philosophy of the Juvenile Court Law. (1) Although some procedural aspects of the criminal law have been made a part of juvenile court procedure, the juvenile system is fundamentally different from the adult penal system. (2) The terminology of the law reflects this philosophy: The order adjudging the minor a ward is not deemed a conviction of crime "for any purpose" (Welf.C. 203); the proceedings are not criminal but are in the nature of guardianship; and a commitment is not a sentence. (12 C.3d 439; see 10 *Summary* (10th), *Parent and Child*, §731.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

2. Minimum and Maximum Amounts.

c. Date at Which Amount Is Measured.

2 *Witkin Sum. Cal. Law Work Comp* § 306

[§ 306] Date at Which Amount Is Measured.

In *Van Voorhis v. Work. Comp. App. Bd.* (1974) 37 C.A.3d 81, 112 C.R. 208, applicant retired in 1963 at age 61, and after that deliberately earned only \$ 1,000 a year to avoid loss of Social Security benefits. In 1971, he was informed that his hearing loss was due to his former employment, and he applied for compensation. The referee found that he was 36% disabled while employed and awarded \$ 7,560, measured by his maximum earning capacity in 1963. On reconsideration, the Board reduced the award to \$ 2,880, measured by applicant's minimum earnings in 1971. *Held*, award annulled.

(a) Because the compensable disability occurred before retirement, applicant's injury occurred then, and his compensation must be measured by his earning capacity at that time. (37 C.A.3d 87.)

(b) The Board erroneously relied on *Lab.C. 5412* (infra, §368), which is merely a limitation statute permitting applicant to apply after retirement because of his lack of knowledge that his disability was work connected. (37 C.A.3d 87, 88.)

(c) Reliance on former *Lab.C. 4453(d)* (now *Lab.C. 4453(c)(4)*; infra, §307) would be proper only if the date of injury were in 1971, when applicant was not working steadily. However, because his injury occurred in 1963, or earlier, his compensation was properly determined under *Lab.C. 4453(a)*. (37 C.A.3d 88.)

(d) The fact that applicant deliberately depressed his postretirement income was irrelevant. "If a person because of indolence, adequate pension earned by longevity, or because of an inheritance, gift or other windfall chooses not to work, although he might do so in spite of a permanent partially disabling condition, he does not forfeit the right to disability benefits which arises because of injuries incurred in the course of or arising out of his employment. No more does he do so because he does not discover his condition was so incurred until some period after the voluntary termination of his employment." (37 C.A.3d 90.)

In *Pham v. Work. Comp. App. Bd.* (2000) 78 C.A.4th 626, 93 C.R.2d 115, applicant, at the time of her injury, was employed by B as a foreman baker working 48 hours, 6 days per week, and was also working 22 hours, 7 days per week as a baker at a second job. The injury rendered applicant temporarily totally disabled. Nine days after the injury, B

downsized and laid off applicant. The workers' compensation judge computed applicant's average weekly earnings after the layoff to reflect an earning capacity based exclusively on her projected earnings from the part-time job, thus lowering applicant's weekly temporary total disability indemnity payment. The Board concurred. *Held*, Board's opinion vacated and remanded to reinstate correct indemnity rate based on applicant's actual earnings with B and earning capacity at time of injury.

(a) The Board incorrectly relied solely on the postinjury layoff to justify using *Lab.C. 4453(c)(4)*, which limits an applicant's average weekly earnings to those based on part-time wages. *Lab.C. 4453(c)(1)* provides that when an injured worker is working 30 or more hours a week and 5 or more days a week, the average weekly earnings must be the number of working days a week times the daily earnings *at the time of the injury*. (78 C.A.4th 634.)

(b) The proper way to calculate applicant's average weekly earnings under *Lab.C. 4453* was to include both her average weekly earnings with B at the time of the injury under *Lab.C. 4453(c)(1)* and (c)(2) and her average weekly earning capacity under *Lab.C. 4453(c)(4)*. (78 C.A.4th 635.) It was applicant's industrial injury that removed her from the labor market, not the layoff. The Board "failed to consider the undisputed evidence of applicant's earning history, her work history, her actual earnings, her ability to work and her motivation to work." (78 C.A.4th 637.)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

3. Earning Capacity.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 307

[§ 307] In General.

Where the employment is for less than 30 hours per week, or where for any reason the other methods described in *Lab.C. 4453* to arrive at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings should be taken at 100% of the sum that reasonably represents the average weekly earning capacity of the employee at the time of his injury, with due consideration given to actual earnings from all sources and employments. (*Lab.C. 4453(c)(4)*; *Jeffares v. Work. Comp. App. Bd.* (1970) 6 C.A.3d 548, 551, 86 C.R. 288; *Van Voorhis v. Work. Comp. App. Bd.* (1974) 37 C.A.3d 81, 88, 112 C.R. 208, supra, §306; *Pascoe v. Work. Comp. App. Bd.* (1975) 46 C.A.3d 146, 152, 120 C.R. 199; see California Civil Practice, 1 Workers' Compensation, Computation of Temporary and Permanent Disability, Chap. 4; 1 Herlick 6th, §5.04.)

Goytia v. Work. Comp. App. Bd. (1970) 1 C.3d 889, 83 C.R. 591, 464 P.2d 47 carefully construed former *Lab.C. 4453(d)* (now *Lab.C. 4453(c)(4)*). The first three subdivisions of the statute relate to actual *earnings*, while in subdivision (d), *earning capacity* is the test.

(a) "Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general over-all capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time. The term does not cut 'capacity' to the procrustean bed of the earnings at the date of injury." (1 C.3d 894.)

(b) Earning capacity may be shown by postinjury earnings as well as prior earnings. (1 C.3d 895.) Petitioner, a married woman with young children, was employed part-time as a seasonal packing house worker, with earnings entitling her only to the minimum compensation rate of \$ 20 per week. After her injury, her children were older and needed less of her attention, and she obtained full-time permanent employment as a cashier, earning about \$ 82 per week. The Board gave her permanent disability indemnity at the minimum rate, i.e., it determined earning capacity as of the time of the injury. *Held*, order annulled. The conditions that led petitioner to work only part-time had ceased to exist, and the Board should have examined all of the relevant facts, including her ability to hold a full-time permanent job. (1 C.3d 898.) (See dissent, arguing that postinjury earnings were not relevant here because petitioner had worked seasonally for more than 20 years and had never sought full-time employment until after the injury.)

On remand, the Board, in carrying out the court's directive, limited its consideration of postinjury earnings to cases in which specific evidence was offered by the employee of *actual steps* for self-improvement taken prior to the injury. The Supreme Court, in its second review, rejected the limitation, holding that the employee's testimony and other evidence of *intention* to seek full-time employment should be considered. (*Goytia v. Work. Comp. App. Bd.* (1972) 6 C.3d 660, 664, 100 C.R. 136, 493 P.2d 864.)

In *Thrifty Drug Stores v. Work. Comp. App. Bd.* (1979) 95 C.A.3d 937, 157 C.R. 459, the temporary disability rate of a full-time employee, normally determined under *Lab.C. 4453(a)* (see *supra*, §304), was adjusted under former *Lab.C. 4453(d)* (now *Lab.C. 4453(c)(4)*) to reflect wage increases she would have received under a union contract had she not been injured on the job. *Held*, award affirmed. (a) *West v. Industrial Acc. Com.* (1947) 79 C.A.2d 711, 180 P.2d 972, *supra*, §303, made it clear that average earnings are only a means of establishing earning capacity, and *Goytia* held that earning capacity may not be locked into actual earnings. (95 C.A.3d 940, 941.) (b) Increases in rates to reflect actual earning capacity have been upheld for temporary employees (*Goytia*), for part-time employees (*Jeffares*) and for those engaged in self-improvement (*Pascoe*). (95 C.A.3d 943, 944.) (c) While average earnings of full-time employees will ordinarily reflect actual earning capacity, there is no logical or legal basis for penalizing these employees when "there is specific demonstrable evidence that the injured employee, would, but for the injury, have received increased earnings" and "the fixed formula of subdivision (a) cannot be reasonably and fairly applied" as that subdivision expressly requires. (95 C.A.3d 944.) (See *Lujan v. Work. Comp. App. Bd.* (1985) 175 C.A.3d 212, 220 C.R. 561 [following *Thrifty*]; *Rubalcava v. Work. Comp. App. Bd.* (1990) 220 C.A.3d 901, 909, 269 C.R. 656 [full-time student pursuing degree was injured while working at pizza restaurant; earnings were not fair and reasonable measure of earning capacity].)

West's Key Number Digest, Workers' Compensation k.802

SUPPLEMENT: [This section is current through the latest supplement]

See *San Joaquin v. Work. Comp. App. Bd.* (2006) 147 C.A.4th 1459, 1467, 55 C.R.3d 152 [Board properly used *Lab.C. 4453(c)(4)* in determining that insurance fund attorney, injured while on jury duty, was maximum wage earner based on his average weekly earning capacity as attorney and not on nominal jury service payment].



117 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

3. Earning Capacity.

b. Wage Increase Following Injury.

2 Witkin Sum. Cal. Law Work Comp § 308

[§ 308] Wage Increase Following Injury.

Wage increases that were scheduled or reasonably anticipated at the time of injury and that would occur during the anticipated duration of the disability may be considered in determining the injured worker's "earning capacity" and ultimately the benefits due. However, where the subsequent change in wages is not scheduled or reasonably anticipated at the time of injury or where it would not occur during the anticipated duration of the disability, it may not be considered. (*Grossmont Hosp. v. Work. Comp. App. Bd.* (1997) 59 C.A.4th 1348, 1351, 1362, 69 C.R.2d 842.)

In *Grossmont Hosp.*, a full-time employee on temporary total disability status received a regularly scheduled wage increase. Her employer refused to increase benefits and the employee applied to the Board for adjudication of the claim. A workers' compensation judge concluded that the employee was entitled to an increase at her temporary disability rate. The Board denied reconsideration. *Held*, order annulled. After extensive statutory analysis and reviewing statutory and case law history, including amendments to *Lab.C. 4453* and the rule in *Thrifty Drug Stores v. Work. Comp. App. Bd.* (1979) 95 C.A.3d 937, 157 C.R. 459, *supra*, §307, the court offered the following guidance:

(a) In deciding what temporary disability benefits to pay an injured employee, due consideration should be given to the employee's earnings at the time of injury. However, other significant factors in determining earning capacity include (1) the employee's employment history, (2) the ability, willingness, and opportunity to work, (3) the employee's age, health, skill, employment history, and education, and (4) the general labor market conditions. Moreover, if a wage increase or decrease is scheduled or would be reasonably anticipated during the expected duration of the disability, that increase or decrease should be taken into account in calculating earning capacity under *Lab.C. 4453(c)(4)*. (59 C.A.4th 1362.)

(b) An employer need not speculate but instead should consider factors that may affect earning capacity and make reasonable determinations based on those factors where there is "specific demonstrable evidence" that increases or decreases would have occurred. (59 C.A.4th 1363.)

(c) When a dispute arises between the employer and an injured worker, the Board must make a two-level analysis to determine what temporary disability benefits are due. First, it must determine the anticipated duration of the disability. Second, it must consider whether, barring the injury, anything would have occurred during that anticipated

duration that would have affected the injured worker's earning capacity in a manner that makes it unreasonable or unfair to use actual wages to calculate temporary disability benefits. In doing so, the Board should consider only those factors existing at the time of injury or those that could *reasonably be anticipated at that time*. When there is specific demonstrable evidence that factors exist that would have affected an injured worker's earning capacity other than in a de minimis manner, the Board should consider those factors to calculate one sum that represents a fair and reasonable estimate of average weekly earning capacity for the anticipated duration of the disability. Here, the record does not permit a determination whether the wage increase should have been considered in awarding benefits, e.g., it is not apparent whether the wage increase was scheduled or reasonably anticipated at the time the employee was injured. Thus, the Board erred in applying *Lab.C. 4453(c)(4)*. Moreover, the Board erred in awarding increased benefits rather than calculating one consistent benefit amount for the term of the disability. (59 C.A.4th 1363.)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

3. Earning Capacity.

c. Effect of Retirement.

2 *Witkin Sum. Cal. Law Work Comp* § 309

[§ 309] Effect of Retirement.

In *Gonzales v. Work. Comp. App. Bd.* (1998) 68 C.A.4th 843, 81 C.R.2d 54, the Board adopted the findings of its referee that plaintiff, who had a work-related toe injury, was not entitled to temporary total disability benefits after plaintiff's 65th birthday, the date on which plaintiff had intended to retire. Plaintiff stipulated that she did not intend to look for work elsewhere after her retirement. Thus, the referee found plaintiff's average weekly earnings for purposes of temporary disability were zero after plaintiff's scheduled retirement. *Held*, affirmed.

(a) *Voluntary retirement for all purposes.* A worker's retirement after sustaining a job-related injury should not cause a radical departure from the general principles governing determination of the amount of temporary disability owed, a touchstone of which is still earning capacity. Thus, the decision to retire implicates the element of "willingness to work" in the earning capacity calculation, and the question is whether the worker is retiring for all purposes or only from the particular employment. If, as here, retirement is for all purposes, the worker should be deemed unwilling to work, and earning capacity is therefore zero. Although there are no known cases on the issue, this view is supported by several *Board cases*. (68 C.A.4th 846.)

(b) *Forced retirement.* If the job-related injury causes the worker to retire for all purposes or interferes with plans to continue working elsewhere, then the worker is still willing to work and would have an earning capacity diminished by the injury. (68 C.A.4th 848.)

SUPPLEMENT: [This section is current through the latest supplement]



119 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

4. Intermittent Employment.

2 Witkin Sum. Cal. Law Work Comp § 310

[§ 310] Intermittent Employment.

If the employment is irregular or seasonal, the total weekly earnings during the year, divided by 52, may not indicate earning capacity at the time of the injury, and the Board may therefore compute earnings on the basis of the daily wage when working. (*California Cas. Indem. Exchange v. Industrial Acc. Com.* (1933) 135 C.A. 746, 750, 27 P.2d 782 [contrary view "places upon an injured employee the entire risk of inability to secure employment without regard to his health, training, experience, or willingness to work"]; see *Aetna Life Ins. Co. v. Industrial Acc. Com.* (1933) 130 C.A. 488, 496, 20 P.2d 372; *Howell v. Industrial Acc. Com.* (1941) 47 C.A.2d 326, 327, 117 P.2d 917 [logger, because of weather, worked only 8 months yearly; Commission found average earnings by dividing earnings by 8]; C.E.B., 1 Workers' Compensation Practice 4th, §4.30; 1 Hanna 2d (2004 ed.), §6.02[5]; 1 Herlick 6th, §5.03.)

However, a sharp distinction between two kinds of intermittent or irregular employment was made in *West v. Industrial Acc. Com.* (1947) 79 C.A.2d 711, 180 P.2d 972, *supra*, §303.

(a) *Computation on basis of full-time work.* Even though the employment is not full-time, i.e., it is for less than 30 hours per week, the award may nevertheless be computed at the rate of pay for full-time work where, e.g., (1) a permanent full-time employee is irregularly employed because of poor business conditions; (2) a full-time employee is hired for a temporary period; or (3) the employment is seasonal. (79 C.A.2d 723.) (See *California Comp. Ins. Co. v. Industrial Acc. Com.* (1948) 86 C.A.2d 861, 871, 195 P.2d 880 [maximum award of death benefits made on basis of regular work in 1947, notwithstanding fact that employee, through ill health, worked only intermittently in 1946]; *Westside Produce Co. v. Work. Comp. App. Bd.* (1978) 81 C.A.3d 546, 552, 146 C.R. 498 [limited to period employment would have continued].)

(b) *Computation on basis of earning history.* In the *West* case, *supra*, a practical nurse, who received \$ 35 per week plus room and board, was injured during the first week of her employment. The award on a full-time basis at this rate of pay was annulled, and the Commission was directed to consider her *earning history*. This history showed that she had been on county relief for about 2 months before taking this job, and she once had a nursing job lasting 2 months, in addition to her 1-week period of work here. The record therefore did not justify the determination of earning capacity on a full-time basis, for this determination ignored the vital factor of *opportunity to work*. "The opportunity to work of the intermittent employee normally is not equal to that of the full-time permanent employee. That circumstance is an element of considerable importance in the choice of a job or a trade. To take the rate of pay at the time of injury and

apply it on a full-time basis in computing earning capacity at that time is to ignore an established incident of intermittent employment--its discontinuity. The result may often be to give to the disabled employee a greater income from a compensation award for idleness during disability than he received while working and to bestow upon him an income far in excess of his true earning capacity." (79 C.A.2d 724.) (See *Campbell v. Industrial Acc. Com.* (1950) 95 C.A.2d 570, 573, 213 P.2d 395 [pensioner doing occasional odd jobs for free rent and supplies earned \$ 59 in 6 months during year of death; maximum death benefit award to widow annulled]; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1976) 59 C.A.3d 647, 655, 130 C.R. 831, supra, §175.)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

C. Determination of Average Earnings.

5. Effect of Previous Disability.

2 Witkin Sum. Cal. Law Work Comp § 311

[§ 311] Effect of Previous Disability.

If the employee has suffered a previous disability that has been compensated, and is subsequently injured, in determining compensation for the later injury, the average earnings are fixed at the sum representing the employee's earning capacity at the time of the later injury. (*Lab.C. 4459*.) Otherwise, the employee could get two total disability allowances at the same time and receive more as compensation than the employee could have earned. (*State Comp. Ins. Fund v. Industrial Acc. Com. (1941) 43 C.A.2d 233, 235, 110 P.2d 510* [first injury, total temporary disability; hence, at time of second injury during that period, he had *no* earning capacity under *Lab.C. 4459*, and was not entitled to second award].)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

D. Dependents.

1. Conclusive Presumptions.

2 Witkin Sum. Cal. Law Work Comp § 312

[§ 312] Conclusive Presumptions.

The following persons are conclusively presumed to be wholly dependent for support on a deceased employee:

(1) A child under 18 years of age, or a child of any age found by "any trier of fact" to be physically or mentally incapacitated from earning, provided that (a) the child was living with the deceased employee-parent at the time of the injury resulting in death, or (b) the deceased parent was legally liable for the child's maintenance and there is no surviving totally dependent parent. (*Lab.C. 3501(a).*) (See *Smith v. Work. Comp. App. Bd.* (1966) 245 C.A.2d 292, 295, 300, 53 C.R. 816 [where noncustodial mother had made monetary gifts to children in legal custody of father, children were entitled to death benefits of deceased mother; "an enforceable obligation to support existed at the time of injury resulting in death and this fact authorized application of the total dependency presumption"]; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 37, 41, 183 P.2d 344 [although child had not received support from decedent father for 12 years, award was proper because child was legally entitled to support; presumption is based on rational connection between minority, legal liability for support, and dependency].)

(2) A surviving spouse who has earned \$ 30,000 or less in the 12 months immediately preceding the death. (*Lab.C. 3501(b).*) (See 1 Hanna 2d (2004 ed.), §9.05 et seq.; 1 Herlick 6th, §9.07 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

D. Dependents.

2. Proof of Actual Dependency.

2 Witkin Sum. Cal. Law Work Comp § 313

[§ 313] Proof of Actual Dependency.

(1) *Date of Injury*. Except for the presumptions under *Lab.C. 3501* (supra, §314), all other questions of who are dependents and the extent of that dependency are determined according to the facts existing at the time of injury. (*Lab.C. 3502*.)

(2) *Required Relationship*. Persons who must show dependency as a fact under *Lab.C. 3502* fall into two main classes:

(a) *Members of family or household of employee*. These need not be relatives. (*Lab.C. 3503*; *Moore Shipbuilding Corp. v. Industrial Acc. Com.* (1921) 185 C. 200, 206, 196 P. 257.)

(b) *Specified relatives*. A person is included who bears to the employee the relation of spouse, child, posthumous child, adopted child or stepchild, grandchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece. (*Lab.C. 3503*.) (See *Wings West Airlines v. Work. Comp. App. Bd.* (1986) 187 C.A.3d 1047, 1051, 232 C.R. 343 [sister was not partial dependent; she had not received support after brother's promise of assistance and failed to establish past dependency on him].)

The test is whether the claimant relied on contributions of the decedent employee, either wholly or partially, for ordinary living expenses; it is not necessary to show absolute dependency for the necessities of life. (*London Guarantee & Acc. Co. v. Industrial Acc. Com.* (1943) 57 C.A.2d 616, 619, 135 P.2d 7; *Larsen v. Industrial Acc. Com.* (1950) 34 C.2d 772, 774, 215 P.2d 16; see *Industrial Indem. Co. v. Industrial Acc. Com.* (1966) 243 C.A.2d 700, 706, 52 C.R. 647 [actual contributions for support must have been made; legal obligation to support, standing alone, is not sufficient]; *Smith v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 560, 567, 117 C.R.2d 420, supra, §281 [payments made by adult child to assist family in paying bills, buying home, or maintaining lifestyle qualify as support and may be considered in assessing whether parents are partial dependents *only if* payments contribute to maintaining standard of living]; Cal. Civil Practice, 1 Workers' Compensation, §3:17 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §7.10; 1 Hanna 2d (2004 ed.), §9.05[4].)

In determining whether one is wholly or partially dependent, irregular employment or other limited sources of

income which are trifling in amount may be disregarded and a finding of total dependency made. (*Munoz v. Work. Comp. App. Bd.* (1971) 19 C.A.3d 144, 147, 96 C.R. 394.) However, where there is regular employment bringing in substantial earnings that are used in partial support of the dependent, the proper finding is one of partial dependency. (*Coborn v. Industrial Acc. Com.* (1948) 31 C.2d 713, 717, 192 P.2d 959 [decedent son made maximum contributions of \$ 70 per month, dependent mother was steadily employed and earned over \$ 80 per month].)

(3) *Cumulative Injury Cases.* For purposes of determining dependency under *Lab.C. 3502* in cumulative injury cases, the "time of injury" and the "date of injury" have the meaning set forth in *Lab.C. 5412* (infra, §368), irrespective of where death benefit provisions are located in the Labor Code. (*Department of the Calif. Highway Patrol v. Work. Comp. App. Bd.* (1995) 33 C.A.4th 1828, 1836, 40 C.R.2d 188 [former Highway Patrol officer applied for benefits 6 years after retiring, alleging stress-related cumulative injury to cardiovascular system; death benefits sought by surviving children].)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

D. Dependents.

3. Nonmarital Relationship.

2 *Witkin Sum. Cal. Law Work Comp* § 314

[§ 314] Nonmarital Relationship.

In *Department of Industrial Relations v. Work. Comp. App. Bd.* (1979) 94 C.A.3d 72, 156 C.R. 183, J, a married woman, moved into decedent employee's home. They opened joint bank accounts and she ran the household in the usual manner. On his death, she claimed benefits as a member of his "household"; her claim was challenged by the state on the basis of the decisions denying benefits to persons knowingly living together in a "meretricious relationship." *Held*, her claim was good, under the policy considerations announced in *Marvin v. Marvin* (1976) 18 C.3d 660, 683, 134 C.R. 815, 557 P.2d 106, rejecting the meretricious relationship concept (see 11 *Summary* (10th), *Community Property*, §272). The *Marvin* holding, and the contemporaneous repeal of P.C. 269a (crime of living "in a state of cohabitation and adultery"), "have, by clear implication, repudiated the policy, and the rule and rationale, upon which the State here relies." (94 C.A.3d 78.) (See 1 *Herlick* 6th, §9.14.) (On balance payable to state under *Lab.C.* 4706.5, see *supra*, §298.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

D. Dependents.

4. Allocation of Award.

2 Witkin Sum. Cal. Law Work Comp § 315

[§ 315] Allocation of Award.

When the amount of the death benefit is determined (see *supra*, §279 et seq.) and the dependents are ascertained (see *supra*, §312 et seq.), the remaining step is allocation of the award among the dependents. (*Lab.C.* 4703; see C.E.B., 1 Workers' Compensation Practice 4th, §7.26 et seq.; 1 Hanna 2d (2004 ed.), §9.03; 1 Herlick 6th, §9.18.)

(1) *General Rule.* *Lab.C.* 4703 provides as follows:

(a) If there is a person wholly dependent, that person receives a full death benefit under *Lab.C.* 4702 (*supra*, §280) for one total dependent. Additional partial dependents receive a death benefit of four times the amount annually devoted to their support (*Lab.C.* 4702(b)), up to a maximum aggregate amount of \$ 25,000.

(b) If there are two or more persons wholly dependent, each receives an equal part of the death benefit under *Lab.C.* 4702(a), and persons partially dependent receive no part.

(c) If there are two or more persons partially dependent, and no person wholly dependent, the amount is divided "in proportion to the relative extent of their dependency."

(2) *Different Award for Good Cause.* The Board may, on good cause shown, order payment or reassign the benefit in a manner different from that specified in *Lab.C.* 4703. (*Lab.C.* 4704; see *Pacific Gas & Elec. Co. v. Industrial Acc. Com.* (1932) 124 C.A. 303, 311, 12 P.2d 647; *California Cas. Indem. Exchange v. Industrial Acc. Com.* (1930) 211 C. 218, 220, 295 P. 34; C.E.B., 1 Workers' Compensation Practice 4th, §7.27; 1 Hanna 2d (2004 ed.), §9.03[2].) However, this discretion must be exercised on the basis of need. (*San Francisco v. Work. Comp. App. Bd. (Guzzetti)* (1969) 269 C.A.2d 382, 391, 74 C.R. 810; *Oakland v. Work. Comp. App. Bd.* (1969) 271 C.A.2d 555, 559, 76 C.R. 886.)

In *San Francisco v. Work. Comp. App. Bd.*, *supra*, the statute of limitations had run against widows, but was tolled as to minor children. The Board made the entire awards of maximum death benefits in favor of the minor children. *Held*, this was an abuse of discretion; the Board had ignored the facts of need, seeking merely to deny the city the defense of limitations against the widows who were equally entitled to share. (269 C.A.2d 392.)

In *Department of Corrections v. Work. Comp. App. Bd.* (1979) 23 C.3d 197, 152 C.R. 345, 589 P.2d 853, decedent, a correctional officer, left a widow who claimed special death benefits under the Public Employees' Retirement Law

(formerly Govt.C. 21363; now *Govt.C. 21537*). D, decedent's 16-year-old daughter by a prior marriage, sought a death benefit under former *Lab.C. 3501(b)*. The workers' compensation judge denied D's claim on the ground that *Lab.C. 4707* precluded an award to a child where the widow has elected to receive benefits under former Govt.C. 21363. The Board made an award to the child. *Held*, the child was entitled, but only on a finding of "good cause" under *Lab.C. 4704*.

(a) Death benefits under the Labor Code are shared among those equally entitled, while special death benefits under the Government Code are payable exclusively to the widow. Hence, the workers' compensation judge correctly concluded that *Lab.C. 4707* did not permit an award to the child, and the Board's contrary construction of the statute was unreasonable. (23 C.3d 201, 204.)

(b) The award to the child may, however, be made in the Board's discretion, on a showing of good cause under *Lab.C. 4704*, a statute that has been liberally construed to carry out the objectives of the Act. (23 C.3d 204, 205.) Hence, although *Lab.C. 4707* precludes a routine award under *Lab.C. 4701* et seq., *Lab.C. 4704* permits the award when good cause is shown. (23 C.3d 205, footnote 11.)

(c) A contrary construction would raise a serious constitutional question; i.e., D would be ineligible for death benefits provided by statute to all other surviving dependent minor children. An interpretation of *Lab.C. 4704* to authorize the award avoids the constitutional issue. (23 C.3d 207.)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

1. Nature of Increased Award.

2 Witkin Sum. Cal. Law Work Comp § 316

[§ 316] Nature of Increased Award.

Where the injury or death results from the serious and wilful misconduct of the employer, a managing representative, or a general superintendent, the amount of compensation is increased by one-half, and costs and expenses are awarded up to \$ 250. (*Lab.C. 4553*; see *Cal. Civil Practice*, 1 *Workers' Compensation*, §5:1; *C.E.B.*, 1 *Workers' Compensation Practice* 4th, §8.25 et seq.; 1 *Hanna* 2d (2004 ed.), §10.01; 1 *Herlick* 6th, §11.14; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §416.) (On misconduct, see *infra*, §318 et seq.; on managing agent, see *infra*, §§323, 324.)

Language in some of the cases refers to the increased award as a "penalty," but this characterization was disapproved in *State Dept. of Corrections v. Work. Comp. App. Bd.* (1971) 5 *C.3d* 885, 97 *C.R.* 786, 489 *P.2d* 818. The award was made against a public entity (the Department of Corrections) for misconduct of its agents, and the Department contended that this violated *Govt.C. 818*, prohibiting imposition of punitive damages against a public entity. The language in prior cases was used only to emphasize the aggravated character of the employer's conduct, justifying an extra award. A true penalty or punitive damage award would be invalid, for the constitutional enabling provision only authorizes compensation. The theory of *Lab.C. 4553* is that ordinary awards are less than full compensation for the loss, and that, where the employer's conduct is particularly culpable, a 50% increase brings it closer to full coverage. (5 *C.3d* 888, 889.)

The Board requires allegation of the facts in detail. (8 *Cal. Code Reg. §10440*; *Ray v. Industrial Acc. Com.* (1956) 146 *C.A.2d* 393, 397, 303 *P.2d* 793; cf. *Lambreton v. Industrial Acc. Com.* (1956) 46 *C.2d* 498, 504, 297 *P.2d* 9 [allegation of "gross negligence" is wholly insufficient, and amendment to allege misconduct after statute of limitations has run is not permissible].)

West's Key Number Digest, *Workers' Compensation* k.938 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



126 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

2. Calculation of Award.

2 Witkin Sum. Cal. Law Work Comp § 317

[§ 317] Calculation of Award.

An award for increased compensation for wilful employer misconduct is computed on the basis of all benefits recoverable by an injured employee, indemnity and nonindemnity alike. So long as the award does not provide the injured worker with more than is necessary to fully compensate for all damages sustained from the injury caused, at least in part, by the misconduct, the award does not constitute punitive damages and is not constitutionally excessive. (*Ferguson v. Work. Comp. App. Bd. (1995) 33 C.A.4th 1613, 1619, 1624, 39 C.R.2d 806.*)

In *Ferguson*, plaintiff was awarded a 50% increase in her total compensation benefits under *Lab.C. 4553*, including all nonindemnity payments. The Board granted the employer's request for reconsideration and held that the 50% increase applied only to compensation (temporary and permanent) indemnity and not to nonindemnity benefits, such as medical treatment payments, medical-legal fees, and vocational rehabilitation costs payable to third parties. *Held*, this was incorrect.

(a) *Lab.C. 4553* must be read with reference to *Lab.C. 3207*, defining compensation to include "every benefit or payment conferred by Division 4 upon an injured employee, including vocational rehabilitation." Under this broad language compensation includes vocational rehabilitation costs, and by virtue of their location in Division 4 (Workers' Compensation and Insurance), medical treatment payments and medical-legal fees. (*33 C.A.4th 1619.*) Moreover, legislative history and amendments removing dollar amount limits on the amount of increased compensation recoverable under *Lab.C. 4553* evidence an intent that the calculation not be restricted, and that increased compensation due to the serious and wilful misconduct of an employer be calculated with reference to every benefit or payment conferred on an injured employee. (*33 C.A.4th 1620.*)

(b) The workers' compensation system authorizes payment of "compensation" for work-related injuries but does not authorize punitive damages. (*33 C.A.4th 1621.*) Although the 50% increase under *Lab.C. 4553* is punitive in the sense that it requires an employer to pay more than would be required in the absence of misconduct, it does not necessarily provide the injured worker with more than is necessary to fully compensate the worker for the injury and is therefore not comparable to exemplary damages. (*33 C.A.4th 1622.*)

One justice dissented, arguing that allowing the 50% increase to be calculated on the entire amount of the award, including nonindemnity payments, effectively gave an injured employee in a wilful misconduct case the functional

equivalent of a tort action, save only the opportunity to collect punitive damages, and that the Legislature did not intend for *Lab.C. 4553* to be read so generously. (33 C.A.4th 1626.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

3. What Constitutes Misconduct.

a. Test of Knowledge.

1. Early Development.

2 Witkin Sum. Cal. Law Work Comp § 318

[§ 318] Early Development.

(1) *Liberal View*. Serious and wilful misconduct was defined in earlier cases as conduct that the employer knew, or should have known, was likely to cause serious injury, or conduct that evinced a reckless disregard for the safety of others. (See *Parkhurst v. Industrial Acc. Com.* (1942) 20 C.2d 826, 829, 129 P.2d 113 [subcontractor was not absolved by reason of reliance on facilities furnished by general contractor]; *Bethlehem Steel Co. v. Industrial Acc. Com.* (1944) 23 C.2d 659, 663, 145 P.2d 583 [employer's mistaken belief that condition is safe is not controlling]; *California Shipbuilding Corp. v. Industrial Acc. Com.* (1947) 31 C.2d 270, 274, 188 P.2d 27 [knowledge inferred from long continuance of condition]; *Henry J. Kaiser Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 818, 825, 185 P.2d 353 [foreman sending employee into harm's way with no protection and starting machinery while unable to observe peril of employee was sufficient to warrant finding of wilful misconduct].)

(2) *Strict View*. A much stricter test was stated in *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 C.2d 102, 251 P.2d 955, *infra*, §322, after an examination of the decisions on various statutes using the term or its equivalent. The court first declared that the misconduct "cannot be established by showing acts any less culpable, any less deliberate, or any less knowing or intentional, than is required to prove wilful misconduct." (40 C.2d 118.) Hence, except where a statute or safety order is violated (see *infra*, §§320, 321), "the true rule is that serious and wilful misconduct is basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct; conversely an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences, cannot properly be classed as the less culpable conduct which is termed negligence. It follows that a finding of serious and wilful misconduct cannot be sustained upon proof of mere negligence of any degree." (40 C.2d 120.)

The *Mercer-Fraser* test was repeated in later cases, and it substantially limits the operation of the statute. (See *Hawaiian Pineapple Co. v. Industrial Acc. Com.* (1953) 40 C.2d 656, 662, 255 P.2d 431, *infra*, §322; cf. *Lambreton v. Industrial Acc. Com.* (1956) 46 C.2d 498, 503, 297 P.2d 9 [original claim could not serve as basis for later amendment

for charge of serious and wilful misconduct which would impose "an entirely new and different legal liability on the employer"].)

SUPPLEMENT: [This section is current through the latest supplement]



128 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

3. What Constitutes Misconduct.

a. Test of Knowledge.

2. Contemporary Approach.

2 *Witkin Sum. Cal. Law Work Comp* § 319

[§ 319] Contemporary Approach.

(1) *Putting Employee in Dangerous Place*. A return to the liberal view (supra, §318) took place in *Keeley v. Industrial Acc. Com.* (1961) 55 C.2d 261, 10 C.R. 636, 359 P.2d 34. H, an inexperienced youth, was employed to haul and load rice onto trucks. His equipment was a tractor-operated wagon with augers powered by a gasoline engine. The auger clogged and the foreman started to remove rice from its pipe by hand--a common practice. He was called away, told H to continue, and H kept pulling rice out by hand. When the foreman returned he had forgotten that H was there, and he started the motor before H could remove his hand. *Held*, additional award, for serious and wilful misconduct, affirmed.

The Court of Appeal and two dissenting Supreme Court justices argued that the result was contrary to *Hawaiian Pineapple Co. v. Industrial Acc. Com.* (1953) 40 C.2d 656, 255 P.2d 431, and *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 C.2d 102, 251 P.2d 955, *infra*, §322, because the basis was only forgetfulness (gross negligence). However, the majority followed *Henry J. Kaiser Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 818, 185 P.2d 353, *infra*, §322, holding that the foreman deliberately put the employee in a dangerous place. "The serious and willful misconduct did not consist of Tanner forgetting that Henry was in a position of danger. The serious and willful misconduct consisted of ordering an employee into a known place of danger, knowing that injury would result if someone started the motor, without taking some precaution to protect against that danger." (55 C.2d 270.)

(2) *Acquiescence in Dangerous Practice*. The employer may be guilty of wilful misconduct without ordering the employee into a place of danger or directing a dangerous activity. "[A]n employer commits wilful misconduct when he 'turns his mind' to the fact that injury to his employees will probably result from his acts or omissions, but he nevertheless deliberately fails to take appropriate precautions for their safety. The employer's conduct is measured by this test whether he permits his employees to work by a dangerous method (*Hawaiian Pineapple*), whether he orders them to perform a hazardous job (*Keeley*), or whether they are allowed to work in a building where any work is dangerous (*Mercer*)." (*Rogers Materials Co. v. Industrial Acc. Com.* (1965) 63 C.2d 717, 723, 48 C.R. 129, 408 P.2d 737.)

In *Rogers*, D, driver of a concrete mixer truck, was cleaning it while standing on the truck platform close to the drive chain rotating the drum. His trouser leg caught in the chain causing injury. *Held*, award for wilful misconduct

affirmed. L, the employer's superintendent, had warned D a month before not to wash the machine from the platform, but nevertheless saw D doing it repeatedly and merely told him to be careful. Thus, the employer was aware of the method, knew of its danger, and, without taking precautions (such as a guard over the chain) or forbidding performance in this manner, "either acquiesced in the practice or impliedly consented to it." (63 C.2d 724.)

(3) *Actual Knowledge Is Essential*. Knowledge remains a requisite to the penalty award. (*Dowden v. Industrial Acc. Com.* (1963) 223 C.A.2d 124, 131, 35 C.R. 541, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §124; *Wolters v. Industrial Acc. Com.* (1963) 223 C.A.2d 136, 141, 35 C.R. 549; *American Smelting & Refining Co. v. Work. Comp. App. Bd.* (1978) 79 C.A.3d 615, 620, 144 C.R. 898; *Johns-Manville Sales Corp. v. Work. Comp. App. Bd.* (1979) 96 C.A.3d 923, 933, 935, 158 C.R. 463 ["we have nothing more than a classic instance of neglect, containing no element of malice, recklessness, or indifference to human safety"].) However, actual knowledge may be shown by proof of prior complaints to the employer of an unsafe condition. (*Bekins Moving & Storage Co. v. Work. Comp. App. Bd.* (1980) 103 C.A.3d 675, 683, 163 C.R. 213.)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

3. What Constitutes Misconduct.

b. Violation of Statute or Safety Order.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 320

[§ 320] In General.

One obvious type of misconduct is the violation of a specific statute or safety order. Although the mere violation itself is not always wilful misconduct and the circumstances must be taken into consideration, where the order is one for the protection of workers against a particular hazard, and the injury incurred is of this type, the penalty will be imposed. (See *Parkhurst v. Industrial Acc. Com.* (1942) 20 C.2d 826, 830, 129 P.2d 113 [contaminated drinking water supplied in open bucket and common dipper, in violation of statute requiring closed containers and individual drinking cups]; *Ethel D. Co. v. Industrial Acc. Com.* (1934) 219 C. 699, 704, 28 P.2d 919 [ladder to roof of oil derrick not equipped with railing]; *Bethlehem Steel Co. v. Industrial Acc. Com.* (1944) 23 C.2d 659, 662, 145 P.2d 583 [loaded steel beams fell on workman; violation of orders against workman riding on insecure load, and requiring loads to be secured against displacement]; *California Shipbuilding Corp. v. Industrial Acc. Com.* (1947) 31 C.2d 270, 274, 188 P.2d 27 [machine operated near high-voltage power lines]; *Ray v. Industrial Acc. Com.* (1956) 146 C.A.2d 393, 398, 303 P.2d 793 [circular saw on manual feed table without guard required by general safety orders of Department; employer warned and did nothing]; Cal. Civil Practice, 1 Workers' Compensation, §5:8.; C.E.B., 1 Workers' Compensation Practice 4th, §8.36; 1 Hanna 2d (2004 ed.), §10.01[4][c]; 1 Herlick 6th, §11.18.) (For safety orders generally, see 8 *Cal. Code Reg.* §330 et seq.)

In *Grason Elec. Co. v. Industrial Acc. Com.* (1965) 238 C.A.2d 46, 47 C.R. 439, G Co. had a contract to erect street lighting standards. M, its foreman, and L, decedent employee, were doing the work. M told the company's general manager of the danger of working, according to the project engineer's plans, in close proximity to high-voltage lines. M then changed to a new method, and, operating under it, the standard was rotated too close to the lines and L was electrocuted. The evidence before the Commission included competent testimony that the new method was safe, and had been safely used in hundreds of instances. Nevertheless, the Commission made an award for serious and wilful misconduct. *Held*, affirmed.

(a) The method violated a known safety order--working with equipment under conditions where it was possible to come within six feet of high-voltage lines, without taking one of three specified precautions (barriers, de-energizing of conductors, removal of conductors). (238 C.A.2d 50, 53.)

(b) The effect of violation depends on the subject and nature of the regulation. This one involved no mild occupational hazard, but a deadly peril. The foreman, disregarding the required safeguards and substituting a different kind of precaution based on his own experience, was guilty of wilful misconduct. "That the foreman did not intend the accident, that he subjected himself to a similar degree of peril, that he believed the safeguards adequate and the risk small--these might serve as sufficient defenses in the face of unregulated conduct and less hazardous activity. Here the conduct was regulated, the regulation known and the hazard intense. Culpability lies in the foreman's decision that the activity was safe notwithstanding violation of the safety order. He took it upon himself to match his own judgment (such as it was) against the emphatic policy decreed by law and safety regulation. He deliberately took the gamble forbidden by law. The law should measure its penalty by the deliberation with which the gamble was taken, not the deliberation with which it was lost. Viewed in relation to acute danger and an inflexible legal demand, the decision was characterized by positive and reckless disregard of its possible consequences." (238 C.A.2d 55.)

A strong dissent argued that M's belief was based on long experience and that his conduct was at most negligence. (238 C.A.2d 57.) (See *White v. Work. Comp. App. Bd.* (1968) 265 C.A.2d 115, 122, 71 C.R. 49 [violation of statutory safety regulations was serious and wilful misconduct, contrary to Board's opinion that industry had disregarded them; following *Grason*].)

SUPPLEMENT: [This section is current through the latest supplement]

See 31 A.L.R.6th 199 [validity, construction, and application of provisions regarding additional compensation for employer's safety violation].



130 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

3. What Constitutes Misconduct.

b. Violation of Statute or Safety Order.

2. Findings Required for Safety Order Violation.

2 Witkin Sum. Cal. Law Work Comp § 321

[§ 321] Findings Required for Safety Order Violation.

Lab.C. 4553.1 provides that the Board must specifically find all of the following regarding the violation of a safety order:

(1) The specific manner in which the order was violated.

(2) That the violation proximately caused the injury or death, and the specific manner of the violation constituted the proximate cause.

(3) That the order, and the conditions making it applicable, were known to, and violated by, a specifically named person, either the employer or representative designated by *Lab.C. 4553* (supra, §316), or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure to correct the condition constituted a reckless disregard for the probable consequences. (See *Rogers Materials Co. v. Industrial Acc. Com.* (1965) 63 C.2d 717, 726, 48 C.R. 129, 408 P.2d 737, supra, §319 [even though required findings are not made, employer may still be found guilty of wilful misconduct under general principles]; C.E.B., 1 Workers' Compensation Practice 4th, §8.37; 1 Hanna 2d (2004 ed.), §1.01[4][c]; 1 Herlick 6th, §11.18.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

3. What Constitutes Misconduct.

c. Other Acts or Omissions.

2 *Witkin Sum. Cal. Law Work Comp* § 322

[§ 322] Other Acts or Omissions.

(1) *Cases Sustaining Award*. Except for safety statute and order situations (*supra*, §§320, 321), there are few cases that meet the strict knowledge test (*supra*, §318). (See *Hatheway v. Industrial Acc. Com.* (1939) 13 C.2d 377, 382, 90 P.2d 68 [broken skylight concealed by dirt, without guardrail or warning, on roof used for storage]; *California Shipbuilding Corp. v. Industrial Acc. Com.* (1946) 27 C.2d 536, 542, 165 P.2d 669 [condition need not be a permanent one]; *Henry J. Kaiser Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 818, 825, 185 P.2d 353 [although forgetfulness of known danger is usually considered only negligence, finding of misconduct was upheld where foreman sent employee to position near machine, and shortly afterwards, started it operating]; *Keeley v. Industrial Acc. Com.* (1961) 55 C.2d 261, 270, 10 C.R. 636, 359 P.2d 34, *supra*, §319 [following *Henry J. Kaiser Co.*].)

(2) *Cases Annuling Award*. In the case establishing the strict knowledge test, *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 C.2d 102, 251 P.2d 955, petitioner-employer, constructing prefabricated wooden buildings for H, held certain vertical timber columns by guy wires. H's engineer told petitioner's superintendent that this temporary bracing was insufficient, and other employees protested, but the superintendent concluded that it was satisfactory. The columns collapsed, killing two employees and injuring two. In annulling the penalty award, the court did not decide whether the evidence was sufficient, but pointed to findings showing the superintendent's good faith belief in the safety of the work, and the lack of findings of either incompetence or inexperience on his part. Hence, the findings showed only a mistake of judgment in a technical matter of construction. (40 C.2d 120, 127.)

In *Hawaiian Pineapple Co. v. Industrial Acc. Com.* (1953) 40 C.2d 656, 255 P.2d 431, the employee, operating a forklift at his employer's cannery, had to cross switch tracks. Safety measures, such as a watchman or blinker stop lights, were not maintained during the slack season. It was nevertheless held that there was no showing of intention to do harm or actual knowledge of the probable consequences, and the award could not be sustained. (40 C.2d 663.) (See *Sutter Butte Canal Co. v. Industrial Acc. Com.* (1953) 40 C.2d 139, 143, 251 P.2d 975 [where employee fell from dam and drowned, there was no evidence to support finding that employer sent employees to work on dam knowing of dangerous conditions or immediate hazards or acted in disregard of possible consequences]; *American Smelting & Refining Co. v. Work. Comp. App. Bd.* (1978) 79 C.A.3d 615, 620, 144 C.R. 898 [injured employee's belief that wire cutting machine, in use for 50 years without incident, should not have been used for his job of cutting copper coils was sole evidence to support award and thus insufficient to show wilful misconduct].)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

4. Managing Agent.

a. Types of Responsible Officers.

2 *Witkin Sum. Cal. Law Work Comp* § 323

[§ 323] Types of Responsible Officers.

Lab.C. 4553 specifies persons whose conduct or knowledge of dangers may bring the statute into operation, including the managing representative of an employer, a partner, managing representative, or general superintendent of a partnership, or an executive, managing officer, or general superintendent of a corporation. (See *Bethlehem Steel Co. v. Industrial Acc. Com.* (1944) 23 C.2d 659, 668, 145 P.2d 583 [general superintendent on construction job]; *California Shipbuilding Corp. v. Industrial Acc. Com.* (1944) 64 C.A.2d 622, 626, 149 P.2d 432 [stage-rigger foreman].)

In *Bechtel McCone Parsons Corp. v. Industrial Acc. Com.* (1944) 25 C.2d 171, 176, 153 P.2d 331, the foreman of a crane operating crew, with limited authority, was held not of sufficient rank to come within the statute. Later decisions indicate that the title is unimportant, nor does it matter that there are others with higher rank in general charge of the work; it is sufficient if the employer has delegated to the employee a general discretionary control over some integral department of the business. (See *California Shipbuilding Corp. v. Industrial Acc. Com.* (1946) 27 C.2d 536, 540, 165 P.2d 669 [shipwright foreman in charge of placing guard rails over vent holes]; *Henry J. Kaiser Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 818, 823, 185 P.2d 353 [foreman in charge of screening unit of rock crusher plant].) Both of the foregoing decisions distinguish *Bechtel* on the ground that the foreman there was merely in charge of one machine, rather than a part of the business, and received numerous daily orders from his superiors.

The following statement from *Vega Aircraft v. Industrial Acc. Com.* (1946) 27 C.2d 529, 533, 165 P.2d 665, makes it clear that both extremes must be avoided: "This court, in the *Bechtel* case, supra, has recently rejected the view that any employee who has authority to give orders to other employees is necessarily, by virtue of such authority, an executive or managing officer or general superintendent. We must now reject the view that because a corporation's business is carried on in many departments, both night and day, the corporation is insulated from responsibility for the serious and willful misconduct of a supervisory employee to whom it has delegated general discretionary power of direction of a relatively small but integrate department during one shift."

SUPPLEMENT: [This section is current through the latest supplement]



133 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

E. Misconduct of Employer.

4. Managing Agent.

b. Failure To Point Out Responsible Officer.

2 *Witkin Sum. Cal. Law Work Comp* § 324

[§ 324] Failure To Point Out Responsible Officer.

A formidable obstacle to the award of a penalty against large corporate employers is the requirement of discovering the culpable officer where the conditions are temporary or where a safety order is violated.

In *California Shipbuilding Corp. v. Industrial Acc. Com.* (1947) 31 C.2d 270, 273, 188 P.2d 27, a general finding that "the employer" was guilty of wilful misconduct was upheld, on a showing that locomotive cranes had been operated for a long time in a partially unlighted area in which high-tension wires were located.

In *California Shipbuilding Corp. v. Industrial Acc. Com.* (1947) 31 C.2d 278, 188 P.2d 32, a similar general finding was held insufficient for lack of specification of the *particular supervisory agent* guilty of the misconduct. Here, the dangerous condition was a hole in a ship's deck, cut shortly before the accident and left unguarded. (31 C.2d 281.) The same corporation, with numerous managing agents, was involved in both cases, and the controlling theory and distinction is thus stated in *Rogers*: "In the situation of a single instance of, or a temporary or new occurrence of conditions amounting to, serious misconduct it is necessary, in order to attribute such misconduct to a corporate employer, to show with reasonable particularity that the reckless disregard for safety was on the part of some particular person with general discretionary power of direction and control of the integral part of the business wherein the misconduct took place. ... But in a situation where there are obvious, fixed, long-maintained conditions of hazard, and where crews are repeatedly required to work thereunder, it can be inferred that such conditions must have been known to responsible managing agents." (31 C.2d 274.)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

1. Intoxication.

2 Witkin Sum. Cal. Law Work Comp § 325

[§ 325] Intoxication.

(1) *In General.* An employee is not entitled to an award or death benefits if the injury or death is caused by the employee's intoxication either by alcohol or the unlawful use of a controlled substance. (*Lab.C. 3600(a)(4)*; see *Pacific Freight Lines v. Industrial Acc. Com.* (1945) 26 C.2d 234, 240, 157 P.2d 634.) A "controlled substance" is given the meaning prescribed in *Health & Saf.C. 11007* (see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §65). (*Lab.C. 3600(a)(4)*.) (See C.E.B., 1 *Workers' Compensation Practice* 4th, §2.25; 1 *Hanna* 2d (2004 ed.), §4.20; 1 *Herlick* 6th, §10.03.)

Lab.C. 5705 makes intoxication an affirmative defense, with the burden of proof on the employer. However, it need only be shown that intoxication was a proximate cause or substantial factor in causing the injury or death; it need not be the sole proximate cause. (*Smith v. Work. Comp. App. Bd.* (1981) 123 C.A.3d 763, 770, 772, 773, 176 C.R. 843.)

(2) *Employer Estopped.* The employer may be estopped to set up the intoxication defense. In *Tate v. Industrial Acc. Com.* (1953) 120 C.A.2d 657, 261 P.2d 759, decedent was killed while operating his employer's company car on company business. A death benefit was denied on evidence of his intoxication. However, on rehearing, it appeared that the employer's district manager, with knowledge of the employee's weakness, had purchased drinks and participated in the drinking. *Held*, order denying award reversed for a finding on the issue of estoppel. The court, in the absence of direct authority, suggested the analogy of the employer's duty to provide a safe place to work. An estoppel would arise if the employer encouraged drinking among employees and ordered an intoxicated employee to operate complicated machinery, and sending such a person onto a busy highway in a company car was similar in effect. (120 C.A.2d 664.)

In *McCarty v. Work. Comp. App. Bd.* (1974) 12 C.3d 677, 117 C.R. 65, 527 P.2d 617, M was employed by A. The work day ended at 4:30 p.m., but employees, and sometimes owner-managers, remained to drink and gamble. On December 23, work ended at 2:30, and a long drinking party began. At 9 p.m., M, intoxicated, drove toward home and was killed when he collided with a railroad signal pole. The referee awarded death benefits to the widow; the Board denied them, applying the going and coming rule. *Held*, decision annulled; she was entitled to benefits.

(a) *Course of employment.* (1) Social and recreational activity, with the express or implied permission of the employer, and of some conceivable benefit to the employer, is in the course of employment. Here, the owner-managers permitted recurrent drinking parties on the premises and routinely used company accounts and funds for the liquor, thus

demonstrating that they considered the gatherings to be company activities. (12 C.3d 682; see supra, §224.) (2) Even though no benefit to the employer is shown, the recreational activity is in the course of employment if it has become a customary incident of the employment relationship. Here, drinking parties had become a recognized, established, and encouraged custom. (12 C.3d 683.)

(b) *Arising out of employment.* It was conceded that M's intoxication was the proximate cause of his death, and the fact that the death occurred at a different time and place was immaterial. (12 C.3d 681; see supra, §230.)

(c) *Estoppel to set up defense of intoxication.* As in *Tate*, if the employer permits drinking or other dangerous practices, the special hazard doctrine applies, and no express representation need be shown. Here, there is no doubt that M relied on A's implied representation. "Nothing in the record suggests that he would have remained at the company office, drinking the company's liquor, without the permission and approval of the owners. We conclude that on the undisputed facts the elements of estoppel, including both representation and reliance, are established as a matter of law." (12 C.3d 685.) (See *Childers v. Shasta Livestock Auction Yard* (1987) 190 C.A.3d 792, 814, 235 C.R. 641 [employer encouraging employees to drink at work site after hours; *McCarty* applied].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 22 A.L.R.6th 329 [validity, construction, and application of statutes that prohibit benefits for employees who test positive for illegal drugs or alcohol following workplace injury].



135 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

2. Self-Inflicted Injury.

2 Witkin Sum. Cal. Law Work Comp § 326

[§ 326] Self-Inflicted Injury.

An employee is not entitled to an award if the injury is intentionally self-inflicted. (*Lab.C. 3600(a)(5)*; see *Lab.C. 3370(a)(1)*, supra, §180 [similar bar applicable to state prisoners]; C.E.B., 1 Workers' Compensation Practice 4th, §2.26; 1 Hanna 2d (2004 ed.), §4.21; 1 Herlick 6th, §10.04.)

In *Smith v. Work. Comp. App. Bd.* (2000) 79 C.A.4th 530, 94 C.R.2d 186, the Board denied the claim of a police officer who injured his hand when he struck a wall at the station in anger during a heated argument with a superior over work-related matters. Applicant had trained as a boxer and described his action as a spontaneous act and not a proper boxing punch. The Board found that applicant had intentionally injured himself because his injury was foreseeable given his expertise as a boxer, and thus compensation was barred under *Lab.C. 3600(a)(5)*. *Held*, decision annulled.

(a) *Lab.C. 3600(a)(5)* qualifies its bar on compensation for self-inflicted injuries only when the injuries are intentional. Although scant authority exists interpreting the provisions, the Supreme Court discussed *Lab.C. 3600(a)(5)* while analyzing another statute in *Johns-Manville Products Corp. v. Superior Court* (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948, supra, §44, and described the type of injury barred as one involving the deliberate infliction of injury on oneself in order to collect compensation. (79 C.A.4th 538.)

(b) Employees who cause their own injury may nevertheless recover compensation because benefits accrue regardless of fault. The Board's reasoning incorrectly focused on applicant's boxing background, and the Board wrongly introduced concepts of foreseeability and negligence into its analysis. (79 C.A.4th 538.)

(c) The causal connection between employment and the injury is sufficient for recovery if the employment is a contributing cause of the injury. (79 C.A.4th 538.) The discussion between applicant and his supervisor occurred in the workplace regarding a work event and resulted in a display of temper. Although applicant may have acted rashly or impulsively, or even negligently and recklessly in punching the wall, nothing indicated that he deliberately sought to injure himself. Thus, the chain of causation necessary for compensation was unbroken. "Mere carelessness or contributory negligence of the injured does not break the causative connection unless such intervening carelessness or negligence is the sole and exclusive cause of the injury." (79 C.A.4th 539.)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

3. Suicide.

2 Witkin Sum. Cal. Law Work Comp § 327

[§ 327] Suicide.

If an employee suffers a compensable injury or illness, but then commits suicide, are the dependents entitled to a death benefit? The majority view is that death by suicide is intentionally self-inflicted, and that recovery is ordinarily barred. Exceptions are recognized where the decedent acts under an irresistible impulse, or in delirium or frenzy, or where the industrial injury or illness deprives the decedent of normal judgment. (See *Burnight v. Industrial Acc. Com.* (1960) 181 C.A.2d 816, 820, 5 C.R. 786 [discussion of rule]; 15 A.L.R.3d 616 [suicide as compensable under workers' compensation act].)

A minority view stresses the mental state of the decedent rather than the volitional character of the act. Under this view--which is an extension of the exceptions noted above--suicide is not intentionally self-inflicted if the decedent could not resist: "Where an employee receives an industrial injury and the resultant pain is such that he believes he cannot continue to stand it, where he becomes so depressed that he feels that there is only one way out, where any condition results which causes him to feel that death will afford him his only relief, his act of suicide is one directly resulting from his injury, unless it appears that he could have resisted the impulse to so act." (*Burnight v. Industrial Acc. Com.*, *supra*, 181 C.A.2d 822.)

Burnight adopted the minority view as the California rule. Decedent, a paint chemist employed by F, was sent to Mexico to supervise conversion of a paint plant. Overwork and frustrations of the unfamiliar job caused a nervous breakdown diagnosed as manic depressive psychosis. Shortly after discharge from the hospital he registered at a cheap hotel, and the next morning was found dead from a severed wrist artery. The Commission refused a death benefit, but the court annulled the order, with directions to determine whether the decedent had the mental capacity to resist the suicidal impulse. "There can be no intention to commit an act in the sense of the Labor Code section if the mind of the actor is such that it is not sound and that because of compulsion due to that condition he is unable to exercise a sound discretion. While the commission found that decedent's action was consciously volitional it did not find that it was 'intentional' in the sense that his mind was sound enough for him to exercise a sound discretion and in the sense of the rule herein discussed." (181 C.A.2d 827.)

Lab.C. 3600(a)(6), added in 1961, states the conditions for an award: "Where the employee has not willfully and deliberately caused his or her own death." (See C.E.B., 1 Workers' Compensation Practice 4th, §2.27; 1 Hanna 2d (2004 ed.), §4.22; 1 Herlick 6th, §10.05.)

In *Beauchamp v. Work. Comp. App. Bd.* (1968) 259 C.A.2d 147, 66 C.R. 352, decedent schoolteacher, with a long record of emotional instability, was injured and received a permanent disability rating which he thought was too low. Three weeks after denial of his petition for reconsideration, he committed suicide. The Board denied death benefits. *Held*, order annulled. *Burnight* is consistent with the statute, and is controlling; i.e., the question is not whether the act was volitional, but whether the compulsion was one that the employee could not resist. (259 C.A.2d 154.) (See *Chu v. Work. Comp. App. Bd.* (1996) 49 C.A.4th 1176, 1184, 57 C.R.2d 221 [widow was entitled to death benefits under Lab.C. 3600(a)(6) where police officer's suicide resulted from stress and depression after unsatisfactory performance as sergeant during probation period; *Burnight* followed].)

Under *Burnight*, once a prima facie case of causal connection is established between employment and suicide, the burden of proof shifts to the employer to show that the decedent could have resisted the impulse to so act. (*Donovan v. Work. Comp. App. Bd.* (1982) 138 C.A.3d 323, 327, 187 C.R. 869.)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

4. Refusal To Submit to Examination.

2 Witkin Sum. Cal. Law Work Comp § 328

[§ 328] Refusal To Submit to Examination.

Under *Lab.C. 4050* et seq., the employee must, on written request of the employer, submit "at reasonable intervals" to examination by a physician provided by the employer or selected by the Administrative Director, Board, or referee. The sanctions for refusal are suspension of the right to maintain proceedings (*Lab.C. 4053*) and suspension of the right to disability payments (*Lab.C. 4054*). Dismissal of the proceeding is not a proper sanction. (*Roth v. Work. Comp. App. Bd. (1971) 20 C.A.3d 452, 458, 97 C.R. 605.*)

An order for a medical examination must be reasonable as to time and place. Thus, the order must consider convenience to the employee and the employee's physical condition and ability to attend at the time and place fixed. (*Lab.C. 4051*; see *Hansen v. Work. Comp. App. Bd. (1989) 211 C.A.3d 717, 721, 259 C.R. 506* [workers' compensation judge's order for defense-requested medical examination 185 miles from applicant's residence was abuse of discretion under *Lab.C. 4051*].)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

5. Refusal To Submit to Treatment.

a. Treatment Offered by Employer.

2 Witkin Sum. Cal. Law Work Comp § 329

[§ 329] Treatment Offered by Employer.

(1) *Unreasonable Refusal*. If the employee unreasonably refuses to submit to medical or surgical treatment, no award can be made for death or disability to the extent that death is caused, or that disability is "caused, continued, or aggravated," by the refusal. (*Lab.C. 4056; Danziger v. Industrial Acc. Com. (1930) 109 C.A. 71, 73, 292 P. 525*; see C.E.B., 1 Workers' Compensation Practice 4th, §§3.36, 1.89; 1 Hanna 2d (2004 ed.), §5.05[9]; 1 Herlick 6th, §§4.27, 6.14; 82 *Am.Jur.2d* (2003 ed.), *Workers'; Compensation* §§390, 391; 72 *A.L.R.4th* 905 [reasonableness of employee's refusal of medical services tendered by employer]; 3 *A.L.R.5th* 907 [what amounts to failure or refusal to submit to medical treatment].)

However, the employer must make an unequivocal tender of treatment. (*Gildersleeve v. Industrial Acc. Com. (1931) 212 C. 763, 765, 1 P.2d 1.*) Moreover, the refusal must be *unreasonable*. Thus, where the insurer demanded that the employee be transferred to another hospital against the advice of the employee's attending physician, refusal did not warrant a forfeiture of rights. (*Simonton v. Industrial Acc. Com. (1931) 119 C.A. 15, 16, 5 P.2d 959.*)

Nor is the employee required to undergo treatment that is uncertain in its outcome or is attended with serious dangers. (*Bethlehem Steel Corp. v. Industrial Acc. Com. (1945) 70 C.A.2d 369, 378, 161 P.2d 18.*) In *Bethlehem*, an award of a 100% disability rating for a back injury was affirmed, despite the refusal of the employee to undergo an operation recommended as reasonably safe by every physician testifying at the hearing. The court observed that "we are not here dealing with the law of averages, but with the case of Paul McClure," and that the test imposed by *Lab.C. 4056* "is not entirely an objective one." (70 *C.A.2d* 379.) The award was then justified by evidence that for 2 years, the employee had undergone all treatment suggested by company physicians and his condition had grown progressively worse, company physicians had originally warned that the operation was "very dangerous," and they did not recommend it until after the employee had refused to make a cash settlement. (70 *C.A.2d* 379.) (See *Janet v. Industrial Acc. Com. (1965) 238 C.A.2d 491, 495, 47 C.R. 829* [recommended surgery would not have effected cure].)

(2) *Refusal Based On Religious Beliefs*. *Martin v. Industrial Acc. Com. (1956) 147 C.A.2d 137, 139, 304 P.2d 828*, upheld the denial of death benefits to dependents of a member of Jehovah's Witnesses who refused a blood transfusion. The constitutional guarantee of religious freedom did not give decedent a right to impose liability on the employer for death resulting from the voluntary practice of the employee's religion. (147 *C.A.2d* 142.) However, the continued

validity of *Martin* is questionable in light of *Montgomery v. Board of Retirement* (1973) 33 C.A.3d 447, 451, 453, 109 C.R. 181, 7 Summary (10th), *Constitutional Law*, §517, where a county employee refused on the basis of religious beliefs to undergo surgery for a nonservice-related tumor. The county retirement board subsequently denied the employee a nonservice-connected disability retirement. In stating that the *Martin* declarations "no longer represent the law in this field" (33 C.A.3d 453), the court declared that neither unemployment compensation nor public employees' retirement benefits can be denied on the ground of refusal to undergo medical treatment for religious reasons. (33 C.A.3d 453; following *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, 7 Summary (10th), *Constitutional Law*, §691.)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

5. Refusal To Submit to Treatment.

b. Treatment Not Offered by Employer.

2 Witkin Sum. Cal. Law Work Comp § 330

[§ 330] Treatment Not Offered by Employer.

In *Flores v. Work. Comp. App. Bd.* (1973) 36 C.A.3d 388, 111 C.R. 424, a divided court determined the effect of refusal to submit to surgery offered by a county welfare department after the employer's denial of liability. Petitioner injured his knee in a fall from his employer's truck, and later noticed lumps in his groin. In a series of examinations by the insurer's physicians, it was determined that petitioner had an inguinal hernia, but opinions on the industrial causation were inconclusive. Petitioner, apparently on relief, consulted Dr. C at the request of the county public welfare department. Dr. C recommended an operation, but petitioner declined because "he did not want to become a welfare patient." The Board found that the injury was compensable, but also concluded that the period of temporary disability terminated on the date petitioner refused to submit to the surgery offered by the county welfare department. *Held*, decision annulled.

(a) *Construction of Lab.C. 4056.* The statute was intended to protect employers who tender treatment, and "to prevent employees with treatable injuries from resorting to unfounded beliefs, ungrounded fears or personal idiosyncrasies or convictions to reject proffered treatment." (36 C.A.3d 392.) It does not state that every refusal must result in a forfeiture, but recognizes disputes about the risk of treatment. "If the forfeiture provisions of section 4056 apply to a case where an employer has denied liability for the injury, how can an employee who in good faith believes that the risk of medical or surgical treatment is considerable have that issue resolved promptly?" (36 C.A.3d 393.) *Lab.C. 4056* is in a Labor Code chapter dealing with the duty of an employee to cooperate with the employer, and contemplates an admitted or adjudicated industrial injury followed by a tender of treatment by the actual employer. (36 C.A.3d 393.)

(b) *Doctrine of avoidable consequences inapplicable.* The doctrine of minimizing or mitigating damages (or avoidable consequences), uniformly applied in tort actions (see 6 *Summary* (10th), *Torts*, §1624), cannot be invoked under the circumstances of this case. To require an employee without means to obtain treatment to resort to public welfare would foist on the general public an initial responsibility that belongs to industry. (36 C.A.3d 394.) The workers' compensation law gives the employee a right to receive treatment at the expense of the employer, as part of the compensation; neither the statutory nor the case law requires an employee to secure treatment on the employee's own or be penalized for failure to do so. (36 C.A.3d 395.)

(c) *Conclusion.* "We do not censure an insurance carrier for seeking to protect itself against the added liability which could flow from its denial of medical treatment to a disabled employee if it is later determined that the disability was caused by an industrial injury. Nor do we declare, unequivocally, that we believe that the mitigation doctrine is never applicable to a workmen's compensation claim; it is conceivable that circumstances could arise where justice and equity would dictate some duty on the part of the employee 'to mitigate the trouble and promote recovery.' ... We hold that the carrier, although it may have acted in good faith, cannot gain such protection at the employee's expense and in derogation of his statutory rights by compelling him to become a recipient of public aid." (36 C.A.3d 396.)

The dissenting opinion forcefully presents the argument for applying the doctrine of avoidable consequences; contends that the statute can and should be interpreted to refer to any unreasonable refusal to submit to medical treatment, whether offered by the employer or another; and points out that, if the employer must advance the costs of treatment, the employer cannot be reimbursed if the injury turns out to be noncompensable, while the public authorities may obtain reimbursement from the employer in the event the employee prevails in the workers' compensation proceeding.

The two opinions also clash on the public policy involved: (1) The dissent states: "It is difficult to understand how accepting an operation from welfare by one already on welfare could add to whatever humiliation one may already be suffering, which reflects on the reasonableness of his refusal to have the operation." (36 C.A.3d 400, footnote 1.) (2) The majority answers: It is likely that petitioner was on welfare because the employer refused to provide treatment. And "[t]o set a precedent which would require a conscientious workman, who has striven diligently to support his own family, to accept a gift from a friend or relative, no matter how generous the gift may be, or to resort to public welfare in order to cure an injury he believes in good faith was incurred in the course of his employment would add unduly to the hardship and would shock the conscience." (36 C.A.3d 397.) (See *Thompson v. Work. Comp. App. Bd.* (1994) 25 C.A.4th 1781, 1788, 31 C.R.2d 242 [Lab.C. 4056 was not applicable where there was no admitted or adjudicated industrial injury and no employer tender of medical treatment for decedent's hypertension; following *Flores*].)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

F. Misconduct of Employee.

6. Serious and Wilful Misconduct.

2 Witkin Sum. Cal. Law Work Comp § 331

[§ 331] Serious and Wilful Misconduct.

If the injury is caused by the employee's serious and wilful misconduct, the compensation is reduced by one-half, except (1) where the injury results in death; (2) where it results in permanent disability of 70% or over; (3) where it is caused by the employer's failure to comply with a safety law or order; or (4) where the employee is under 16. (*Lab.C. 4551*; see *Auto Lite Battery Corp. of Calif. v. Industrial Acc. Com. (1947) 77 C.A.2d 629, 633, 176 P.2d 62, supra, §200* [violation of instructions was wilful misconduct]; *Williams v. Work. Comp. App. Bd. (1974) 41 C.A.3d 937, 941, footnote 2, 116 C.R. 607* [even criminal misconduct does not defeat recovery, but merely reduces it, so long as employee acts in scope of employment]; *Cal. Civil Practice, 1 Workers' Compensation, §5:2 et seq.*; *C.E.B., 1 Workers' Compensation Practice 4th, §8.45*; *1 Hanna 2d (2004 ed.), §10.02*; *1 Herlick 6th, §11.13*; *73 A.L.R.4th 270* [effect of allegation of worker's illegal conduct]; *61 A.L.R.5th 375* [violation of employment rule as barring claim for workers' compensation].)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

1. Wages or Other Earnings.

2 *Witkin Sum. Cal. Law Work Comp* § 332

[§ 332] Wages or Other Earnings.

The Board may take into account "in fixing the amount of the compensation to be paid" payments, allowances, or benefits received by the injured employee during the period of incapacity that were not due and payable under the Act. (*Lab.C. 4909.*) (See C.E.B., 1, 2 Workers' Compensation Practice 4th, §§1.51, 23.39 et seq.; 1 Hanna 2d (2004 ed.), §7.04[5], [6]; 1 Herlick 6th, §6.22; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §419.)

If a temporarily disabled employee receives full wages during the period of disability, a compensation award would be double recovery. Hence, the Board, exercising its discretion under *Lab.C. 4909*, may properly deny an award. (*Herrera v. Work. Comp. App. Bd.* (1969) 71 *C.2d* 254, 258, 78 *C.R.* 497, 455 *P.2d* 425.)

Under *Lab.C. 4909*, an employer may receive a credit against an employee's permanent disability award for voluntary payments to an injured employee made under the employer's private benefit plan when the payments were clearly intended by both the employer and employee as an advance on future compensation. (*Appleby v. Work. Comp. App. Bd.* (1994) 27 *C.A.4th* 184, 192, 32 *C.R.2d* 375 [employer's plan stated that benefits were intended to be of same general character and functional equivalent of workers' compensation system's benefits; citing *Herrera*].) (On credit for payments made by employer where injury is subject to concurrent federal and state jurisdiction, see *Sea-Land Service v. Work. Comp. App. Bd.* (1996) 14 *C.4th* 76, 58 *C.R.2d* 190, 925 *P.2d* 1309, *supra*, §143 [dollar-for-dollar credit].)

A payment by the employer of compensation not due or disputed is not an admission of liability, but it may be taken into account by the Board in fixing the amount of compensation. (*Lab.C. 4909*; see *Huston v. Work. Comp. App. Bd.* (1979) 95 *C.A.3d* 856, 866, 157 *C.R.* 355, *infra*, §391; *Ott v. Work. Comp. App. Bd.* (1981) 118 *C.A.3d* 912, 921, 173 *C.R.* 648 [employer bears burden of proving voluntary nature of wage payments].)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

a. Ordinary Public Employees.

2 Witkin Sum. Cal. Law Work Comp § 333

[§ 333] Ordinary Public Employees.

Except as to local safety or patrol members, as defined by *Govt.C. 20390*, the right to receive a death benefit from the Public Employees' Retirement System is a bar to the claim of dependents for a death benefit (except reasonable burial expenses not exceeding \$ 1,000) under the Workers' Compensation Act. However, death benefits under the Act will be awarded if it is determined that a special death benefit (as defined by the Public Employees' Retirement Law), or the benefit provided in lieu of the special death benefit in *Govt.C. 21547* (death with 20 years of service) and *Govt.C. 21548* (death on attaining minimum age for voluntary retirement), will not be paid by the Retirement System. Also, if the Retirement System benefit is smaller than the death benefit otherwise payable under the Act, the surviving spouse and children under 18 are entitled to a compensation award of the difference. (*Lab.C. 4707.*)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

b. Law Enforcement Officers and Firefighters.

1. Local Officers.

2 *Witkin Sum. Cal. Law Work Comp* § 334

[§ 334] Local Officers.

City police officers, firefighters, and other specified law enforcement and safety members (*Lab.C. 4850(b)*) who are "temporarily or permanently" disabled by injury or illness arising out of and in the course of their duties, are entitled to a leave of absence without loss of salary for 1 year or until retirement on a disability pension. (*Lab.C. 4850(a)*.) The employer is prohibited from deeming this leave family care or medical leave, as defined in Govt.C. 1294.2 (see 8 *Summary* (10th), *Constitutional Law*, §942 et seq.). (*Lab.C. 4850(e)*.) After this period has expired, the employee is entitled to continue the leave of absence without pay until retirement, and may also obtain workers' compensation benefits. (*Lab.C. 4853*.) (See Cal. Civil Practice, 1 *Workers' Compensation*, §1:72.) (On persons excluded from coverage, see *Lab.C. 4850(c)*; on similar statutes, see *Lab.C. 4800* [state peace officers and firefighters]; *Lab.C. 4800.5* [State Highway Patrol officers]; *Lab.C. 4806* [University of California Police].)

The governing body of a local agency, including the Public Employees' Retirement System, may request the Board to determine whether a disability under *Lab.C. 4850* was industrially caused. (*Lab.C. 4851*; *Reynolds v. San Carlos* (1981) 126 C.A.3d 208, 214, 178 C.R. 636.)

The following cases are illustrative of the application of *Lab.C. 4850*:

Boyd v. Santa Ana (1971) 6 C.3d 393, 397, 99 C.R. 38, 491 P.2d 830 [police officer]; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1972) 26 C.A.3d 200, 202, 103 C.R. 29 [same].

San Mateo v. Work. Comp. App. Bd. (1982) 133 C.A.3d 737, 742, 184 C.R. 240 [phrase "leave of absence" as used in *Lab.C. 4850* does not apply to period of disability occurring after voluntary or nonvoluntary nonmedical discharge].

Burns v. Work. Comp. App. Bd. (1987) 190 C.A.3d 759, 766, 235 C.R. 610 [*Lab.C. 4853* does not limit right to disability indemnity after county disability retirement; although statute terminates receipt of disability indemnity after retirement under PERS, when read with *Lab.C. 4850*, it is "apparent that the PERS retirement mentioned in section 4853 is an industrial disability retirement"].

United Public Employees v. Oakland (1994) 26 C.A.4th 729, 732, 31 C.R.2d 610 [city jailers were not entitled to benefits under *Lab.C. 4850* because their principal duties and job functions were not clearly within scope of active law enforcement service].

Ritchie v. Work. Comp. App. Bd. (1994) 24 C.A.4th 1174, 1179, 29 C.R.2d 722 [under *Lab.C. 4850*, 4853 and 139.5 (supra, §282), injured municipal police officer was not entitled to receive vocational rehabilitation maintenance allowance after effective date of disability retirement under PERS].

Housing Authority of Los Angeles v. Work. Comp. App. Bd. (1998) 60 C.A.4th 1076, 1082, 70 C.R.2d 738 [Los Angeles City Housing Authority Chief of Police was entitled to *Lab.C. 4850* benefits and Appeals Board had jurisdiction to determine that issue, given broad duties assigned under *Lab.C. 4851*].

Biggers v. Work. Comp. App. Bd. (1999) 69 C.A.4th 431, 435, 81 C.R.2d 628 [courtroom bailiff qualified as employee of sheriff's office and was entitled to leave of absence at full salary].

Martinez v. Work. Comp. App. Bd. (2000) 85 C.A.4th 601, 620, 102 C.R.2d 588 [attempt to retire police officer while she was in vocational rehabilitation was not legally effective because officer was entitled to continued payment of benefits under *Lab.C. 4850*].

Sacramento v. Work. Comp. App. Bd. (2002) 94 C.A.4th 1304, 1309, 115 C.R.2d 63 ["fire recruit" was not firefighter under *Lab.C. 4850* and was not entitled to benefits].

Fenn v. Work. Comp. App. Bd. (2003) 107 C.A.4th 1292, 1298, 132 C.R.2d 878 [injured firefighter was not entitled to Fair Labor Standards Act overtime premium pay as part of *Lab.C. 4850* benefit even though he was so entitled when working his normal shift; FLSA premium pay is only payable when excess hours are actually worked].

Los Angeles County Professional Peace Officers' Assn. v. Los Angeles (2004) 115 C.A.4th 866, 9 C.R.3d 615 [district attorney investigators were not entitled to cash-out excess vacation time during disability leave].

SUPPLEMENT: [This section is current through the latest supplement]

See 40 U.S.F. L. Rev. 149 [discussing scope and issues of full salary rule for California peace officers].

Illustrative cases: In *Los Angeles County Professional Peace Officers' Assn. v. Los Angeles* (2008) 165 C.A.4th 63, 80 C.R.3d 572, plaintiffs were retired deputy sheriffs who were on disability leave under *Lab.C. 4850* for the year prior to their retirement. Under the county's policy regarding excess accumulated vacation hours, deputies on disability leave are not permitted to cash out excess hours as are deputies normally, which has a direct impact on calculating retirement pay. For example, if a cash out takes place in a deputy's final compensation measurement period to determine retirement benefits, the cash out payment is "pensionable income," whereas the disabled deputy loses that money. Hence, a deputy who has accumulated excess vacation hours, but who has never been injured on duty, might collect more in retirement than a deputy who has been injured on duty, all other aspects of their employment being equal. The trial court found that the county's policy violated *Lab.C. 4850*. *Held*, affirmed.

(a) *Lab.C. 4850* prohibits discrimination in salary, and "salary" includes sick pay and other fringe benefits that accrue incident to the employee's service and to which the employee is entitled. Thus, because the right to cash out deferred excess vacation hours is a benefit and constitutes salary under *Lab.C. 4840*, the county's plan denying that right to disabled deputies violates the statute. (165 C.A.4th 67.)

(b) *Los Angeles County Professional Peace Officers' Assn. v. Los Angeles* (2004) 115 C.A.4th 866, 9 C.R.3d 615, text, p. 950, is distinguishable but nevertheless supports plaintiffs in that it applied an analysis that recognized that "salary" included the benefit at issue here. That case involved district attorney investigators who took *Lab.C. 4850* leave and retired the following year. The district attorney proved that as a matter of policy and practice its employees were not allowed to accumulate excess vacation hours, and that there were no cash outs. Thus, unlike here, a cash out was not a

benefit to which the investigators were entitled so it was not "salary" and there was no violation of *Lab.C. 4850*. (165 C.A.4th 70.)



144 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

b. Law Enforcement Officers and Firefighters.

2. Employer's Offset for Self-Employment Earnings.

2 *Witkin Sum. Cal. Law Work Comp* § 335

[§ 335] Employer's Offset for Self-Employment Earnings.

The employee's right to receive full salary for a year is in lieu of temporary disability payments. However, if during that period the employee receives earnings from self-employment, the employer is entitled to credit those earnings against the employer's obligation to pay full salary. (*Kosowski v. Work. Comp. App. Bd.* (1985) 170 C.A.3d 632, 636, 637, 216 C.R. 280.)

The employer's offset must be based on the employee's *net*, rather than *gross*, self-employment earnings. An employer may, in good faith, challenge the legitimacy of an employee's declared self-employment business expenses and is entitled to a hearing to do so at which the employee must prove that the expense is reasonably related to the production of self-employment income. (*Hupp v. Work. Comp. App. Bd.* (1995) 39 C.A.4th 84, 90, 45 C.R.2d 859 [deputy sheriff teaching and performing music during period of disability was permitted to deduct self-employment business expenses; citing *Kosowski*].)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

b. Law Enforcement Officers and Firefighters.

3. Health Benefits For Surviving Spouse.

2 *Witkin Sum. Cal. Law Work Comp* § 336

[§ 336] Health Benefits For Surviving Spouse.

When a local peace officer or firefighter is killed in the line of duty, either by accident or external violence or physical force, the surviving spouse is permitted to continue receiving health benefits from the employer under the same terms and conditions as provided prior to the death, or prior to the accident or injury that caused the death, unless the spouse elects a lump-sum benefit. Minor dependents continue to receive the benefits under coverage provided to the surviving spouse, or if there is no surviving spouse, until age 21. However, the surviving spouse may not add a new spouse or stepchildren as family members under the continued health benefits coverage. (*Lab.C. 4856(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

c. Credit Authorized by Municipal Charter.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 337

[§ 337] In General.

Under appropriate charter provisions, a municipality has the power to prevent double liability for one disabling injury to an employee. (See *Oakland v. Work. Comp. App. Bd.* (1969) 271 C.A.2d 555, 556, 76 C.A. 886 ["double recovery" provision in city charter].)

The city's right to credit depends on an express provision in its charter, which constitutes a part of the employment contract. "[T]he city must put the employee on notice by means of the contract of employment or charter that his pension payments will not be independent of his workmen's compensation benefits for permanent disability. Neither the city nor the Workmen's Compensation Appeals Board could allow any credit if the contract of employment fails so to provide." (*Symington v. Albany* (1971) 5 C.3d 23, 33, 95 C.R. 206, 485 P.2d 270, *infra*, §338; see *In re Marriage of Corriveau* (1986) 183 C.A.3d 1012, 1015, 228 C.R. 563 [charter expressly providing for offset of workers' compensation benefits paid to employee against disability retirement benefits not financed by employee contributions].)

A municipality may, under an appropriate charter provision, take credit for death allowances paid or payable to a person who is also the beneficiary of a workers' compensation award. (*Myers v. Fire & Police Pension System* (1973) 32 C.A.3d 725, 728, 731, 108 C.R. 429.)

In *Healy v. Industrial Acc. Com.* (1953) 41 C.2d 118, 258 P.2d 1, a police officer, injured by a third-party tortfeasor, was given medical treatment by respondent city and later retired on a pension of \$ 283.50 per month. He recovered judgment against the tortfeasor for \$ 2,750 and paid \$ 750 to his attorney. In addition, the Commission awarded him \$ 7,200 for permanent disability and \$ 18.46 a week for life. The city was properly allowed a credit against his award for the sum he received from the tortfeasor (see *supra*, §73). (41 C.2d 120.) On the question whether the city should receive a credit for the monthly pension payments, the court made no positive decision. The employee claimed that he was required to contribute to the pension fund, hence that by this credit, he was being forced to pay part of the cost of compensation in violation of *Lab.C.* 3751 (prohibiting deductions from employee's earnings to cover compensation costs). Because the Commission failed to inquire into how the pension fund was created the case was remanded. (41 C.2d 122.) (See *infra*, §338.)

In *Lyons v. Hoover* (1953) 41 C.2d 145, 258 P.2d 4, plaintiffs, widow and children of a deceased Sacramento fireman, were awarded \$ 5,910.71 as disability and death benefits, and the city gave the widow a pension of \$ 75 per month. Then the city sought to reduce the pension by \$ 71.31 per month, under a charter provision that workers' compensation payments are a deductible credit against an allowance under the retirement system which is provided by contributions of the city. *Held*: (a) The amount of deduction was properly taken from the part of the pension that represented the city's contributions to the pension fund, thus avoiding the rule of the *Healy* case. (b) Construing the charter liberally in favor of the pension claimant, the deduction is authorized only against the person receiving the double payments. Hence, because the widow was only one of four persons to receive the compensation award, the deduction should be applied only to her share of it, i.e., to one-fourth. (41 C.2d 149.)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

c. Credit Authorized by Municipal Charter.

2. Partial Credit.

2 *Witkin Sum. Cal. Law Work Comp* § 338

[§ 338] Partial Credit.

The question left open in *Healy v. Industrial Acc. Com.* (1953) 41 C.2d 118, 258 P.2d 1, supra, §337, was answered in *Los Angeles v. Industrial Acc. Com.* (1965) 63 C.2d 242, 46 C.R. 97, 404 P.2d 801: The city is entitled to a partial credit. The Los Angeles Fire and Police Pension Fund consists of mingled deductions from the employees' salaries (6%) and tax allocations. The city contended that its charter authorized a total credit against workers' compensation liability for the disability pension payments. Its contention was supported by reference to the ruling of the Commissioner of Internal Revenue that the deductions were not part of the "gross income" of the employee, and by the accounting characterization of the deductions as an interdepartmental transfer of funds from the general fund to the pension fund. The court held, however, that neither theory justified the practical nullification of *Lab.C. 3751* by thus indirectly taking a contribution from the employee's earnings to pay compensation. (63 C.2d 249.) Moreover, the practice could lead to dangers:

(a) "If we uphold the city's system of employee deductions which can be used for disability pensions and permit the city a complete credit against its workmen's compensation liability, we encourage employers to set up hybrid funds composed of employee contributions and other funds for the purpose of discharging compensation liability, even though the employer cannot show that employee contributions are not used for payment of benefits. Such a system would violate the legislative mandate as interpreted by *Healy* and offer a stratagem for the purpose of undermining the system of workmen's compensation long established in this state. The statute does not authorize us to condone such a result." (63 C.2d 252.)

(b) However, the city does contribute substantially to the fund and, unless it is credited with its contributions, it receives inequitable treatment and the employee gets a double recovery to the extent of those contributions. "The city, therefore, should receive a partial credit against workmen's compensation liability for the disability pension it pays each employee. The credit should bear the same ratio to workmen's compensation liability as the 'city's contributions' bears to the 'total contributions.' " (63 C.2d 253.) (See *Oakland v. Work. Comp. App. Bd.* (1968) 259 C.A.2d 163, 166, 66 C.R. 283 [Oakland charter; city was entitled to partial credit where its plan segregated employee and employer contributions]; *San Francisco v. Work. Comp. App. Bd. (Engler)* (1968) 267 C.A.2d 771, 775, 73 C.R. 429 [San Francisco charter; city was entitled to partial credit for disability retirement allowance against permanent disability

indemnity]; *Oakland v. Work. Comp. App. Bd.* (1976) 61 C.A.3d 254, 257, 132 C.R. 505 [partial credit is proper for death benefits paid in installments, as well as benefits paid in lump sum].)

In *Symington v. Albany* (1971) 5 C.3d 23, 95 C.R. 206, 485 P.2d 270, plaintiff, a fireman, contributed 6% of his earnings to the pension fund for 20 years, and the city matched his contributions. On his retirement, the city claimed a credit of the entire amount of workers' compensation benefits. *Held*, the rule of *Los Angeles v. Industrial Acc. Com.*, supra, was controlling, and the city was entitled only to a partial credit commensurate with its contribution. The court rejected six grounds of distinction of its prior decision urged by defendant city.

First, that the evidence did not show that any funds paid for workers' compensation came from the employee's earnings. The *Fraide* rule applies whether the charter reduces pension payments to account for workers' compensation or deducts from workers' compensation the amounts disbursed as pension payments; i.e., the city may not evade the rule by reducing pension payments instead of workers' compensation liability. (5 C.3d 29.)

Second, that the pension fund was a separate trust account apart from the city's general fund. This "rather metaphysical" difference does not permit circumvention of the *Fraide* rule. (5 C.3d 29.)

Third, that the language differed in the Los Angeles and Albany charters. The differences were irrelevant. (5 C.3d 31.)

Fourth, that Los Angeles was self-insured and Albany was insured by the State Fund. This distinction was immaterial. (5 C.3d 32.)

Fifth, that application of the *Fraide* rule would result in double liability for the city. The partial credit avoids this result. (5 C.3d 32.)

Sixth, that the pension provision, an integral part of the employment contract, binds the employee. The contract does not give the city power to abrogate *Lab.C. 3751* (prohibiting employer from exacting a contribution to cover the cost of workers' compensation), and a condition in the contract of employment violative of *Lab.C. 3751* is void. (5 C.3d 32.)

The court also rejected the suggestion that the city should be credited with premiums paid for workers' compensation; this, too, is contrary to *Lab.C. 3751* as interpreted in *Los Angeles v. Industrial Acc. Com.* (5 C.3d 33.)

In *Lyons v. Work. Comp. App. Bd.* (1975) 44 C.A.3d 1007, 119 C.R. 159, petitioner served 10 years under the Los Angeles pension system which resulted in the "*Fraide*" rule of allowance of a partial credit only. He then voluntarily joined a new system under which employee contributions (including those made under the former system) were segregated in a separate fund used exclusively to fund *service* pensions. A special fund, supported solely by tax moneys, funded *disability* pensions. Petitioner was injured before the new system was adopted, but was paid a disability pension under the new system. The Board granted the city full credit. *Held*, affirmed. The *Fraide* rule "is inapposite in this case since ... the disability pension ... was paid from the General Fund which consisted solely of city contributions." (44 C.A.3d 1018.) Because employee contributions from the former system were not used, petitioner had no vested right to double recovery of public funds, and his voluntary acceptance of the new system barred reliance on the *Fraide* rule. (44 C.A.3d 1019, 1020.)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

c. Credit Authorized by Municipal Charter.

3. Credit for Present Value of Future Payments.

2 Witkin Sum. Cal. Law Work Comp § 339

[§ 339] Credit for Present Value of Future Payments.

In *Smith v. Los Angeles* (1969) 276 C.A.2d 156, 81 C.R. 120, a Los Angeles city police officer was killed in an automobile collision with a Los Angeles county vehicle. The officer's heirs and the city sued the county in separate actions for wrongful death. The actions were consolidated, a large verdict was returned for the heirs, and the city was credited with \$ 26,160 of death benefit and pension payments actually made to the heirs. The city appealed, claiming credit for the present value of future or contingent pension payments to the heirs. *Held*, reversed. Unless an actuarial equivalent of the present obligation to pay future pension benefits to the decedent's heirs is permitted, there would be no method by which the city could recover in one judgment the amounts it is entitled to recover under *Lab.C. 3852*. (276 C.A.2d 166.) In addition, *Lab.C. 3858* (relieving the employer of duty to pay further compensation) requires that the total liability must be fixed by the judgment against the tortfeasor. (276 C.A.2d 167.) If there is a problem of contingent obligation (e.g., remarriage of the surviving spouse), this is only a matter of careful draftsmanship of the judgment. (276 C.A.2d 168.)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

2. Public Pension or Retirement Benefits.

c. Credit Authorized by Municipal Charter.

4. No Credit for Payments to Third Persons.

2 *Witkin Sum. Cal. Law Work Comp* § 340

[§ 340] No Credit for Payments to Third Persons.

Payments to third persons were distinguished in *San Francisco v. Work. Comp. App. Bd. (Guzzetti)* (1969) 269 C.A.2d 382, 387, 74 C.R. 810. Police officers died, each leaving a surviving spouse and two or more children under 18. The surviving spouses, under the city charter, received a monthly allowance, and the children sought workers' compensation benefits. The city contended that it was entitled to credit the surviving spouses' death allowances against the compensation awards for the minor children. *Held*, the credit was properly denied. To uphold the city's position would be to deprive a surviving spouse of the living allowance until the payments to which she was entitled equaled the amount of a workers' compensation award to third persons--children or even dependents who were not members of the family or household. (269 C.A.2d 387.) (See 1 Herlick 6th, §9.18.)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

3. Unemployment Benefits.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 341

[§ 341] In General.

California's unemployment insurance laws (*Unemp.Ins.C. 100 et seq.*) furnish benefits to persons able to work but unemployed; disability compensation under the Unemployment Insurance Code (*Unemp.Ins.C. 2601 et seq.*) provides benefits to employees disabled under conditions not entitling them to workers' compensation. (See 3 *Summary* (10th), *Agency and Employment*, §452 et seq.) These laws and the Workers' Compensation Act contain provisions designed to avoid double liability. (See *Unemp.Ins.C. 2628* [employee ineligible for disability benefits for period of receiving unemployment compensation]; *Unemp.Ins.C. 2629.1* [cessation of unemployment disability benefits if employer or insurer has agreed to commence payment of benefits; reimbursement provisions]; *Lab.C. 4903(f)* [lien for unemployment compensation disability benefits]; *Bryant v. Industrial Acc. Com. (1951) 37 C.2d 215, 219, 231 P.2d 32*; *California Comp. Ins. Co. v. Industrial Acc. Com. (1954) 128 C.A.2d 797, 804, 276 P.2d 148, 277 P.2d 442*; C.E.B., 1 Workers' Compensation Practice 4th, §§1.48, 1.50; 96 *A.L.R.2d* 941 [effect of application for or receipt of unemployment compensation benefits on workers' compensation].)

Unemp.Ins.C. 1255.5 denies unemployment compensation or extended duration benefits for any day of unemployment on which an employee receives temporary total disability indemnity, under the Workers' Compensation Act or similar state or federal law. If, however, the workers' compensation payments are less than the unemployment benefits, the employee is entitled to the latter less the amount of disability indemnity received. (See *Lab.C. 4654* [temporary partial disability payment reduced by sum of unemployment compensation benefits and extended duration benefits received during period of temporary partial disability].)

The purpose of the several provisions has been stated as follows: "The legislative intention that a worker shall be compensated in part for the wage loss resulting from unemployment due to sickness or injury both where the disability is industrially caused (covered by the Workmen's Compensation Act) and where it is not so caused (covered by the Unemployment Insurance Act), but that he shall not be entitled to unemployment compensation disability benefits *in addition* to workers' compensation for the same period of unemployment, is manifest in the substance of the respective statutes." (*Garcia v. Industrial Acc. Com. (1953) 41 C.2d 689, 692, 263 P.2d 8.*)

SUPPLEMENT: [This section is current through the latest supplement]



151 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

3. Unemployment Benefits.

b. Lien on Award.

2 Witkin Sum. Cal. Law Work Comp § 342

[§ 342] Lien on Award.

The Labor Code creates liens against the amount to be paid as compensation in certain circumstances when the employee is receiving unemployment insurance payments. (*Lab.C. 4903*; see C.E.B., 2 Workers' Compensation Practice 4th, §15.48 et seq.; 2 Hanna 2d (2004 ed.), §30.08; 2 Herlick 6th, §17.34 et seq.) The following liens are permitted:

(1) A lien in the amount of unemployment compensation disability benefits that have been paid in cases of uncertainty as to whether the injury was compensable under the Workers' Compensation Act or the Unemployment Insurance Code. (*Lab.C. 4903(f)*.)

(2) A lien in the amount of unemployment compensation benefits and extended duration benefits paid to the injured employee for "the same day or days for which he or she receives, or is entitled to receive, temporary total disability indemnity payments" under the Workers' Compensation Act. (*Lab.C. 4903(g)*.)

These items should be allowed and paid as provided in *Lab.C. 4904*. (*Lab.C. 4903(f)* and (g).) *Lab.C. 4904* specifies the procedure for lien claims generally, and also provides for the determination of the amount of a lien for unemployment benefits in case of compromise and release of a workers' compensation claim.

The application of the lien provisions has given rise to considerable litigation:

Bryant v. Industrial Acc. Com. (1951) 37 C.2d 215, 220, 231 P.2d 32 [*Lab.C. 4903(f)*; Commission must grant lien against entire award]; *Aetna Life Ins. Co. v. Industrial Acc. Com.* (1952) 38 C.2d 599, 600, 241 P.2d 530 [same; right of insurer under voluntary plan to lien on compromise payment].

California-Western States Life Ins. Co. v. Industrial Acc. Com. (1952) 39 C.2d 104, 107, 244 P.2d 912 [compensation insurer, erroneously paying compensation award before it became final and after notice of claim of lien, was liable to unemployment insurer for amount of lien].

Garcia v. Industrial Acc. Com. (1953) 41 C.2d 689, 694, 263 P.2d 8 [evidence, burden of proof, and determination by Commission].

California Comp. Ins. Co. v. Industrial Acc. Com. (1954) 128 C.A.2d 797, 809, 276 P.2d 148, 277 P.2d 442 [although *Lab.C. 4903(g)* only provides for lien for temporary total disability, similar equitable result was reached regarding temporary partial disability by deducting unemployment benefit payments in computing wage loss].

California-Western States Life Ins. Co. v. Industrial Acc. Com. (1963) 59 C.2d 257, 262, 28 C.R. 872, 379 P.2d 328 [compromise agreement; effect of *Lab.C. 4904*].

Department of Employment v. Industrial Acc. Com. (1964) 227 C.A.2d 532, 536, 38 C.R. 739 [lien for both disability payments and hospital treatment].

Kaiser Foundation Hosp. v. Work. Comp. App. Bd. (1974) 13 C.3d 20, 28, 117 C.R. 678, 528 P.2d 756, *infra*, §409 [*Lab.C. 4904* does not authorize reduction of liens for other claims allowed by *Lab.C. 4903*].

Department of Employment Development v. Work. Comp. App. Bd. (1976) 61 C.A.3d 470, 475, 131 C.R. 204 [lien is proper where worker suffers second, nonindustrial injury that results in claim for unemployment benefits].

Department of Employment Development v. Work. Comp. App. Bd. (1976) 62 C.A.3d 500, 509, 133 C.R. 236 [lien claimant's share in settlement was properly reduced by deduction for past and future medical expenses].

In *Fireman's Fund Indem. Co. v. Industrial Acc. Com.* (1959) 170 C.A.2d 412, 339 P.2d 225, the employee applied to his employer for a compensation award, which was denied. During the 6-month period of refusal, petitioner, unemployment insurer, paid \$ 40 per week and hospital expenses. The Commission then decided that the injury was compensable and made an award of \$ 971.72, but ordered petitioner's lien reduced by the amount of the fee of the employee's attorney. *Held*, petitioner was entitled to its full lien without deduction of the fee, for the Commission has no jurisdiction to obligate anyone but the claimant for this contractual obligation. However, petitioner was not entitled to a lien for the expense of treatment; *Lab.C. 4903(f)* only authorizes a lien for unemployment disability benefits, and the employee was entitled to receive hospitalization under the Workers' Compensation Act and not under the *Unemployment Insurance Code*. (170 C.A.2d 421.)

SUPPLEMENT: [This section is current through the latest supplement]



152 of 153 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

4. Benefits Under Health Care Plan or Insurance.

a. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 343

[§ 343] In General.

Compensation benefits do not provide full indemnity for loss of income from work-related injuries, and some employees are provided supplemental benefits by an independent plan. In *Anderson v. Union Oil Co.* (1975) 49 C.A.3d 968, 123 C.R. 191, the employer provided and fully paid for a sick pay supplement for the employees, under which payments were "reduced by any temporary disability benefits or indemnity" received by the employees. A, after receiving his full base pay during a period of illness (\$ 3,420 from compensation and \$ 2,905 from the plan), filed a class action for declaratory relief, alleging that the plan violated *Lab.C. 3751* (prohibiting deductions from an employee's earnings to cover compensation costs) and *Lab.C. 3752* (prohibiting reduction of compensation liability by benefits due an employee). The trial court, finding that payments under the plan were not "earnings" or "benefits" and were independent of compensation payments, entered judgment for the employer. *Held*, affirmed.

(a) *No fixed right.* Under the plan, an employee has no fixed right to payment based on longevity. The purpose of the plan is simply to supplement compensation, and payments under the plan are therefore neither "earnings" nor a "benefit." (49 C.A.3d 972.)

(b) *Payments solely by employer.* In *Symington v. Albany* (1971) 5 C.3d 23, 95 C.R. 206, 485 P.2d 270, and *Los Angeles v. Industrial Acc. Com.* (1965) 63 C.2d 242, 46 C.R. 97, 404 P.2d 801, *supra*, §338, an employer was held entitled to a partial credit for compensation payments against pension benefits, in proportion to the employer's contributions to the pension's funding. (49 C.A.3d 973.) Because the plan here was fully funded by the employer, reduction of payments under the plan to the extent of compensation payments does not violate either *Lab.C. 3751* or *3752*. (49 C.A.3d 974.) (See *Lyons v. Work. Comp. App. Bd.* (1975) 44 C.A.3d 1007, 1008, 119 C.R. 159, *supra*, §338.)

SUPPLEMENT: [This section is current through the latest supplement]



153 of 153 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

IX. THE AWARD

G. Receipt of Other Benefits.

4. Benefits Under Health Care Plan or Insurance.

b. Lien for Benefit Payments.

2 *Witkin Sum. Cal. Law Work Comp* § 344

[§ 344] Lien for Benefit Payments.

Before issuing an award, the Board, arbitrator (*infra*, §392), or settlement conference referee (*infra*, §396), must award a lien for medical benefits paid and services provided by health care providers or service plans, group disability policies, self-insured employee welfare benefit plans, or hospital service contracts, even when the employer is not required to pay for these benefits or services because the employee fails to give the required notice (see *supra*, §269). (*Lab.C. 4903.1*.) (On lien filing requirements, see *Lab.C. 4903.1(b)*, (c), and (d).) (See *Beverly Hills Multispecialty Group v. Work. Comp. App. Bd.* (1994) 26 *C.A.4th* 789, 799, 32 *C.R.2d* 293, *infra*, §351 [medical or medical-legal lien claimant has right to participate in hearing in employee's case-in-chief]; *Midas Recovery Services v. Work. Comp. App. Bd.* (1997) 55 *C.A.4th* 1321, 1325, 64 *C.R.2d* 574 [lien claimant, having previously made disability payments, stands in shoes of injured worker for purposes of reimbursement from employer who refused to pay benefits when owed, and should receive full benefit of *Lab.C. 4661.5*, *supra*, §304]; *Cal. Civil Practice*, 2 *Workers' Compensation*, §12:4.)

Lab.C. 4903.1 was enacted following the decisions in *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1974) 13 *C.3d* 20, 117 *C.R.* 578, 528 *P.2d* 766, *infra*, §409, and *Silberg v. California Life Ins. Co.* (1974) 11 *C.3d* 452, 113 *C.R.* 711, 521 *P.2d* 1103, 2 *Summary* (10th), *Insurance*, §64. Its purpose was to permit reduction of lien claims to effect settlements in cases of disputed coverage (see *infra*, §409) and to encourage provision of medical benefits when compensation coverage is disputed. It does not require medical payments and plans, but relies on *Silberg* to ensure compliance, "rewarding cooperating medical benefit providers with a lien recovery for any excess benefits in addition to other remedies." (*Prudential Ins. Co. v. Work. Comp. App. Bd.* (1978) 22 *C.3d* 776, 783, 151 *C.R.* 537, 588 *P.2d* 239.)

In *Prudential Ins. Co.*, the insurer made salary continuation payments to an injured employee pursuant to a group disability policy that provided for reduction in payments to the extent that compensation benefits were received or available. *Held*, it was not entitled to a lien.

(a) *Lab.C. 4903.1* limits the lien remedy to cases where medical benefits are "self-procured" and not provided by the employer or insurer. This limit promotes the compensation policy of ensuring medical benefits that would not otherwise be provided to an injured employee, and indicates a legislative intent to restrict the remedy to "claims for medical costs incurred by the applicant under whatever plan gave him the benefits." (22 *C.3d* 783.)

(b) Had the employer provided medical benefits, there clearly would be no basis for an insurer's lien for payments under its policy. It is unreasonable, therefore, to construe the statute to give a remedy for payments "unconnected to the furnishing of such medical care" merely because the employee procured them. (22 C.3d 783, 784.)

When the employee does not comply with the requirements for validly self-procured medical services, the effect of *Lab.C. 4903.1(a)* may be "that the legitimate claim of the medical provider may exceed the award ... leaving the provider only to such rights against other assets of the workman as its contract with him allows." (*Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1978) 87 C.A.3d 336, 344, 151 C.R. 368, *infra*, §409.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE
A. In General.
1. Statutes and Rules.

2 Witkin Sum. Cal. Law Work Comp § 345

[§ 345] Statutes and Rules.

Judicial functions are exercised by the Workers' Compensation Appeals Board (see *supra*, §14), and although the Board functions as a court (*supra*, §13), its proceedings are simple, informal, and expeditious. (See generally *Beaida v. Work. Comp. App. Bd.* (1968) 263 C.A.2d 204, 209, 69 C.R. 516, *infra*, §432 [relaxation of procedural rules].)

Procedure is governed in part by statute and in part by the Board's own Rules of Practice and Procedure, adopted under statutory authority. (See *Lab.C. 5307(a), 5708.*) The rules are in Title 8 of the California Code of Regulations. (See *8 Cal. Code Reg. §10300 et seq.*; *Cal. Civil Practice*, 1 Workers' Compensation, §8:1 *et seq.*; *C.E.B., 1 Workers' Compensation Practice* 4th, §2.1 *et seq.*; 2 *Hanna* 2d (2004 ed.), §21.02.) (On procedures for adoption, amendment, or repeal of Board's rules, see *Lab.C. 5307.4*; on requirement that court administrator and Board establish uniform procedures for specified areas of responsibility, see *Lab.C. 5500.3.*)

West's Key Number Digest, Workers' Compensation k.1189 *et seq.*

SUPPLEMENT: [This section is current through the latest supplement]



2 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE
A. In General.
2. Venue.

2 Witkin Sum. Cal. Law Work Comp § 346

[§ 346] Venue.

(1) *Place of Filing.* An application for adjudication of a claim may be filed with the Board in the following locations:

- (a) The county where the claimant resides on the date of filing. (*Lab.C. 5501.5(a)(1).*)
- (b) The county where the injury occurred for a specific injury, or where the last injurious exposure occurred for cumulative trauma and industrial disease claims. (*Lab.C. 5501.5(a)(2).*)
- (c) The county where the employee's attorney maintains a principal place of business. (*Lab.C. 5501.5(a)(3).*)

Under *Lab.C. 5501.5(a)*, if the county for filing has multiple Board offices, the application may be filed at any office in that county together with the claimant's written consent to the selected venue. (*Lab.C. 5501.5(b).*) If there is no Board office in a venue permitted under *Lab.C. 5501.5(a)*, the application is filed at the Board office nearest to the appropriate venue. (*Lab.C. 5501.5(d).*)

(2) *Change of Venue.* A claimant or defendant may petition the Board for a change of venue, and the change must be granted for good cause. (*Lab.C. 5501.6(a).*) The reasons for the request must be specifically stated, and if the reason is the convenience of witnesses, the names and addresses of these witnesses and the substance of their testimony must be specifically set forth. (*Lab.C. 5501.6(a), (b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Change of Venue.* See *Domino's Pizza v. Work. Comp. App. Bd. (2006) 144 C.A.4th 1316, 1319, 51 C.R.3d 116*

[Board should have transferred venue at request of insurer where requested venue was county in which injury occurred and employee's attorney maintained office].



3 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE
A. In General.
3. Pleading Requirements.

2 Witkin Sum. Cal. Law Work Comp § 347

[§ 347] Pleading Requirements.

The Board "need not adhere to rules of pleading and practice binding ordinary courts. ... This liberal way of proceeding, free of formalism, applies also to the manner in which parties are brought under the jurisdiction of the commission ... although the constitutional requirements of due process must be observed." (*DeMartini v. Industrial Acc. Com.* (1949) 90 C.A.2d 139, 148, 202 P.2d 828; see *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1949) 95 C.A.2d 10, 14, 212 P.2d 1 [nonprejudicial variance]; *Bland v. Work. Comp. App. Bd.* (1970) 3 C.3d 324, 334, 90 C.R. 431, 475 P.2d 663 ["awkwardness in allegation" should not constrict right to compensation]; *Moyer v. Work. Comp. App. Bd.* (1972) 24 C.A.3d 650, 656, 100 C.R. 540 [issue tried without objection is before Board despite lack of pleading]; C.E.B., 1 Workers' Compensation Practice 4th, §13.1 et seq.; 1 Hanna 2d (2004 ed.), §25.05; 2 Herlick 6th, §15.06.)

However, *Lab.C. 5500* requires that the application and answer (1) simply but clearly and completely delineate all relevant matters of agreement and all issues of disagreement within the jurisdiction of the Board and (2) provide for the furnishing of additional information as the Board may properly determine necessary to expedite its hearing and determination of the claim.

In *Brennfleck v. Work. Comp. App. Bd.* (1968) 265 C.A.2d 738, 71 C.R. 525, petitioner sought death benefits. Her attorney carelessly filled in a form with only the names of three sons, omitting her name as widow. At the hearing the issue of her dependency was briefly considered without contest, and the referee awarded her benefits. The insurer sought reconsideration, raising the pleading defect. The court held that reconsideration was properly granted where death benefits were awarded to the widow without a claim by her as such. However, the opinion criticized the "cat and mouse" game played by the insurer: "If workmen's compensation proceedings were altogether adversary in nature, it might be proper to weigh the one fault against the other to determine whether a penalty should be imposed and, if so, against whom. Traditionally and historically, however, the adversary aspects of proceedings before the Board are muted, and properly so if the constitutional aims of workmen's compensation ... are to be achieved." (265 C.A.2d 743.)

In *Rivera v. Work. Comp. App. Bd.* (1987) 190 C.A.3d 1452, 1456, 236 C.R. 28, the applicant's readiness declaration did not meet the formal requirements for filing an appeal from the rehabilitation bureau's decision terminating benefits. The Board accordingly refused to give the applicant a hearing. *Held*, order annulled. "[A]pplicant's readiness declaration specifically stated that it was an appeal from the Bureau decision; it specified the issue on appeal

that the Bureau denied applicant's right to a pretermination hearing, and it set forth facts regarding such denial." (190 C.A.3d 1457.) Thus, the Board disregarded the case law on proceedings free of formalism, and relied on form at the expense of substance to avoid resolving the matter on the merits. (190 C.A.3d 1456.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE
A. In General.
4. Causes of Action.

2 *Witkin Sum. Cal. Law Work Comp* § 348

[§ 348] Causes of Action.

Implementing the policy of eliminating the technicalities of pleading the code cause of action, *Lab.C. 5303* states that "[t]here is but one cause of action for each injury." (See *supra*, §292.) Nevertheless, separate causes of action do exist:

(1) A dependent's right to a *death benefit* is a separate cause of action from the employee's right to compensation prior to death. (*Glavich v. Industrial Acc. Com.* (1941) 44 C.A.2d 517, 521, 112 P.2d 774.)

(2) The cause of action for an ordinary award of compensation is distinct from that seeking an award for serious and wilful misconduct. (*Lambreton v. Industrial Acc. Com.* (1956) 46 C.2d 498, 504, 297 P.2d 9 [invoking strict pleading rules to prevent belated assertion of disfavored claim against employer].) (On penalty for bad faith actions, see *infra*, §414.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

5. Parties.

a. Employee, Dependent, Employer, and Insurer.

2 Witkin Sum. Cal. Law Work Comp § 349

[§ 349] Employee, Dependent, Employer, and Insurer.

(1) *Employee or Dependent.* "[A]ny party in interest" may file an application before the Board. (*Lab.C. 5501.*) Usually, the employee or a dependent is the applicant. Cases are listed in the Board files under the name of the person injured. (*8 Cal. Code Reg. §10306.*) (See C.E.B., 1 Workers' Compensation Practice 4th, §13.11; 2 Hanna 2d (2004 ed.), §26.01; on Labor Commissioner as assignee, see 3 *Summary* (10th), *Agency and Employment*, §316.)

(2) *Employer.* An employer will sometimes apply for an adjustment or determination of the employee's claim.

(3) *Insurer.* The employee may file a separate claim against the insurer or join the insurer as a defendant. (*Lab.C. 3753.*) On assumption of liability, the insurer will be substituted for the employer, and the latter will normally be dismissed from the proceedings. (*Lab.C. 3755*; see 38 *A.L.R.4th* 355 [intervention by insurers].)

However, the employer may elect to remain, and has a right to do so. In *Giacalone v. Industrial Acc. Com.* (1953) 120 *C.A.2d* 727, 262 *P.2d* 79, petitioner, widow of decedent employee, filed (a) a tort action against B alleging that he was a third-party tortfeasor, and (b) a cautionary application with the Commission claiming that B was decedent's employer. B then filed an application with the Commission for adjustment of claim, and B's insurer filed a notice of assumption of liability and motion to be substituted for B. Petitioner then sought mandamus to compel the Commission to substitute the insurer. *Held*, writ denied. *Lab.C. 3755*, though mandatory in terms ("shall" be dismissed), is not so in purpose or effect, for the employer may have a vital interest in continuing as a party. Thus, the employer has to carry compensation insurance but may not have public liability coverage; hence, the employer is interested in knowing whether the insurer will satisfy the petitioner's claim by compensation or whether the employer will be compelled to pay a civil judgment. In addition, there may be a conflict of interest between the employer and the insurer. "It would be to the insurer's interest to join with the widow to delay this proceeding in which the insurer is supposed to take the laboring oar for his insured until the trial of the civil action in which the insurer has no interest and in which the insured has the laboring oar. Moreover, it would be to the insurer's interest to join with the widow in an endeavor to prove her husband's status as that of an independent contractor." (120 *C.A.2d* 734.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

5. Parties.

b. Physician.

2 Witkin Sum. Cal. Law Work Comp § 350

[§ 350] Physician.

A physician's claim for medical services rendered to the employee must be determined in a proceeding before the Board unless (1) an express agreement was made by the *employer* with the physician, fixing the amount to be paid; or (2) the physician was engaged by the *employee* at the employee's expense. (*Lab.C. 4600, 4605, 5304; Independence Indem. Co. v. Industrial Acc. Com. (1935) 2 C.2d 397, 405, 41 P.2d 320; Credit Bureau of San Diego v. Johnson (1943) 61 C.A.2d Supp. 834, 839, 142 P.2d 963; see PM & R Associates v. Work. Comp. App. Bd. (2000) 80 C.A.4th 357, 361, 94 C.R.2d 887* [Board had jurisdiction over claim for services where medical assistants were used in treating injured worker]; *C.E.B., 1, 2 Workers' Compensation Practice 4th, §§13.17, 15.22 et seq.; 2 Hanna 2d (2004 ed.), §21.03[6].*)

In *Bell v. Samaritan Med. Clinic (1976) 60 C.A.3d 486, 131 C.R. 582*, defendant clinic and its member physicians fixed fees for services at higher amounts than the sums paid by the employer or the employer's insurer, and charged the excess to the employee. *Held*, injunction granted to restrain this practice. The Workers' Compensation Act vests exclusive jurisdiction in the Board over a controversy relating to medical treatment, and the Director has authority to adopt an official minimum medical fee schedule. A physician dissatisfied with the amount paid may petition the Board for relief, or if contending that application of the fee schedule is arbitrary, may seek judicial relief after exhaustion of administrative remedies. (*60 C.A.3d 489, 490.*) However, *Lab.C. 4906* (*infra*, §354) prohibits charges for either legal or medical services in excess of a reasonable amount, as determined by the Board, and the defendants' attempt to circumvent the exclusive jurisdiction of the Board was properly restrained. (*60 C.A.3d 492.*) (See *Gould v. Work. Comp. App. Bd. (1992) 4 C.A.4th 1059, 1069, 6 C.R.2d 228* [fees in excess of schedule].)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

5. Parties.

c. Medical or Medical-Legal Lien Claimant.

2 Witkin Sum. Cal. Law Work Comp § 351

[§ 351] Medical or Medical-Legal Lien Claimant.

Beverly Hills Multispecialty Group v. Work. Comp. App. Bd. (1994) 26 C.A.4th 789, 32 C.R.2d 293, infra, §394, holds that a medical or medical-legal lien claimant has a right to participate in the employee's case-in-chief. This right is supported by both case and statutory law.

(a) In *Kaiser Foundation Hosp. v. Work. Comp. App. Bd. (1979) 91 C.A.3d 507, 154 C.R. 768, supra, §78*, an attorneys' fee award was annulled because the lien claimant did not receive notice of the sole hearing on the employee's claim. The claimant was entitled to notice so that it could decide whether it wanted to participate actively in the hearing. (26 C.A.4th 798.)

(b) *Lab.C. 5900* (infra, §418) provides a right to petition for reconsideration of a final decision by persons directly or indirectly aggrieved. Lien claimants whose liens are denied following an adverse finding on a threshold matter are indirectly aggrieved persons. This right implies a corollary right of the lien claimant to participate in the employee's case-in-chief. (26 C.A.4th 798.)

(c) The right to participate in the case-in-chief is implicit in *Lab.C. 4903.2* (infra, §407), which provides that the applicant's attorney may be allowed a fee out of the lien claimant's recovery where the attorney's services are reasonably required to establish compensability or allowability of the lien. (26 C.A.4th 799, 800.)

(d) *Lab.C. 3202.5* (supra, §6) provides support for the proposition that a medical lien claimant may litigate the threshold issue of industrial injury to establish its entitlement to recover on its lien claim. The statute provides that nothing in *Lab.C. 3202* relieves a party or lien claimant from meeting the evidentiary burden of proof by a preponderance of the evidence. (26 C.A.4th 801.)

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8 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

5. Parties.

d. Joinder of Parties and Claims.

2 Witkin Sum. Cal. Law Work Comp § 352

[§ 352] Joinder of Parties and Claims.

The Board may join interested persons on application of a party or on its own motion. (*State Comp. Ins. Fund v. Industrial Acc. Com. (1945) 26 C.2d 278, 282, 158 P.2d 195.*) The Rules contain typical provisions on joinder of parties. (See *8 Cal. Code Reg. §10360* [compulsory joinder of injured party]; *8 Cal Code Reg. §10364* [permissive joinder of other parties interested in relief]; *8 Cal Code Reg. §10380* [order bringing in additional parties necessary for full determination of matter]; *8 Cal Code Reg. §10590* [order consolidating related proceedings for hearing]; Cal. Civil Practice, 1 Workers' Compensation, §8:48 et seq.; 2 Hanna 2d (2004 ed.), §26.01[2]; 2 Herlick 6th, §15.10 et seq.; on joinder in legal proceedings, see *4 Cal. Proc. (4th), Pleading*, §155 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: *4 Cal. Proc. (5th), Pleading*, §173 et seq.



9 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

a. Appearance and Representation.

2 *Witkin Sum. Cal. Law Work Comp* § 353

[§ 353] Appearance and Representation.

(1) *In General.* The applicant may appear in person, by attorney, or by any other agent or representative; i.e., a layman may appear as the attorney for an applicant. (*Lab.C. 5501, 5700; Eagle Indem. Co. v. Industrial Acc. Com.* (1933) 217 C. 244, 247, 18 P.2d 341.) However, a representative who is not an attorney licensed in California must so notify the Board in writing. (*Lab.C. 5501.*) (See Cal. Civil Practice, 1 Workers' Compensation, §6:1 et seq.)

If the applicant is represented by an attorney of record, all notices and other papers must be served on the attorney, not the party. (*C.C.P. 1015; Lyydikainen v. Industrial Acc. Com.* (1939) 36 C.A.2d 298, 300, 97 P.2d 993; see 1 *Cal. Proc.* (4th), Attorneys, §266; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §11 et seq.) Ordinarily, a substitution or dismissal of attorney must be made according to *C.C.P. 284* et seq. (8 *Cal. Code Reg. §10774*; see 1 *Cal. Proc.* (4th), Attorneys, §106 et seq.) However, the Board may dispense with these requirements. (See *Beaida v. Work. Comp. App. Bd.* (1968) 263 C.A.2d 204, 209, 69 C.R. 516, *infra*, §432.)

(2) *Board Has No Power To Suspend or Disbar.* *Lab.C. 4907* provides that, for good cause, the Board may suspend or disbar a licensed attorney from practicing before it. However, *Hustedt v. Work. Comp. App. Bd.* (1981) 30 C.3d 329, 178 C.R. 801, 636 P.2d 1139, held that this provision was an unconstitutional infringement on the inherent power of the Supreme Court over discipline of attorneys.

(a) The discipline of attorneys is a judicial function. (30 C.3d 336; see 1 *Cal. Proc.* (4th), Attorneys, §616.) The Legislature may place reasonable restrictions on the functions of the courts, as in the power granted to the State Bar under the State Bar Act, which has been upheld against the separation of powers challenge. (30 C.3d 338; see 1 *Cal. Proc.* (4th), Attorneys, §370.) However, the power granted the State Bar is only to recommend; final action can only be taken by the court. (30 C.3d 338; see 1 *Cal. Proc.* (4th), Attorneys, §680.) The power purportedly granted to the Board under *Lab.C. 4907* is significantly different. It is authorized to take final action. (30 C.3d 339.) Thus, "the Legislature overreached its traditionally recognized authority, under the police power, to regulate the practice of law." (30 C.3d 341.)

(b) The constitutional enabling provision (Cal. Const., Art. XIV, §4, *supra*, §2) does not support *Lab.C. 4907*. Discipline of attorneys is not an integral part of a "complete system of workers' compensation." (30 C.3d 343.)

Moreover, the Board has other sufficient means of control over the conduct of attorneys and others who appear before it: (1) It has the power to punish for contempt under *Lab.C. 134* (supra, §14); and (2) it may file charges against attorneys with the *State Bar. (30 C.3d 345, 346.)* (See *Katz v. Work. Comp. App. Bd. (1981) 30 C.3d 353, 178 C.R. 815, 636 P.2d 1153* [following *Hustedt* and declaring null Board's order suspending attorney].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*Cross-References: 1 *Cal. Proc. (5th), Attorneys, §240*; 6 *Cal. Proc. (5th), Proceedings Without Trial, §13 et seq.*; 1 *Cal. Proc. (5th), Attorneys, §78 et seq.*

(2) *Board Has No Power To Suspend or Disbar.*

Cross-References: 1 *Cal. Proc. (5th), Attorneys, §552*; 1 *Cal. Proc. (5th), Attorneys, §354*; 1 *Cal. Proc. (5th), Attorneys, §613.*



10 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

b. Attorneys' Fees.

1. Amount Fixed by Board.

aa. In General.

2 Witkin Sum. Cal. Law Work Comp § 354

[§ 354] In General.

Attorneys' fees may not be demanded or accepted until the amount of the fee has been approved or set by the Board. (*Lab.C. 4906(b)*.) The fee must be limited to a reasonable amount, and in determining that amount, the Board must give consideration to the responsibility assumed by the attorney, the care exercised in representing the applicant, the time involved, and the results obtained. (*Lab.C. 4906(a)*, (d); *8 Cal. Code Reg. §10775*.) Fee agreements are permissible but must be submitted to the Board for approval within 10 days after the agreement is made. (*Lab.C. 4906(c)*.) (See *Bentley v. Industrial Acc. Com.* (1946) 75 C.A.2d 547, 550, 171 P.2d 532 [attorney need not, but may, offer evidence as to value of services; value of work should be appraised and fee fixed according to standard practice]; *Coviello v. State Bar* (1953) 41 C.2d 273, 276, 259 P.2d 7 [because purpose of *Lab.C. 4906* is to protect claimants, attorney attempting to obtain additional amounts is subject to discipline]; 1 *Cal. Proc.* (4th), *Attorneys*, §548; C.E.B., 2 *Workers' Compensation Practice* 4th, §15.10 et seq.; 2 *Hanna* 2d (2004 ed.), §20.02 et seq.; 2 *Herlick* 6th, §17.10.) (On appointment of attorney and payment of fee where applicant is state prisoner, see *Lab.C. 3371*; on restriction of fees to licensed, California attorneys only, see *infra*, §359.)

At the initial consultation, the attorney must furnish the employee with a specified written disclosure form that describes procedures available to injured employees and their dependents, the provisions of *Lab.C. 4906*, the range of attorneys' fees customarily approved by the Board, the attorneys' fees provisions of *Lab.C. 4064*, and the extent to which an employee may receive compensation without incurring attorneys' fees. A copy of the form, signed by the employee and the attorney, must be sent by the attorney to the employer, or insurer or third-party administrator within 15 days after execution. (*Lab.C. 4906(e)*.)

The form must "prominently" state: "Any person who makes or causes to be made any knowingly false or fraudulent material statement or representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony." (*Lab.C. 4906(f)*.) (For form, see *8 Cal. Code Reg. §10134*; *Cal. Civil Practice*, 1 *Workers' Compensation*, §6:29.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Vierra v. Work. Comp. App. Bd.* (2007) 154 C.A.4th 1142, 1150, 65 C.R.3d 423 [Board properly found that fee agreement setting forth either hourly fee to be paid from permanent disability, or 12% of permanent disability award, whichever was less, was permissible but not binding on employee, and that once attorney's services are rendered, workers' compensation judge may approve, disapprove, or adjust fees according to factors in *Lab.C. 4906(d)*]. *Cross-Reference*: 1 *Cal. Proc.* (5th), *Attorneys*, §488.



11 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

b. Attorneys' Fees.

1. Amount Fixed by Board.

bb. Board's Guidelines.

2 Witkin Sum. Cal. Law Work Comp § 355

[§ 355] Board's Guidelines.

In 1975, the Board adopted guidelines for setting fees by compensation judges, which provide that in cases of "average complexity" the fee should "be in the range of 9% to 12% of the permanent disability, death benefit or compromise and release awarded." In *Morgan, Beauzay, Hammer, Ezgar, Bledsoe & Rucka v. Work. Comp. App. Bd.* (1976) 59 C.A.3d 353, 130 C.R. 661, a fee of \$ 2,500 was awarded for services resulting in an award of 4 months' temporary total disability, permanent disability of 78% amounting to \$ 31,167.50, and a life pension thereafter of \$ 29.08 per week, plus continued medical treatment, etc. *Held*, annulled. The purpose of the guidelines was to ensure that competent attorneys will handle compensation cases (59 C.A.3d 355), and to avoid wide variations in fees (59 C.A.3d 356). The award here was 7.25% of the permanent disability, well below the recommended range. (59 C.A.3d 355.) The case was at least of average complexity and was competently handled. (59 C.A.3d 356.) "If the Board's purpose in promulgating these guidelines was to prevent the setting of unreasonably low or high fees, we cannot perceive how this purpose will be achieved if the Board permits its workers' compensation judges to employ their own standards, at variance from the published guidelines of the Board, in setting fees." (59 C.A.3d 356.) (See 8 Cal. Code Reg. §10775; C.E.B., 2 Workers' Compensation Practice 4th, §15.11; 2 Herlick 6th, §17.10.)

However, where the fee awarded is within the range, the Board's determination should be upheld even though it is contrary to an agreement between the applicant and counsel for a higher fee. (*Reich, Adell, Crost & Perry v. Work. Comp. App. Bd.* (1979) 99 C.A.3d 225, 234, 160 C.R. 218.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

b. Attorneys' Fees.

1. Amount Fixed by Board.

cc. Illustrations.

2 Witkin Sum. Cal. Law Work Comp § 356

[§ 356] Illustrations.

(1) *In General.* In *Lawrence Drasin & Associates v. Work. Comp. App. Bd.* (1992) 3 C.A.4th 1564, 5 C.R.2d 215, the applicant, found to be 100% permanently disabled, was awarded total permanent disability indemnity, payable at \$ 120 per week for life. However, rather than basing the attorneys' fee on the present value of a percentage of this lifetime award, the Board based it on a percentage of permanent disability indemnity payable at the *partial* permanent disability rate, i.e., approximately 12% of 621.25 weeks of permanent disability indemnity payable at \$ 70 per week. *Held*, this method of computation is not required under the circumstances of this case.

(a) The method used in computing the attorneys' fee was based on *Goler v. W & J Sloane Co.* (1979) 44 Cal.Comp.Cases 1065, which reasoned that the difference between a finding of 99% permanent disability and 100% permanent disability was not so significant that the latter finding should entitle the applicant's attorney to a fixed percentage of the lifetime award of total permanent disability indemnity. It should be noted, however, that the difference between awards to employees found to be 99% permanently disabled and those found to be 100% permanently disabled is quite significant. In any event, the *Goler* case, being one of average complexity, need not be followed where, as here, the case is of above-average complexity. "Limitation of the attorney fee to slightly more than 12 percent of 621.25 weeks of permanent partial disability indemnity may not adequately compensate an attorney in a case of above-average complexity if the attorney has expended a substantial amount of time and provided representation of high quality." (3 C.A.4th 1573.)

(b) On remand, the Board must consider whether, in view of the extent and quality of the applicant's representation, that portion of the attorneys' fee attributable to permanent disability indemnity should be based on a percentage of the lifetime award of total permanent disability indemnity at the *total* permanent disability indemnity rate. (3 C.A.4th 1574.)

In *Wheeler & Beaton v. Work. Comp. App. Bd.* (1995) 40 C.A.4th 389, 46 C.R.2d 581, petitioner law firm sufficiently deposed a psychiatrist to elicit an opinion that applicant was totally disabled. Petitioner also: (a) obtained a ruling from the rehabilitation unit that established applicant's inability to compete in the labor market; (b) participated in settlement negotiations with the employer; and (c) prepared for and participated in a hearing that convinced the workers'

compensation judge that applicant was totally disabled. Finally, petitioner assumed the responsibility of advising applicant to turn down a sizable settlement offer, and succeeded in obtaining a result far in excess of that offer. The workers' compensation judge based payment of attorneys' fees on *Goler*, and on the Board's policy and procedural manual in finding that the case was of average complexity. The Board denied petitioner's request for reconsideration. *Held*, annulled, and Board directed to award attorneys' fees based on enumerated factors. Although the workers' compensation judge was in the best position to determine the value of petitioner's services, the judge applied the *Goler* rule without giving full consideration to the factors listed in 8 Cal. Code Reg. §10775. Those factors require the workers' compensation judge to consider (a) the responsibility assumed by the attorney, (b) the care exercised in representing the applicant, (c) the time involved, and (d) the results obtained. (40 C.A.4th 395, 396.)

(2) *Improper Reduction of Fees.* In *Beloud v. Work. Comp. App. Bd.* (1975) 50 C.A.3d 729, 123 C.R. 750, many hearings were held, and the hearing judge awarded fees of \$ 600 and \$ 2,000. The Board reduced them to \$ 400 and \$ 850. *Held*, it acted in excess of its authority in modifying the amount allowed by the hearing judge without giving the attorney notice and an opportunity to be heard. (50 C.A.3d 734.) The use of a standard 10% may be appropriate in many cases, but in one as complicated as this use of the "10 percent norm" is improper. The hearing judge had the entire record before him, and his findings were supported by the evidence. Moreover, fees should not be fixed so low as to discourage competent attorneys from accepting compensation cases. (50 C.A.3d 737.)

In *Reich, Adell, Crost & Perry v. Work. Comp. App. Bd.* (1979) 99 C.A.3d 225, 234, 160 C.R. 218, petitioner law firm settled two cases. On its settlement agreement form submitted for approval, it specified the fees agreed to by the applicants--\$ 500 and \$ 800. The workers' compensation judge reduced each fee by \$ 100, stating in the order approving the settlement that the awarded fee was "reasonable." Petitioner contended that it was entitled to notice and an opportunity to be heard before the fee agreement could be disregarded. *Held*, order annulled. Fee agreements, though not binding on the Board, are valid. (99 C.A.3d 235.) The practice, recognized in the Board's procedure manual, is to allow the attorney to offer evidence as to matters properly to be considered. Hence, the judge's failure to give notice prior to reduction of the requested fee requires remanding of the case for further proceedings. (99 C.A.3d 236.)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

b. Attorneys' Fees.

2. Fee for Resisting Petition.

2 Witkin Sum. Cal. Law Work Comp § 357

[§ 357] Fee for Resisting Petition.

(1) *Petition To Terminate Award.* The Board may award the applicant reasonable attorneys' fees in resisting a petition to have an award terminated or reduced (*Lab.C. 4651.3, 5410.1*), and also for successfully resisting termination of an award for continuing medical treatment (*Lab.C. 4607*).

(2) *Petition for Writ of Review.* In *Employers Mut. Liab. Ins. Co. v. Work. Comp. App. Bd.* (1975) 46 C.A.3d 104, 120 C.R. 48, the court construed *Lab.C. 5801*, providing that if the employee "prevails in any petition by the employer for a writ of review," a supplemental award of fees may be made for services rendered in that connection. The award is usually proper where the petition is contested; but in this case the petition was summarily denied by the court. The Board sought guidance from the court:

(a) Unless the reviewing court rules favorably on an employee's request for fees pursuant to *Lab.C. 5801*, the employee will have to bear the cost of defending against the employer's unsuccessful petition, contrary to the obvious purpose of the statute "to shift the burden of attorney's fees to the employer when the reviewing court finds no reasonable basis for the petition." (46 C.A.3d 108.)

(b) The practice of denying requests under *Lab.C. 5801* without comment should be discontinued; in each instance the reviewing court "should make a separate ruling upon any request." (46 C.A.3d 108.)

(c) The court may conclude that there is no reasonable basis for the petition, and therefore that fees should be awarded, in the following circumstances:

(1) When the employer contends that the award is not supported by substantial evidence, and a review shows that it has the support of the competent opinion of one physician. (46 C.A.3d 108.)

(2) When the employer raises an issue in the petition for a writ of review that was not raised in the petition for reconsideration before the Board and therefore may not be considered. (46 C.A.3d 109.) (See *Crown Appliance v. Work. Comp. App. Bd.* (2004) 115 C.A.4th 620, 627, 9 C.R.3d 415 [attorneys' fees ordered where employer's petition presented

no question of law and only argued that Board's decision was unreasonable and not supported by substantial evidence; following *Employers Mut. Liab. Ins. Co.*.)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

b. Attorneys' Fees.

3. Payment of Fee.

2 Witkin Sum. Cal. Law Work Comp § 358

[§ 358] Payment of Fee.

(1) *Fee Payable Out of Award.* Normally, the attorney's fee fixed by the Board is an obligation of the employee or dependent; it is a lien on the award, and is deducted from the amount paid to the employee or dependent. (*Lab.C. 4903(a)*, *infra*, §405; *California Comp. & Fire Co. v. Industrial Acc. Com.* (1961) 193 C.A.2d 6, 9, 13 C.R. 885.)

Price v. Work. Comp. App. Bd. (1992) 10 C.A.4th 959, 12 C.R.2d 831, involved an unusual situation in which no payments were ever made under the award from which the employee's attorneys' fees were to be paid. The workers' compensation judge, pursuant to stipulations, issued an award of temporary and permanent disability indemnity, further medical treatment, and attorneys' fees "payable from the far end of the award." However, the employee had died 3 weeks earlier. Due to a prior overpayment of benefits, no unpaid benefits had accrued or were due to the employee at the time of his death. The employee's attorneys sought payment of their fees, which was denied on the ground that because no benefits had been paid under the stipulations, there was no basis for payment of the fees. The Board denied reconsideration. *Held*, affirmed. (a) No benefits were payable for any period of time after the employee's death (*Lab.C. 4700*, *supra*, §275). (10 C.A.4th 965.) (b) The employer and insurer should not be penalized for the overpayment of benefits by being required to pay the attorneys' fees; there was no reason for them to know that the overpayment (which was insufficient to cover the amount of the fees) would result in a lack of funds from which to satisfy the fee award. (10 C.A.4th 967.)

(2) *Fee Added to Award.* If the employer was uninsured, the fee is not deducted from the award, but added as a bonus to the employee. (*Lab.C. 4555*; see *supra*, §150.) The same is true where the employer seeks a review, and "the reviewing court finds that there is no reasonable basis for the petition." (*Lab.C. 5801*; *Nelson & Sloan v. Work. Comp. App. Bd.* (1978) 79 C.A.3d 51, 53, 44 C.R. 614.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

b. Attorneys' Fees.

4. Attorney Must Be Licensed.

2 Witkin Sum. Cal. Law Work Comp § 359

[§ 359] Attorney Must Be Licensed.

(1) *Representation Before Appeals Board.* The Board may only award attorneys' fees to applicant representatives who are attorneys licensed to practice in California. (*Lab.C. 4903(a), 5710(b)(4).*)

In *Longval v. Work. Comp. App. Bd.* (1996) 51 C.A.4th 792, 59 C.R.2d 463, petitioner sought attorneys' fees for representing applicants before the Board. Although a member of the North Carolina State Bar, petitioner was not licensed to practice law in California. The workers' compensation judge denied the request, relying on *Lab.C. 4903(a)* and *5710(b)(4)*. In denying reconsideration, the Board determined that only attorneys licensed in California are entitled to fees for representing applicants. *Held*, affirmed.

(a) *Due process.* *Lab.C. 4903(a)* and *5710(b)(4)* do not deprive lay representatives of a "fundamental right" to engage in their occupation. Petitioner and other lay representatives have no fundamental right to appear before the Board and receive compensation for services. Even where the state licenses a person to conduct a business, trade, or occupation, the person acquires a privilege, not a right, subject to the state's reasonable restrictions. The 1991 amendments terminating the Appeals Board's power to make awards of, and allow liens for, attorneys' fees to lay representatives but permitting the representatives to continue representing workers were part of comprehensive legislation aimed at reducing fraudulent workers' compensation claims. The amendments were not arbitrary but were a valid exercise of police power for the public good. (51 C.A.4th 798, 801.)

(b) *Equal protection.* The amendments do not deny workers' compensation applicants equal protection by treating those who choose nonattorney representatives differently than those who choose attorneys. Moreover, petitioner has no standing to challenge the provisions on behalf of applicants. To the extent petitioner's argument can be viewed that he has been denied due process because he is not compensated and others are, petitioner is not similarly situated to persons licensed to practice law in California. (51 C.A.4th 802, 803.)

(c) *Licensure in California.* Petitioner contends that the Legislature intended to compensate all attorneys regardless of their state of licensure because *Lab.C. 4903(a)* provides in general language that "[n]o fee for legal services shall be awarded to any representative who is not an attorney" whereas *Lab.C. 5710* specifically permits fees only for attorneys

"licensed by the state bar of this state." However, the language in *Lab.C. 5710* is superfluous in light of the general rule in California that no person may practice law unless the person is an active member of the State Bar (*B. & P.C. 6125*; see 1 *Cal. Proc.* (4th), *Attorneys*, §395). This membership allows the State Bar and Supreme Court to regulate and discipline attorneys through standards of conduct. In order to eliminate fraudulent claims, the Legislature logically ended compensation for persons not licensed to practice law in California because they were not subject to professional regulation. (51 *C.A.4th* 803.)

(2) *Nonattorney Representation at Depositions*. Nonattorneys employed by licensed counsel may represent injured workers at depositions, but charging fees comparable to those that would be awarded to licensed attorneys must be substantiated. Thus, because the services can only be awarded under the umbrella of a law firm, the value of the services should be determined by the same guidelines as for attorneys, i.e., considerations must be given to the responsibility assumed, the care exercised in the representation, the time involved, and the results obtained. (99 *Cents Only Stores v. Work. Comp. App. Bd.* (2000) 80 *C.A.4th* 644, 649, 95 *C.R.2d* 569 [disapproving fee to lay representative where actual qualifications or evidence of supervision to justify fee were not shown].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Representation Before Appeals Board*. Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §379.



16 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

6. Attorneys and Other Representatives.

c. Regulation of Advertising.

2 Witkin Sum. Cal. Law Work Comp § 360

[§ 360] Regulation of Advertising.

(1) *Truth in Advertising.* The Workers' Compensation Truth in Advertising Act (*Lab.C. 5430 et seq.*) is an effort to ensure truthful and adequate disclosure of relevant information in advertising that solicits persons to file workers' compensation claims or to engage or consult with counsel or medical care providers to consider a claim. (*Lab.C. 5430, 5431.*) The essential provisions are as follows:

(a) A written or broadcast advertisement must contain the following notice: "Making a false or fraudulent workers' compensation claim is a felony subject to up to 5 years in prison or a fine of up to \$ 50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine." (*Lab.C. 5432(a), (b).*) An advertiser who fails to include the notice is guilty of a misdemeanor. (*Lab.C. 5434(a).*) (For definition of "advertisement," see *Lab.C. 5433(c)*; for definition of "advertiser," see *Lab.C. 5434(b).*)

(b) An advertisement must not use a name that misleads or deceives as to the person's status, character, or capacity, or regarding the true purpose of the advertisement. (*Lab.C. 5433(b).*) Moreover, advertisements may not (1) use a device that is so similar to one used by governmental agencies or nonprofit or charitable institutions that it could mislead the public (*Lab.C. 5433(d)*); (2) use the name of a state or political subdivision (*Lab.C. 5433(e)*); (3) use a device that implies that the advertiser is connected with a governmental agency (*Lab.C. 5433(f)*); or (4) imply that the reader, listener, or viewer may lose a legal right by failing to respond to the advertisement (*Lab.C. 5433(g)*).

(2) *Attorney Advertising.* A print or broadcast advertisement by an individual or organization that purports to provide legal services for obtaining workers' compensation benefits must include the name of at least one attorney associated with the individual or organization. (*B. & P.C. 5499.30(a).*) Violation of this requirement is a misdemeanor punishable by either imprisonment in the county jail for up to 1 year, a maximum fine of \$ 10,000, or both. (*B. & P.C. 5499.30(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

7. Release or Compromise.

a. Authority To Compromise.

2 Witkin Sum. Cal. Law Work Comp § 361

[§ 361] Authority To Compromise.

(1) *In General.* An employee or a dependent may compromise and release a claim for injury or death. (*Lab.C. 5000.*) However, the release or compromise is valid only when approved by the Board or workers' compensation judge. (*Lab.C. 5001; Chavez v. Industrial Acc. Com. (1958) 49 C.2d 701, 702, 321 P.2d 44* ; see *Argonaut Ins. Exchange v. Industrial Acc. Com. (1958) 49 C.2d 706, 710, 321 P.2d 460*, *infra*, §362; *Carmichael v. Industrial Acc. Com. (1965) 234 C.A.2d 311, 315, 44 C.R. 470* [release knowingly made by competent person and approved by Commission is binding]; *Johnson v. Work. Comp. App. Bd. (1970) 2 C.3d 964, 973, 88 C.R. 202, 471 P.2d 1002*, *infra*, §364; *Anaheim v. Work. Comp. App. Bd. (1982) 128 C.A.3d 200, 206, 180 C.R. 132* [approved agreement has same force and effect as award made after hearing]; *Smith v. Work. Comp. App. Bd. (1985) 168 C.A.3d 1160, 1169, 214 C.R. 765* [same]; *Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 C.A.3d 754, 759, 210 C.R. 619* [same]; see C.E.B., 2 Workers' Compensation Practice 4th, §16.1 et seq.; 2 Hanna 2d (2004 ed.), §29.01; 2 Herlick 6th, §18.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §507 et seq.) (On reduction of medical lien to effect settlement, see *Lab.C. 4903.1(d)*, *infra*, §409.)

In cases involving occupational disease or cumulative injury (see *supra*, §§169, 170), an employee may settle a claim against a single employer or insurer with the approval of the Board. The other employers are not released, but the released employer's total liability, without regard to the release, must be deducted from the liability of the remaining employers, and no credit is given to the released employer for any sum paid in excess of the liability actually assessed. (*Lab.C. 5005.*)

(2) *Notice to Employer.* If an employer notifies its insurer in writing that it believes no compensation is payable to an employee, at the employer's written request the Board may approve a compromise and release or stipulation of compensation *only if* there is proof of service on the employer by the insurer noticing the time and place of the hearing concerning the approval. The notice must be given as specified not less than 15 days before the hearing. If the insurer fails to provide the notice, the Board may still approve the agreement, but must order the insurer to pay reasonable expenses as provided in *Lab.C. 5813. (Lab.C. 3761(b).)*

SUPPLEMENT: [This section is current through the latest supplement]



18 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

7. Release or Compromise.

b. Board's Power To Disapprove.

2 Witkin Sum. Cal. Law Work Comp § 362

[§ 362] Board's Power To Disapprove.

(1) *In General.* A release or compromise agreement is not valid unless approved by the Board. (*Lab.C. 5001*, supra, §361.) However, the Board can only approve or disapprove; it cannot change the agreement in a manner not agreed to by the parties. (*Burbank Studios v. Work. Comp. App. Bd.* (1982) 134 C.A.3d 929, 935, 937, 184 C.R. 879.) (See C.E.B., 2 Workers' Compensation Practice 4th, §16.57.)

(2) *Scope of Reconsideration.* In *Argonaut Ins. Exchange v. Industrial Acc. Com.* (1958) 49 C.2d 706, 321 P.2d 460, decedent died of a heart attack. The issue of compensability was contested and, after hearings before a referee, a compromise agreement was executed for \$ 5,000, with a request that the attorney for the applicants be allowed a fee of \$ 750. The referee approved the agreement but increased the attorney's fee to \$ 1,000. The Commission's panel granted reconsideration to reexamine the attorney's fee, but looking at the whole record, set aside the referee's compromise and made its own findings and award of \$ 8,750 death benefit, \$ 400 burial expense, and \$ 750 fee as a lien on the benefit. *Held*, affirmed. Although the referee found the agreement fair to all concerned, and the decision to reconsider was apparently prompted by the referee's decision increasing the attorney's fee, the reconsideration, once granted, was not limited. (49 C.2d 711.) (See C.E.B., 2 Workers' Compensation Practice 4th, §16.53 et seq.; 2 Hanna 2d (2004 ed.), §29.04[1]; 30 A.L.R.4th 294 [release of claim under duress or coercion].)

(3) *Rescission Before Approval.* In *Chavez v. Industrial Acc. Com.* (1958) 49 C.2d 701, 321 P.2d 449, the Board's power to disapprove was given the extended and somewhat debatable effect of allowing an unlimited right of unilateral rescission by either party prior to approval. The employer gave medical treatment and temporary disability payments for 3 months. After the employee filed an application for compensation, a compromise was reached in the sum of \$ 2,250. The insurer prepared the agreement, the employee signed it, and the insurer then signed it and forwarded it to the Commission. However, unknown to the insurer, the employee had died of a nonindustrial heart condition just before the insurer signed. The insurer, contending that consideration had failed because death would normally terminate disability payments, requested that the compromise be disapproved, and the Commission did so. *Held*, order affirmed. The court did not accept the obviously untenable argument of failure of consideration. However, it held that (a) the statute clearly makes Commission approval essential to the validity of a compromise, and (b) the written compromise agreement contained an express provision making its effectiveness dependent on the Commission's approval. (49 C.2d 702.) The dissent, contending that no proper ground of rescission was shown, asserts that the decision allows disapproval without

legal cause, and places each party at the caprice of the other during the period after submission of the agreement to the Commission and before its action. (49 C.2d 703.)

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19 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

7. Release or Compromise.

c. Form and Content.

2 *Witkin Sum. Cal. Law Work Comp* § 363

[§ 363] Form and Content.

The form and content of a release or compromise are subject to strict requirements set forth in *Lab.C. 5003* and *5004*, and *8 Cal. Code Reg. §10874* requires conformity to the forms provided by the Board. (See *Martin v. Industrial Acc. Com.* (1947) 82 C.A.2d 737, 742, 187 P.2d 101 [defective execution was readily curable and not ground for Commission's order denying approval].) A copy must be filed with the Board (*Lab.C. 5002*), and the Board may hold a hearing on its adequacy (*8 Cal. Code Reg. §10882*). If the agreement provides for payment of less than the full amount of compensation due or to become due, the Board's policy is to approve "only where it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interest of the parties." (*8 Cal. Code Reg. §10870*.) Every agreement is treated by the Board as an application for an adjustment of a claim on behalf of the employee, on which the Board may hold hearings and make an award (*8 Cal. Code Reg. §§10878, 10882*.)

The Board prefers that parties use Board forms because of their uniformity and inclusiveness, and has adopted the following forms for settlements: Form 15 [disability cases], Form 16 [death cases], and Form 17 [third-party settlements]. (See C.E.B., 2 *Workers' Compensation Practice* 4th, §16.24.) Electronic versions of forms may be available on the Division of Workers' Compensation website, <http://www.dir.ca.gov/dwc/forms.html>.

SUPPLEMENT: [This section is current through the latest supplement]



20 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

7. Release or Compromise.

d. Claim for Death Benefits.

2 Witkin Sum. Cal. Law Work Comp § 364

[§ 364] Claim for Death Benefits.

An employee may release by compromise a dependent's claims for benefits. (*Lab.C. 5000(b)*.) The validity of the statute was upheld in *Johnson v. Work. Comp. App. Bd.* (1970) 2 C.3d 964, 970, 88 C.R. 202, 471 P.2d 1002, against due process and equal protection challenges. Sound policy considerations support "the salutary purpose of enabling the parties to enter into an all-embracing, single settlement of all claims arising from the injury, including any claim for death benefits." (2 C.3d 972.)

However, the court saw dangers in unintentional release of rights of dependents by employees using the current form, and suggested that the Board devise a better one that "(a) notifies the applicant of the consequences of the release in clear and nontechnical language, and (b) does not compel the release of death benefits when the parties and the referee lack sufficient information to weigh the desirability of releasing these benefits and the adequacy of the compensatory consideration." (2 C.3d 974.) (See C.E.B., 2 Workers' Compensation Practice 4th, §16.24.)

A compromise or release that releases a claim for death benefits must notify the applicant in clear and nontechnical language of the surrender of dependents' right to death benefits. In *Sumner v. Work. Comp. App. Bd.* (1983) 33 C.3d 965, 191 C.R. 811, 663 P.2d 534, S developed pulmonary emphysema, which a medical report of the employer's insurer attributed half to the working environment and half to longstanding cigarette smoking. S stopped working in January 1979, and discussed settlement with his employer. In December 1979, S and his spouse signed a compromise and release agreement (WCAB Form 15) that released claims of the employee and also death benefits. S died in March 1980, and his spouse filed a claim for death benefits. The Board, considering itself bound by *Lab.C. 5000(b)*, as upheld in *Johnson*, denied the application, holding that the release was binding. *Held*, order annulled.

(a) *Johnson holding and Johnson directive.* *Johnson* pointed out that the WCAB Form 15, which did not expressly refer to death benefits, created a risk that rights of dependents would be released without the proper attention and analysis of the parties or the referee. Although the opinion directed the Board to devise a form that gave adequate notice of the consequences of the release of death benefits, the Board failed to do so. (33 C.3d 967.)

(b) *Johnson directive is new rule of law.* "[W]e declare, in light of the WCAB's procrastination and the demonstration in this case ... , that the risk we anticipated in *Johnson* is far from fanciful, that we will no longer accept

form 15--or any form which does not conform to the *Johnson* directive--as precluding inquiry into whether a release of death benefits was knowing and voluntary. As we declared in *Johnson*, the form should first notify the applicant of the consequences of the release--surrender of dependents' right to death benefits--in 'clear and non-technical language.' The form should also direct the attention of the parties and the referee to the compromise of death benefits in order that they may obtain sufficient information to 'weigh the desirability of releasing these benefits and the adequacy of the compensatory consideration.' This should alleviate the risk that death benefits will be compromised without proper attention." (33 C.3d 972.) Although an employee who contemplates survival may not be anxious to consider the event of death, "[w]e require--and *Johnson* required--only that the form focus enough attention on the release of death benefits to enable an informed choice." (33 C.3d 972, footnote 7.)

Form 15, as revised by the Board in 1983, provides in part: "4. Unless otherwise expressly provided herein, approval of this agreement RELEASES ANY AND ALL CLAIMS OF APPLICANT'S DEPENDENTS FOR DEATH BENEFITS RELATING TO INJURY OR INJURIES COVERED BY THIS COMPROMISE AGREEMENT. The parties have considered the release of these benefits in arriving at the sum in Paragraph 2." Paragraph 2 contains the amount being paid to settle the claim. (See C.E.B., 2 Workers' Compensation Practice 4th, §16.24.)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

A. In General.

7. Release or Compromise.

e. Claims Outside Workers' Compensation Law.

2 Witkin Sum. Cal. Law Work Comp § 365

[§ 365] Claims Outside Workers' Compensation Law.

(1) *In General.* A compromise or release intended to cover claims that are not compensable under workers' compensation law must expressly so state. In *Lopez v. Sikkema* (1991) 229 C.A.3d 31, 280 C.R. 7, plaintiffs, surviving family members of a farm worker slain after voting in a union election, sued the worker's former employer for personal injury, wrongful death, conspiracy to violate civil rights, and violation of civil rights. After plaintiffs' compromise and release of their workers' compensation dependency claims was approved by the Board, defendant moved for summary judgment, based on typewritten language in the release stating that plaintiffs agreed to settle "any and all claims" on account of the worker's injury and death. Plaintiffs contended that the compromise and release was restricted to claims compensable under workers' compensation liability by language in Paragraph 11 of the form, which states that it applies to claims "under Division IV of Labor Code." The trial judge granted summary judgment. *Held*, reversed. The rationale and analysis in *Johnson v. Work. Comp. App. Bd.* (1970) 2 C.3d 964, 88 C.R. 202, 471 P.2d 1002, and *Sumner v. Work. Comp. App. Bd.* (1983) 33 C.3d 965, 191 C.R. 811, 663 P.2d 534, *supra*, §364, "are particularly compelling. If the mandatory compromise and release form executed by appellants was intended to cover claims which are not compensable under the workers' compensation act, it should have contained express language to that effect. Indeed, since the civil action was pending at the time the parties executed the compromise and release, the settlement document would be expected to recite that the release included the particular lawsuit. It does not. Absent such express language, we cannot say as a matter of law appellants released respondent from liability for civil damages by execution of the release form." (229 C.A.3d 38.)

When an employee has knowledge of a potential claim against an employer at the time of executing a general release in the workers' compensation proceeding, but has not yet initiated litigation, the employee must expressly except the claim from the release. Absent this exception, and absent contrary extrinsic evidence, a court must enforce general language in the release and attachments that release all claims including civil claims. In *Jefferson v. Department of Youth Authority* (2002) 28 C.4th 299, 121 C.R.2d 391, 48 P.3d 423, plaintiff employee settled her workers' compensation claim for physical and psychological injury arising from her supervisor's alleged sexual harassment. The preprinted release encompassed known and ascertained causes of action, and a typed attachment stated that plaintiff agreed the release applied to "all unknown and unanticipated injuries and damages resulting from such accident, and all rights" under C.C. 1542, which protects parties from inadvertently settling unknown claims. Contemporaneous with her

original workers' compensation claim, plaintiff had also filed a sex discrimination claim with the Department of Fair Employment and Housing (DFEH) for which she received a right to sue letter. Following the board's approval of the compromise and release, plaintiff filed a civil action. The trial court granted defendant's motion for summary judgment based on the broad language of the compromise and release, and found that the release referred to matters that were clearly outside the scope of workers' compensation. *Held*, affirmed.

(a) The broad settlement language of the preprinted release form was enforceable as written. The form provided a space for plaintiff to enumerate express exceptions to the comprehensive release and she listed none, even though at the time she had already filed a claim with the *DFEH*. (28 C.4th 306.)

(b) The parties also made their intent clear by adding a typed attachment quoting C.C. 1542 and further stating that the release applied to all unknown and unanticipated injuries. This addition established "unambiguously the parties' intent that the release cover possible civil claims." (28 C.4th 307.) Thus, this case is factually distinguishable from *Lopez* where the court did not consider the legal significance of a comparable attachment. In addition, the civil actions there were pending at the time of the settlements. Here, plaintiff had not filed her FEHA action when she executed the compromise and release and defendant had no basis to assume she would do so. (28 C.4th 309.)

In *Kohler v. Interstate Brands Corp.* (2002) 103 C.A.4th 1096, 127 C.R.2d 366, plaintiff employee brought a Fair Employment Housing Act (FEHA) action against defendant employer before she signed a workers' compensation settlement containing broad release language. At the time of settlement, defendant was unaware of the FEHA action. Based on the release, the trial court granted defendant's motion for summary judgment. *Held*, affirmed. As a matter of law, plaintiff's FEHA claim fell within the scope of the settlement's broad release language. Where, as here, the employer has no knowledge of the litigation, "the employee bears the burden of expressly excepting the lawsuit from the broad language of the release," and plaintiff failed to do so. (103 C.A.4th 1100; following *Jefferson*.) Moreover, there was no extrinsic evidence that the parties intended to exclude the FEHA action from the scope of the release. (103 C.A.4th 1102.)

(2) *Use of Extrinsic Evidence.* In *Mitchell v. Union Cen. Line Ins. Co.* (2004) 118 C.A.4th 1331, 13 C.R.3d 732, plaintiff had two attorneys, one for her civil action against her former employer, the other for her workers' compensation claim. In an exchange of offers to compromise the defendant offered \$ 1,010,000. Both offers expressly included the civil action and the workers' compensation claim. Although neither party accepted, neither offer was revoked. Later, the workers' compensation matter was settled for \$ 57,500, and plaintiff signed a two-page Board compromise and release form purporting to settle "any and all claims on account of" the injury to plaintiff's psyche. A workers' compensation judge approved the settlement. Defendant subsequently offered to settle the civil action for \$ 1.1 million and attorneys' fees, which plaintiff rejected. Defendant then filed a motion for summary judgment contending that the workers' compensation settlement barred the civil action. In opposing the motion, plaintiff stated that there had been no discussions about the civil action at the workers' compensation settlement conference, and that her intent and understanding was that she was settling only the workers' compensation claim. Plaintiff noted that when she signed the release, defendant's first offer to settle the civil action was still open, and all she had to do was sign another document to receive more than \$ 1 million, adding that she would never have forgone that offer and settled her workers' compensation claim for \$ 57,500. Plaintiff's workers' compensation attorney stated that he focused solely on the compensation claim, and that there were no discussions about plaintiff's civil action during negotiations. The trial court granted defendant's motion for summary judgment, finding it "undisputed" that plaintiff intended to and did settle her civil action. *Held*, reversed. Plaintiff's workers' compensation attorney had no authority to settle the civil action and never intended to do so. The civil action is not mentioned in the compromise and release, and defendant's workers' compensation attorney and the workers' compensation judge conceded that the civil action was not discussed during their negotiations. Moreover, plaintiff clearly did not intend to include the civil action in her settlement. Therefore, because an abundance of extrinsic evidence demonstrated that neither the workers' compensation attorneys nor their clients intended to include the civil action in the settlement of the workers' compensation claim, the trial court should have denied defendant's motion for summary judgment. (118 C.A.4th 1338.)

However, the use of evidence extrinsic to the preprinted workers' compensation compromise and release form to show whether the parties intended to release claims outside the workers' compensation system was disapproved in *Claxton v. Waters* (2004) 34 C.4th 367, 18 C.R.3d 246, 96 P.3d 496. Plaintiff filed a workers' compensation claim for physical and psychological injuries from a slip and fall, and a separate claim for psychological injury due to sexual harassment. A year later plaintiff filed a civil action under the FEHA alleging sexual harassment. In settling the workers' compensation claims, plaintiff executed the Board's mandatory preprinted compromise and release form, Form 15, which contained only the case numbers for plaintiff's workers' compensation claims, and made no reference to the pending civil action. The workers' compensation judge approved the settlement. The trial court subsequently granted defendant's motion for summary judgment on the basis that the settlement and release form extinguished recovery for emotional distress damages in the civil action. *Held*, reversed.

(a) A preprinted workers' compensation compromise and release form, with nothing more, releases only workers' compensation claims. Unlike *Jefferson*, the parties here had no attachments expressing an intent to release the civil action. (34 C.4th 376.)

(b) Although prior cases have allowed the use of extrinsic evidence to show that the preprinted compromise and release form also applies to civil actions, to allow that evidence unduly burdens the courts and the parties. If the parties have agreed to settle plaintiff's workers' compensation claim and actions outside the workers' compensation system, it is a simple matter for them to execute another document expressing that agreement. The document need not identify precise claims, but may refer generally, in clear, nontechnical language, to causes of action outside the workers' compensation law. (34 C.4th 378.)

(c) Because parties in the past may have relied on using extrinsic evidence to prove a mutual intent not evidenced by their preprinted compromise and release, the rule disallowing extrinsic evidence applies prospectively only. Thus, for preprinted workers' compensation settlement forms "executed before the finality of this decision, extrinsic evidence may be admitted to prove the parties intended to release claims outside the workers' compensation system." (34 C.4th 379.)

One Justice concurred in the reversal, but dissented with respect to disallowing extrinsic evidence, arguing that to do so improperly and unnecessarily creates an exception to the "long-standing rules of contract interpretation for a preprinted compromise and release form used in workers' compensation cases." (34 C.4th 380.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE
B. Statute of Limitations.
1. In General.

2 Witkin Sum. Cal. Law Work Comp § 366

[§ 366] In General.

The limitation provisions of the Act are in *Lab.C. 5400* et seq. (On provisions governing essential preliminary notice of injury, see *Lab.C. 5400* et seq.; infra, §385; on limitations on commencing proceedings before the Board, see *Lab.C. 5404* et seq.; infra, §367 et seq.; on limitations in proceeding against Subsequent Injuries Fund, see supra, §302.)

The statute of limitations is not jurisdictional; it is an affirmative defense. It is *waived* if not raised before the cause is submitted to the Board for decision. (*Lab.C. 5409*; see *United States Fidelity & Guaranty Co. v. Industrial Acc. Com.* (1925) 195 C. 577, 580, 234 P. 369 [waiver by employer binds insurer]; *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1978) 82 C.A.3d 39, 44, 147 C.R. 30 [employer's failure to request Board review in initial petition for reconsideration on issue of statute of limitations was waiver of defense].) Furthermore, the rule of liberally construing the Act in favor of compensation has been applied in determining whether a particular claim was barred. (See supra, §§6, 7 and infra, §374 et seq.) (See C.E.B., 1 Workers' Compensation Practice 4th, §12.2 et seq.; 2 Hanna 2d (2004 ed.), §24.01 et seq.; Cal. Civil Practice, 1 Workers' Compensation, §1:75 et seq.; 1 Herlick 6th, §14.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §527.)

Generally, the timely filing of an application with the Board by any party in interest tolls the statute as to further claims by that party against the named defendants for compensation arising from that injury. (*Lab.C. 5404*.) However, as in civil cases (see 3 *Cal. Proc.* (4th), *Actions*, §633 et seq.), the statute may also be tolled in various specific situations. (See infra, §374 et seq.)

West's Key Number Digest, Workers' Compensation k.1199 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §695 et seq.



23 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

2. Claim for Disability.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 367

[§ 367] In General.

(1) *Claim for Disability.* The period on a claim for disability is 1 year from: (a) the date of injury (*Lab.C. 5405(a)*); (b) the expiration of the period covered by the last disability indemnity payment (*Lab.C. 5405(b)*, *infra*, §375); or (c) the date of last furnishing of medical, surgical, or hospital treatments (*Lab.C. 5405(c)*, *infra*, §375).

The date of injury, except in cases of occupational disease or cumulative injury, is that date during the employment on which the alleged incident or exposure (specific injury) occurred. (*Lab.C. 5411.*) (See C.E.B., 1 Workers' Compensation Practice 4th, §12.2; 2 Hanna 2d (2004 ed.), §24.03; 1 Herlick 6th, §14.13.) (On procedure for dismissal of inactive cases, see 8 *Cal. Code Reg. 10582*; Cal. Civil Practice, 1 Workers' Compensation, §8.19; on occupational disease, see *infra*, §368; on cumulative injury, see *infra*, §369 et seq.)

(2) *Claim for Penalty.* The period on a claim of serious and wilful misconduct by the employer is 12 months, and the period is not tolled by either an ordinary application for compensation, or the payment of compensation. (*Lab.C. 5407*; see *Lambreton v. Industrial Acc. Com.* (1956) 46 C.2d 498, 505, 297 P.2d 9, *supra*, §348; 1 Herlick 6th, §14.12.)

The Board may not allow the joinder of a new party after the expiration of the period for filing a claim for serious and wilful misconduct. In *McGee Street Productions v. Work. Comp. App. Bd.* (2003) 108 C.A.4th 717, 133 C.R.2d 813, P suffered a fatal heart attack while employed by general employer E and special employer M. P's spouse, G, filed claims against E, which were settled. Within 1 year of the death, G filed a petition alleging serious and wilful misconduct against E. M was served by mail with a copy of the petition, but was not named as a defendant. More than 1 year after the death, G filed an amended petition that named M, and an order joining M was issued. *Held*, joinder was barred by the statute of limitations.

(a) The general rule for civil cases applies, and unless the amendment is to correct "good faith ignorance" and add the true name of a Doe defendant rather than add a new defendant, a plaintiff may not amend the complaint after the statute of limitations expires. (108 C.A.4th 725; citing 5 *Cal. Proc.* (4th), *Pleading*, §1158.)

(b) At the time G filed the serious and wilful misconduct petition, she was not ignorant of the identity of M, as evidenced by the mailing of a copy of the petition to M. Absent true ignorance of an employer's identity, there is "no

justification to depart from the unambiguous and plain language of" *Lab.C. 5407*, which compels filing the petition within 1 year of the date of injury. (*108 C.A.4th* 725.)

(3) *Proceeding To Reduce Compensation*. The period for a proceeding to reduce the compensation for the employee's misconduct is 12 months, but it is inapplicable where the employee has commenced proceedings for the penalty against the employer. (*Lab.C. 5407.5*.) (See C.E.B., 1 Workers' Compensation Practice 4th, §12.40; 2 Hanna 2d (2004 ed.), §24.03[6]; 1 Herlick 6th, §14.12.)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

2. Claim for Disability.

b. Occupational Disease.

2 Witkin Sum. Cal. Law Work Comp § 368

[§ 368] Occupational Disease.

Where progressive occupational diseases, such as silicosis, are involved, the courts allowed compensation only when the disease culminated in disability. Hence, the statute of limitations did not begin to run until the employee knew or should have known of the disability, by the exercise of reasonable diligence. (*Marsh v. Industrial Acc. Com.* (1933) 217 C. 338, 351, 18 P.2d 933 ["the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained"]; *Argonaut Mining Co. v. Industrial Acc. Com.* (1937) 21 C.A.2d 492, 496, 70 P.2d 216; cf. *Urie v. Thompson* (1949) 337 U.S. 163, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282, 1292 [applying similar test to occupational disease of silicosis compensable under Federal Employers' Liability Act].)

This rule was codified in *Lab.C. 5412*, which provides that the date of injury in occupational disease cases is the date the employee first suffered disability from the disease and either knew, or in the exercise of reasonable diligence should have known, that the disability was caused by the employee's present or prior employment. (See *Chavira v. Work. Comp. App. Bd.* (1991) 235 C.A.3d 463, 474, 286 C.R. 600 [term "disability" in *Lab.C. 5412* refers to either temporary or permanent disability]; *Chevron U.S.A. v. Work. Comp. App. Bd.* (1990) 219 C.A.3d 1265, 1267, 1271, 268 C.R. 699, supra, §280 [if separate and distinct occupational "disease processes" resulting from single period of exposure to asbestos manifest themselves at different times, each is entitled to different date of injury under *Lab.C. 5412*]; C.E.B., 1 Workers' Compensation Practice 4th, §12.3; 2 Hanna 2d (2004 ed.), §24.03[7]; 1 Herlick 6th, §14.13; 86 A.L.R.5th 295 [limitations period on claims for contracting disease].)

In *Hanna v. Work. Comp. App. Bd.* (1973) 32 C.A.3d 719, 108 C.R. 227, petitioner was employed as a peace officer from 1946 to 1962, when he retired because of a back injury. In 1965, he consulted a physician about chest pains, and had intermittent treatment thereafter for this condition until 1971, when he suffered a major heart attack and became aware of a disabling heart disease. The referee found the date of injury to be 1965, and held the claim barred. On reconsideration, the Board found that date to be 1969, when petitioner was first hospitalized, but also held the claim barred. *Held*, order reversed.

While the court assumed that the date of disability for a cumulative injury was not governed by the knowledge requirements of *Lab.C. 5412* (but see *infra*, §369), it noted that the injury was an occupational disease, as found by the

referee and as presumed by *Lab.C. 3212.5* (supra, §239). Hence: "When petitioner's injury is viewed in its cumulative aspect the date of injury depends on disability (§3208.1), but viewed in its occupational aspect the date of injury depends on petitioner's knowledge of the causation of his disability (§5412). With respect to heart disease in peace officers we think its statutory character as an occupational injury (§3212.5) preponderates, even though the injury is one that is cumulative and not specific. It follows that heart disease in peace officers falls under section 5412 and that the date of injury is the date of the employee's disability with knowledge of its causation." (32 *C.A.3d* 723.)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

2. Claim for Disability.

c. Cumulative Injuries.

1. Governing Statute.

2 *Witkin Sum. Cal. Law Work Comp* § 369

[§ 369] Governing Statute.

The date of injury in cases of cumulative injury, as with occupational diseases, is governed by *Lab.C. 5412*. Thus, the date of injury is the date the employee first suffers disability from the injury and knows, or should know, that the disability was caused by the present or prior employment. (*Lab.C. 5412*; see *Chavez v. Work. Comp. App. Bd.* (1973) 31 C.A.3d 5, 12, 106 C.R. 853 [employee only became aware of industrial origin of back injury 16 months after date of disability]; *Bassett-McGregor v. Work. Comp. App. Bd.* (1988) 205 C.A.3d 1102, 1115, 252 C.R. 868 [amendment substituting claim for cumulative injury relates back for purposes of statute of limitations to filing of specific injury claim if disability is same and injury arises from same set of facts]; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (2004) 119 C.A.4th 998, 1005, 14 C.R.3d 793 [either temporary or permanent disability satisfies *Lab.C. 5412*]; C.E.B., 1 Workers' Compensation Practice 4th, §12.3; 2 Hanna 2d (2004 ed.), §24.03[7]; 1 Herlick 6th, §14.13.)

The meaning and effect of *Lab.C. 5412* were the subject of an elaborate opinion in *Thorp v. Work. Comp. App. Bd.* (1984) 153 C.A.3d 327, 200 C.R. 219. The questions addressed were: (1) "[W]hether an employee suffering from asbestosis can obtain workers' compensation reimbursement for disease-related medical expenses incurred in the disease's latent stages prior to the onset of any occupational disability." (2) "If so, does the pursuit of such a claim by the employee trigger statutes that limit the employer's exposure for medical or disability claims to those filed within five years of the employee's initial diagnosis even if the disease subsequently progresses to serious and disabling stages?" (153 C.A.3d 330.) *Held*: (1) "[A]n employee suffering from asbestosis may obtain reimbursement for predisability medical expenses." (2) "[A]n award of such expenses does not prohibit the Board from awarding additional compensation for medical expenses or for disability manifesting itself more than five years after initial diagnosis or treatment." (153 C.A.3d 330.)

(a) The employer contended that the Board had to set a "date of injury" under *Lab.C. 5412* in order to trigger the 5-year limit on the Board's power under *Lab.C. 5410* and *5804* (infra, §383). However, where the employee suffers from a cumulative injury or occupational disease, "there is a 'date of injury' only at such time as the employee suffers an impairment of bodily functions which results in the impairment of earnings capacity." (153 C.A.3d 336.)

(b) Here the Board found that the employee was not disabled because he had suffered no impairment of earnings

capacity. "Since no statutory 'date of injury' had occurred ... the Board had no duty to set it." (153 C.A.3d 337.)

The following earlier decisions are also instructive:

Fireman's Fund Indem. Co. v. Industrial Acc. Com. (1952) 39 C.2d 831, 834, 250 P.2d 148 [stroke resulting from cumulative stress].

Beveridge v. Industrial Acc. Com. (1959) 175 C.A.2d 592, 346 P.2d 545 [back injury].

Dow Chemical Co. v. Work. Comp. App. Bd. (1967) 67 C.2d 483, 493, 62 C.R. 757, 432 P.2d 365 [multiple back injuries from heavy lifting over 18 years].

Fruehauf Corp. v. Work. Comp. App. Bd. (1968) 68 C.2d 569, 68 C.R. 164, 440 P.2d 236 [employee who failed to diagnose back condition was not barred].

Miller v. Work. Comp. App. Bd. (1968) 258 C.A.2d 490, 495, 65 C.R. 835 [back and hip injuries].

SUPPLEMENT: [This section is current through the latest supplement]



26 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

2. Claim for Disability.

c. Cumulative Injuries.

2. Knowledge and Lack of Diligence.

2 Witkin Sum. Cal. Law Work Comp § 370

[§ 370] Knowledge and Lack of Diligence.

(1) *Knowledge*. The claimant's knowledge (supra, §369) is a question of fact. (See *Alford v. Industrial Acc. Com.* (1946) 28 C.2d 198, 203, 169 P.2d 641 [record amply sustained Commission's denial of award on ground that employee was aware of disability].)

In *Fresno v. Work. Comp. App. Bd.* (1985) 163 C.A.3d 467, 209 C.R. 463, claimant suffered from heart problems. More than 1 year before filing a claim, he formed his own opinion that his disability was job-related, but he did not obtain a medical diagnosis. The Board concluded that claimant's belief was not sufficient to start the 1-year statute of limitations running and that his claim was not barred. *Held*, affirmed. An applicant cannot be charged with knowledge that his injury is job-related without medical advice to that effect, *unless* the nature of the disability and applicant's training, intelligence, and qualifications are such that he should have recognized the relationship between his job and the disability. (163 C.A.3d 473.) (See *Nielsen v. Work. Comp. App. Bd.* (1985) 164 C.A.3d 918, 929, 210 C.R. 843 [describing *Fresno* rule as "a bit overly expansive," but agreeing with conclusion that "the absence of a medical opinion is but one important circumstance" in determining knowledge]; *Bassett-McGregor v. Work. Comp. App. Bd.* (1988) 205 C.A.3d 1102, 1111, 252 C.R. 868 [substantial evidence supported finding that employee had knowledge that disability was work-related at time claim for specific injury of heart attack was filed].)

(2) *Lack of Diligence*. The employer has the burden of proof on the issue of lack of diligence. (See *Pacific Indem. Co. v. Industrial Acc. Com.* (1950) 34 C.2d 726, 729, 214 P.2d 530 [employer failed to sustain burden of showing that employee should have known; award affirmed]; *Globe Indem. Co. v. Industrial Acc. Com.* (1954) 125 C.A.2d 763, 768, 271 P.2d 149 [same].)

In *Chambers v. Work. Comp. App. Bd.* (1968) 69 C.2d 556, 72 C.R. 651, 446 P.2d 531, petitioner was a machinist with a third grade education. He was employed by an iron company from 1952 to 1964, operating a boring mill in a room with insufficient ventilation and constantly filled with heavy dust from the cutting process. In the middle of 1963 he noticed that he was tiring easily, and he ceased work in January 1964. He consulted Dr. W, who told him that he had emphysema. The physician suggested that he stop smoking, and, in response to a query by petitioner's wife whether the work could have caused the condition, replied, "I doubt it. I don't think so." In December 1966, petitioner read a

newspaper article about emphysema caused by the inhalation of dust. He consulted an attorney, who filed a claim within a month, then consulted Dr. D, who attributed his emphysema to exposure to dust on the job. The Board made a finding of industrial disease, but concluded that petitioner did not exercise diligence after first becoming aware of his condition in 1963. *Held*, order annulled. The employee is not required to make a correct medical diagnosis. Petitioner's knowledge that the employment was tiring was not knowledge that his difficulty was traceable to a disease caused by conditions of the work, and Dr. W's statement negated that indication. (69 C.2d 560.)

If a provider of medical services can be shown to have knowledge that a disability is work-related, its lien may be barred by the 1-year statute; but the burden is on the employer to show that the employee had that knowledge, and the provider's knowledge is not superior to that of the employee if both are apprised of the same facts. (*Los Angeles v. Work. Comp. App. Bd. (Rottman) (1982) 135 C.A.3d 567, 572, 185 C.R. 419.*)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

2. Claim for Disability.

d. No Merger of Prior Injuries.

2 Witkin Sum. Cal. Law Work Comp § 371

[§ 371] No Merger of Prior Injuries.

Lab.C. 5303 contains the proviso that "no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury." (See *supra*, §292; *Chavez v. Work. Comp. App. Bd. (1973) 31 C.A.3d 5, 14, 106 C.R. 853* [purpose of statute was to abolish rule that prior injuries could be merged with subsequent injury to avoid bar of 1-year statute of limitations]; *Aetna Cas. & Surety Co. v. Work. Comp. App. Bd. (1973) 35 C.A.3d 329, 342, 343, 10 C.R. 780* [because referee found two separate periods of disability, which were not specific injuries, *Lab.C. 3208.1* required finding of two separate cumulative injuries, and *Lab.C. 3208.2* and *5303* required that they not be merged and that disability for each be apportioned]; *Rumbaugh v. Work. Comp. App. Bd. (1978) 87 C.A.3d 907, 917, 151 C.R. 563*, *supra*, §295 [statutes that bar merger of specific and cumulative injuries do not affect rule that injuries may become permanent and statutory at same time]; *Los Angeles v. Work. Comp. App. Bd. (Calvert) (1978) 88 C.A.3d 19, 29, 151 C.R. 679* [statutes that bar merger apply to cumulative injuries in cases of continuous trauma with intermittent disability and need for medical care].)

In *Hooker v. Work. Comp. App. Bd. (1974) 36 C.A.3d 698, 111 C.R. 766*, petitioner was employed as a state traffic officer between July 6, 1954, and June 19, 1970. In early 1962, he first suffered a dizzy spell which his family physician originally diagnosed as sinus trouble, but concluded in 1967 was probably also work-connected. In 1968, a neurologist concluded that his complaint was caused by tension due in part to his work. His last sick leave was taken in June 1970, and his application was filed September 14, 1970. His condition became permanent and stationary as of January 2, 1971. The referee awarded him further medical treatment, temporary disability indemnity at the maximum rate for the 1-year period before the application was filed, and permanent disability indemnity. On reconsideration, the Board set the award aside. *Held*, order reversed.

(a) The Board's reliance on *Lab.C. 3208.1* and *5412* (*supra*, §368) was misplaced. Petitioner's knowledge of his temporary disability in 1967 and 1968 was clear, and the referee properly disallowed recovery for the losses. However, "[i]t is irrational to rule that the employee who shrugs off the effects of the initial stages of industrial trauma forfeits the right to recover from the cumulative effect of that trauma which ultimately renders him unable to carry on his regular duties." (*36 C.A.3d 704.*) Thus, "so long as the repetitive trauma continues to cause further disability, recovery may be had for such disability as has occurred within one year of the filing of the application." (*36 C.A.3d 706.*)

(b) Neither the statutes nor *Fruehauf Corp. v. Work. Comp. App. Bd.* (1968) 68 C.2d 569, 68 C.R. 164, 440 P.2d 236, supra, §369, require a different rule. The statutes were designed to preclude merger of barred injuries into a subsequent cumulative injury. *Fruehauf* "did not state that any claim for disability for a cumulative injury would be barred one year after knowledge that the employment was contributing to the aggravation and progress of that injury. It only states that such a claim could not be barred ... if there were no such knowledge." *Lab.C.* 3208.2 requires that each disability, specific and cumulative, be treated separately, and *Lab.C.* 5303 precludes a merger of separate injuries. (36 C.A.3d 706.) Accordingly, petitioner was entitled to temporary disability and medical benefits for the 1-year period before filing, and to permanent disability benefits for his condition that subsequently stabilized. (36 C.A.3d 707.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

3. Claim for Death Benefit.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 372

[§ 372] In General.

(1) *Interval Between Injury and Death.* With noted exceptions, the period on a claim for death is specified in *Lab.C. 5406*, and depends on the interval between injury and death:

(a) If death occurs within 1 year after the date of injury, the period is 1 year from the date of death.

(b) If death occurs more than 1 year after the date of injury, and medical or disability benefits have been furnished, the period is the earliest of either 1 year from the date of death, or 1 year from the last date benefits were furnished.

In any event, however, no proceedings may be commenced more than 1 year after the date of death or more than 240 weeks from the date of injury. (*Lab.C. 5406*.) (See C.E.B., 1 Workers' Compensation Practice 4th, §§12.38, 12.39; 2 Hanna 2d (2004 ed.), §24.03[5]; 1 Herlick 6th, §14.11; 100 A.L.R.5th 567 [commencement of time period for claim under workers' compensation or occupational disease statutes for death of employee who contracts disease].)

Conceivably, death could occur more than 240 weeks after a specific injury. In that case, prompt filing of the claim is useless, because it was barred before it arose. This is of course contrary to the general principle of the running of the statute of limitations (see 3 *Cal. Proc.* (4th), *Actions*, §459), but the legislative intent to prevent the filing of fraudulent claims long after the injury was clearly expressed in *Lab.C. 5405* (supra, §367). As the court said in *Ruiz v. Industrial Acc. Com.* (1955) 45 *C.2d* 409, 414, 289 *P.2d* 229: "[T]he time limitation appears to be not a normal statute of limitations, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits. Diligence in the presentation of the claim ... apparently has no bearing if the specified time provisos are not satisfied." (See *Fisher v. Work. Comp. App. Bd.* (1976) 62 *C.A.3d* 924, 926, 133 *C.R.* 471 [death benefits were denied to widow where death occurred 240 weeks and 1 day after totally disabling heart attack].) (On tolling of *Lab.C. 5406*, where dependent is ignorant of industrial origin of death, see *infra*, §373.)

(2) *Exceptions.*

(a) *Asbestosis.* For the death of an asbestos worker or a firefighter from asbestosis, the period is 1 year from the date of death. (*Lab.C. 5406.5*; see *Clark v. Work. Comp. App. Bd.* (1991) 230 *C.A.3d* 684, 696, 281 *C.R.* 485

[limitations period of *Lab.C. 5406.5* is tolled until dependent of deceased asbestos worker knows, or in exercising reasonable diligence should know, that worker's death was caused by employment].)

(b) *HIV--Related Disease*. For the death of specified health care workers, public safety employees, and correctional peace officers from an HIV-related disease, the period is 1 year from the date of death if one or more of the following occurs: (1) The required report of injury or exposure was made within 1 year of the injury or exposure. (2) The employee has complied with all notice requirements. (3) The employer provided or was ordered to provide workers' compensation benefits prior to the date of death. (*Lab.C. 5406.6(a)*.) (On definition of "health care worker," see *Lab.C. 5406.6(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Interval Between Injury and Death*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §493.



29 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE

B. Statute of Limitations.

3. Claim for Death Benefit.

b. Dependent's Ignorance of Progressive Disease.

2 Witkin Sum. Cal. Law Work Comp § 373

[§ 373] Dependent's Ignorance of Progressive Disease.

Lab.C. 5406(a) (supra, §372) is to be construed as requiring that a dependent's compensation claim, arising out of an employee's death from an industrially caused disease, must be commenced within 1 year from the date of death, or the date that the applicant knew, or in the exercise of reasonable diligence should have known, that the death was of industrial causation. In *Arndt v. Work. Comp. App. Bd.* (1976) 56 C.A.3d 139, 128 C.R. 250, decedent, on April 28, 1967, left an employment of many years, which had exposed him to asbestos particles. He continued working elsewhere until August 11, 1970, and died February 3, 1971, of mesothelioma, a disease of unknown origin at that time. In April 1973, his widow learned that her husband's death was from an occupational disease, and on July 5, 1973, she applied for death benefits. Her application was denied because it was filed more than 1 year from the date of her husband's death, and more than 240 weeks after he had last been exposed to the asbestos particles. *Held*, order annulled.

(a) *240-week limitation.* The Board erred in concluding that the date of injury, for purposes of the 240-week limitation, was the date decedent was last exposed to the asbestos particles. *Marsh v. Industrial Acc. Com.* (1933) 217 C. 338, 351, 18 P.2d 933, supra, §368, held that the date of injury in these cases is the date when the disability is manifested, and its industrial origin should have been known to the claimant. (56 C.A.3d 143.)

(b) *1-year limitation.* *Marsh* upheld the denial of a widow's claim despite the lack of earlier knowledge of the industrial causation. (56 C.A.3d 144.) However, *Fruehauf Corp. v. Work. Comp. App. Bd.* (1968) 68 C.2d 569, 68 C.R. 164, 440 P.2d 236, supra, §369, casts doubt on the continued validity of this aspect of the *Marsh* decision. (56 C.A.3d 145.) While *Fruehauf* concerned a disability claim, the rationale of that opinion, that a claimant should not be denied compensation for failure to make a correct medical diagnosis, and that limitations should not be construed to deny claims before they accrue, is equally compelling in this case. (56 C.A.3d 145, 146.) The law has at least equal concern for ignorant dependents as ignorant workers, and neither reason nor logic will support a distinction between the two classes of claimants. (56 C.A.3d 146, 147.) *Fruehauf* received legislative recognition by the enactment of *Lab.C. 5412* (supra, §368) after the *Marsh* case, and extension of its rationale to death claims will not result in an unreasonable number of additional claims. (56 C.A.3d 148.) (See *Berkebile v. Work. Comp. App. Bd.* (1983) 144 C.A.3d 940, 944, 945, 193 C.R. 12 [decedent's knowledge is not determinative; date of applicant's knowledge is pertinent "date of injury" for purposes of death claim; following *Arndt*].) (On period for death due to asbestosis, see supra, §372.)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

a. Minors and Incompetents.

2 *Witkin Sum. Cal. Law Work Comp* § 374

[§ 374] Minors and Incompetents.

The statute does not run against a minor or incompetent until a guardian or conservator of the estate is appointed by the court, or a guardian ad litem or trustee is appointed by the Board. (*Lab.C.* 5408; see *Royal Indem. Co. v. Industrial Acc. Com.* (1948) 85 C.A.2d 373, 378, 192 P.2d 811 [liberal application of "new and further disability" rule (infra, §383) may permit minor's belated claim]; C.E.B., 1 *Workers' Compensation Practice* 4th, §12.49 et seq.; 2 *Hanna* 2d (2004 ed.), §24.05; 1 *Herlick* 6th, §14.14.)

In *Massey v. Work. Comp. App. Bd.* (1993) 5 C.4th 674, 20 C.R.2d 825, 854 P.2d 117, the court, overruling *Roblyer v. Work. Comp. App. Bd.* (1976) 62 C.A.3d 574, 133 C.R. 246, and *Fisher v. Work. Comp. App. Bd.* (1976) 62 C.A.3d 924, 133 C.R. 471, held that the son of a deceased employee who died more than 240 weeks after he was injured was barred from claiming death benefits even though the claimant applied for death benefits less than 240 weeks after he turned 18 and less than a year after his father's death. The 240-week period from the date of injury to the filing of a death benefit is not a limitations period that "runs against" anyone, but is "a qualifying condition in the exercise of any right to death benefits." (5 C.4th 682; quoting *Ruiz v. Industrial Acc. Com.* (1955) 45 C.2d 409, 289 P.2d 229, supra, §372.) If more than 240 weeks pass from the date of injury to the date of death, no claim can come into existence. This principle applies equally whether the claimant is a minor or an adult. However, if death occurs before the 240-week period has expired, the unexpired portion of the period "runs against" a potential claimant, and is subject to the *Lab.C.* 5408 tolling provision. (5 C.4th 682.)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

b. Compensation or Benefits.

1. In General.

2 *Witkin Sum. Cal. Law Work Comp* § 375

[§ 375] In General.

The statute is extended by the actual payment of compensation or the furnishing of benefits. (*Lab.C. 5405(b)* and (c); see *Pacific Indem. Co. v. Industrial Acc. Com.* (1948) 85 C.A.2d 490, 496, 193 P.2d 117 [first aid treatment by nurse in employer's plant constituted furnishing of benefits]; *Plotnick v. Work. Comp. App. Bd.* (1970) 1 C.3d 622, 624, 83 C.R. 163, 463 P.2d 387 [medical treatment continuing after employee left employment]; *McDaniel v. Work. Comp. App. Bd.* (1990) 218 C.A.3d 1011, 1016, 267 C.R. 440 [payment of benefits tolls 1-year limitation of *Lab.C. 5405(a)* and triggers 5-year limitations period of *Lab.C. 5410*, infra, §430]; C.E.B., 1 Workers' Compensation Practice 4th, §12.35 et seq.; 2 Hanna 2d (2004 ed.), §24.03[1]; 1 Herlick 6th, §14.03.)

Where there are general and special employers, payment by one of them will toll the statute as to both. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1945) 26 C.2d 278, 283, 158 P.2d 195; see *State Comp. Ins. Fund v. Industrial Acc. Com.* (1946) 73 C.A.2d 248, 253, 166 P.2d 310 [payment by one employer]; *Industrial Indem. Exchange v. Industrial Acc. Com.* (1947) 80 C.A.2d 480, 485, 182 P.2d 309 [compensation paid in another state for out-of-state injury].)

The extension also applies to claims filed against the Subsequent Injuries Fund (supra, §297). (See *Subsequent Injuries Fund v. Industrial Acc. Com.* (1962) 198 C.A.2d 818, 833, 18 C.R. 458 [claim filed more than 5 years after injury but within 1 year from last payment of compensation].)

In *Colonial Ins. Co. v. Industrial Acc. Com.* (1945) 27 C.2d 437, 164 P.2d 490, the court made some important distinctions with respect to the burden of proof. (a) Under *Lab.C. 5409*, the statute of limitations is an affirmative defense and therefore the burden of proving that it has run is on the defendant. (b) Where the period has apparently run, the claimant has the burden of proving statutory exceptions or exemptions, such as minority or incompetency (see supra, §374). (c) However, the provision for extension of the period by payment of compensation is not a statutory exception; it is an alternative date for the commencement of the period, so that the limitation period begins at the date of the injury or the date of the last payment. Hence, the burden of proof on this issue is on the defendant. This somewhat technical distinction has a logical basis, in that incompetency and minority are peculiarly within the ability of the employee to prove, while payment is something of which the defendant certainly has knowledge. (27 C.2d 442.)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

b. Compensation or Benefits.

2. No Tolling After Disclaimer.

2 *Witkin Sum. Cal. Law Work Comp* § 376

[§ 376] No Tolling After Disclaimer.

In *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1977) 19 C.3d 329, 137 C.R. 878, 562 P.2d 1037, employee W developed a hernia in November 1973, which was treated by petitioner health care provider under a union health care plan. The insurer's physician concluded that the hernia was not job-related, and on January 2, 1974, the insurer sent W and petitioner a written notice of rejection of liability. Petitioner concluded treatment on February 3, 1974, and filed a claim for reimbursement on January 20, 1975; i.e., more than 1 year after notification of rejection of liability, but within 1 year after the last rendition of medical services. *Held*, the claim was barred.

(a) The terms "compensation" or "benefits" as used in *Lab.C. 5405(b)* and (c) and predecessor statutes have been judicially related to the purpose of the tolling provisions: "to prevent a potential claimant from being misled by an employer's voluntary acts which reasonably indicate an acceptance of responsibility for the employee's injury." (19 C.3d 334.)

(b) Although an employer furnishing medical treatment without a notice of disclaimer will be estopped to set up the defense of the statute, the situation is different where the potential claimant has been fully informed of rejection of liability. "Such notice, when given, fairly advises the recipient that formal remedies must be invoked in order to recover amounts claimed due under the Act. The legislative purposes of subdivisions (b) and (c) are thereby satisfied and the statute of limitations begins to run no later than the date on which such notice is given." (19 C.3d 335.)

(c) *Lab.C. 3751*, prohibiting an employer from requiring an employee to bear a portion of the cost of treatment or compensation (see *supra*, §337 et seq.), and *Lab.C. 4600*, imposing a broad duty on the employer to provide treatment (see *supra*, §261), do not call for a different result. "The statute of limitations neither 'limits' duties, nor makes them less than 'mandatory.' It merely requires diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs, and ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh." (19 C.3d 336.)

(d) The statute of limitations in *Lab.C. 5405* "begins to run against a potential claimant no later than the date on which the claimant is notified of a disclaimer by the employer, or its compensation carrier. Thereafter, a claimant can no

longer be fairly said to harbor any false hopes engendered by the employer, but must thereafter be deemed fully aware that resort must be had to the formal statutory remedies in order to vindicate any claimed benefits." (19 C.3d 336.) (See *McDaniel v. Work. Comp. App. Bd.* (1990) 218 C.A.3d 1011, 1017, 267 C.R. 440 [notice of denial of liability to employee who has been given benefits triggers 1-year limitation period; *Kaiser Foundation Hosp.* followed].)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

b. Compensation or Benefits.

3. Wages or Disability Payments.

2 *Witkin Sum. Cal. Law Work Comp* § 377

[§ 377] Wages or Disability Payments.

(1) *Wages*. If the employee is unable to work, and the employer, with knowledge of the disability, nevertheless continues to pay money as wages, these payments are not considered wages or gifts, but are the equivalent of compensation, and operate to toll the statute. (*Bulger v. Industrial Acc. Com.* (1933) 218 C. 716, 719, 24 P.2d 796 [half wages]; *Morrison v. Industrial Acc. Com.* (1938) 29 C.A.2d 528, 534, 85 P.2d 186 [full wages]; see 2 Hanna 2d (2004 ed.), §24.04[2][b]; 1 Herlick 6th, §14.03.)

(2) *Disability Payments*. Payments made pursuant to a city charter disability and retirement plan, if received when "disability was due" under the Labor Code, are regarded as compensation and toll the statute; payments made more than 1 year after full discharge of liability under the Labor Code are not so regarded and do not toll the statute. (*San Francisco v. Work. Comp. App. Bd.* (1970) 2 C.3d 1001, 1011, 88 C.R. 371, 472 P.2d 459.)

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34 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

b. Compensation or Benefits.

4. Effect of Tolling.

2 *Witkin Sum. Cal. Law Work Comp* § 378

[§ 378] Effect of Tolling.

Payment of compensation or benefits merely tolls the statute during the period of payment. It does not dispense with an application, and the 1-year statute again begins to run when the payments end. In *Royal Indem. Co. v. Industrial Acc. Com.* (1966) 239 C.A.2d 917, 49 C.R. 224, the employee suffered a back injury in March 1962. The employer's insurer voluntarily made disability payments and paid physician bills for a few weeks and then stopped. The employee, thinking he had no recourse, did nothing until April 1964, 23 months later. Then he filed an application and was awarded temporary disability from the time of the accident. *Held*, annulled.

(a) The Commission reasoned that, because the right to compensation is barred if compensation is not paid within 1 year, the converse must be true; i.e., if compensation is paid within 1 year, the right is not barred and the Commission has jurisdiction to act for 5 years under *Lab.C. 5804*. However, this would convert the 1-year statute into a 5-year statute; and an employer, facing the possibility of claims deferred for that time, would make a payment only with extreme caution. (239 C.A.2d 921, 922.)

(b) *Lab.C. 5404, 5405* and *5410* read together clearly contemplate the following: (1) an applicant must institute proceedings before the Commission within 1 year after the date of the injury unless there has been a voluntary payment of benefits, (2) voluntary payments will toll the statute of limitations during the continuation of payments, but the period commences to run again when payments are stopped, (3) if a "new and further disability" arising from the original injury occurs within 5 years, the employee may institute proceedings for the new disability and the Commission has jurisdiction to hear, determine, and make awards based on, and limited to, the new disability. (239 C.A.2d 921.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

c. Estoppel To Plead Statute.

2 *Witkin Sum. Cal. Law Work Comp* § 379

[§ 379] Estoppel To Plead Statute.

The general doctrine that a party, by reason of fraudulent concealment of a cause of action or other inequitable conduct, may be estopped to set up the defense of the statute of limitations (see 3 *Cal. Proc.* (4th), *Actions*, §685) has been applied to workers' compensation proceedings.

In *Benner v. Industrial Acc. Com.* (1945) 26 C.2d 346, 159 P.2d 24, the employer and the insurer, indicating a desire to settle the claim, engaged in discussions and requested time for investigation. The application was eventually filed 5 days late. *Held*, the conduct of the employer and the insurer, relied on by the employee, and inducing him to delay filing the claim, justified raising an estoppel against the defense. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1944) 66 C.A.2d 376, 380, 152 P.2d 501 [concealment by general employer of facts of employment]; *Industrial Indem. Co. v. Industrial Acc. Com.* (1953) 115 C.A.2d 684, 689, 252 P.2d 649 [facts similar to *Benner*]; *United States Cas. Co. v. Industrial Acc. Com.* (1954) 122 C.A.2d 427, 433, 265 P.2d 35 [same]; C.E.B., 1 Workers' Compensation Practice 4th, §12.59 et seq.; 2 *Hanna* 2d (2004 ed.), §24.04[5]; 1 *Herlick* 6th, §14.15.)

In *Nolan v. Work. Comp. App. Bd.* (1977) 70 C.A.3d 122, 138 C.R. 561, petitioner made a timely claim, then went to prison, and was released about 5 years after his injury. The insurer advised him that the claim would be processed on his release; but 1 year before that time the insurer moved to dismiss the claim without prejudice for lack of prosecution. Petitioner never received actual notice of the motion, and his attorney did not oppose it because it was without prejudice. Ten months after his release, petitioner filed a petition to reopen under *Lab.C. 5410* (infra, §383), which was denied. *Held*, order annulled.

(a) *Lab.C. 5410* was inapplicable because there never was an original award; the only time limitation was that of the general statute of limitations, *Lab.C. 5405* (supra, §367). (70 C.A.3d 127.)

(b) The original application was made in time; hence, the Board could have made its decision on the claim any number of years after the injury, except for the dismissal. (70 C.A.3d 128.) A dismissal without prejudice does not bar filing a new claim within the limitation period; but here the statute had run at the time of dismissal and was a bar. (70 C.A.3d 129.)

(c) The facts, however, called for an estoppel to assert the bar: (1) The communications of the insurer to petitioner and his attorney could only lead them to believe that petitioner's release from prison was necessary before the claim would be processed. (2) The insurer waited until the statute had run before moving to dismiss. (3) The form of the motion misled petitioner's attorney; had it asked for a dismissal with prejudice, he would have appeared and contested it. (70 C.A.3d 130.)

The situation differs, however, where the representation was of substantive law, and though erroneous, was reasonable when made. In *Los Angeles v. Industrial Acc. Com.* (1965) 63 C.2d 255, 46 C.R. 105, 404 P.2d 809, city officials told applicants that, because they had received disability pensions under the city charter, they could not also receive workers' compensation. In light of *Los Angeles v. Industrial Acc. Com.* (1965) 63 C.2d 242, 46 C.R. 97, 404 P.2d 801, supra, §338, decided after the representation had been made, this statement was wrong. Compensation was payable, with credit to the city for the pension payments. Hence, the issue was presented: Under what circumstances "a public agency's advice to its employees concerning their substantive rights against the agency may serve as the basis for estopping the agency from asserting the statute of limitations." (63 C.2d 257.)

(a) "The role of estoppel in this field is unique because officials of such agencies ordinarily must constantly deal with a large number of employees." (63 C.2d 257.) The basic test is set forth in *Adler v. Pasadena* (1962) 57 C.2d 609, 614, 21 C.R. 579, 371 P.2d 315: whether the public agency "acted in an unconscionable or unreasonable manner or ... either unintentionally or otherwise ... set out to, or did, take unfair advantage of plaintiffs." (63 C.2d 257.)

(b) "Reasonableness" must be viewed according to the right the employee seeks to assert. "[T]he greater the right of the claimant, the heavier the obligation upon the agency not to mislead him. In matters that gravely affect the welfare of the employee, the employer bears a more stringent duty to desist from conduct or advice that may induce the employee not to explore or pursue his remedies." (63 C.2d 258.)

(c) Here, the employees received substantial pension payments; i.e., the city's conduct affected only the right to additional partial compensation benefits, and did not involve either the loss of the right to work or the total loss of deferred compensation. Hence, the advice was not so unreasonable as to preclude the city from asserting the statute of limitations. (63 C.2d 262.)

In *Galloway v. Work. Comp. App. Bd.* (1998) 63 C.A.4th 880, 74 C.R.2d 374, petitioner ironworker injured his elbow, and in a 1992 examination following corrective surgery he complained of neck pain. The physician found and reported a neck injury caused by continuous industrial trauma. In 1993 petitioner stated to a claims representative that he believed his neck problems were part of the claim for the elbow injury. The claims representative mentioned the physician's report of continuous trauma and sent petitioner two letters warning him of the need to file a claim for the neck injury but not advising him of time limits for doing so. In November 1994, after speaking with an attorney, petitioner filed a claim. A workers' compensation judge found that the insurer and the employer were estopped from asserting the statute of limitations because petitioner was not appropriately advised of his rights under the Labor Code. On reconsideration, the Board found that petitioner knew or should have known of the compensable nature of his neck injury more than 1 year before filing his claim and that the insurer was not estopped from asserting the statute as a defense. *Held*, order annulled.

(a) *Knowledge*. Under *Lab.C. 5412* (supra, §§369, 370) petitioner knew or should have known that he had to file a separate claim for the cumulative injury to his neck by early April 1993, after talking with the claim representative and receiving subsequent letters. Thus, petitioner needed to file a separate claim and failed to do so. However, that does not end the analysis. (63 C.A.4th 886.)

(b) *Failure to notify of time limits tolls statute*. 8 Cal. Code Reg. §9882 requires an employer to give notice to an employee of the entitlements and obligations under workers' compensation law. This includes an explanation of the procedures for making a claim, and the time limits for doing so (8 Cal. Code Reg. §9882(b)(5)). Here, the insurer had knowledge of the neck injury in April 1992, but neither the insurer nor the employer gave the required notice of time

limits. Nor was notice given in 1993. Thus, even if petitioner knew he had to file a claim, he had no knowledge of the appropriate time limits. Hence, the insurer is estopped from asserting the statute as a defense. (63 C.A.4th 886.) Otherwise, the employer would be rewarded for failing to "adhere to the regulations which absolutely require an advisement of the time limits in which to make a claim." (63 C.A.4th 887.) Therefore, the statute of limitations was tolled until petitioner became aware of the time limits to file the claim, which was November 1994. (63 C.A.4th 888.)

SUPPLEMENT: [This section is current through the latest supplement]

See *California Ins. Guarantee Assn. v. Work. Comp. App. Bd.* (2008) 163 C.A.4th 853, 865, 77 C.R.3d 868, Supp., infra, §381 [insurer was estopped to assert statute of limitations defense where insurer's 3-year delay in failing to admit coverage for injury contributed to employee's delayed filing for adjudication of claim].

Cross-Reference: 3 Cal. Proc. (5th), Actions, §762.



36 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

d. Employer's Failure To Notify of Right.

1. Judicial Rule.

2 *Witkin Sum. Cal. Law Work Comp* § 380

[§ 380] Judicial Rule.

The former rules of the Administrative Director of the Division of Industrial Accidents provided that, where an employer had notice or knowledge of an injury that required hospitalization or resulted in more than 3 days' disability, the employer had to give the employee notice of payment or nonpayment of benefits; and, if the notice was of denial of benefits, the employer had to advise the employee that the employee could obtain information from the Director, file an application, or consult an attorney. *Reynolds v. Work. Comp. App. Bd.* (1974) 12 C.3d 726, 117 C.R. 79, 527 P.2d 631, held that failure of the employer to give the notice tolled the statute of limitations. "The clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of the workmen's compensation law. Since the employer is generally in a better position to be aware of the employee's rights, it is proper that he should be charged with the responsibility of notifying the employee ... that there is a possibility he may have a claim for workmen's compensation benefits." (12 C.3d 729.) (See *Buena Ventura Gardens v. Work. Comp. App. Bd.* (1975) 49 C.A.3d 410, 416, 122 C.R. 714 [*Reynolds* holding applies despite fact that employer had no formal medical evidence from employee as to precise cause of his ailment].)

In *Hurwitz v. Work. Comp. App. Bd.* (1979) 97 C.A.3d 854, 158 C.R. 914, the court suggested that broad language in *Reynolds* and *Buena Ventura Gardens*, *supra*, should be interpreted in accordance with the doctrine of *equitable estoppel* to avoid the effect of the statute of limitations (97 C.A.3d 871, 872): "The rule they establish is that when an employer has the requisite notice or knowledge of an employee's injury as to which there is a reasonable possibility the employee may be entitled to workers' compensation benefits, the employer has a duty to notify the employee of the potential right to benefits, and if the employer fails to do so, and if as a consequence the employee fails to file an application for workers' compensation benefits until after the applicable period of limitations has expired, the employer is estopped to assert the statute of limitations for a period of time equal to the delay resulting from the failure to give the required notice. ... A more precise use of language by the courts should have indicated not that the statutory period had not commenced to run, but that the employers were *estopped* to assert it had run or, perhaps, commenced to run." (97 C.A.3d 873.)

In *Hurwitz*, the essential elements of estoppel--ignorance and reliance--were lacking: The applicant was aware from the beginning that her injury might be job-related, and that she had to institute proceedings within 1 year if she wanted

compensation benefits; she was also aware that her employer would resist a claim, and, after consultation with her attorney and acting on his advice, made a deliberate decision not to seek workers' compensation but to pursue her third-party tort remedy. (97 C.A.3d 874, 875.) (See *Nielsen v. Work. Comp. App. Bd.* (1985) 164 C.A.3d 918, 210 C.R. 843 [employer had no knowledge or notice of facts and was not in position of superior knowledge, while employee believed injury was job-related; following *Hurwitz*; C.E.B., 1 Workers' Compensation Practice 4th, §12.60.]

SUPPLEMENT: [This section is current through the latest supplement]



37 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

d. Employer's Failure To Notify of Right.

2. Statutory Rule.

2 *Witkin Sum. Cal. Law Work Comp* § 381

[§ 381] Statutory Rule.

(1) *Duties and Presumption of Compensability.* The requirement of notice has been codified in *Lab.C. 138.3* and *5402*. (See C.E.B., 1 Workers' Compensation Practice 4th, §§12.9 et seq., 12.23 et seq.) *Lab.C. 138.3* requires the Administrative Director, with respect to all injuries, to prescribe reasonable rules and regulations to carry out the notice requirements of *Lab.C. 5402*. (See *8 Cal. Code Reg. §9882* [written notice to injured employees].)

Lab.C. 5402 provides as follows:

(a) "Knowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under" *Lab.C. 5400*. (*Lab.C. 5402(a)*.)

(b) "If liability is not rejected within 90 days after the date the claim form is filed under" *Lab.C. 5401*, the injury is presumed compensable and the presumption is rebuttable "only by evidence discovered subsequent to the 90-day period." (*Lab.C. 5402(b)*.) (See *Kaiser Foundation Hosp. v. Work. Comp. App. Bd. (1985) 39 C.3d 57, 64, 216 C.R. 115, 702 P.2d 197*, infra, §382 [legislation expands employer's duty to inform injured employee of benefits when employer has actual or constructive knowledge of any work-related injury, including those requiring no hospitalization or missed work]; *Galloway v. Work. Comp. App. Bd. (1998) 63 C.A.4th 880, 74 C.R.2d 374*, supra, §379 [failure of insurer or employer to give injured employee notice of rights and time limits, as required by *8 Cal. Code Reg. §9882*, tolls statute].)

(2) *Rebuttable Presumption.* In *State Comp. Ins. Fund v. Work. Comp. App. Bd. (1995) 37 C.A.4th 675, 43 C.R.2d 660*, the court concluded that the presumption of *Lab.C. 5402* was intended to affect the *burden of proof* rather than the burden of producing evidence because it was created by the Legislature to implement the public policy of expediting workers' compensation claims. Once the underlying facts have been established, its effect in workers' compensation litigation is to place on the defendant employer/insurer the burden of proving that the employee does not have a compensable injury. (*37 C.A.4th 682, 683*.) On the issue of what evidence may be admitted to rebut the presumption,

the court applied the principle that the construction of a statute by the agency charged with its enforcement will be followed unless that construction is erroneous or unauthorized. Here, a number of panel decisions of the Board have concluded that *Lab.C. 5402* bars evidence that could have been obtained with the exercise of reasonable diligence within the initial 90-day period. What constitutes "reasonable diligence" is determined on a case-by-case basis. (37 *C.A.4th* 683, 684.) (See *Williams v. Work. Comp. App. Bd.* (1999) 74 *C.A.4th* 1260, 1264, 88 *C.R.2d* 798 [presumption applied where employer city failed to investigate despite having all information and witnesses it needed within 90 days after claim was filed].)

(3) *Psychiatric Injury. Lab.C. 5402* does not apply to an employee claiming psychiatric injuries, provided the employee has been employed for less than 6 months *and* the injury is not caused by a sudden and extraordinary employment incident. The employer may assert that the conditions of compensability for a psychiatric injury under *Lab.C. 3208.3(d)* (see *supra*, §244 et seq.) have not been met. (*James v. Work. Comp. App. Bd.* (1997) 55 *C.A.4th* 1053, 1055, 64 *C.R.2d* 392 [employee claimed psychiatric injury 11/2 months after being hired and employer provided medical treatment and temporary disability for over 1 year before asserting *Lab.C. 3208.3(d)*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Duties and Presumption of Compensability.* In *California Ins. Guarantee Assn. v. Work. Comp. App. Bd.* (2008) 163 *C.A.4th* 853, 77 *C.R.3d* 868, employee C had sustained an industrial injury to his shoulder and neck in 1996 for which he was paid benefits. In 1997, C injured his back after arriving for work 2 hours early. Although he notified his employer, C was led to believe that the injury was not compensable because he had arrived early, and was neither advised of potential eligibility nor given a claim form. C sought treatment on his own. When C sought compensation in 2004 for the 1997 injury, the insurer raised the 1-year statute of limitations as a defense. The Board ruled that the claim was not barred. *Held*, decision affirmed. C's awareness of his right to compensation for the 1996 injury did not act to inform him of his potential right to compensation for the 1997 injury; the employer had the duty of informing him, and the failure to do so tolled the statute. (163 *C.A.4th* 863.)

(b) *Ninety-day rule:* The 90-day period for the employer to reject liability runs from the date the employee files a claim form with the employer, not from the date the employer knows of the injury or claim. In *Honeywell v. Work. Comp. App. Bd.* (2005) 35 *C.4th* 24, 24 *C.R.3d* 179, 105 *P.3d* 544, W's spouse advised H's disability coordinator on October 16, 1998, that W had been admitted to a psychiatric facility as a result of work-related stress. H furnished W a claim form on January 11, 1999, after receiving W's medical leave request. W served H with the completed claim form on January 15, 1999. H denied the claim on March 31, 1999. The Board concluded that the 90-day period under *Lab.C. 5402* begins either when the employee files a claim form or when an employer is "reasonably certain" of an injury, and thus, here the period had expired on January 15, 1999, and that the presumption of compensability applied. *Held*, reversed, and remanded to Board to determine issue of estoppel.

(a) Regardless of when the employer knows of an injury, *Lab.C. 5402(b)* unambiguously provides that the 90-day period during which the employer may investigate and accept or reject the claim begins after the date the claim form is filed under *Lab.C. 5401*. (35 *C.4th* 35.)

(b) An employer may be estopped from denying the 90-day period began running before the filing of a claim only under the following conditions: "(1) [T]he employer, knowing the employee had suffered or was asserting an industrial injury, refused to provide a claim form, or misrepresented the availability of or the need for the employee to file a claim form; (2) the employee was actually misled into believing that no claim form was available or necessary and failed to file one for that reason; and (3) because of this reliance, the employee suffered some loss of benefits or setback as to the claim." (35 *C.4th* 37.)

See *Fleetwood Enterprises v. Work. Comp. App. Bd.* (2005) 134 *C.A.4th* 1316, 1322, 37 *C.R.3d* 587 [there can be no presumption of compensability unless injured employee can establish all of estoppel elements set forth in *Honeywell*; matter remanded to Board to determine estoppel issue].



38 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

d. Employer's Failure To Notify of Right.

3. Application of Medical Lien Claimant.

2 *Witkin Sum. Cal. Law Work Comp* § 382

[§ 382] Application of Medical Lien Claimant.

In *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1985) 39 C.3d 57, 216 C.R. 115, 702 P.2d 197, M, a city employee, was injured in February 1981, and was treated at Kaiser hospital. In July 1981, the city's adjusters wrote M rejecting liability and advising him of his workers' compensation rights. In April 1982, after being informed that M did not intend to apply for compensation, Kaiser filed an application as a medical lien claimant. The Board held that the claim, filed more than 1 year after the date of the injury, was barred by *Lab.C. 5405(a)* (supra, §367). *Held*, the claim, filed less than 1 year after the employer notified the employee of his workers' compensation rights, was timely.

(a) The Legislature did not amend *Lab.C. 5404* (the limitations statute) and therefore did not adopt an ironclad rule that the statute starts running only on receipt of the required notice. It merely codified the duty to give notice (*Lab.C. 5402*) without specifying the consequences of breach of the duty. The legislative intent will be carried out by holding that the statute is tolled if the employee, without that tolling, is *prejudiced* by the breach. (1) If, between the date of injury and the date of the employer's breach, the employee gains actual knowledge of his or her rights, the employee will not be prejudiced and the statute will not be tolled even if the employer never advises of those rights. (2) If the employee remains ignorant of these rights, the employee will be prejudiced from the date of breach until the date of actual knowledge. (39 C.3d 64, 65.) To hold that the limitations period starts only on the employee's receipt of the statutory notice would read "date of injury" out of the statute of limitations in almost all cases. (39 C.3d 66.)

(b) Kaiser's medical claim under *Lab.C. 5501* initiated the workers' compensation proceeding as if the employee himself had filed a claim. The medical lien claimant has no separate independent right, and an award in favor of the injured employee must be made before a lien can be imposed. Because Kaiser's lien claim is derivative, Kaiser's rights are equal with M's; and no statute or decision creates a different statute of limitations. "[T]here is but one limitations period for any particular workers' compensation claim, and that is the period applicable to the injured employee." (39 C.3d 68.) Here, the city was in breach of its duty during a 2-month period; and, regardless of its own prior knowledge of the workers' compensation laws, Kaiser had 1 year from the date of M's injury plus the 2-month period of the city's breach to file a claim. (39 C.3d 68.)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

e. New and Further Disability.

1. Nature and Theory of Extension.

2 *Witkin Sum. Cal. Law Work Comp* § 383

[§ 383] Nature and Theory of Extension.

If an original injury causes "new and further disability," a claim may be filed within 5 years from the date of the injury. (*Lab.C. 5410*; see *Armstrong v. Industrial Acc. Com.* (1934) 219 C. 673, 675, 28 P.2d 672; *Associated Oil Co. v. Industrial Acc. Com.* (1931) 214 C. 358, 360, 5 P.2d 420; *Broadway-Locust Co. v. Industrial Acc. Com.* (1949) 92 C.A.2d 287, 290, 206 P.2d 586; *Nickelsberg v. Work. Comp. App. Bd.* (1991) 54 C.3d 288, 301, 285 C.R. 86, 814 P.2d 1328, *infra*, §430 [meaning of "new and further disability"]; C.E.B., 1 *Workers' Compensation Practice* 4th, §12.32 et seq.; 2 *Hanna* 2d (2004 ed.), §24.03[3]; 1 *Herlick* 6th, §14.04.)

It has been held that when there is an existing temporary disability award, a second award for subsequent permanent disability is not a mere amendment of the former award under *Lab.C. 5804*, but is a "new and further disability" that brings the extension provisions of *Lab.C. 5410* into operation. (*Furness Pac. Ltd. v. Industrial Acc. Com.* (1946) 74 C.A.2d 324, 326, 168 P.2d 761.)

Lab.C. 5410 operates only to extend the time to recover for the *new and further disability* when there has been a prior timely claim or receipt of benefits. If the employee never reports the injury, and never receives benefits, either voluntarily by the employer or through an award, the employee cannot invoke this statutory extension to revive a claim already barred by the ordinary limitation period; i.e., the statute refers to "a disability in addition to that for which the employer previously provided benefits." (*Blakeley v. Work. Comp. App. Bd.* (1970) 3 C.3d 320, 322, 90 C.R. 429, 475 P.2d 661, *infra*, §384.)

A distinction is made where an employee is injured while participating in vocational rehabilitation following an industrial injury. The subsequent injury is not a new and further disability for which a claim may be filed within 5 years from the date of the original industrial injury. The injury suffered in rehabilitation is a new injury subject to the statutory time limits governing the Board's original jurisdiction. (*Newton v. Work. Comp. App. Bd.* (1993) 17 C.A.4th 147, 155, 156, 21 C.R.2d 146.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

B. Statute of Limitations.

4. Suspension or Tolling of Statute.

e. New and Further Disability.

2. Extension by Nonprofessional Medical Aid.

2 Witkin Sum. Cal. Law Work Comp § 384

[§ 384] Extension by Nonprofessional Medical Aid.

In *Pacific Indem. Co. v. Industrial Acc. Com.* (1948) 85 C.A.2d 490, 494, 193 P.2d 117, the court held that first aid treatment by a nurse at the employer's plant was a receipt of benefits sufficient to bring *Lab.C. 5410* into operation.

This theory was given an extraordinary extension in *Standard Rectifier Corp. v. Work. Comp. App. Bd.* (1966) 65 C.2d 287, 54 C.R. 100, 419 P.2d 164. W, on a job requiring many motions of her arms, neck, and shoulders, noticed aches and pains in April 1961. She complained of them during the next several months to her supervisor. The supervisor gave her some "gray pain pills." Her condition grew worse, she quit her employment, and in August 1963, filed her first application for benefits. It was barred by the 1-year statute of limitations (*Lab.C. 5405*) unless it came within the 5-year period of *Lab.C. 5410*. *Held*, it was timely. The court viewed the supervisor's furnishing of pain pills, with knowledge that they were needed to alleviate a condition caused by the work, as analogous to furnishing first aid by the nurse in *Pacific Indem. Co. v. Industrial Acc. Com.* (65 C.2d 291.)

Blakeley v. Work. Comp. App. Bd. (1970) 3 C.3d 320, 90 C.R. 429, 475 P.2d 661, is to the same effect. Petitioner, a potato chip packer, fell and injured her knees, elbow, pelvis, and rib cage. She was examined by the company nurse, who recommended aspirin. Petitioner took the aspirin from the "chip room" cupboard available to all employees. *Held*, her compensation claim, filed 22 months after the date of injury, was timely. Aspirin was a "pain pill" within the holding in *Standard Rectifier Corp. v. Work. Comp. App. Bd.*; and the fact that petitioner took the pills from the employees' cupboard rather than the nurse's own cabinet was of no consequence: "aspirin was the form of medical treatment prescribed to petitioner and followed by her." (3 C.3d 323.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

1. Notice of Injury.

2 Witkin Sum. Cal. Law Work Comp § 385

[§ 385] Notice of Injury.

The first required step in establishing a claim is written notice to the employer, of the time, place, and nature of the injury, within 30 days after its occurrence. (*Lab.C. 5400*.) Although *Lab.C. 5400* states that this notice is an essential condition on the right to recover, in practice it is of little importance, for it is excused where the employer has actual or constructive knowledge of the injury or claim, or where the employer was not misled or prejudiced by the failure to give the notice. (*Lab.C. 5402* (supra, §381), *Lab.C. 5403*; see *Argonaut Mining Co. v. Industrial Acc. Com.* (1937) 21 C.A.2d 492, 500, 70 P.2d 216 [employer was not prejudiced by lack of formal notice]; *Beckstead v. Work. Comp. App. Bd.* (1997) 60 C.A.4th 787, 791, 71 C.R.2d 254 [Board erred in failing to determine employee's case based on cumulative injury theory as reported by physicians even though employee had designated specific date of injury on form; employer had actual knowledge of nature of injury]; Cal. Civil Practice, 1 Workers' Compensation, §8:1 et seq.; C.E.B., 1 Workers' Compensation Practice 4th, §12.9; 2 Hanna 2d (2004 ed.), §24.01; 1 Herlick 6th, §14.01; 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §489 et seq.) (On claim form and notice to be provided by employer, see *infra*, §386.)

West's Key Number Digest, Workers' Compensation k.1216 et seq.

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42 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

2. Claim Form and Notice of Rights.

2 Witkin Sum. Cal. Law Work Comp § 386

[§ 386] Claim Form and Notice of Rights.

(1) *Employer Must Provide Form and Notice.* Within 1 working day of receiving notice or knowledge of an injury under *Lab.C. 5400* or *5402* (supra, §385), which results in lost time beyond the employee's work shift at the time of injury, or medical treatment beyond first aid, the employer must provide the employee, or the employee's dependents in cases of death, personally or by first-class mail, a claim form and a notice of potential eligibility for benefits. (*Lab.C. 5401(a).*) Where practicable, the claim and notice must be a single document that is easily understandable, must be available in both English and Spanish, and must instruct the employee to fully read the notice of potential eligibility. The document must also contain specified information about the claims procedure, available benefits, and related rights associated with workers' compensation. (*Lab.C. 5401(b).*)

(2) *Return and Distribution of Claim Form.* The employee, dependent, or agent is to file the claim form with the employer. Except as provided by *Lab.C. 5401(d)*, a claim form is deemed filed when personally delivered or received by the employer by first-class or certified mail. The employer is to provide a dated copy of the completed form to the employer's insurer and to the party who filed the claim form. (*Lab.C. 5401(c).*)

(3) *Effect of Filing.* Filing the claim form with the employer has the following effects: (a) filing commences the injured employee's entitlement to late payment supplements under *Lab.C. 4650(d)* and a medical evaluation under *Lab.C. 4060, 4061* or *4062*; (b) filing tolls, for an injury occurring on or after January 1, 1994, the time limits of *Lab.C. 5405* and *5406* until the claim is denied by the employer or the injury becomes presumptively compensable under *Lab.C. 5402*. (*Lab.C. 5401(d).*)

Without creating a presumption of employer liability, within 1 working day after the claim is filed, the employer must authorize treatment, as specified, and continue to provide treatment until the claim is either accepted or rejected, up to a limit of \$ 10,000. (*Lab.C. 5402(c), (d).*)

Once an employee has filed the claim form, a medical provider with actual knowledge that the claim is pending is prohibited from collecting money directly from the employee for services in connection with the injury for which the claim form was filed unless the provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee. (*Lab.C. 3751(b).*)

(4) *Prominent Admonishment.* The claim form must contain a prominently displayed statement that it is a felony to knowingly make a false or fraudulent material statement or representation for the purpose of obtaining or denying workers' compensation benefits or payments. (*Lab.C. 5401.7.*)

(5) *Claims Administrator.* A claims administrator must provide a notice of benefit eligibility and claim form to an employee within 3 working days of learning that the employer has failed to do so and that the injury has resulted in lost time beyond the employee's work shift at the time of injury, or in medical treatment beyond first aid. (*Lab.C. 138.4(b)(1).*) If unable to determine whether the employer has provided the material, the claims administrator must provide the form and notice within 30 days of learning of the claim. (*Lab.C. 138.4(b)(2).*) (For definition of "claims administrator," see *Lab.C. 138.4(a).*)

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43 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

3. Pleadings or Stipulation.

a. Application.

2 Witkin Sum. Cal. Law Work Comp § 387

[§ 387] Application.

The proceeding is commenced by a written application that simply, clearly, and completely delineates all relevant matters of agreement and disagreement. (*Lab.C. 5500*; see *8 Cal. Code Reg. §10400* et seq.) Forms furnished by the Board should be used. (See *8 Cal. Code Reg. §10408*; Form DWC 1, available at: <http://www.dir.ca.gov/dwc/DWCForm1.pdf>.) If the pleading charges serious wilful misconduct, the allegations must be specific and sufficiently detailed. (*8 Cal. Code Reg. §§10440, 10445*; see *supra*, §316.) (See *Brennfleck v. Work. Comp. App. Bd. (1968) 265 C.A.2d 738, 743, 71 C.R. 525*, *supra*, §347 [defective application]; *Cal. Civil Practice*, 1 Workers' Compensation, §8:41 et seq.; *C.E.B.*, 1 Workers' Compensation Practice 4th, §13.2 et seq.; 1 *Hanna* 2d (2004 ed.), §25.05; 2 *Herlick* 6th, 15.06 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §549.)

Notwithstanding *Lab.C. 5401* (*supra*, §386), except where a claim form has been filed for an injury occurring between January 1, 1990, and January 1, 1994, the filing of the application for adjudication, not the filing of a claim form, establishes the Board's jurisdiction and begins proceedings for collecting benefits. (*Lab.C. 5500*.)

The employee and his or her attorney must file with the application a signed, sworn statement that they have not violated *Lab.C. 139.3*, restricting physician referrals, and have not offered, delivered, received, or accepted consideration as compensation or inducement for a referred examination or evaluation. (*Lab.C. 4906(g)*.)

SUPPLEMENT: [This section is current through the latest supplement]

On development and implementation of the Division of Workers' Compensation paperless, computer-based Electronic Adjudication Management System (EAMS), initiated in August, 2008, see *Supp.*, *supra*, §10, and www.dir.ca.gov/dwc/eams.



44 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

3. Pleadings or Stipulation.

b. Service by Board.

2 *Witkin Sum. Cal. Law Work Comp* § 388

[§ 388] Service by Board.

(1) *In General.* If the claimant is not represented, the Board serves a copy of the application on all adverse parties; if the applicant is represented, the Board serves a conformed copy of the application showing the filing date and case number, on the attorney or other representative, who then must serve a copy of the *conformed* application on all other parties. (*Lab.C. 5501; 8 Cal. Code Reg. §10500 et seq. [service].*)

In addition, a notice of the time and place of the hearing must be served on the applicant and all adverse parties. (*Lab.C. 5504; see 8 Cal. Code Reg. §10544.*) Service must be on the attorney or agent of record, not on the party. (*8 Cal. Code Reg. §10510; see Lyydikainen v. Industrial Acc. Com. (1939) 36 C.A.2d 298, 300, 97 P.2d 993 [employer's petition to terminate liability for temporary disability indemnity and to amend permanent disability rating was improperly served on applicant only].*)

Service of notice is in accordance with *C.C.P. 1010 et seq.*, unless the Board directs otherwise. (*Lab.C. 5316.*) It may be made either by mail or personal service (*8 Cal. Code Reg. §10505*); if by mail, the time requirements of *C.C.P. 1013* apply (*8 Cal. Code Reg. §10507*). (On *C.C.P. 1013*, see *6 Cal. Proc. (4th), Proceedings Without Trial*, §28 et seq.)

A defendant aggrieved by lack of notice of the proceeding may obtain relief from the Board substantially in accordance with *C.C.P. 473*. (*Lab.C. 5506.*) (On *C.C.P. 473*, see *8 Cal. Proc. (4th), Attack on Judgment in Trial Court*, §152 et seq.)

(2) *Foreign Corporation Employer.* In *Buckner v. Industrial Acc. Com. (1964) 226 C.A.2d 619, 38 C.R. 332*, petitioner alleged that his contract of employment was made in California and that he was injured in Nevada. The Commission, under its former Rules 10750 and 10752 (now *8 Cal. Code Reg. §§10505, 10507*) served R, the employer, by mail in Nevada, and gave an award. After a special appearance and motion to quash service on the ground that R was a foreign corporation not doing business in California, the Commission, without a hearing, granted the motion. The order stated that it was the applicant's duty to ascertain whether the defendant corporation was qualified to do business in California, and that he failed to do so. *Held*, order annulled.

(a) Service by mail outside the state was unauthorized; *Lab.C. 134* provides that process of the Board extends to all

parts of the *state*, thus, the order quashing service was proper. (226 C.A.2d 621.)

(b) The Commission has jurisdiction that it can exercise by a proper method of service. The corporation had sufficient contacts with California, for it "aggressively recruited California residents for employment in its Nevada operation." (226 C.A.2d 623; see 3 Cal. Proc. (4th), *Actions*, §966 et seq.) In such a case, service may be made on an officer or general manager, an authorized agent for service, or, lacking these, on the *Secretary of State*. (226 C.A.2d 624; see 3 Cal. Proc. (4th), *Actions*, §966 et seq.) Here, petitioner's counsel had advised the Commission that R had appointed an agent for service in California, and it was the duty of the Commission, under its own rules of practice, to serve him; petitioner had no additional duty to perform. (226 C.A.2d 624.)

(c) If the Commission is in doubt as to who should be served, it should serve the Secretary of State, and R may question it or appear and try the merits. "We know of no rule which prohibits double service if the efficacy of one mode is in reasonable doubt." (226 C.A.2d 624.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* Cross-References: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §30 et seq.; 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144 et seq.

(2) *Foreign Corporation Employer.*

Cross-References: 3 Cal. Proc. (5th), *Actions*, §1049 et seq.



45 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

3. Pleadings or Stipulation.

c. Answer.

2 Witkin Sum. Cal. Law Work Comp § 389

[§ 389] Answer.

Although an answer to an application for adjudication is not required, it is the appropriate method for a defendant to deny liability and raise inaccuracies and defenses, and must be made within 10 days after service of the application. (*Lab.C. 5505; Argonaut Ins. Exchange v. Industrial Acc. Com. (1953) 120 C.A.2d 145, 153, 260 P.2d 817.*) A general denial will not suffice, and the form must conform to *8 Cal. Code Reg. §10484. (8 Cal. Code Reg. §10484.)* Demurrers are not permitted, but continuances may be granted to deal with unintelligible, uncertain, or ambiguous pleadings. (See *8 Cal. Code Reg. §10490.*) Moreover, if an application on its face shows that the applicant is not entitled to compensation, the Board may, after an opportunity to the applicant to be heard, dismiss the application without further hearing. (*Lab.C. 5507.*) (See C.E.B., 1 Workers' Compensation Practice 4th, §§13.135, 13.136, 13.144; 1 Hanna 2d (Rev), §25.22 et seq.; 2 Herlick 6th, §§15.34, 15.35.)

Failure to file an answer is not an admission of facts alleged in the application and no default is permitted. (*Lab.C. 5506.*) However, affirmative defenses not set up by a responsive pleading will be deemed waived. (*8 Cal. Code Reg. §10484; see Johnson v. Work. Comp. App. Bd. (1970) 2 C.3d 964, 975, 88 C.R. 202, 471 P.2d 1002, supra, §364.*) If the defendant fails to appear or answer, the Board will hear the matter as it deems proper. (*Lab.C. 5506; Idaho Maryland Mines Corp. v. Industrial Acc. Com. (1959) 174 C.A.2d 693, 695, 345 P.2d 109* [hearing and award were proper where defendant failed to appear after service by mail].)

In submitting an answer, the employer, insurer, and attorney must file with the answer a signed, sworn statement that they have not violated *Lab.C. 139.3*, restricting physician referrals, and have not offered, delivered, received, or accepted consideration as compensation or inducement for a referred examination or evaluation. (*Lab.C. 4906(g).*)

SUPPLEMENT: [This section is current through the latest supplement]



46 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE

C. Steps in Obtaining Award.

3. Pleadings or Stipulation.

d. Other Pleadings, Motions, and Appearance.

2 *Witkin Sum. Cal. Law Work Comp* § 390

[§ 390] Other Pleadings, Motions, and Appearance.

(1) *Pleadings or Motions*. All requests for action other than applications or answers are called "petitions." (8 *Cal. Code Reg.* §10450.) When new issues are stipulated or agreed to, the pleading is deemed amended to conform. (8 *Cal. Code Reg.* §10492.)

A proceeding may be dismissed on motion of the adverse party or on the Board's own motion. (*Lab.C.* 5507.) However, 8 *Cal. Code Reg.* §10780 provides that orders for dismissal of a proceeding will issue only after service of a notice of intention allowing at least 15 days for adverse parties to show good cause to the contrary. Dismissal without compliance with this regulation is a violation of due process. (*Fortich v. Work. Comp. App. Bd.* (1991) 233 *C.A.3d* 1449, 1454, 285 *C.R.* 222.)

(2) *Special Appearance*. A party has the usual right to appear specially to object to personal jurisdiction. (*Braden Copper Co. v. Industrial Acc. Com.* (1956) 147 *C.A.2d* 205, 305 *P.2d* 222 [foreign corporation]; on special appearance, see 2 *Cal. Proc.* (4th), *Jurisdiction*, §197.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Special Appearance*.

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §205.



47 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

3. Pleadings or Stipulation.

e. Stipulation.

2 *Witkin Sum. Cal. Law Work Comp* § 391

[§ 391] Stipulation.

(1) *Submission of Claim.* Although not binding on the Board, the parties may submit a claim on a stipulation of facts. (*Lab.C. 5702*; 8 *Cal. Code Reg. §10496*; see *Sacramento v. Work. Comp. App. Bd. (Weatherall)* (2000) 77 *C.A.4th* 1114, 1119, 92 *C.R.2d* 290 [Board may not without good cause reject stipulation that clarifies issues in controversy].)

(2) *Executed Stipulation.* In *Huston v. Work. Comp. App. Bd.* (1979) 95 *C.A.3d* 856, 157 *C.R.* 355, a hearing, scheduled for June 10, 1977, was disposed of by stipulation, the Board's minutes indicating that the employer's insurer would pay temporary disability and petition to terminate. H began part-time self-employment in October 1977. Temporary disability payments continued until November 30, and the insurer petitioned to terminate these payments on December 7, 1977. At a hearing on February 3, 1978, the insurer was granted credit against the award for permanent disability for all temporary disability payments made after April 7, 1977, based on a medical report of that date. *Held*, order annulled.

(a) Entry of the stipulation in the Board's minutes established a formal agreement, contrary to the insurer's claim, particularly since the insurer did not attempt to prove that the minutes were inaccurate. (95 *C.A.3d* 864.)

(b) While *Lab.C. 5702* permits rejection of a stipulation, here it was executed, and the insurer must therefore establish grounds for relief from an executed agreement. (95 *C.A.3d* 865.) The bases for relief--the medical report and other facts predating the stipulation--were all known when the insurer entered into the stipulation. (95 *C.A.3d* 866.) The Board may, under *Lab.C. 4909* (*supra*, §332), allow a credit for voluntary payments erroneously, even negligently made; but here the payments were made pursuant to a stipulation entered in the Board's minutes, and the stipulation must be enforced as though there were formal findings and an award. (95 *C.A.3d* 866, 867.) The insurer's remedy is to petition to reopen on the basis of newly discovered evidence, which is lacking in this record. (95 *C.A.3d* 867, 868.) (See *Brannen v. Work. Comp. App. Bd.* (1996) 46 *C.A.4th* 377, 383, 53 *C.R.2d* 768 [conflicting medical opinion given 3 years after stipulation to industrial injury and award resolved causation issue was not considered change in facts stipulated to and was not good cause to rescind stipulation].)

(3) *No Unrestricted Right To Withdraw.* In *Robinson v. Work. Comp. App. Bd.* (1987) 194 *C.A.3d* 784, 239 *C.R.* 841, R, represented by an attorney, submitted a stipulation at a hearing. Later, through new counsel, R sought to

withdraw from the stipulation, relying on evidence directly contradicting it. The workers' compensation judge issued an award on the stipulation, and the Board refused to set aside the findings and award. *Held*, affirmed.

(a) The requirement that workers' compensation laws be liberally construed (*Lab.C. 3202*; see *supra*, §§6, 7) does not give the parties the right to withdraw from stipulations before they have been acted on by the Board. "Stipulations are designed to expedite trials and hearings and their use in workers' compensation cases should be encouraged. ... If one party could, as a matter of right, withdraw from a stipulation at any time before it was acted upon by the WCJ or the WCAB, other parties could not rely upon the stipulation and, rather than being expedited, hearings would be subject to uncertainty and disruption in order for the parties to gather and present evidence on issues thought to have been laid to rest by the stipulation." (*194 C.A.3d 791*.)

(b) Where a stipulation has been entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation, a court may exercise its sound discretion and set aside the stipulation. However, when there is no mistake but merely a lack of full knowledge of the facts, which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief. (*194 C.A.3d 791*, citing *Huston v. Work. Comp. App. Bd.*, *supra*.)

(c) Here, there was a substantial conflict about the evidence, and the Board could have issued an award even less favorable to R. No fraud or duress was contended, and both parties knew or should have known about this conflict in evidence before they entered into the stipulation. The only possible reason the parties entered into the stipulation was to settle these factual issues. Hence, the Board did not abuse its discretion in failing to relieve R from the stipulation. (*194 C.A.3d 791, 792*.)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

4. Alternative Dispute Resolution.

a. Statutory Arbitration.

2 *Witkin Sum. Cal. Law Work Comp* § 392

[§ 392] Statutory Arbitration.

(1) *Governing Provisions.* *Lab.C. 5270* et seq. provide for arbitration, both mandatory (*Lab.C. 5275(a)*) and by agreement (*Lab.C. 5275(b)*), in cases where the injured employee or dependent is represented by an attorney (*Lab.C. 5270*). (See *8 Cal. Code Reg. §10995* [mandatory arbitration]; *8 Cal. Code Reg. §10996* [voluntary arbitration]; C.E.B., 1 *Workers' Compensation Practice* 4th, §19.1 et seq.) (On requirements and selection of arbitrator, see *Lab.C. 5270.5, 5271*; on supplementation or replacement of these arbitration provisions by collective bargaining agreement, see *infra*, §393.)

(2) *Mandatory Arbitration.* Under *Lab.C. 5275*, when the employee is represented by counsel, disputes involving the following issues must be submitted for arbitration:

(a) Insurance coverage. (*Lab.C. 5275(a)(1)*.)

(b) Right of contribution under *Lab.C. 5500.5* (*supra*, §§169, 170). (*Lab.C. 5275(a)(2)*.)

(c) Permanent disability where an informal rating indicates a permanent disability of 15% standard or less and the presiding judge determines that the case will not be set for hearing within 110 calendar days from the date the declaration of readiness is filed. (*Lab.C. 5275(a)(3)*.)

(d) Permanent disability where an informal rating indicates a permanent disability of 20% standard or less and the presiding judge determines that the case will not be set for hearing within 150 calendar days from the date the declaration of readiness is filed. (*Lab.C. 5275(a)(4)*.)

(e) Rehabilitation unit disputes where the matter will not be set for conference within 90 calendar days from the date the request for resolution is filed. (*Lab.C. 5275(a)(5)*.)

(f) Appeals from rehabilitation unit decisions and orders where the appeal will not be heard within 120 calendar days from the date the appeal is filed. (*Lab.C. 5275(a)(5)*.)

(3) *Voluntary Arbitration.* The parties may agree to arbitrate any dispute under the Act, provided the injured

employee is represented by counsel. (*Lab.C. 5275(d).*)

(4) *Proceedings.* The proceedings commence at the place and time agreed on by the parties, or as set by the arbitrator where the parties are in disagreement. Unless otherwise agreed, the proceeding must commence between 30 and 60 days from the date an arbitrator is selected. Ten days before the arbitration, each party must furnish the arbitrator and all other parties with the documentary evidence on which the party intends to rely. (*Lab.C. 5276.*)

(5) *Findings and Award.* An arbitrator's findings of fact, award, order, and decision have the same effect as those of a workers' compensation judge. (*Lab.C. 5277(c)*; see *infra*, §403 et seq.) The decision must be served on all parties within 30 days of submission of the case, must comply with *Lab.C. 5313*, and must be filed with the Board. (*Lab.C. 5277(a), (b).*)

(6) *Costs.* In disputes between an employee and an employer, the employer pays all costs related to the proceeding. (*Lab.C. 5273(a).*) Costs are divided equally among the parties in disputes between an employer and an insurer, an employer and a lien claimant, and by parties in proceedings under *Lab.C. 5500.5* (occupational disease or cumulative injury arising from multiple employments). Dependents bear the costs in accordance with their proportionate share of death benefits where there is no dispute about the injury causing death. (*Lab.C. 5273(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

4. Alternative Dispute Resolution.

b. Collective Bargaining Agreements in Specified Industries.

2 Witkin Sum. Cal. Law Work Comp § 393

[§ 393] Collective Bargaining Agreements in Specified Industries.

A private employer or groups of employers engaged in construction, construction maintenance, or activities limited to rock, sand, gravel, cement and asphalt operations, heavy-duty mechanics, surveying, and construction inspection may enter into collective bargaining agreements with recognized or certified exclusive bargaining representatives that establish alternative dispute resolution systems that supplement or replace all or part of those dispute resolution processes contained in the workers' compensation law, including but not limited to mediation and arbitration. (*Lab.C. 3201.5(a)(1)*; see *Costa v. Work. Comp. App. Bd. (1998) 65 C.A.4th 1177, 1184, 77 C.R.2d 289* [*Lab.C. 3201.5* is constitutional and ADR plan between employer and union met statute's requirements and was valid].) (On similar provisions with respect to noncollective bargaining, labor-management agreements generally, see *Lab.C. 3201.7*.)

An arbitration system must provide that the decision of the arbiter or board of arbitration is subject to Board review in the same manner as provided for reconsideration of a final order, decision, or award made by a workers' compensation judge. The arbitrator's findings, award, order, and decision have the same effect as those of a workers' compensation judge. Provisions for arbitration established under *Lab.C. 3201.5* are not subject to *Lab.C. 5270, 5270.5, 5271, 5272, 5273, 5275, and 5277* (*supra*, §392). (*Lab.C. 3201.5(a)(1)*; on reconsideration, see *infra*, §418 et seq.)

Lab.C. 3201.5(a) applies only to employers that meet eligibility requirements predicated on specified developed or projected annual workers' compensation insurance premium amounts. (See *Lab.C. 3201.5(c)*.) (On material required to be submitted by employers to establish or continue arbitration system under *Lab.C. 3201.5*, see *Lab.C. 3201.5(f)*.)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

a. Nature of Hearing.

2 Witkin Sum. Cal. Law Work Comp § 394

[§ 394] Nature of Hearing.

The hearing is essentially an informal investigation of facts; the technical rules of evidence are not binding (see *infra*, §398), and informality of procedure will not invalidate a decision. (See *Lab.C. 5709*; *8 Cal. Code Reg. §10541 et seq.*; *C.E.B., 2 Workers' Compensation Practice 4th*, §§17.4, 18.1 *et seq.*; *1 Hanna 2d* (2004 ed.), §26.06[1]; *2 Herlick 6th*, §16.01 *et seq.*; *82 Am.Jur.2d* (2003 ed.), *Workers' Compensation* §581 *et seq.*)

Despite its informality, procedural due process must be assured. "Notice and opportunity to be heard are fundamental procedural rights to which every litigant is entitled in workers' compensation proceedings as in all other proceedings of an adjudicatory nature." (*Hartford Acc. & Indem. Co. v. Work. Comp. App. Bd.* (1982) 132 C.A.3d 796, 807, 183 C.R. 440 [after case was submitted and without notice to or presence of parties, workers' compensation judge improperly viewed accident scene, communicated with unidentified title company, and accepted as material evidence out-of-court report by unidentified person].)

In *Beverly Hills Multispecialty Group v. Work. Comp. App. Bd.* (1994) 26 C.A.4th 789, 32 C.R.2d 293, the Board upheld the workers' compensation judge's denial of a medical group's lien claims for medical treatment and medical-legal costs in 10 cases that were consolidated on appeal. The costs were billed for services provided to workers alleging cumulative industrial injury following their termination of employment. In each case, the employer and the insurer obtained medical reports criticizing petitioner physicians' treatment, evaluation methods, and conclusions. Some of the reports asserted that the workers' claims or supporting reports were fraudulent. None of the reports was served on petitioner before trial, and in each trial fraud was an issue. Nor was petitioner provided with notice of mandatory settlement conferences, in several of which fraud was an issue. In one case, petitioner was not permitted to cross-examine a material witness, and in another petitioner was not permitted to make further objections. *Held*, the workers' compensation judge committed reversible error per se in denying petitioner due process and the right to a fair trial.

(a) *Notice*. Lien claimants are entitled to due process. (26 C.A.4th 803.) By its own rules of practice and procedure (8 Cal. Code Reg. §§10500, 10544, 10770), the Board is required to serve lien claimants with notice of all hearings. (26 C.A.4th 803.) Because a lien claim for medical treatment or medical-legal costs may be denied if the worker's injury claim was fraudulent, "it is important that a medical or medical-legal lien claimant be served with notice before trial in

the worker's case-in-chief that *fraud* is alleged when the employer or its insurer is alleging fraud by the worker or the lien claimant." (26 C.A.4th 803.)

(b) *Evidence and reports.* "Due process requires that all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." (26 C.A.4th 804.) California's Code of Regulations requires that copies of all physicians' reports be served on lien claimants whose liens are proposed to be reduced or disallowed. The service must be made not later than the time the reduction or disallowance is proposed. (26 C.A.4th 805.) Thus, because the employer and insurer here failed to serve petitioner with copies of the defense medical reports, petitioner was unaware of the evidence the employer and insurer would rely on to support disallowance of the lien claims and was also unaware of the allegations of fraud contained in many of the reports. (26 C.A.4th 805.) Not having the reports, petitioner could not make a fully informed decision whether to appear at the trials in eight of the cases, and thus was denied due process. (26 C.A.4th 805.)

(c) *Reversible per se.* Denial of due process to a party "ordinarily compels annulment of the board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se." (26 C.A.4th 806.) Because failure to serve the defense medical reports denied petitioner due process, petitioner was denied a fair trial. "Although the California Constitution states that a goal of workers' compensation proceedings is to 'accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character,' the right to due process is paramount to the goal of conducting workers' compensation proceedings expeditiously. Therefore, denial of a fair trial to a lien claimant is reversible per se." (26 C.A.4th 806, citing Cal. Const., Art. XIV, §4.) (On lien claimant's right to participate in workers' case-in-chief, see supra, §351.) (See *Katzin v. Work. Comp. App. Bd.* (1992) 5 C.A.4th 703, 712, 7 C.R.2d 66 [failure to serve employer with applicant's medical reports, notice of pretrial conference, lien claim, summary of evidence, and notice of intention to submit on record deprived employer of due process]; *Hand Rehabilitation Center v. Work. Comp. App. Bd.* (1995) 34 C.A.4th 1204, 1211, 40 C.R.2d 734 [medical lien claimants' nonparticipation in choosing medical examiner did not violate due process because lien claimants participated fully in lien hearing]; *Rucker v. Work. Comp. App. Bd.* (2000) 82 C.A.4th 151, 158, 97 C.R.2d 852 [workers' compensation judge's amended decision based on previously submitted evidence without notice to parties to provide opportunity to be heard was denial of due process].)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

b. Workers' Compensation Judge.

2 *Witkin Sum. Cal. Law Work Comp* § 395

[§ 395] Workers' Compensation Judge.

(1) *Titles for Hearing Officers.* Although the hearing officer is generally referred to as the "workers' compensation judge," *Lab.C.* 27 provides that whenever the term "workers' compensation judge" or "workers' compensation referee" is used in the Labor Code, the term means "workers' compensation administrative law judge." Under the Board rules, the titles of "referee" and "referee in charge" are respectively known as "workers' compensation judge" and "presiding workers' compensation judge." (8 *Cal. Code Reg.* §10302.)

(2) *Appointment and Powers.* Workers' compensation judges are appointed by the Board (*Lab.C.* 5310), and the Board may make orders relating to the functions to be performed (*Lab.C.* 5309). (On powers and duties generally, see 8 *Cal. Code Reg.* §10340 et seq.; *Allison v. Work. Comp. App. Bd.* (1999) 72 *C.A.4th* 654, 661, 84 *C.R.2d* 915 [workers' compensation judges have authority to hear discovery disputes, make orders concerning those disputes, and determine if hearing is appropriate].) (On contempt powers, see *infra*, §397.)

(3) *Code of Judicial Ethics Applies.* The Code of Judicial Ethics (see 2 *Cal. Proc.* (4th), *Courts*, §51) applies to workers' compensation judges. (*Lab.C.* 123.6(a); see *Young v. Gannon* (2002) 97 *C.A.4th* 209, 222, 118 *C.R.2d* 187 [upholding termination of workers' compensation judge for incompetence, dishonesty, unlawful discrimination, deficient productivity, and inappropriate behavior; regulations adopted pursuant to *Lab.C.* 123.6 were within scope and authority conferred and were reasonably necessary to effectuate statute's purpose].)

(4) *Continuing Education.* Workers' compensation judges must participate in continuing education, including courses in ethics and conflicts of interest, as required by the Administrative Director or court administrator. The Director may coordinate these requirements with those imposed on attorneys by the State Bar. (*Lab.C.* 5311.5.)

(5) *Objections to Judge.* A party to the proceeding may object to a reference to a particular judge on a ground specified for the objection to referees generally, and the Board must hear and dispose of the matter. Affidavits may be read and witnesses examined by the Board. (*Lab.C.* 5311.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Code of Judicial Ethics Applies.*

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §52 et seq.



52 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

c. Procedure.

2 *Witkin Sum. Cal. Law Work Comp* § 396

[§ 396] Procedure.

(1) *Time and Place.* Except as provided in *Lab.C. 5502(b)*, (d), the hearing must be held between 10 and 60 days after the date the declaration of readiness to proceed is filed. (*Lab.C. 5502.*) Notice of the time and place of the hearing must be served on all parties at least 10 days before the hearing, except where (a) notice is waived, (b) all parties agree on a different time and the Board concurs, or (c) the proceedings are governed by *8 Cal. Code Reg. §10940* et seq., pertaining to claims against the Subsequent Injuries Fund. (*Lab.C. 5504; 8 Cal. Code Reg. §10544; see C.E.B., 2 Workers' Compensation Practice 4th, §§17, 19 et seq.*)

The court administrator must establish a priority calendar for specified issues requiring expedited resolution so that a hearing is held and a determination made and filed within 30 days after the declaration of readiness to proceed is filed. (*Lab.C. 5502(b).*)

(2) *Mandatory Settlement Conference.* A settlement conference must be held between 10 and 30 days after the filing of a declaration of readiness to proceed. If the dispute is not resolved, the regular hearing must be held within 75 days after the declaration of readiness to proceed is filed. (*Lab.C. 5502(e)(1).*) The conference is conducted by a workers' compensation judge, an eligible referee, or an arbitrator under *Lab.C. 5270.5* (see *supra*, §392). (*Lab.C. 5502(e)(2).*)

If the claim is not resolved, the parties must file pretrial conference statements that (a) set forth disputed issues, (b) state each party's proposed disability ratings, (c) list exhibits, and (d) disclose witnesses. Discovery closes on the date of the mandatory settlement conference. Thus, evidence subsequently disclosed or obtained is not admissible unless the proponent can show that it was not available or could not have been discovered by due diligence before the conference. (*Lab.C. 5502(e)(3).*) (See *Sacramento v. Work. Comp. App. Bd. (Estrada)* (1999) 68 C.A.4th 1429, 1432, 81 C.R.2d 266 [workers' compensation judge exceeded authority by keeping discovery open after mandatory settlement conference].)

The court administrator must establish a priority conference calendar for cases in which the employee is represented by counsel and the disputed issues are employment or whether the injury arises out of or in the course of employment. The conference is conducted by a workers' compensation judge within 30 days of the declaration of readiness to proceed. If the dispute cannot be resolved, a trial must be set as expeditiously as possible, or when

discovery is deemed completed. (*Lab.C. 5502(c).*)

(3) *Presentation of Evidence.* Testimony of witnesses is ordinarily taken at the hearing, although the Board may also obtain evidence by its own investigation, with or without notice. (*Lab.C. 5701*; 2 *Cal. Evidence (4th)*, *Witnesses*, §§35, 36; see *infra*, §400.) Depositions may be taken in the usual manner. (*Lab.C. 5710(a)*; see 7 *Cal. Evidence (4th)*, *Introduction*, §81.) When the injured employee or dependent claimant is deposed by the employer or insurer, the deponent is entitled to recover all expenses occasioned, including attorneys' fees, and must be supplied with a copy of the deposition. (*Lab.C. 5710(b).*)

Although *Lab.C. 5502* requires all witnesses to be disclosed, nothing in the statute precludes one party from calling witnesses disclosed by any other party during the proceedings. (*Dole Bakersfield v. Work. Comp. App. Bd. (1998) 64 C.A.4th 1273, 1276, 75 C.R.2d 836* [Board erred in precluding employer from calling and cross-examining injured employee where employee's attorney disclosed employee as his only witness but submitted case on record]; see also *San Bernardino Community Hosp. v. Work. Comp. App. Bd. (1999) 74 C.A.4th 928, 88 C.R.2d 516*, *infra*, §400 [Board erred by permitting applicant to reopen record and introduce testimony of expert witness not disclosed under *Lab.C. 5502(d)(3)*]; *Kuykendall v. Work. Comp. App. Bd. (2000) 79 C.A.4th 396, 403, 94 C.R.2d 130* [*Lab.C. 5502(e)(3)* does not preclude admission of evidence obtained and submitted subsequent to mandatory settlement conference as rebuttal to unanticipated testimony at trial when necessary to accomplish substantial justice; distinguishing *Estrada* and *San Bernardino Community Hosp.*].)

(4) *Use of Interpreters.* A party producing a witness who requires an interpreter is responsible for arranging for a qualified interpreter to be present at the relevant proceeding (e.g., deposition or hearing). A qualified interpreter is a language interpreter certified under *Govt.C. 11435.05 et seq.* or *Govt.C. 68566*. (*Lab.C. 5811(b).*)

In cases of depositions taken of an injured employee or person claiming benefits as a dependent, the deponent is entitled to a reasonable allowance for interpreter's fees. (*Lab.C. 5710(b)(5).*)

(5) *Continuances and Further Hearings.* Continuances are "not favored" and will be granted "only upon a clear showing of good cause." (8 *Cal. Code Reg. §10548*; *Lab.C. 5502.5* [continuances granted by workers' compensation judges].) Similarly, further hearings will not be granted except by order of the Board "on a showing of good cause and in the exercise of sound discretion." (8 *Cal. Code Reg. §10560*.) (On showing necessary for continuance in legal proceedings, see 7 *Cal. Proc. (4th)*, *Trial*, §7 *et seq.*)

(6) *Failure To Appear.* When a party served with notice of hearing fails to appear, the Board may dismiss the application or claim after issuing a 10-day notice of intention to dismiss, or the workers' compensation judge may take evidence and, after serving the minutes and a summary of evidence that includes a 10-day notice of intention to submit, render a decision. If a noticed party fails to appear at a mandatory settlement conference, the workers' compensation judge may dismiss the application after issuing a 10-day notice of intention to do so, or may close discovery and forward the case to the presiding workers' compensation judge to set for hearing. If a party, after notice, fails to appear at a hearing or settlement conference, the workers' compensation judge may take the case off calendar, dismiss the application, or continue the case. (8 *Cal. Code Reg. §10562*; see *Idaho Maryland Mines Corp. v. Industrial Acc. Com. (1959) 174 C.A.2d 693, 695, 345 P.2d 109* [where defendant failed to appear, complete hearing was held and award was made; affirmed]; *Roth v. Work. Comp. App. Bd. (1971) 20 C.A.3d 452, 459, 97 C.R. 605* [although referee has inherent power to dismiss proceedings, applicant should be given notice and opportunity to be heard on issue of dismissal]; *C.E.B., 2 Workers' Compensation Practice 4th*, §18.15 *et seq.*; 2 *Hanna 2d* (2004 ed.), §26.01[3]; 2 *Herlick 6th*, §16.07[2].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Presentation of Evidence.* See *Grupe Co. v. Work. Comp. App. Bd. (2005) 132 C.A.4th 977, 988, 34 C.R.3d 98* [testimony of employee's vocational rehabilitation expert was properly admitted even though expert's evaluation was made after discovery closed; employee had disclosed witness' name in pretrial conference statement in conformity with

Lab.C. 5502].(5) Continuances and Further Hearings.

Cross-Reference: 7 Cal. Proc. (5th), Trial, §7 et seq.



53 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

d. Contempt in Hearing.

2 *Witkin Sum. Cal. Law Work Comp* § 397

[§ 397] Contempt in Hearing.

(1) *Prior Law.* Formerly, a referee had no statutory power to punish for contempt, and the Board's attempt to delegate that power under *Lab.C. 134* (supra, §14) was held invalid. (*Marcus v. Work. Comp. App. Bd.* (1973) 35 C.A.3d 598, 603, 111 C.R. 101 [applicant's attorney struck insurer's attorney]; *Rowen v. Work. Comp. App. Bd.* (1981) 119 C.A.3d 633, 174 C.R. 185 [following *Marcus*]; *Morton v. Work. Comp. App. Bd.* (1987) 193 C.A.3d 924, 238 C.R. 651 [following *Marcus* and *Rowen*].)

(2) *Statutory Authority.* *Lab.C. 5309* (supra, §395) was amended in 1988 to give the Board power to direct and order a workers' compensation judge to issue writs or summons, warrants of attachment, warrants of commitment, and all necessary process in proceedings for direct and hybrid contempt to the same extent as courts of record. "Hybrid contempt" means a charge of contempt that arises from events occurring in the immediate presence of the workers' compensation judge for reasons that occur outside the presence of the workers' compensation judge. (*Lab.C. 5309(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



54 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

e. Rules of Evidence Are Not Binding.

2 Witkin Sum. Cal. Law Work Comp § 398

[§ 398] Rules of Evidence Are Not Binding.

The Board is not bound by the common law or statutory rules of evidence and procedure. Thus, it may inquire in a manner, through oral testimony and records, best calculated to determine the substantial rights of the parties and "carry out justly the spirit and provisions" of the Act. (*Lab.C. 5708*.) This is the general practice followed in most administrative proceedings, and the subject has been covered elsewhere. (See 1 *Cal. Evidence* (4th), *Introduction*, §52 et seq. [evidence in administrative proceedings]; C.E.B., 2 *Workers' Compensation Practice* 4th, §18.48 et seq.; 2 *Hanna* 2d (2004 ed.), §26.06; 2 *Herlick* 6th, §§16.01, 16.50; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §570 et seq.)

The principal illustration is hearsay. The hearsay rule is inapplicable under the statute, and hearsay is admissible and may be sufficient to sustain an award. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1924) 195 C. 174, 177, 231 P. 996; *McAllister v. Work. Comp. App. Bd.* (1968) 69 C.2d 408, 413, footnote 2, 71 C.R. 697, 445 P.2d 343; see 1 *Cal. Evidence* (4th), *Introduction*, §67 [incompetent hearsay admissible in workers' compensation proceeding]; 17 *A.L.R.3d* 993 [use of medical books and treatises].)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

f. Medical and Scientific Reports and Records.

2 *Witkin Sum. Cal. Law Work Comp* § 399

[§ 399] Medical and Scientific Reports and Records.

Reports of physicians and investigators, hospital records, and official governmental publications are generally admissible. (*Lab.C. 5703*; *8 Cal. Code Reg. §10600* et seq.; see *1 Cal. Evidence* (4th), *Introduction*, §69 et seq. [affidavits and reports].) However, physicians' reports are admissible only if the physician has stated in the body of the report under penalty of perjury that there has been no violation of *Lab.C. 139.3* (restrictions on referrals) and that the contents of the report are true and correct. (*Lab.C. 5703(a)(2)*.) Statements regarding bills for services are similarly only admissible if the physician has provided a sworn statement as to their validity. (*Lab.C. 5703(a)(1)*.)

A medical report will be inadmissible where a physician fails to comply with the medical report preparation requirements of *Lab.C. 4628* (see *supra*, §274). (*Lab.C. 4628(e)*.) Moreover, failure to comply with *Lab.C. 4628* subjects a physician to civil penalties and contempt. (*Lab.C. 4628(f)*, (g), (h).) (See *Scheffield Med. Group v. Work. Comp. App. Bd.* (1999) 70 *C.A.4th* 868, 875, 83 *C.R.2d* 71 [medical-legal reports falsely representing that X-ray technician was licensed were inadmissible and whether noncompliance with statute affected reliability was irrelevant because *Lab.C. 4628* is strict liability statute].)

The physician signing the report must sign a sworn statement that the information in the report is true and that information received from others is accurately described and believed to be true. (*Lab.C. 4628(j)*.) (See *Stress Care v. Work. Comp. App. Bd.* (1994) 26 *C.A.4th* 909, 917, 32 *C.R.2d* 426 [marriage, family, and child counselor is not "physician" within meaning of *Lab.C. 3209.3* (*supra*, §§261, 266), and thus not subject to penalty provisions of *Lab.C. 4628*].)

Excerpts from expert testimony received by the Board on similar issues of scientific fact in other cases and the prior decisions of the Board on those issues are also admissible (*Lab.C. 5703(g)*), as are relevant portions of medical treatment protocols published by medical specialty societies, subject to specified admissibility requirements (*Lab.C. 5703(h)*).

The required report of an injury or death by an employer or insurer (*Lab.C. 6409(a)*, *6409.1*) is not admissible; but the required report of a physician (*Lab.C. 6409(a)*) is admissible as evidence. (*Lab.C. 6412*.) (On Occupational Safety and Health Act of which these statutes are part, and its federal counterpart, see 3 *Summary* (10th), *Agency and*

Employment, §364 et seq.)

Copies of reports or investigations made without notice must be furnished to adverse parties. (*Lab.C. 5704*; *8 Cal. Code Reg. §10580*; *Peak v. Industrial Acc. Com. (1947) 82 C.A.2d 926, 929, 187 P.2d 905.*) A medical report that a party wilfully suppresses will be presumed to be adverse. (*8 Cal. Code Reg. §10622*; see *3 Cal. Evidence (4th), Presentation at Trial, §115* et seq. [suppressed evidence]; C.E.B., 2 Workers' Compensation Practice 4th, §18.50.)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

g. Evidence Developed by Board.

2 *Witkin Sum. Cal. Law Work Comp* § 400

[§ 400] Evidence Developed by Board.

(1) *In General.* The Board has broad power, with or without notice to the parties, to procure evidence, including taking testimony, inspecting the injury site, and examining employer time and payroll records. (*Lab.C. 5701.*) Moreover, the Board may refer disputed medical questions to its own medical bureau or to an independent medical examiner appointed for the purpose. (*8 Cal. Code Reg. §10700 et seq.*)

The general power and duty of the Board to act independently was described in *West v. Industrial Acc. Com. (1947) 79 C.A.2d 711, 719, 180 P.2d 972*, as follows: "The commission is a court ... deliberately clothed by the Legislature with administrative facilities to permit it to develop the facts in reference to matters not generally known to laymen. It was not intended that the litigants before it be impaled upon the results of their lack of familiarity with the often occult problems of medical science frequently arising in compensation cases. As a consequence the commission may not leave undeveloped matters which its acquired, specialized knowledge should identify as requiring further evidence." (See C.E.B., 2 *Workers' Compensation Practice* 4th, §18.67.)

The Board, at any time after an application is filed and prior to the expiration of its jurisdiction may, on the agreement of a party to pay the cost, direct an unrepresented employee to be examined by a qualified medical evaluator selected by the Board, within the scope of the qualified medical evaluator's professional training, on clinical questions at issue. (*Lab.C. 5703.5(a).*) (For definition of "qualified medical evaluator," see *Lab.C. 110(e).*)

(2) *Illustrations.* The following cases are instructive:

Columbia-Geneva Steel Div. v. Industrial Acc. Com. (1953) 115 C.A.2d 862, 864, 253 P.2d 45 [Commission should have determined date of notice of injury to employer left in dispute by panel].

Johns-Manville Products Corp. v. Work. Comp. App. Bd. (1978) 87 C.A.3d 740, 752, 151 C.R. 215 [rejecting claim of abuse of discretion in not appointing independent examiner "merely because of a divergence of medical opinion"].

Robinson v. Work. Comp. App. Bd. (1987) 194 C.A.3d 784, 792, 239 C.R. 841 [Board was not required to accept opinion of independent medical examiner on issues of conflicting medical evidence].

Tyler v. Work. Comp. App. Bd. (1997) 56 C.A.4th 389, 394, 65 C.R.2d 431 [*Lab.C.* 5701 and 5906 (*infra*, §422) permit workers' compensation judge or Board to develop further information, including medical evidence, in determining case].

McClune v. Work. Comp. App. Bd. (1998) 62 C.A.4th 1117, 1120, 72 C.R.2d 898 [failure of workers' compensation judge and Board to take additional information when record lacked substantial evidence to support finding of industrial causation violated worker's due process rights; following *Tyler*].

M/A Com-Phi v. Work. Comp. App. Bd. (1998) 65 C.A.4th 1020, 1025, 76 C.R.2d 907 [further development of competent medical record as to nature and extent of injury was required and workers' compensation judge or Board should have facilitated review of surveillance films by physicians or some other reasonable and fair method to ensure reliance on substantial evidence].

San Bernardino Community Hosp. v. Work. Comp. App. Bd. (1999) 74 C.A.4th 928, 933, 88 C.R.2d 516 [Board abused discretion by permitting applicant to reopen record for additional evidence by previously undisclosed expert witness].

Kuykendall v. Work. Comp. App. Bd. (2000) 79 C.A.4th 396, 405, 94 C.R.2d 130 [*Lab.C.* 5502(d)(3) (now *Lab.C.* 5502(e)(3), *supra*, §396) does not preclude Board from admitting evidence obtained and submitted subsequent to mandatory settlement conference when necessary to accomplish substantial justice; distinguishing *San Bernardino Community Hosp.*, and following *Tyler*, *McClune*, and *M/A Com-Phi*].

Telles Transport v. Work. Comp. App. Bd. (2001) 92 C.A.4th 1159, 1165, 112 C.R.2d 540 [workers' compensation judge's duty to develop record does not supersede parties' obligation to disclose all relevant evidence under *Lab.C.* 5502(d)(3); thus, Board erred in directing judge to admit medical evidence that employee's counsel purposely failed to disclose at mandatory settlement conference and did not introduce at hearing; following *San Bernardino Community Hosp.*].

SUPPLEMENT: [This section is current through the latest supplement]



57 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

h. Evidence Fraudulently Obtained.

2 Witkin Sum. Cal. Law Work Comp § 401

[§ 401] Evidence Fraudulently Obtained.

In *Redner v. Work. Comp. App. Bd.* (1971) 5 C.3d 83, 95 C.R. 447, 485 P.2d 799, petitioner, a deliveryman, suffered a back injury that kept him in bed for some time, following which, he underwent surgery and continued to have pain and impaired ability to walk. The insurer paid temporary disability for about a year, and then engaged C, an investigator, who had H invite petitioner to a ranch party. The group had a great many drinks, H suggested that they go horseback riding, and petitioner joined them in riding that day and the next day. C filmed the activity from a concealed place. After riding, petitioner had to go to bed again for 3 weeks, and then was able to find only part-time employment, and continued to suffer pain. The referee recommended a permanent disability rating, in a hearing in which the film was not introduced. The insurer's petition for reconsideration was granted, the Board viewed the film without permitting testimony, and denied an award. *Held*, order annulled. Even if the film had been offered in a timely fashion at the hearing, the referee should have rejected it because of the fraud in its procurement. (5 C.3d 95.)

The court concluded with this observation: "[W]e cannot sanction the carrier's attempt to profit by its deceitful inducement of applicant to engage in activity which he would not otherwise have undertaken. The legal process cannot be stultified by crowning such amoral maneuvers with apparent success. In the instant case the procedure becomes even more aggravated by the late reliance upon introduction of the ill-gotten film at a hearing on reconsideration although that film had not been previously produced and although on reconsideration applicant was denied the rights of cross-examination and presentation of rebuttal evidence. The procedure here is thus doubly dubious." (5 C.3d 97.)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

5. Hearing.

i. Evidence of Sexual Conduct.

2 Witkin Sum. Cal. Law Work Comp § 402

[§ 402] Evidence of Sexual Conduct.

(1) *Admissibility of Evidence.* Opinion evidence, evidence of reputation, and evidence of specific instances of sexual conduct of the applicant with a person other than the defendant is not admissible by the defendant to prove consent by or the absence of injury to the applicant, unless the injury alleged by the applicant is in the nature of loss of consortium. (*Lab.C. 3208.4.*)

(2) *Discovery of Evidence.* If the employee's injury arises out of alleged conduct constituting sexual harassment, sexual assault, or sexual battery, a party seeking discovery concerning the sexual conduct of the applicant with a person other than the defendant must show good cause for that discovery based on specific facts on a noticed motion to the Board. The motion may not be made or considered at an ex parte hearing. (*Lab.C. 3208.4.*)

(3) *Procedure.* If evidence of sexual conduct of the applicant is offered to attack the applicant's credibility, the procedures provided in *Ev.C. 783 (1 Cal. Evidence (4th), Circumstantial Evidence, §49)* must be followed. (*Lab.C. 3208.4.*)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 403

[§ 403] In General.

The decision consists of findings and an award of compensation or other order. It is made by the Board or the workers' compensation judge within 30 days after the case is submitted. (*Lab.C. 5313*; see *C.E.B., 2 Workers' Compensation Practice* 4th, §20.1 et seq.; 2 *Hanna* 2d (2004 ed.), §27.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §587 et seq.)

Although *Lab.C. 5800.5* requires that a finding and award be rendered within 30 days after submission, the time is not jurisdictional, and a belated award is not for that reason subject to annulment. (*Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1964) 231 *C.A.2d* 501, 508, 509, 42 *C.R. 58* [award 42 days after submission]; *Janet v. Industrial Acc. Com.* (1965) 238 *C.A.2d* 491, 497, 47 *C.R. 829* [most of delay was attributable to petitioner's own acts].)

Board awards carry interest in a manner similar to judgments in civil actions (see 7 *Cal. Proc.* (4th), *Judgment*, §272 et seq.). The interest is computed from the date the award is made and filed. (*Lab.C. 5800*; *Myers v. Work. Comp. App. Bd.* (1969) 2 *C.A.3d* 621, 624, 83 *C.R. 427*; *Myers v. Work. Comp. App. Bd.* (1971) 20 *C.A.3d* 120, 122, 97 *C.R. 400*.) If a reconsideration is granted (see *infra*, §418) but the same result is reached, interest runs from the date of the original award. (*Myers v. Work. Comp. App. Bd.*, *supra*, 2 *C.A.3d* 629.) (See 79 *A.L.R.5th* 201 [interest on fees and penalties].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Barr v. Work. Comp. App. Bd.* (2008) 164 *C.A.4th* 173, 181, 78 *C.R.3d* 732 [where parties agreed to facts and award without trial or testimony, *Lab.C. 5811* (text, §439), gave Board discretion to award costs for preparation of vocational rehabilitation consultant's report requested by employee's attorney, even if report would have been inadmissible]. *Cross-Reference:* 7 *Cal. Proc.* (5th), *Judgment*, §326 et seq.



60 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

b. Findings.

2 Witkin Sum. Cal. Law Work Comp § 404

[§ 404] Findings.

The Board or workers' compensation judge must make findings on all facts involved in the controversy. (*Lab.C. 5313*; see *Horn v. Industrial Acc. Com. (1954) 128 C.A.2d 837, 847, 276 P.2d 673.*) Every order, decision, or award (other than an order merely appointing a trustee or guardian) must contain a determination of all issues presented; issues not so determined will be deemed decided adversely as to the party in whose interest the issue was raised. (*Lab.C. 5815*; see *Lab.C. 5816* [Board's determination of facts under *Lab.C. 5800* et seq. has no collateral estoppel effect on subsequent criminal prosecution]; *Twentieth Century-Fox Film Corp. v. Work. Comp. App. Bd. (1983) 141 C.A.3d 778, 784, 190 C.R. 560* [requirements "were established to avoid careless and arbitrary action and to assist the reviewing court in meaningful judicial review"]; *C.E.B., 2 Workers' Compensation Practice 4th, §20.5* et seq.; *2 Hanna 2d (2004 ed.)*, §27.01[1][b]; *82 Am.Jur.2d (2003 ed.)*, *Workers' Compensation §587* et seq.)

It has been frequently held that general findings of ultimate facts in the words of the statute are sufficient; e.g., a finding that death or injury arose out of and occurred in the course of employment. (See *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com. (1946) 29 C.2d 492, 499, 175 P.2d 823* [injury "arising out of and occurring in the course of his employment"]; *Argonaut Ins. Exchange v. Industrial Acc. Com. (1958) 49 C.2d 706, 712, 321 P.2d 460* [injury "proximately caused his death"].) However, a finding of an employer's serious and wilful misconduct requires specific findings. (See *supra*, §§316, 321.)

SUPPLEMENT: [This section is current through the latest supplement]

In addition to making findings on all facts involved in a controversy, *Lab.C. 5313* requires a workers' compensation judge or the Board to prepare and serve on the parties a summary of the evidence received and relied on and the reasons or grounds on which a determination was made. In *Sharareh v. Work. Comp. App. Bd. (2007) 156 C.A.4th 189, 67 C.R.3d 147*, after a contested hearing the arbitrator found that S had not been acting as a police informant when he was shot and thus, his injuries were not compensable. The arbitrator did not file a summary of evidence. S sought reconsideration, claiming in part that the arbitrator's failure to file the summary of evidence required reversal. The Board granted reconsideration but upheld the decision and concluded that although the arbitrator had erred in failing to prepare a summary of evidence, S had not been prejudiced by the error. *Held*, the Board's order is annulled and the case is remanded with directions to return the matter to the arbitrator for preparation of a summary of evidence. S's statement

of the facts set forth conversations between S and the police and deposition testimony that related directly to whether S was engaged as a police informant when he was shot. However, without an unbiased summary of each witness's testimony, a reviewing court is unable to address the substantive issues raised in S's petition for review. Although the arbitrator prepared an opinion with findings, there is no way to determine whether those findings are supported by the evidence because there is no summary of that evidence. (156 C.A.4th 195.)



61 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

c. Liens Against Award.

1. In General.

2 Witkin Sum. Cal. Law Work Comp § 405

[§ 405] In General.

The Board may allow liens against the compensation award as specified in *Lab.C. 4903* (infra, §406). (*Lab.C. 4903*; see *Coltherd v. Work. Comp. App. Bd.* (1990) 225 C.A.3d 455, 461, 275 C.R. 130 [Board may not allow lien for obligation not specified in *Lab.C. 4903*; "[i]f it does so, it acts in excess of its authority and without jurisdiction"]; Cal. Civil Practice, 2 Workers' Compensation, §12:1 et seq.; C.E.B., 2 Workers' Compensation Practice 4th, §15.9 et seq.; 2 Hanna 2d (2004 ed.), §30.01 et seq.; 2 Herlick 6th, §17.01 et seq.; 48 A.L.R.5th 473 [validity, construction, and application of statutes that protect awards from creditors].)

The Board may not compromise a court order for restitution. In *People v. Shelton* (1986) 188 C.A.3d 371, 232 C.R. 783, S was convicted of welfare fraud, and as a condition of probation was ordered to pay restitution to the county in the amount of \$ 11,731.61. In her workers' compensation proceeding, the Board awarded the county \$ 5,000 "in full satisfaction" of the lien, and the superior court upheld the compromise. *Held*, judgment reversed. Although the Board "has the authority to determine the amount of living expenses, and may, as it did here, award an amount less than that demanded, it does not, in the absence of an agreement, have the power to modify or compromise an order for restitution in a criminal proceeding." (188 C.A.3d 373.) (See *Farmers Ins. Group v. Work. Comp. App. Bd.* (2002) 104 C.A.4th 684, 128 C.R.2d 353 [award approving credit for insurer against injured employee's receipt of future medical benefits to satisfy restitution order following employee's conviction of insurance fraud amounted to impermissible modification or compromise of criminal restitution order and was annulled; insurer's remedy was civil action to enforce judgment].)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

c. Liens Against Award.

2. Permissible Liens.

2 Witkin Sum. Cal. Law Work Comp § 406

[§ 406] Permissible Liens.

The following liens are permissible under *Lab.C. 4903*:

(1) *Attorneys' Fees*. Reasonable attorneys' fees for services pertaining to the claim either before the Board or a reviewing court, and reasonable related disbursements. (*Lab.C. 4903(a)*; see *Lab.C. 4906* [attorneys' fees]; *supra*, §354 et seq.; *Longval v. Work. Comp. App. Bd.* (1996) 51 C.A.4th 792, 59 C.R.2d 463, *supra*, §359 [*Lab.C. 4903(a)* and 5710(b)(4) prohibit Board from making awards of, and allowing liens for, attorneys' fees to lay representatives]; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1997) 53 C.A.4th 579, 585, 61 C.R.2d 794 [lien for attorneys' fee is proper *only* if applicant is still owed benefits out of which lien may be satisfied].)

(2) *Medical or Hospital Expenses*. A reasonable amount for expenses incurred by or on behalf of the injured employee for medical or hospital expenses. (*Lab.C. 4903(b)*; see *Gerson v. Industrial Acc. Com.* (1961) 188 C.A.2d 735, 738, 11 C.R. 1 [hospital service organization was entitled to lien even though it mistakenly furnished medical and hospital services to injured employee]; *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1974) 13 C.3d 20, 28, 117 C.R. 678, 528 P.2d 756, *infra*, §409; *Rangel v. Interinsurance Exchange* (1992) 4 C.4th 1, 16, 14 C.R.2d 783, 842 P.2d 82, 2 *Summary* (10th), *Insurance*, §212 [uninsured motorist benefits are not considered "medical expenses" under *Lab.C. 4903(b)*]; *Boehm & Associates v. Work. Comp. App. Bd.* (2003) 108 C.A.4th 137, 142, 133 C.R.2d 396 [Medi-Cal recoupment provisions of Welf.C. 14124.70 et seq. (11 *Summary* (10th), *Equity*, §185) apply in workers' compensation proceedings].)

(3) *Living Expenses*. The reasonable value of the living expenses of the employee or the employee's dependents after the injury. (*Lab.C. 4903(c)*; see *Williams v. Industrial Acc. Com.* (1966) 64 C.2d 618, 619, 51 C.R. 277, 414 P.2d 405 [living expenses are distinct from medical expenses; medical treatment furnished to surviving wife was not recoverable under living expenses lien]; *Rowland v. Work. Comp. App. Bd.* (1977) 66 C.A.3d 448, 452, 136 C.R. 1 [disability insurance payments do not give payor right to lien; purpose of *Lab.C. 4903(c)* "is to protect persons who advance credit or loan money to dependents for necessary living expenses. It is not intended for the benefit of a debtor who pays a debt legally owing under a contractual obligation"]; *Reiman v. Work. Comp. App. Bd.* (1977) 66 C.A.3d 732, 740, 742, 136 C.R. 218 [self-insured employer that paid compensation and "Other Benefits" pursuant to private program

maintained for support and welfare of industrially disabled employees was not entitled to lien; payments were in nature of gift or gratuity and *Lab.C. 4903* authorizes lien for living expenses only if payments give rise to debts[.]

A lien for *rent* as a living expense is limited to rent that became due after the employee's injury. If the employee or the employee's dependents share the rent with others, the lien is limited to the claimant's pro rata share of the rent notwithstanding that the claimant may be jointly and severally liable with others for rent owed. (*Williams v. Work. Comp. App. Bd.* (1993) 17 C.A.4th 582, 591, 592, 21 C.R.2d 438.)

(4) *Burial Expenses*. The reasonable burial expenses of the deceased employee. (*Lab.C. 4903(d)*; see *San Francisco v. Work. Comp. App. Bd. (Medrano)* (1973) 36 C.A.3d 412, 415, 111 C.R. 387 [when there is surviving dependent or heir, burial expenses paid by third party should be secured by lien under *Lab.C. 4903(d)*; direct payment under *Lab.C. 4706(b)* is not authorized]; *supra*, §279 et seq.)

(5) *Living Expenses of Spouse or Minor Children*. The reasonable living expenses of the spouse or minor children deserted or neglected by the injured employee. An *assignee* under Welf.C. 11477(a) (authorizing assignment of rights to payors by recipients of public assistance) of the spouse, former spouse, or minor children may also apply for a lien. (See *Santa Barbara v. Work. Comp. App. Bd.* (1975) 53 C.A.3d 820, 823, 126 C.R. 281 [county payor of public assistance was entitled to lien]; C.E.B., 2 Workers' Compensation Practice 4th, §15.47.)

(6) *Unemployment Benefits*. The amount of unemployment compensation disability benefits paid during uncertainty as to coverage (*Lab.C. 4903(f)*; see *supra*, §342), or paid for the same period the injured employee received, or was entitled to receive, temporary total disability indemnity payments (*Lab.C. 4903(g)*; see *supra*, §342).

(7) *Family Temporary Disability Benefits*. The amount of family temporary disability insurance benefits paid to the injured employee under the Unemployment Insurance Code for the same days that the employee receives temporary total disability indemnity, subject to the procedures under *Lab.C. 4904*. (*Lab.C. 4903(h)*.)

(8) *Indemnification for Loss From Crime*. The amount of indemnification granted to those suffering a pecuniary loss as the result of a crime (see *Govt.C. 13950* et seq.). (*Lab.C. 4903(i)*.)

(9) *Payments by Asbestos Workers' Account*. The amount of compensation and recoverable costs paid by the Asbestos Workers' Account. (*Lab.C. 4903(j)*.) The Asbestos Workers' Account statutes (*Lab.C. 4401* et seq.) were repealed in 1989; however, the Account continues to have authority to recover benefits and costs paid to asbestos workers prior to that date. (*Lab.C. 4418*.)

(10) *Payments by Health and Welfare Plan*. The amount of benefits paid or the value of services provided by certain health and welfare plans. (*Lab.C. 4903.1*, *supra*, §344.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Medical or Hospital Expenses*. See *Zenith Ins. Co. v. Work. Comp. App. Bd.* (2006) 138 C.A.4th 373, 377, 41 C.R.3d 380 [award of facility fees was not supported by evidence where lien claimants failed to prove they were licensed or accredited to operate outpatient medical facilities].



63 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

c. Liens Against Award.

3. Award of Attorneys' Fees Out of Lien Claim.

2 Witkin Sum. Cal. Law Work Comp § 407

[§ 407] Award of Attorneys' Fees Out of Lien Claim.

Lab.C. 4903.2 deals with a lien claimant reimbursed pursuant to *Lab.C. 4903(f)* or (g) (unemployment compensation disability benefits, unemployment compensation benefits; *supra*, §406), or pursuant to *Lab.C. 4903.1* (benefits under health care plan or insurance; *supra*, §344).

Under the statute, the Board may award a fee to the *applicant's attorney* out of the lien claimant's recovery (in an amount based on the attorney's efforts on behalf of the lien claimant) if the Board determines that all of the following occurred: (a) The lien claimant received notice of all hearings following the filing of the lien and received notice of intent to award the fee. (b) An attorney or other representative of the lien claimant did not participate in the proceedings before the Board with respect to the lien claim. (c) There were bona fide issues respecting compensability or allowance of the lien, so that an attorney's services were reasonably required and instrumental in effecting recovery. (d) The case was not disposed of by compromise and release. (See *Kaiser Foundation Hosp. v. Work. Comp. App. Bd. (1978) 83 C.A.3d 413, 418, 148 C.R. 54* [decided prior to statutory enactment but permitting recovery and discussing equitable basis of rule]; *Raisola v. Flower Street Ltd. (1988) 205 C.A.3d 1004, 1008, 252 C.R. 726* [employee's attorneys were entitled to fees on lien of employer's insurer that was assigned to defendant tortfeasor and deducted from employee's judgment]; Cal. Civil Practice, 2 Workers' Compensation, §12:3; C.E.B., 2 Workers' Compensation Practice 4th, §15.95 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

c. Liens Against Award.

4. Procedure.

2 Witkin Sum. Cal. Law Work Comp § 408

[§ 408] Procedure.

(1) *Notice of Claim.* Written notice of the lien, on a form prescribed by the Board, should be given to the insurer or to the uninsured employer. (*Lab.C. 4904, 4903.1(c).*) The party seeking the lien must submit a supporting statement or voucher justifying reimbursement, together with proof of service on the other parties. (*Lab.C. 4903.1(c).*) Where more than one lien is allowed, the Board may determine the priorities. (*Lab.C. 4903.*) (See Cal. Civil Practice, 2 Workers' Compensation, §12:12 et seq.; on Board rules governing lien procedure, see 8 Cal. Code Reg. §10770; on filing fees for initial liens filed under *Lab.C. 4903*, see *Lab.C. 4903.05.*)

(2) *Time Limitations.* A lien claim for expenses under *Lab.C. 4903(b)* (supra, §406) must be filed either (a) within 6 months from the date the Board or a workers' compensation law judge issues a final decision, order, or award on the merits of the claim, (b) within 5 years from the date of injury, or (c) within 1 year from the date the services were provided, whichever is later. (*Lab.C. 4903.5(a).*) An injured worker is not liable for an underlying obligation if a lien claim is not timely filed and served. (*Lab.C. 4903.5(c).*) (On excluded actions, see *Lab.C. 4903.5(d).*)

An entity providing medical benefits on a nonindustrial basis may file a claim within 6 months after knowledge that an industrial injury is being claimed. (*Lab.C. 4903.5(b).*)

(3) *Payments.* *Lab.C. 4904.1* provides that satisfaction of liens must not affect the commencement of immediate payments on the balance of an award to the claimant where installments have been determined. However, the statute does not authorize an immediate payment of attorneys' fees where no accrued installments of compensation are due. (*California Comp. & Fire Co. v. Industrial Acc. Com. (1961) 193 C.A.2d 6, 8, 13 C.R. 885.*)

(4) *Lien Incidental to Award.* There must be an award before there can be a lien. Consequently, the Board has no jurisdiction over a proceeding by a physician against an insurer to recover for services rendered to an employee where no proceedings for a compensation award have been instituted. (*Pacific Employers Ins. Co. v. French (1931) 212 C. 139, 141, 298 P. 23.*)

This theory is also illustrated by the strange situation in *State Comp. Ins. Fund v. Industrial Acc. Com. (1949) 89*

C.A.2d 821, 202 P.2d 86. A compensation claim was settled and the bulk of it was paid before the employee was represented by counsel; the balance of \$ 225 was subsequently paid. A few months later the Commission made a belated formal award of "\$ 225, payable forthwith," less \$ 35 payable to the attorney as his fee. *Held*, award annulled. (a) The claim was fully satisfied and the employer's insurer could not be required to pay a part of it a second time. (b) The attorney's fee may only be made payable out of *unpaid compensation*, and the lien may only be impressed on that unpaid compensation; hence, there was no fund to which the lien could attach. (c) The attorney could have protected himself by filing a written notice of his claim of lien prior to the award. (*89 C.A.2d 824.*)

(5) *Separate Proceeding To Resolve Disputes.* The Board may, in a separate proceeding, resolve disputes concerning liens for expenses incurred by or on behalf of the injured employee. The proceeding may include binding arbitration on agreement of the parties and according to the rules of practice and procedure. (*Lab.C. 4903.4.*)

(6) *Relief From Default.* In *Fox v. Work. Comp. App. Bd.* (*1992*) *4 C.A.4th 1196, 6 C.R.2d 252*, physician F treated an injured employee and, over a 7-year period, submitted a series of lien claims. When the employer objected to the claims, a hearing was scheduled. However, F was unable to attend because of illness, and the workers' compensation judge issued a "Notice of Intention to Disallow Lien," stating that F had 15 days in which to object. Because his office administrator had recently quit, F never saw the notice. The judge issued an order disallowing the lien, and the Board denied reconsideration. *Held*, order annulled; F was denied due process.

(a) There is little case law concerning the procedural rights of medical lien claimants. However, a commentator has stated that because the rights of lien claimants derive from the employees' rights, due process is required. (*4 C.A.4th 1204*, citing *2 Herlick, Cal. Workers'; Compensation Law Practice* (4th ed.), Liens §17.1.) An early case held that the Fourteenth Amendment requires a fair and open hearing. (*4 C.A.4th 1204*, citing *Kaiser Co. v. Industrial Acc. Com.* (*1952*) *109 C.A.2d 54, 240 P.2d 57.*) In addition, *8 Cal. Code Reg. §10500* states that no lien may be disallowed or reduced unless the lien claimant has been given notice and an opportunity to be heard. (*4 C.A.4th 1204.*)

(b) There is no specific statutory provision for relief from default for lien claimants. However, *Lab.C. 5506* (*supra*, §389) provides that defaulting defendants may apply for relief substantially in accordance with the procedure set forth in *C.C.P. 473* (see *8 Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.), and both fundamental fairness and the goal of protecting injured workers require such a provision for defaulting lien claimants. "Given the lack of any express language in the Labor Code or Board's rules providing relief to lien claimants, we hold that lien claimants may seek relief from the consequences of a failure to appear by utilizing a procedure substantially similar to *Code of Civil Procedure section 473*, until such time as the matter is more specifically addressed by statutory provision or Board rule." (*4 C.A.4th 1205.*)

(c) Here, F relied on his illness and the departure of a key employee, simultaneously, as the reason for his failure to either attend the hearing or respond to the "Notice of Intention to Disallow Lien." The judge, who never questioned F's credibility, stated that the reasons for not appearing were "irrelevant." Under these circumstances, it cannot be said that F received the fair and impartial treatment that due process requires. (*4 C.A.4th 1206.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice of Claim.* *Lab.C. 4903.05* (filing fees for liens) was repealed in 2006.

(2) *Time Limitations.*

(New) *Prohibitions:* *Lab.C. 4903.6* was added in 2006 to provide as follows:

Except as necessary to comply with *Lab.C. 4903.5*, no lien claim or application for adjudication may be filed under *Lab.C. 4903(b)* until the expiration of one of the following events: (a) 60 days after the acceptance or rejection of liability for the claim, or expiration of the time permitted for investigation of liability, whichever is earlier; (b) the time for payment of medical treatment expenses under *Lab.C. 4603.2*; or (c) the time for payment of medical-legal expenses

under *Lab.C. 4622*. (*Lab.C. 4903.6(a)*.) In addition, a declaration of readiness to proceed may not be filed for a lien under *Lab.C. 4903(b)* (medical or hospital expenses) until the underlying case has been resolved or the applicant chooses not to proceed. (*Lab.C. 4903.6(b)*.)

Lab.C. 4903.6 does not apply to lien claims, applications for adjudication, or declarations of readiness to proceed filed by the employee or the employer. (*Lab.C. 4903.6(d)*.) (6) *Relief From Default*. Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.



65 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

c. Liens Against Award.

5. Involuntary Reduction of Lien To Effect Settlement.

2 Witkin Sum. Cal. Law Work Comp § 409

[§ 409] Involuntary Reduction of Lien To Effect Settlement.

(1) *No Power Without Statute.* In *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1974) 13 C.3d 20, 117 C.R. 578, 528 P.2d 766 (*Kaiser I*), the referee approved a compromise (see supra, §361) between the employer and the employee because of doubt about causation, and ordered that petitioner be paid \$ 1,815 of its lien of \$ 4,420 for medical and hospital care. The Board denied reconsideration. *Held*, decision annulled.

(a) The wide discretion granted the Board by *Lab.C. 4903* (supra, §406) is limited to determining the reasonable amount of the lien; the statute gives no power to disallow a proper claim. (13 C.3d 25.)

(b) *Lab.C. 4904* (supra, §342) deals with liens for unemployment compensation benefits; it does not authorize the reduction of liens for other claims allowed by *Lab.C. 4903*. (13 C.3d 27.)

(c) Once a lien claimant establishes a prima facie case for full allowance of a lien, the lien may not be reduced solely because of the complexity of the causation issue. "If the Board or the employee believes that the lien claim is disproportionately large in comparison with the employer's compromise offer, then either the compromise should be rejected, or the question of causation litigated ... or, as a further alternative, the cooperation of the lien claimant sought in order to effect a compromise under which the lien is voluntarily reduced." (13 C.3d 28.)

(2) *Purpose and Scope of Statute.* *Lab.C. 4903.1(a)(4)* permits reduction of the lien for services and benefits provided by a health care service plan, group disability policy, self-insured employee welfare benefit plan, or a hospital service contract, "in the ratio of the applicant's recovery to the potential recovery," when the lien claimant does not agree to the amount allocated for the lien under a proposed compromise and release agreement of the parties. The purpose of the provision was to authorize what had been held improper in *Kaiser I*. (*Prudential Ins. Co. v. Work. Comp. App. Bd.* (1978) 22 C.3d 776, 781, 151 C.R. 537, 588 P.2d 239, supra, §344; *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1978) 87 C.A.3d 336, 347, 151 C.R. 368 (*Kaiser II*) [statute is constitutional].)

Lab.C. 4903.1(a)(4) does not apply when there is no reduction in the lien claim, and the claimant is free to litigate the claim. "If ... the lien claimant were permitted to intervene and postpone a settlement until it received a satisfactory

award, many employees would be deprived of an early and advantageous settlement." (*Permanente Med. Group v. Work. Comp. App. Bd.* (1977) 73 C.A.3d 135, 139, 140 C.R. 612.)

(3) *Formula for Reduction of Claim.* The proper method of determining the reduced lien recovery is to divide the settlement by the applicant's "potential recovery" and multiply the result by the full lien. This formula differs from that approved for reducing claims for unemployment compensation disability payments in *California-Western States Life Ins. Co. v. Industrial Acc. Com.* (1952) 39 C.2d 104, 244 P.2d 912, supra, §342. (*Kaiser II*, supra, 87 C.A.3d 354, 355.)

The parties seeking settlement should provide documents that compute the proper lien reduction (87 C.A.3d 354) and provide the necessary detail from the record to support the computation of "potential recovery" (87 C.A.3d 356). These should include: "(1) the percentage of disability; (2) the adjustments; (3) the dates of temporary disability; (4) medical expenses to be reimbursed; and (5) the value and duration of future medical care." These items should be set forth "in sufficient detail to assist the lien claimant, the Board, and reviewing court in determining whether the assumed potential value of the claim has been exaggerated." (87 C.A.3d 357.) When this is done, the judge may incorporate the appropriate calculation in the decision. (87 C.A.3d 354.) Otherwise, the judge must, on objection of the claimant, prepare a proper analysis. (87 C.A.3d 357.) (See C.E.B., 2 Workers' Compensation Practice 4th, §§15.94, 16.40 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

d. Judgment and Enforcement.

1. In General.

2 Witkin Sum. Cal. Law Work Comp § 410

[§ 410] In General.

(1) *Enforcement as Superior Court Judgment.* An affected party may file an award with a superior court and judgment will be entered immediately. (*Lab.C.* 5806; *Vickich v. Superior Court* (1930) 105 C.A. 587, 589, 288 P. 127; *Pizarro v. Superior Court* (1967) 254 C.A.2d 416, 418, 61 C.R. 923; see 8 *Cal. Code Reg. §10820* et seq. [issuance of certified copies of award or order for purpose of having judgment and execution].) Thus, it is a claim against the employer's estate having the same preference as a claim for wages and is for the entire amount of the compensation. (*Lab.C.* 4908.) An affected party includes the Uninsured Employers Benefits Trust Fund, and the State, on the Fund's behalf, is entitled to have judgment entered against an uninsured employer and against persons found to be parents or substantial shareholders under *Lab.C.* 3717 (supra, §155). (See C.E.B., 2 Workers' Compensation Practice 4th, §§20.24 et seq., 20.34 et seq.; 2 Hanna 2d (2004 ed.), §27.11.)

(2) *Limited Modification.* A final award cannot be modified by the Board except by an exercise of its extraordinary continuing jurisdiction to reopen the proceeding for good cause (infra, §426 et seq.). (*Ocean Acc. & Guarantee Corp. v. Industrial Acc. Com.* (1938) 12 C.2d 116, 120, 82 P.2d 603.)

(3) *Discharge in Bankruptcy.* A workers' compensation award is a provable claim in bankruptcy, and is therefore barred by a discharge. In *Wilcox v. Rohr* (1947) 81 C.A.2d 312, 313, 183 P.2d 916, it was argued that an award against an uninsured employer came within the proviso of the Bankruptcy Act that prevents the release of liabilities for wilful and malicious injuries to person or property. It was held, however, that, although the failure to insure might have been wilful, the *injury* was not caused by any wilful act, and the ordinary rule applied.

SUPPLEMENT: [This section is current through the latest supplement]



67 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

d. Judgment and Enforcement.

2. Interest on Award.

2 Witkin Sum. Cal. Law Work Comp § 411

[§ 411] Interest on Award.

Awards carry interest from the date of making and filing (*Lab.C. 5800*), and any party may file a certified copy of the award with the clerk of the superior court, and the clerk must enter judgment immediately (*Lab.C. 5806*; see *supra*, §410).

In *Franczak v. Liberty Mut. Ins. Co.* (1977) 19 C.3d 481, 138 C.R. 467, 564 P.2d 9, plaintiff brought a class action against defendant insurer, alleging that defendant made payments some days after the award, but paid only the principal sum without interest; that the amount of individual interest owed to claimants was too small to justify the expense and effort of filing a certified copy of the award (none of the claims exceeded \$ 10 or \$ 15), but that the total sum owed to the class was over \$ 250,000. Plaintiff sought an audit of defendant's books at its own expense, and the entry of a single judgment for the entire class based on the audit. The trial judge dismissed the suit for lack of jurisdiction. *Held*, reversed.

(a) Because *Lab.C. 5806* gives the court the power to enter judgment on an award, it has the same jurisdiction to award interest as it has to award the principal sum. "The award has been fixed; the plaintiff does not seek to enlarge it or alter it in any way, nor to review the merits of the award, but merely to enforce its precise terms." (19 C.3d 485.)

(b) It is unnecessary to consider defendant's argument that the trial court cannot waive the requirement of filing certified copies of the awards; because the court has jurisdiction to enter judgment on the award, it also has jurisdiction "to decide what requirements plaintiffs must fulfill in order to obtain the entry of judgment." (19 C.3d 487.)

Three justices joined in a dissenting opinion reasoning as follows: (a) The requirement of filing a certified copy of the award (*Lab.C. 5806*) is jurisdictional; there is no statutory procedure for invoking the superior court's jurisdiction by a complaint. (b) When a statute conferring jurisdiction specifies the procedure to be followed, a court that proceeds contrary to the statute is acting in excess of jurisdiction, and may be restrained by prohibition. (19 C.3d 489, citing *Abelleira v. District Court of Appeal* (1941) 17 C.2d 280, 109 P.2d 942, 2 Cal. Proc. (4th), *Jurisdiction*, §276.) Thus, without a certified copy "there is nothing for the judgment to be entered in conformity with, and the superior court completely lacks power to hear or determine the cause." (19 C.3d 489.)

SUPPLEMENT: [This section is current through the latest supplement]

Abelleira case:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §285.



68 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

e. Penalties for Delay or Refusal To Pay.

1. Former Law.

2 Witkin Sum. Cal. Law Work Comp § 412

[§ 412] Former Law.

Under former Lab.C. 5814, when payment of compensation had been unreasonably delayed or refused, either before or after the issuance of an award, the full amount of the order, decision, or award was increased by 10%. (See *Avalon Bay Foods v. Work. Comp. App. Bd.* (1998) 18 C.4th 1165, 1179, 77 C.R.2d 552, 959 P.2d 1228; *General Reinsurance Corp. v. St. Jude Hosp.* (2003) 107 C.A.4th 1097, 1105, 132 C.R.2d 540; C.E.B., 1 Workers' Compensation Practice 4th, §8.6 et seq.; 2 Hanna 2d (2004 ed.), §27.12[2]; 1 Herlick 6th, §§11.11, 11.12.) Under the reform legislation of 2004, former Lab.C. 5814 became inoperative on June 1, 2004, and was repealed January 1, 2005. (See *infra*, §413.)

The following issues and cases, which may still be relevant under the reform legislation, arose under former law:

(1) *Penalty Is Measured Against Full Amount of Award.* (*Garcia v. Work. Comp. App. Bd.* (1972) 6 C.3d 687, 690, 100 C.R. 149, 493 P.2d 877; *Adams v. Work. Comp. App. Bd.* (1976) 18 C.3d 226, 231, 133 C.R. 517, 555 P.2d 303 [award included medical-legal costs]; *Gallamore v. Work. Comp. App. Bd.* (1979) 23 C.3d 815, 824, 153 C.R. 590, 591 P.2d 1242; *Avalon Bay Foods v. Work. Comp. App. Bd.* (1998) 18 C.4th 1165, 1177, 77 C.R.2d 552, 959 P.2d 1228; *Manning v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 655, 658, 89 C.R. 76 [particular class of benefits]; *Ryerson Concrete Co. v. Work. Comp. App. Bd.* (1973) 34 C.A.3d 685, 688, 110 C.R. 319; *Fidelity & Cas. Co. v. Work. Comp. App. Bd.* (1977) 75 C.A.3d 192, 141 C.R. 925 [award against several parties]; *Burton v. Work. Comp. App. Bd.* (1980) 112 C.A.3d 85, 90, 91, 169 C.R. 72 [particular class of benefits]; *Anderson v. Work. Comp. App. Bd.* (1981) 116 C.A.3d 954, 960, 172 C.R. 398 [prior penalties treated as part of award]; *Gellie v. Work. Comp. App. Bd.* (1985) 171 C.A.3d 917, 921, 922, 217 C.R. 630 [accumulated interest]; *Kopitske v. Work. Comp. App. Bd.* (1999) 74 C.A.4th 623, 628, 88 C.R.2d 216.)

(2) *Where Partial Payments Are Made.* (*Rhiner v. Work. Comp. App. Bd.* (1993) 4 C.4th 1213, 1218, 18 C.R.2d 129, 848 P.2d 244; *Los Angeles v. Work. Comp. App. Bd.* (Crowe) (1980) 103 C.A.3d 877, 163 C.R. 246; *Kaminski v. Work. Comp. App. Bd.* (1981) 126 C.A.3d 778, 179 C.R. 135; *Toccalino v. Work. Comp. App. Bd.* (1982) 128 C.A.3d 543, 554, 556, 180 C.R. 427; *Consani v. Work. Comp. App. Bd.* (1991) 227 C.A.3d 12, 24, 277 C.R. 619; *Soto v. Work. Comp. App. Bd.* (1996) 46 C.A.4th 1356, 1361, 54 C.R.2d 446.)

(3) *Length of Delay.* (*State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1998) 18 C.4th 1209, 1216, 77 C.R.2d 528, 959 P.2d 1204; *Sacramento v. Work. Comp. App. Bd. (Souza)* (1999) 69 C.A.4th 726, 730, 81 C.R.2d 780; *Waters v. Work. Comp. App. Bd.* (2000) 80 C.A.4th 652, 661, 95 C.R.2d 574; *Gangwish v. Work. Comp. App. Bd.* (2001) 89 C.A.4th 1284, 1296, 108 C.R.2d 1; *San Luis Obispo v. Work. Comp. App. Bd.* (2001) 92 C.A.4th 869, 874, 112 C.R.2d 246.)

(4) *No Exception for Minor Delinquencies.* (*Gallamore v. Work. Comp. App. Bd.*, *supra*, 23 C.3d 822; *Tucker v. Work. Comp. App. Bd.* (1975) 44 C.A.3d 330, 332, 118 C.R. 567.)

(5) *Penalty Computed From Time of Award.* (*Langer v. Work. Comp. App. Bd.* (1968) 258 C.A.2d 400, 406, 65 C.R. 598.)

(6) *Preaward Delinquencies.* (*Gallamore v. Work. Comp. App. Bd.*, *supra*, 23 C.3d 822; *Christian v. Work. Comp. App. Bd.* (1997) 15 C.4th 505, 507, 63 C.R.2d 336, 936 P.2d 115; *Ralphs Grocery Co. v. Work. Comp. App. Bd.* (1995) 38 C.A.4th 820, 832, 45 C.R.2d 197; *California v. Work. Comp. App. Bd. (Ellison)* (1996) 44 C.A.4th 128, 133, 142, 51 C.R.2d 606.)

(7) *Delay in Payment of Interest.* (*Laucirica v. Work. Comp. App. Bd.* (1971) 17 C.A.3d 681, 683, 95 C.R. 219; *Tucker v. Work. Comp. App. Bd.*, *supra*, 44 C.A.3d 332; *California Highway Patrol v. Work. Comp. App. Bd.* (2001) 89 C.A.4th 1201, 1205, 108 C.R.2d 118.)

(8) *Delay After Compromise and Release.* (*Kampner v. Work. Comp. App. Bd.* (1978) 86 C.A.3d 376, 383, 150 C.R. 222; *Smith v. Work. Comp. App. Bd.* (1986) 186 C.A.3d 1451, 1454, 231 C.R. 364; *Neel v. Work. Comp. App. Bd.* (1998) 67 C.A.4th 847, 851, 79 C.R.2d 353.)

(9) *Delay During Period Review Petition Is Pending.* (*Klee v. Work. Comp. App. Bd.* (1989) 211 C.A.3d 1519, 1521, 260 C.R. 217.)

(10) *Multiple Penalties for Successive Delays.* (*Gallamore v. Work. Comp. App. Bd.*, *supra*, 23 C.3d 824; *Viegas v. Work. Comp. App. Bd.* (1983) 148 C.A.3d 423, 427, 196 C.R. 10; *Jardine v. Work. Comp. App. Bd.* (1984) 163 C.A.3d 1, 9, 209 C.R. 139.)

(11) *Delay in Furnishing Medical Care.* (*Davison v. Industrial Acc. Com.* (1966) 241 C.A.2d 15, 18, 50 C.R. 76 [medical care awarded was also subject to penalty for delay]; *Ramsey v. Work. Comp. App. Bd.* (1971) 18 C.A.3d 155, 160, 95 C.R. 558; *Dorman v. Work. Comp. App. Bd.* (1978) 78 C.A.3d 1009, 1019, 1021, 144 C.R. 573.)

(12) *Genuine Doubt as Excuse.* (*Kerley v. Work. Comp. App. Bd.* (1971) 4 C.3d 223, 227, 93 C.R. 192, 481 P.2d 200; *Adams v. Work. Comp. App. Bd.* (1976) 18 C.3d 226, 229, 133 C.R. 517, 555 P.2d 303; *Berry v. Work. Comp. App. Bd.* (1969) 276 C.A.2d 381, 383, 81 C.R. 65; *Ramirez v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 227, 235, 88 C.R. 865; *Pascoe v. Work. Comp. App. Bd.* (1975) 46 C.A.3d 146, 158, 120 C.R. 199; *Ulrich v. Work. Comp. App. Bd.* (1975) 50 C.A.3d 643, 651, 652, 123 C.R. 435; *Bekins Moving & Storage Co. v. Work. Comp. App. Bd.* (1980) 103 C.A.3d 675, 682, 163 C.R. 213; *Los Angeles v. Work. Comp. App. Bd. (King)* (1980) 104 C.A.3d 933, 940, 168 C.R. 789; *State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1982) 130 C.A.3d 933, 938, 939, 182 C.R. 171; *Rohrbach v. Work. Comp. App. Bd.* (1983) 144 C.A.3d 896, 193 C.R. 558; *Jensen v. Work. Comp. App. Bd.* (1985) 170 C.A.3d 244, 216 C.R. 33; *Ralphs Grocery Co. v. Work. Comp. App. Bd.* (1995) 38 C.A.4th 820, 832, 45 C.R.2d 197.)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

e. Penalties for Delay or Refusal To Pay.

2. Nature of Penalties.

2 Witkin Sum. Cal. Law Work Comp § 413

[§ 413] Nature of Penalties.

(1) *In General.* As part of the reform legislation of 2004, former Lab.C. 5814 (supra, §412), became inoperative on June 1, 2004, and a new Lab.C. 5814 became operative June 1, 2004. It is applicable to all injuries, whether occurring before, on, or after the statute's operative date. (Lab.C. 5814(h).) The statute provides as follows:

(a) *Measure of payment.* When payment of compensation has been unreasonably delayed or refused, either before or after an award, the amount of the payment unreasonably delayed or refused must be increased up to 25% or \$ 10,000, whichever is less. The Board may exercise its discretion "to accomplish a fair balance and substantial justice between the parties." (Lab.C. 5814(a).) A payment must be reduced by the amount paid under Lab.C. 4650(d) (late temporary disability payment; infra, this section) with respect to the same unreasonably delayed or refused benefit payment. (Lab.C. 5814(d).)

(b) *Self-imposed penalty.* If an employer discovers a potential violation of Lab.C. 5814 before an employee claims a penalty, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty of 10% of the amount of the payment unreasonably delayed or refused, along with the amount of the errant payment. This self-imposed penalty is in lieu of the penalty in Lab.C. 5814(a). (Lab.C. 5814(b).)

(c) *Effect of compromises, stipulations, and Board orders.* On approval of a compromise and release, findings and awards, or stipulations and orders by the Board, it is conclusively presumed that accrued claims for penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award. Similarly, when issues are submitted at a trial hearing, it is conclusively presumed that an accrued claim for penalty in connection with the benefit has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues. (Lab.C. 5814(c).)

(d) *Delay in medical treatment.* No unreasonable delay in medical treatment will be found if the employer has authorized treatment in a timely manner and the only dispute concerns payment of a bill submitted by a physician or medical provider, as specified. (Lab.C. 5814(e).)

(e) *No civil action.* The provisions of *Lab.C. 5814* are not to be construed as creating a civil cause of action. (*Lab.C. 5814(f).*)

(f) *Statute of Limitation.* No action may be brought to recover penalties under *Lab.C. 5814* more than 2 years from the date the payment of compensation was due. (*Lab.C. 5814(g).*)

(2) *Administrative Penalty.* Employers or insurers that knowingly violate *Lab.C. 5814* "with a frequency that indicates a general business practice" are liable for administrative penalties of up to \$ 400,000. (*Lab.C. 5814.6.*)

(3) *Untimely Indemnity Payment.* If a timely indemnity payment is not made as required by *Lab.C. 4650* (see *supra*, §277), the amount of the late payment is increased 10% and must be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan (see *Lab.C. 4650(g).*) (*Lab.C. 4650(d).*) However, the increase is inapplicable in the following circumstances: (a) To a payment due prior to or within 14 days after the date the claim form was submitted to the employer under *Lab.C. 5401* (see *supra*, §386); (b) when, within the 14-day period specified under *Lab.C. 4650(a)* (see *supra*, §277), the employer is unable to determine whether temporary disability indemnity payments are owed and advises the employee, in the manner prescribed in regulations adopted pursuant to *Lab.C. 138.4*, why payments cannot be made within the 14-day period, what additional information is required to make the decision whether temporary disability payments are owed, and when the employer expects to have the information required to make the decision. (*Lab.C. 4650(d).*) (See *Mote v. Work. Comp. App. Bd. (1997) 56 C.A.4th 902, 910, 65 C.R.2d 806* [each separate failure to pay amounts due within 14 days justified penalties under *Lab.C. 4650(d)*]; *Moulton v. Work. Comp. App. Bd. (2000) 84 C.A.4th 837, 842, 101 C.R.2d 175* [employer's admitted unreasonable delay in paying temporary disability benefits was subject to three penalties: 10% self-imposed penalty under *Lab.C. 4650(d)*, 10% penalty under *Lab.C. 5814* for unreasonable delay, and 10% penalty under *Lab.C. 5814* for failing to self-assess under *Lab.C. 4650*; *Lab.C. 5814* penalties were assessed against past, present, and future temporary disability payments as increased by *Lab.C. 4650(d)* penalty]; *Gangwish v. Work. Comp. App. Bd. (2001) 89 C.A.4th 1284, 1293, 108 C.R.2d 1* [penalty under *Lab.C. 4650* is applicable to late *permanent disability indemnity* payments after initial *permanent disability indemnity* payment even though *temporary disability indemnity* payments are not involved or have not been paid]; *Rivera v. Work. Comp. App. Bd. (2003) 112 C.A.4th 1124, 1133, 6 C.R.3d 16* [penalty provisions of *Lab.C. 4650* are applicable to payments of periodic and accrued temporary and permanent disability indemnity but not to payments of future permanent disability indemnity commuted to lump sum]; C.E.B., 1 Workers' Compensation Practice 4th, §8.3 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Lab.C. 5814(h)* states the Legislature's intent that *Lab.C. 5814* should apply retroactively. In *Green v. Work. Comp. App. Bd. (2005) 127 C.A.4th 1426, 26 C.R.3d 527, G*, a police officer, claimed injuries from 1987 to 2000. Employer City denied benefits, and the parties submitted the medical issues to two agreed medical examiners who both found industrial causation and recommended benefits. G petitioned for increased compensation based on unreasonable delay, and the parties entered into a stipulation regarding an award. G alleged additional unreasonable delay in payment, which City denied. The matter proceeded to hearing and the workers' compensation judge awarded a single 10% increase under former *Lab.C. 5814* against various benefits. G petitioned for reconsideration, contending that the reports of the agreed medical examiners and the later stipulations were separate legally significant events under *Christian v. Work. Comp. App. Bd. (1997) 15 C.A.4th 505, 63 C.R.2d 336, 936 P.2d 115*, thus requiring separate increases. In the interim, the current version of *Lab.C. 5814* was enacted. *Held*, current *Lab.C. 5814* applies retroactively, and permits multiple increases under *Christian*.

(a) *Lab.C. 5814(h)* unambiguously states that *Lab.C. 5814* applies to all injuries, without regard to whether the injury occurred before, on, or after June 1, 2004, and not merely to unreasonable delay or refusal of compensation that occurs after June 1, 2004. (*127 C.A.4th 1440.*) Furthermore, there are no policy considerations that preclude retroactive application of the statute. (*127 C.A.4th 1441.*)

(b) Former *Lab.C. 5814* permitted increased compensation for unreasonable delay in providing benefits that were

indicated by the employer's physician, and *Christian* permitted multiple increases in compensation where there were other legally significant events, such as a stipulation of liability. Here, the opinions of the agreed medical examiners and the subsequent stipulation each qualify as separate, legally significant events under *Christian*, and nothing on the face of *Lab.C. 5814(a)* precludes multiple increases when the same benefit is unreasonably delayed more than once. (127 C.A.4th 1445.)

(b) *Self-imposed penalty*: *Lab.C. 5814(b)* does not limit its application to where the employer discovers a potential violation before the employee. Rather, the statute limits its application to where the employer discovers a potential violation before the employee claims a penalty. (*New United Motors Manufacturing v. Work. Comp. App. Bd.* (2006) 141 C.A.4th 1533, 1538, 47 C.R.3d 200 [employer was permitted to pay lower, self-imposed penalty even though employee first discovered violation because employer made payment before employee applied for 25% penalty].)



70 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

f. Penalty for Bad Faith Action.

2 Witkin Sum. Cal. Law Work Comp § 414

[§ 414] Penalty for Bad Faith Action.

The workers' compensation judge or the Board may impose sanctions for bad faith actions or tactics that are frivolous or for the sole purpose of causing unnecessary delay. The sanctions may require the offending party to pay another party's reasonable expenses including attorneys' fees and costs, as well as a fine of up to \$ 2,500. (*Lab.C. 5813(a), (c).*) (See *Runnion v. Work. Comp. App. Bd. (1997) 59 C.A.4th 277, 287, 69 C.R.2d 105, supra*, §14 [workers' compensation judge properly sanctioned attorney under *Lab.C. 5813* for bad faith actions and trifling with proceedings by electing not to appear at noticed hearing].)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

g. Award as Res Judicata.

1. Merger: Second Proceeding Precluded.

2 *Witkin Sum. Cal. Law Work Comp* § 415

[§ 415] Merger: Second Proceeding Precluded.

In *Gerini v. Pacific Employers Ins. Co.* (1938) 27 C.A.2d 52, 80 P.2d 499, the complaint alleged that plaintiffs' son was killed through the negligence of defendant R, an intimate friend and family adviser; that R conspired with defendant insurance company to fraudulently represent that the son was his employee and that their sole claim was before the Commission; and that as a result the Commission awarded burial expenses. *Held*, the award was conclusive on the issue of employment, and barred an action at law for damages. (27 C.A.2d 55.) (On merger aspect of res judicata, see 7 Cal. Proc. (4th), *Judgment*, §342; see also 82 Am.Jur.2d (2003 ed.), *Workers' Compensation* §615 et seq.)

A different result could have been reached in *Gerini* if the action had been treated as an attack on the Commission's judgment on the ground of *extrinsic fraud*, for it was sufficiently alleged that the adverse party acted on behalf of the plaintiffs and prevented their presentation of the actual case. (See 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §§214, 223, 242.)

In *Busick v. Work. Comp. App. Bd.* (1972) 7 C.3d 967, 104 C.R. 42, 500 P.2d 1386, petitioner filed a claim with the Board, and later filed an action in the superior court. Although petitioner could have obtained an order from the superior court staying the action pending the Board's determination of the jurisdictional issue, neither party objected to the superior court trial, which went to judgment for plaintiff. *Held*, the superior court judgment merged petitioner's claim, and it was unnecessary to consider whether the injury was compensable. (7 C.3d 975, 977; see 7 Cal. Proc. (4th), *Judgment*, §344.)

In *Azadigian v. Work. Comp. App. Bd.* (1992) 7 C.A.4th 372, 8 C.R.2d 643, petitioner's cumulative heart trauma claim was dismissed, and his petition for reconsideration was denied. Petitioner then filed two more claims seeking compensation for injury to his heart, and argued that the claims were not barred by res judicata because of the Board's continuing jurisdiction under *Lab.C. 5803* and *5804* (infra, §426). *Held*, the subsequent claims were barred. *Lab.C. 5803* requires "good cause" before a compensation proceeding may be reopened, and the denial of the petition to reconsider petitioner's initial claim was found to be supported by substantial evidence. Hence, the order dismissing the claim was final and invulnerable for purposes of res judicata. (7 C.A.4th 379.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-References: 7 *Cal. Proc.* (5th), *Judgment*, §401; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§215, 218, 225, 241. *Cross-Reference:* 7 *Cal. Proc.* (5th), *Judgment*, §403.



72 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

g. Award as Res Judicata.

2. Where Merger Does Not Occur.

2 Witkin Sum. Cal. Law Work Comp § 416

[§ 416] Where Merger Does Not Occur.

(1) *Different Parties*. No merger results where the parties in the two proceedings are different. In *Unruh v. Truck Ins. Exchange* (1972) 7 C.3d 616, 102 C.R. 815, 498 P.2d 1063, supra, §36, a Board award of compensation was res judicata on both jurisdiction and coverage of the Act, and therefore precluded a tort action against the insurer on the same cause of action--negligent failure to supervise its agents. (7 C.3d 634.) However, on the additional counts for intentional torts of assault, battery, and infliction of emotional distress, the insurer was being sued in a capacity different from that of insurer, and, as in *Duprey v. Shane* (1952) 39 C.2d 781, 249 P.2d 8, supra, §62, the subsequent civil action was not between the same parties. (7 C.3d 636.)

(2) *No Opportunity To Litigate Issues*. In *Young v. Libbey-Owens Ford Co.* (1985) 168 C.A.3d 1037, 214 C.R. 400, plaintiff, an employee of defendant company and a grievance man for the local union, was struck by an electric cart driven by employee M. Plaintiff applied for compensation, and received an award on stipulation for temporary and permanent disability and future medical benefits. After the final disability payment was received, he filed a tort action against defendants, alleging in two causes of action that (a) M, acting within the scope and course of his employment, intentionally assaulted him with the cart; and (b) M intentionally struck him in the presence of other employees in order to humiliate him in his union position and to make him suffer emotional distress. Defendants successfully moved for summary judgment on the ground that the compensation award was res judicata. *Held*, reversed.

(a) The essential basis of res judicata was lacking. Plaintiff could not have litigated the issue of intentional infliction of emotional distress before the Board, because the tort is outside the coverage of the *Workers' Compensation Act*. (168 C.A.3d 1042.) Moreover, the cause of action for physical injuries could have been presented to the Board only for the purpose of showing that the injuries were suffered in the course of the employment and were work-related; issues such as causation, which must be litigated in a civil action, are not involved in a compensation proceeding. (168 C.A.3d 1043.)

(b) The court's theory in *Busick v. Work. Comp. App. Bd.* (1972) 7 C.3d 967, 104 C.R. 42, 500 P.2d 1386, supra, §415, of election of one of two mutually exclusive remedies is answered by language in *Johns-Manville Products Corp. v. Superior Court* (1980) 27 C.3d 465, 165 C.R. 858, 612 P.2d 948, supra, §44, sanctioning a cumulative remedy and

pointing out that double recovery may be avoided by allowing the employer a setoff. (168 C.A.3d 1043, 1044.) In addition, policy reasons support a tort action even when compensation benefits are available or have been received. "Workers' compensation awards may fall short of making the tort victim 'whole' and provide no deterrent effect on an intentionally wrongdoing tortfeasor." (168 C.A.3d 1044.)

(c) *Hollywood Refrigeration Sales Co. v. Superior Court* (1985) 164 C.A.3d 754, 210 C.R. 619, held that a tort action was barred by a previous award based on a compromise and release. That case is not controlling: (1) The award in *Hollywood* was for physical injuries; in the present case, the additional element of intentional infliction of emotional distress was not dealt with by the Board. (2) In *Hollywood*, the compromise agreement contained an express waiver of other claims. (3) *Hollywood* asserts that recovery in a civil case after receipt of a compensation award would be such "a drastic change in the law" as to require legislative action; but the language in *Johns-Manville* indicates that the change has already occurred, and, with the protection of a setoff, "it is not as drastic as *Hollywood* indicates." (168 C.A.3d 1045.)

(3) *Board Decision Not Final*. Res judicata applies only when the "judgment" is final, and because "board decisions may be rescinded or amended for a five-year period, they are not final for res judicata purposes until that period has elapsed." (*Hughes v. Atlantic Pac. Const. Co.* (1987) 194 C.A.3d 987, 1002, 240 C.R. 200; see *infra*, §426.)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

C. Steps in Obtaining Award.

6. Award or Order.

g. Award as Res Judicata.

3. Collateral Estoppel.

2 Witkin Sum. Cal. Law Work Comp § 417

[§ 417] Collateral Estoppel.

(1) *In General.* The award, like any judgment, is also conclusive on matters decided by it, including the issue of jurisdiction, in a subsequent action at law or administrative proceeding. (*French v. Rishell* (1953) 40 C.2d 477, 481, 254 P.2d 26; *Goodman Bros. v. Superior Court* (1942) 51 C.A.2d 297, 301, 124 P.2d 644; *Dow Chemical Co. v. Work. Comp. App. Bd.* (1967) 67 C.2d 483, 491, 62 C.R. 757, 432 P.2d 365; *Marsh v. Work. Comp. App. Bd.* (1968) 257 C.A.2d 574, 580, 65 C.R. 69; *Dakins v. Board of Pension Commrs.* (1982) 134 C.A.3d 374, 381, 387, 184 C.R. 576; *Causey v. Board of Pension Commrs.* (1984) 152 C.A.3d 484, 199 C.R. 535; 7 Cal. Proc. (4th), Judgment, §301.)

(2) *Issues Different.* The doctrine of collateral estoppel does not apply where the issues in the new proceeding are different. (*Addington v. Industrial Indem. Co.* (1972) 24 C.A.3d 802, 809, 101 C.R. 277; *Jackson v. Sacramento* (1981) 117 C.A.3d 596, 602, 172 C.R. 826; *Winn v. Board of Pension Commrs.* (1983) 149 C.A.3d 532, 540, 197 C.R. 111; see *Nash v. Work. Comp. App. Bd.* (1994) 24 C.A.4th 1793, 1812, 30 C.R.2d 454 [applicant's recent injuries and resultant disability were distinct from those of earlier award, even though they involved same body parts, because they stemmed from nonindustrial condition rather than industrially-related condition of earlier litigation]; 7 Cal. Proc. (4th), Judgment, §355.)

(3) *Parties Different.* The doctrine is also inapplicable where the parties are different. Thus, a determination by the Board that a county employee's disability was service-connected is not binding on a county employees' retirement association Board; the latter is an organization distinct from the county. (*Summerford v. Board of Retirement* (1977) 72 C.A.3d 128, 131, 139 C.R. 814; *Preciado v. Ventura* (1983) 143 C.A.3d 783, 788, 789, 192 C.R. 253; see 7 Cal. Proc. (4th), Judgment, §301.)

(4) *Later Tort Action by Third Party.* In *Kelly v. Trans Globe Travel Bureau* (1976) 60 C.A.3d 195, 131 C.R. 488, W, employed by T as a delivery man, drove his car in the performance of his duties, deviated, and some time thereafter negligently caused a collision in which plaintiff was injured. W sought workers' compensation, and the Court of Appeal, reversing the Board, held that the deviation had ended and that he was acting in the course and scope of his employment at the time of the accident. Plaintiff, in this action against T as the employer of W, contended that for the basis of liability under the respondeat superior doctrine (see 3 Summary (10th), *Agency and Employment*, §165), T was

collaterally estopped to challenge the determination that W was acting in the scope of his employment. *Held*, for significant reasons of policy, the doctrine was inapplicable.

(a) Because a jury trial is not available to the employer in a workers' compensation proceeding, to apply the doctrine in this civil action by a third party would deny the employer the constitutional right to a jury trial on the key issue determinative of liability. (60 C.A.3d 202.)

(b) Collateral estoppel changes the economic balance of litigation, with the potential of loss to one party much greater than the possible gain to the other. "A defendant fearing the collateral consequences of the result of litigation in future proceedings with others may be forced to spend in defense sums all out of proportion to the amount in immediate question. He is required to take procedural steps at trial and on appellate review that otherwise would not be taken because of the economics involved." (60 C.A.3d 202.)

(c) The adverse effect on the economic balance is particularly undesirable in workers' compensation proceedings, in which the policy is to secure quick and, where possible, certain resolution of questions of coverage. "Any doctrine which encourages delay in final resolution by the exercise of procedural and appellate steps is counter to the policy. ... The possibility of collateral estoppel consequences of a workers' compensation determination with its effect upon the economic balance of the controversy is counter to that policy also." (60 C.A.3d 203.)

(5) *Subsequent Criminal Prosecution*. A determination of facts by the Board has no collateral estoppel effect on a subsequent criminal prosecution. (Lab.C. 5816.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §358.

(2) *Issues Different*.

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §415.

(3) *Parties Different*.

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §358.



74 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

1. Nature and Necessity of Petition.

2 Witkin Sum. Cal. Law Work Comp § 418

[§ 418] Nature and Necessity of Petition.

A party aggrieved by a final order, decision, or award of the Board or a workers' compensation judge may petition the Board for reconsideration. (*Lab.C. 5900 et seq.*; *8 Cal. Code Reg. §10840 et seq.*; see *Gonzales v. Industrial Acc. Com.* (1958) 50 C.2d 360, 363, 325 P.2d 993; *Mantel v. Work. Comp. App. Bd.* (1974) 37 C.A.3d 739, 746, 112 C.R. 855 [petitioner was not entitled to object to procedural defects in order (infra, §419) where he personally sought reconsideration and made no objection to order when it was made]; *Cal. Civil Practice*, 1 Workers' Compensation, §10:1; *C.E.B.*, 2 Workers' Compensation Practice 4th, §21.1 et seq.; 2 *Hanna* 2d (2004 ed.), §28.01 et seq.; 2 *Herlick* 6th, §19.01 et seq.)

The petition is a prerequisite to a petition for writ of review in the Court of Appeal. (*Lab.C. 5901*; *Ingram v. Department of Industrial Relations* (1930) 208 C. 633, 636, 284 P. 212; *Nelson & Sloan v. Work. Comp. App. Bd.* (1978) 79 C.A.3d 51, 53, 55, 144 C.R. 614.)

A party is entitled to apply only once; if the petition is denied, the party cannot petition again for reconsideration but must seek relief by writ of review (infra, §434). However, if reconsideration is granted and new evidence is developed, a second petition for reconsideration will be entertained. "In such a case the very purpose of the second petition for reconsideration is to have a reconsideration of a matter, i.e., the new evidence, which has theretofore been considered on one occasion." (*Zozaya v. Work. Comp. App. Bd.* (1972) 27 C.A.3d 464, 470, 103 C.R. 793; *Goodrich v. Industrial Acc. Com.* (1943) 22 C.2d 604, 611, 140 P.2d 405.)

In *General Ins. Co. v. Work. Comp. App. Bd.* (1980) 104 C.A.3d 278, 163 C.R. 537, three insurers were involved, and only one filed a timely petition. *Held*, the Board erred in not granting reconsideration to the nonpetitioning insurers, for its liability was inextricably interwoven with liability of the insurers that did petition. (104 C.A.3d 282, 283.)

West's Key Number Digest, Workers' Compensation k.1796 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

In *Rea v. Work. Comp. App. Bd.* (2005) 127 C.A.4th 625, 25 C.R.3d 828, the former Uninsured Employers Fund (Fund) petitioned the Board for reconsideration regarding the identity of an uninsured employer. The Board affirmed the workers' compensation judge's finding but went further by establishing new procedures that the Fund would have to

follow in the future at priority conferences and that assisted with the discovery of the proper uninsured employer. The Fund filed another petition for reconsideration that challenged the new procedures, which the Board denied on the ground that the procedures applied to future cases and that the Fund was not aggrieved within the meaning of *Lab.C. 5900* and *5903*. *Held*, the second petition was proper. The new procedures directly affected the Fund's substantive rights and liabilities and were effective immediately. Moreover, neither party raised the basis for the procedures in the first challenge, and the new procedures were decided by the Board for the first time without proper notice. Thus, the Fund's second petition was not repetitive, and properly requested reconsideration of the new procedures which had been considered on only one occasion. (*127 C.A.4th 642*.)



75 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

2. Grounds and Showing Required.

2 *Witkin Sum. Cal. Law Work Comp* § 419

[§ 419] Grounds and Showing Required.

(1) *Grounds*. The petition can be based only on one or more of the following grounds:

(a) That by the order, decision, or award made and filed by the Board or the workers' compensation judge, the Board acted without or in excess of its powers. (*Lab.C. 5803(a).*)

(b) That the order, decision, or award was procured by fraud. (*Lab.C. 5803(b).*)

(c) That the evidence does not justify the findings of fact. (*Lab.C. 5803(c).*)

(d) That the petitioner has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing. (*Lab.C. 5803(d).*)

(e) That the findings of fact do not support the order, decision, or award. (*Lab.C. 5803(e).*) (See Cal. Civil Practice, 1 Workers' Compensation, §10:2 et seq.)

(2) *Statement of Grounds*. The petition must set forth the grounds "specifically and in full detail," and must contain "a general statement of any evidence or other matters" on which the petitioner relies. (*Lab.C. 5902*; see 8 *Cal. Code Reg. §10842* [contents of petition], 8 *Cal. Code Reg. §10846* [prohibiting "skeleton" petition to be supplemented by later detailed petition]; 8 *Cal. Code Reg. §10852* [specificity of evidence]; *Michon v. Work. Comp. App. Bd.* (1971) 15 C.A.3d 917, 924, 93 C.R. 476 [conclusionary statement of grounds is insufficient]; *Gillette v. Work. Comp. App. Bd.* (1971) 20 C.A.3d 312, 321, 322, 97 C.R. 542, 97 C.R. 893 [reconsideration was improperly granted where there was no newly discovered evidence and no conflict of evidence; *Michon* followed].)

When the ground is newly discovered evidence, the petition must contain specific offers of proof (8 *Cal. Code Reg. §10856*) and must also show why the evidence could not have been discovered or produced before. (*Lab.C. 5903(d)*; 8 *Cal. Code Reg. §10856(e)*; see *Redner v. Work. Comp. App. Bd.* (1971) 5 C.3d 83, 91, 95 C.R. 447, 485 P.2d 799, supra, §401; *Royal Globe Ins. Co. v. Work. Comp. App. Bd.* (1978) 84 C.A.3d 287, 292, 148 C.R. 325 [showing insufficient].)

(3) *Waiver of Irregularities*. Objections, irregularities, and illegalities not set forth in the petition are waived, and

cannot later be attacked by a petition for writ of review. (*Lab.C. 5904*; *Cowell v. Industrial Acc. Com.* (1938) 11 C.2d 172, 179, 78 P.2d 1016; *Los Angeles v. Industrial Acc. Com.* (1930) 109 C.A. 724, 726, 293 P. 820; *Alford v. Industrial Acc. Com.* (1946) 28 C.2d 198, 206, 169 P.2d 641; *Pullman Co. v. Industrial Acc. Com.* (1946) 28 C.2d 379, 386, 170 P.2d 10; *U.S. Auto Stores v. Work. Comp. App. Bd.* (1971) 4 C.3d 469, 476, 93 C.R. 575, 482 P.2d 199; *Johns-Manville Products Corp. v. Work. Comp. App. Bd.* (1978) 87 C.A.3d 740, 747, 151 C.R. 215.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE
D. Reconsideration by Board.
3. Service, Filing, and Answer.

2 Witkin Sum. Cal. Law Work Comp § 420

[§ 420] Service, Filing, and Answer.

(1) *Service and Filing.* The petition must be served and filed within 20 days after service of the order, decision, or award. (*Lab.C.* 5903; see *Northington v. Industrial Acc. Com.* (1937) 23 C.A.2d 255, 259, 72 P.2d 909 [procedural irregularities may be waived]; *Bethlehem Steel Co. v. Industrial Acc. Com.* (1964) 227 C.A.2d 781, 783, 39 C.R. 41 [notation on order in Commission files, "parties served 11/22/63 AY" was insufficient to show nature of service]; Cal. Civil Practice, 1 Workers' Compensation, §§10:7 et seq., 10:32 et seq.)

In *Royster v. Work. Comp. App. Bd.* (1974) 40 C.A.3d 412, 115 C.R. 210, petitioner was awarded a 301/2% permanent disability rating for a cumulative injury to his heart and back. No petition for reconsideration was filed. In the same year he suffered a major heart attack, and was awarded an additional 691/2% permanent disability rating (100% less the prior 301/2%). After that award became final, petitioner sought to reopen the second claim on the ground that the first should have been apportioned between the back and heart injuries, and therefore the second rating should be increased proportionately. The petition to reopen was denied, as was a petition to reconsider that denial. Petition for writ of review was then filed. *Held*, petition dismissed. "Petitioner may not cure his failure to seasonably seek judicial review of the Board's decision by the device of a later filed petition, basing his right to review on the denial of that petition, when in fact he is seeking review of the basic decision." (40 C.A.3d 414.) "[T]he grounds urged by petitioner as supplying justification for reopening were existent at the time a petition for reconsideration of the second claim should have been filed." (40 C.A.3d 415.)

(2) *Stay of Decision.* Filing the petition automatically stays the decision for 10 days, and the Board may direct a further stay during the pendency of reconsideration. (*Lab.C.* 5910; see *Greitz v. Sivachenko* (1957) 152 C.A.2d 849, 851, 313 P.2d 922 [filing judgment 11 days after petition was filed was proper; stay is for 10 days only, leaving further stay to discretion of commission].)

(3) *Time Extended by Defective Service of Findings and Award.* In *Hartford Acc. & Indem. Co. v. Work. Comp. App. Bd.* (1978) 86 C.A.3d 1, 149 C.R. 878, the Board mailed its findings and award, but to a wrong address (not to the address of record of either the insurer or its attorney). *Held*, this defective service was not a mere irregularity but an omission of substance; hence, the petition for reconsideration could be filed within 20 days after the time the findings and award were actually received by the attorney of record. (86 C.A.3d 3.)

(4) *Answer*. The adverse party may file a verified answer within 10 days after service of the petition. (*Lab.C. 5905*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Service and Filing*.

(New) Amended Award. In *Nestle' Ice Cream Co., LLC v. Work. Comp. App. Bd.* (2007) 146 C.A.4th 1104, 53 C.R.3d 340, the workers' compensation judge awarded R benefits and filed and served the order on April 3. R's attorney sent a letter to the judge asking her to correct the names of the parties and to increase the rate of temporary disability and vocational rehabilitation maintenance allowance, which were incorrectly calculated. The judge did so, and an order amending the findings and award was filed and served on April 14. The employer filed a petition for reconsideration on May 4, 20 days after the amended award was filed and served, and the Board dismissed it as untimely. *Held*, order dismissing petition annulled.

(a) 8 *Cal. Code Reg. §10858* permits a workers' compensation judge to correct mathematical, clerical, or procedural errors in an award or amend it for good cause before a petition for reconsideration is filed. This is the case here. However, the regulation is silent on whether an amendment triggers a new 20-day period for filing a petition for reconsideration and no Court of Appeal case has decided the issue. (146 C.A.4th 1109.)

(b) For civil judgments, the period for filing an appeal is not extended by an amendment that merely corrects a clerical error, but is extended where the amendment effects a substantial or material change or involves the exercise of a judicial function or judicial discretion (see 9 *Cal. Proc.* (5th), *Appeal*, §583). A challenge to a workers' compensation judge's award is analogous to an appeal from a civil judgment, and the rule distinguishing between clerical and judicial acts is sound and applicable here. (146 C.A.4th 1110.)

(c) The changes here were substantial and material. Correction of the parties' names was not merely a clerical change, as they were the wrong parties entirely, and increasing the benefits was of sufficient import that the amendment superseded the original award. Thus, "the time for filing a petition for reconsideration ran from the time of the amended award." (146 C.A.4th 1111.)



77 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

4. Grant of Petition.

a. Statement of Evidence and Reasons.

2 Witkin Sum. Cal. Law Work Comp § 421

[§ 421] Statement of Evidence and Reasons.

A decision granting a petition for reconsideration must be in writing, must "state the evidence relied upon and specify in detail the reasons for the decision," and must be "signed by a majority of the appeals Board members assigned thereto." (*Lab.C. 5908.5.*)

"The purpose of the requirement that evidence be stated and reasons detailed ... is to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans v. Work. Comp. App. Bd. (1968) 68 C.2d 753, 755, 68 C.R. 825, 441 P.2d 633* [bare statement that applicant's incompetency to toll 5-year limitation period of *Lab.C. 5804* "is not established by the evidence" was insufficient].)

In *Goytia v. Work. Comp. App. Bd. (1970) 1 C.3d 889, 83 C.R. 591, 464 P.2d 47*, supra, §307, the court said: "[T]he instant case symbolizes the vice of the neglect of the rule: in reading the narrative account of applicant's work history one cannot authoritatively tell whether the Board did or did not give any consideration to the evidence of subsequent earnings. The Board's conclusionary statement does not suffice to inform this court of its specific holding or the basis for it. It offers no scintilla of reason for refusing to fix the rate in accordance with petitioner's subsequent earnings, if it did give such earnings 'due consideration,' and such omission is the more flagrant in view of the statutory obligations of the Board." (*1 C.3d 893.*)

The following cases are illustrative:

Vandagriff v. Work. Comp. App. Bd. (1968) 265 C.A.2d 854, 864, 71 C.R. 630 [although decision stated that Board reviewed entire record before granting reconsideration and found that employee's death was suicide, it made no specific finding that suicide was wilful and deliberate, or was result of irresistible impulse, and it did not state evidence and reasons relied on].

Baker v. Work. Comp. App. Bd. (1971) 18 C.A.3d 852, 862, 96 C.R. 279 [Board's conclusory statement that petitioner did not sustain industrial injury did not state what consideration Board gave to uncontradicted evidence that petitioner experienced specific symptoms, nor did it give reason for ignoring or rejecting inference that petitioner

sustained disability from work-related mental disturbance].

Solomon v. Work. Comp. App. Bd. (1972) 24 C.A.3d 282, 287, 100 C.R. 899 [noncompliance was not cured by subsequent compliance in decision following reconsideration; statute requires compliance in both instances].

Zozaya v. Work. Comp. App. Bd. (1972) 27 C.A.3d 464, 471, 103 C.R. 793 [Board committed reversible error by failing to state evidence relied on and specific details for granting reconsideration].

Yavitch v. Work. Comp. App. Bd. (1983) 142 C.A.3d 64, 69, 190 C.R. 793 [conclusory statement was inadequate].

State Comp. Ins. Fund v. Work. Comp. App. Bd. (1983) 148 C.A.3d 649, 653, 196 C.R. 169 [Board's adoption of compensation judge's recommendation was insufficient where recommendation was made without hearing or evidence and was contrary to parties' stipulation].

Lawrence Drasin & Associates v. Work. Comp. App. Bd. (1992) 3 C.A.4th 1564, 1572, 5 C.R.2d 215 [insufficient explanation of how Board determined amount of attorneys' fees].

SUPPLEMENT: [This section is current through the latest supplement]



78 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

4. Grant of Petition.

b. Procedure After Granting.

2 Witkin Sum. Cal. Law Work Comp § 422

[§ 422] Procedure After Granting.

After granting the petition, the Board may direct the taking of additional evidence and make its new decision on a consideration of all the facts, or it may decide the matter without further proceedings. (*Lab.C. 5906, 5907, 5908; 8 Cal. Code Reg. §10862* [hearing after reconsideration is granted]; *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com. (1946) 29 C.2d 492, 502, 175 P.2d 823; Columbia-Geneva Steel Div. v. Industrial Acc. Com. (1953) 115 C.A.2d 862, 864, 253 P.2d 45; Argonaut Ins. Exchange v. Industrial Acc. Com. (1958) 49 C.2d 706, 711, 321 P.2d 460, supra, §362; see Zozaya v. Work. Comp. App. Bd. (1972) 27 C.A.3d 464, 468, 103 C.R. 793* [reconsideration was granted to refer employee to independent medical examiner and take additional evidence as to disability].) A decision following reconsideration must be made by the Board, not by a workers' compensation judge. (*Lab.C. 5908.5.*)

Granting a petition reopens the case on all issues, including ones that could have been raised on the original hearing but were not. (*Tate v. Industrial Acc. Com. (1953) 120 C.A.2d 657, 663, 261 P.2d 759.*) Moreover, the Board may make its decision contrary to a recommendation of the workers' compensation judge. (*Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com., supra, 29 C.2d 502; Argonaut Ins. Exchange v. Industrial Acc. Com., supra.*)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

5. Denial of Petition.

a. Statement of Evidence and Reasons.

2 Witkin Sum. Cal. Law Work Comp § 423

[§ 423] Statement of Evidence and Reasons.

Lab.C. 5908.5 refers to both grant and denial of the petition, and seemingly makes the requirement of a statement of the evidence and reasons applicable to both. However, *Lab.C. 5909* provides that a petition is deemed denied if not acted on within 60 days after the date of filing. The apparent contradiction was resolved in *LeVesque v. Work. Comp. App. Bd.* (1970) 1 C.3d 627, 83 C.R. 208, 463 P.2d 432, by reading the two statutes together and permitting a substantial compliance with *Lab.C. 5908.5*. The Board's memorandum order recited its consideration of the petition and the referee's report, and concluded with a denial for the reasons stated by the referee, "whose report we herewith adopt and incorporate." (1 C.3d 633, footnote 7.) *Held*, this was valid. It satisfied the main purpose of *Lab.C. 5908.5*, to provide the reviewing court with adequate guidance; and if strict compliance (detailed findings and statement of reasons) were required, the Board could simply bypass the statute entirely by pocket denial under *Lab.C. 5909*. (1 C.3d 635.) (See *Patterson v. Work. Comp. App. Bd.* (1975) 53 C.A.3d 916, 924, 126 C.R. 182 [following *LeVesque*]; *Kaiser Foundation Hosp. v. Work. Comp. App. Bd.* (1979) 91 C.A.3d 501, 506, 154 C.R. 765 [Board may not seek to uphold denial on basis of ground not stated below].)

Denial of the petition by merely incorporating the original decision of the workers' compensation judge without a report is not sufficient compliance with *Lab.C. 5908.5*. "Reconsideration before the WCAB by its very nature contemplates a review of the original decision and the evidentiary record *in light of the contentions in the petition for reconsideration*. Simply reincorporating the original decision does nothing to explain or justify that decision in light of the petition. Put another way, it does nothing to assure the decision has received a substantive review for its correctness." (*Painter v. Work. Comp. App. Bd.* (1985) 166 C.A.3d 264, 269, 212 C.R. 354.) (See *Bonner v. Work. Comp. App. Bd.* (1990) 225 C.A.3d 1023, 1038, 275 C.R. 337 [Board's order denying reconsideration and incorporating by reference workers' compensation judge's report and initial opinion was not compliance with *Lab.C. 5908.5*; citing *Painter*].)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

5. Denial of Petition.

b. Judge's Report Is Not Essential.

2 Witkin Sum. Cal. Law Work Comp § 424

[§ 424] Judge's Report Is Not Essential.

The workers' compensation judge customarily prepares a report on reconsideration dealing with the issues raised in the petition. That report is contemplated by C.R.C., Rule 57(a) (petition for review must include "the referee's report and recommendation on the petition for reconsideration"); and 8 *Cal. Code Reg. §10860* indicates that the petition "shall be referred to the judge who shall prepare a report." (*Painter v. Work. Comp. App. Bd. (1985) 166 C.A.3d 264, 268, 212 C.R. 354.*) Similar dicta in other Court of Appeal opinions suggest that the report is mandatory. (See *California Highway Patrol v. Work. Comp. App. Bd. (1986) 178 C.A.3d 1016, 1020, 224 C.R. 94* [listing cases].)

These dicta were disapproved in *California Highway Patrol*, where the workers' compensation judge who originally rendered the decision became unavailable due to termination of his temporary assignment. The Board, unable to refer the petition to the judge, issued an opinion fully discussing the facts and reasons for denial in compliance with *Lab.C. 5908.5* (supra, §423). *Held*, this was sufficient.

(a) "We agree that in the normal course of events the petition for reconsideration should be referred to the judge for a report and recommendation. However, we construe the requirements of section 10860 ... to be directory rather than mandatory, procedural rather than substantive. Accordingly, the Board can in its discretion avoid the requirements of that rule when the judge is unavailable and the Board itself independently and fully recites the facts and sets forth its reasons for its decision." (*178 C.A.3d 1021.*)

(b) If the requirement were mandatory, it would be necessary to retry every case where the judge became unavailable to prepare the report. This would be contrary to the general purpose of the Act and to the policy of liberal construction. (*178 C.A.3d 1021, 1022.*)

(c) C.R.C., Rule 57(a) merely requires that a petition for review contain a copy of the report if there is one. If there is none, "the petitioner is not precluded from filing a petition for review in the appellate court stating the circumstances giving rise to the omission of the report." (*178 C.A.3d 1022.*)

SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 57(a) was renumbered C.R.C., Rule 8.494(a) in 2006.

C.R.C., Rule 8.494(a) was renumbered C.R.C., Rule 8.495(a) in 2008.



81 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

D. Reconsideration by Board.

6. Reconsideration on Own Motion.

2 *Witkin Sum. Cal. Law Work Comp* § 425

[§ 425] Reconsideration on Own Motion.

At any time within 60 days after a decision is filed, the Board may grant reconsideration on its own motion. (*Lab.C. 5900(b)*.) The power is unlimited; i.e., within the 60-day period the Board may reconsider a decision without good cause shown. (*Argonaut Ins. Exchange v. Industrial Acc. Com. (1958) 49 C.2d 706, 710, 321 P.2d 460, supra, §362.*)

However, the 60-day period is jurisdictional, and the Board lacks power to act after the time has expired. (*United States Pipe & Foundry Co. v. Industrial Acc. Com. (1962) 201 C.A.2d 545, 548, 20 C.R. 395; Argonaut Ins. Co. v. Work. Comp. App. Bd. (1967) 247 C.A.2d 669, 675, 55 C.R. 810, infra, §426.*)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE

E. Continuing Jurisdiction of Board.

1. Reopening Case for Good Cause.

a. Nature of Jurisdiction and Five-Year Limitation.

2 Witkin Sum. Cal. Law Work Comp § 426

[§ 426] Nature of Jurisdiction and Five-Year Limitation.

Unlike the usual judgment of a court, the "final" award or other decision of the Board is not truly final. The Board has continuing jurisdiction, for 5 years from the date of injury, to rescind or amend an order or award, or increase, diminish, or terminate the compensation awarded. (*Lab.C. 5803, 5804*; see *C.E.B., 2 Workers' Compensation Practice 4th*, §23.1 et seq.; *2 Hanna 2d* (2004 ed.), §31.02 et seq.; *1 Herlick 6th*, §14.04 et seq.; on good cause, see *infra*, §427.)

An award may not be amended, etc., "except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition." (*Lab.C. 5804*.) The 5-year period is *jurisdictional*. (See *Broadway-Locust Co. v. Industrial Acc. Com.* (1949) 92 C.A.2d 287, 294, 206 P.2d 856 [*Lab.C. 5803*, without time limit, is subject to *Lab.C. 5804* limitation of 5 years]; *Sutton v. Industrial Acc. Com.* (1956) 46 C.2d 791, 793, 298 P.2d 857 [same]; *Smith v. Work. Comp. App. Bd.* (1978) 168 C.A.3d 1160, 1170, 214 C.R. 765 [approved compromise and release has same res judicata effect as award after hearing (see *supra*, §415), and 5-year limitation period applies]; *Poole v. Work. Comp. App. Bd.* (1989) 211 C.A.3d 694, 697, 259 C.R. 564 [rehabilitation bureau had jurisdiction to award further rehabilitation benefits more than 5 years after date of injury; record reflected that bureau's prior order was intended to suspend rather than close case]; *Barnes v. Work. Comp. App. Bd.* (2000) 23 C.4th 679, 684, 97 C.R.2d 638, 2 P.3d 1180 [employer's petition to terminate liability for medical benefits was petition to rescind award of future medical benefits and because it was filed 5 years after applicant's injury, Board lacked jurisdiction under *Lab.C. 5804*].)

The limitation, however, only prevents reopening of the case. Supplemental proceedings are not precluded; e.g., the Board may make orders for enforcement of an award (*Llewellyn Iron Works v. Industrial Acc. Com.* (1933) 129 C.A. 449, 453, 18 P.2d 975), and it may commute an award to a lump sum "at any time" (*Lab.C. 5100*; *Norwich Union Indem. Co. v. Industrial Acc. Com.* (1934) 140 C.A. 36, 37, 34 P.2d 1062).

A further extension of time is also possible under the *reconsideration* procedure (*supra*, §418). If an order amending the award is made within the 5-year period, a timely petition for reconsideration may be granted and a decision on reconsideration may be made without reference to the period. (*Gonzales v. Industrial Acc. Com.* (1958) 50 C.2d 360, 364, 325 P.2d 993.)

In *Argonaut Ins. Co. v. Work. Comp. App. Bd.* (1967) 247 C.A.2d 669, 55 C.R. 810, the employee's application was denied by the referee on December 14, 1965. The applicant petitioned for reconsideration on January 3, 1966. The referee's report recommended denial on February 18, 1966. However, on that date, 67 days after the original order, the Board filed a notice of intention to reopen the case under *Lab.C. 5803*. The ground was that the delay occurred because of preparation of the transcript, and the petition was not presented to the Board within the 60-day jurisdictional period of *Lab.C. 5900(b)* (*supra*, §425). In holding that the case could be reopened, the court made this distinction:

(a) Reconsideration under *Lab.C. 5900(a)* is in effect an appeal to the Board from the trial referee's determination. Under *Lab.C. 5900(b)*, the Board on petition or its own motion may grant it, without a showing of good cause, but only within 60 days. (247 C.A.2d 673.)

(b) Reopening the case under *Lab.C. 5803* and *5804* requires good cause. Here, it was the inequity of allowing an unintended lapse of time in examining the petition for reconsideration to be deemed a denial by operation of law. Not only was there no objection, but the parties executed a written stipulation that the Board should reopen. Hence, the order was within jurisdiction, even though mistakenly worded as an order "Granting Reconsideration." (247 C.A.2d 676.)

In calculating the 5-year period for a petition to reopen under either *Lab.C. 5804* or *5410* (*infra*, §430), the *date of injury* provision of the statute of limitations (*Lab.C. 5412*, *supra*, §368) should be used. (*Palmer v. Work. Comp. App. Bd.* (1987) 192 C.A.3d 1241, 1248, 237 C.R. 800.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1051, line 9, "*Smith v. Work. Comp. App. Bd.* (1978)" should be "*Smith v. Work. Comp. App. Bd.* (1985)".



83 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

E. Continuing Jurisdiction of Board.

1. Reopening Case for Good Cause.

b. Grounds for Reopening Case.

1. Equitable Grounds.

2 *Witkin Sum. Cal. Law Work Comp* § 427

[§ 427] Equitable Grounds.

(1) *Changed Conditions*. The Board may exercise its power to reopen on the grounds that the disability has "recurred, increased, diminished, or terminated." (*Lab.C. 5803*; see *8 Cal. Code Reg. §10454* [petition must set out specifically and in detail facts relied on].)

(2) *Other Equitable Grounds*. The power is not confined to situations involving changed conditions; the "good cause" in *Lab.C. 5803* authorizes reopening the case on any equitable grounds, including the following:

(a) *Mistake in original disability rating*. (*Bartlett Hayward Co. v. Industrial Acc. Com.* (1928) 203 C. 522, 532, 265 P. 195.)

(b) *Intrinsic fraud in procuring award*. (*Brunski v. Industrial Acc. Com.* (1928) 203 C. 761, 764, 265 P. 918; *Johnson v. Work. Comp. App. Bd.* (1970) 2 C.3d 964, 975, 88 C.R. 202, 471 P.2d 1002; *Farmers Ins. Group v. Work. Comp. App. Bd.* (2002) 104 C.A.4th 684, 690, 128 C.R.2d 353 [conviction under *Ins.C. 1871.4, 1871.5*].)

(c) *Newly discovered evidence*. (*Western Pipe & Steel Co. v. Industrial Acc. Com.* (1932) 126 C.A. 225, 228, 14 P.2d 530; *Walters v. Industrial Acc. Com.* (1962) 57 C.2d 387, 395, 20 C.R. 7, 369 P.2d 703.)

(d) *Disability originally found to be temporary and later found to be permanent*. (*Pullman Co. v. Industrial Acc. Com.* (1946) 28 C.2d 379, 387, 170 P.2d 10; see *Aliano v. Work. Comp. App. Bd.* (1979) 100 C.A.3d 341, 366, 367, 161 C.R. 190 [failure of employer to properly investigate and present facts relative to applicant's claim, resulting in erroneous determination of applicant's condition].)

In *LeBoeuf v. Work. Comp. App. Bd.* (1983) 34 C.3d 234, 193 C.R. 547, 666 P.2d 989, petitioner was given a 60% permanent disability rating. Later, in proceedings under *Lab.C. 139.5* (supra, §282), the Bureau of Rehabilitation decided that he was ineligible for rehabilitation benefits. He failed to take a timely appeal from the Bureau's decision to the Board; instead he filed a petition to reopen. The Board denied the petition on the dual grounds that the Bureau's decision did not constitute new evidence and that petitioner's proper remedy was the administrative appeal. *Held*,

decision annulled.

(a) "[A]ny factor or circumstance unknown at the time the original award or order was made which renders the previous findings and award 'inequitable,' will justify the reopening of a case and amendment of the findings and award." (34 C.3d 242, citing list of leading cases.)

(b) The Bureau's decision was such a new circumstance. It is irrelevant that the Bureau may have based its eligibility decision on the same evidence that the Board considered in affirming the permanent disability rating. "What is new and significant is the Bureau's determination that petitioner is not qualified to receive *any* rehabilitation benefits. This determination, which is an important one in assessing petitioner's ability to compete in the open labor market, was not available to or considered by the workers' compensation judgment. Accordingly, it constitutes 'new evidence' not previously available which may render the previous award inequitable." (34 C.3d 244.)

(c) The right of appeal carries out the legislative purpose in enacting *Lab.C. 139.5* by ensuring that the injured employee seeking rehabilitative benefits will not be deprived of them unless both the Bureau and the Board concur that he is unqualified; and requiring that the employee appeal an adverse decision before seeking reopening contributes to that goal. Hence, a timely appeal is a prerequisite to a petition to reopen. (34 C.3d 244, 245.)

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84 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

E. Continuing Jurisdiction of Board.

1. Reopening Case for Good Cause.

b. Grounds for Reopening Case.

2. Error of Law.

2 *Witkin Sum. Cal. Law Work Comp* § 428

[§ 428] Error of Law.

Where a decision of the Board has been affirmed by an appellate court, the decision on an issue of law becomes the law of the case. Hence, although subsequent cases may establish its error, the Board cannot reopen the proceedings in order to make a determination contrary to the decision. (*United Dredging Co. v. Industrial Acc. Com.* (1930) 208 C. 705, 707, 284 P. 922.)

However, if the mistake becomes apparent as a result of an appellate decision in another case, the Board has power to reopen the award and correct it in conformity with the latest and controlling declaration of the law. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1946) 73 C.A.2d 248, 257, 166 P.2d 310; *Knowles v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 1027, 1030, 89 C.R. 356; *Ryerson Concrete Co. v. Work. Comp. App. Bd.* (1973) 34 C.A.3d 685, 688, 110 C.R. 319 [Board's disregard of binding Supreme Court decision on point was ground for petition to reopen, and order denying petition was annulled].)

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85 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

E. Continuing Jurisdiction of Board.

1. Reopening Case for Good Cause.

b. Grounds for Reopening Case.

3. Insufficient Grounds.

2 *Witkin Sum. Cal. Law Work Comp* § 429

[§ 429] Insufficient Grounds.

"The requirement of good cause is central to the exercise of the continuing jurisdiction" under *Lab.C. 5803*. (*Fidelity & Cas. Co. v. Work. Comp. App. Bd.* (1980) 103 C.A.3d 1001, 1012, 163 C.R. 339.)

Thus, it has been said that there must be more than a mere change of opinion by the Board (*Merritt-Chapman & Scott Corp. v. Industrial Acc. Com.* (1936) 6 C.2d 314, 317, 57 P.2d 501); that "good cause" is not established unless it is shown that the challenged award is inequitable (*Ocean Acc. & Guarantee Corp. v. Industrial Acc. Com.* (1938) 12 C.2d 116, 120, 82 P.2d 603); and that the power to reopen for newly discovered evidence should be exercised with great caution, on a showing that the evidence could not with reasonable diligence have been produced at the original hearing and that it is not merely cumulative (*Merritt-Chapman & Scott Corp. v. Industrial Acc. Com.*, *supra*). (See *Clendaniel v. Industrial Acc. Com.* (1941) 17 C.2d 659, 662, 111 P.2d 314 [proposed witness' testimony considered cumulative and not ground to reopen]; *Nickey Blair's Restaurant v. Work. Comp. App. Bd.* (1980) 109 C.A.3d 941, 956, 167 C.R. 516 [petition to reopen may not be used to litigate issues that should have been raised by timely petition for reconsideration].)

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86 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

E. Continuing Jurisdiction of Board.

2. Award for New and Further Disability.

a. Nature of Jurisdiction.

2 *Witkin Sum. Cal. Law Work Comp* § 430

[§ 430] Nature of Jurisdiction.

(1) *In General.* The jurisdiction to reopen and change an award (*supra*, §426) must be distinguished from the jurisdiction under *Lab.C. 5410* to grant an additional award for a new and further disability, after a prior award for either temporary or permanent disability. (*Westvaco Chlorine Products Corp. v. Industrial Acc. Com. (1955) 136 C.A.2d 60, 65, 288 P.2d 300*; see C.E.B., 2 *Workers' Compensation Practice* 4th, §23.13 et seq.; 2 *Hanna* 2d (2004 ed.), §31.05; 1 *Herlick* 6th, §14.04 et seq.)

Lab.C. 5410 also has a 5-year limitation but it works differently. If the application is filed within 5 years from the date of injury, the Board may determine it long after the period has run. (*Westvaco Chlorine Products Corp. v. Industrial Acc. Com., supra*, 136 C.A.2d 64 [injury, 1946; application, 1949; recital of jurisdiction reserved, 1950; determination, 1953]; *Casualty Ins. Co. v. Industrial Acc. Com. (1964) 226 C.A.2d 748, 754, 38 C.R. 364.*) (See *Palmer v. Work. Comp. App. Bd. (1987) 192 C.A.3d 1241, 1249, 237 C.R. 800, supra*, §426 [in calculating 5-year period, definition of *date of injury* in *Lab.C. 5412* should be used].)

However, the benefits of *Lab.C. 5410* are available only to an employee seeking an additional award. In *Sutton v. Industrial Acc. Com. (1956) 46 C.2d 791, 298 P.2d 857*, the insurer petitioned to amend the existing award to reduce the percentage of permanent disability. *Held*, *Lab.C. 5803* and *5804* governed, and the Commission's power expired at the end of the 5-year period.

In *Nickelsberg v. Work. Comp. App. Bd. (1991) 54 C.3d 288, 285 C.R. 86, 814 P.2d 1328*, N, a truck driver suffered industrial injuries to his back and legs in 1976 and 1979. He stipulated with his school district employer that the injuries had resulted in temporary disability from January 6, 1979, through June 8, 1981, and in permanent disability. The parties also stipulated that N might need further medical treatment. On February 2, 1983, a workers' compensation judge awarded N indemnity for temporary and permanent disability and further medical treatment.

In July 1987, N underwent back surgery, and the school district paid for the medical treatment pursuant to the original award. He again suffered temporary total disability from March 7, 1987, to November 25, 1987. On February 8, 1988, more than 9 years from the date of his 1979 injury, N petitioned under *Lab.C. 5410* claiming that he had suffered a "new and further disability," and that because the new period of disability was caused by medical treatment provided

under his existing award, he was entitled to recover further temporary total disability indemnity under *Lab.C. 4656* (supra, §275). The workers' compensation judge made the award, but the Board determined that the petition to reopen was barred by *Lab.C. 5804* (supra, §426). *Held*, affirmed.

(a) The workers' compensation judge was not enforcing the original award pursuant to *Lab.C. 5803* (supra, §427). Medical treatment and temporary total disability are two different classes of benefits. Temporary total disability, which is paid as a result of missing work because of an injury, is a benefit separate and distinct from medical treatment. (54 C.3d 294.)

(b) N argued that, when future medical treatment is included in an original award, *Lab.C. 4656* allows an applicant to recover temporary total disability benefits whenever, and for as long as, they are required, as a mere enforcement of the original award. However, the language of *Lab.C. 4656* and the legislative history do not support this interpretation. The 1978 amendment of *Lab.C. 4656* removed the 240-week limitation on aggregate temporary total disability indemnity within a 5-year postinjury period; but this does not imply that temporary total disability can now be awarded at any time and for any period as a result of an original award of future medical treatment. (54 C.3d 294.)

(c) The amendment did not change the jurisdictional time limitations of *Lab.C. 5804* and *Lab.C. 5410*. (54 C.3d 298.) The workers' compensation judge lacked jurisdiction under *Lab.C. 5804*, because N's petition was filed more than 5 years from the date of his original injury. (54 C.3d 300.) Moreover, if his disability could be regarded as a "new and further disability" under *Lab.C. 5410*, it would be untimely. (54 C.3d 301, 302.)

Three justices joined in a strong dissent. (54 C.3d 302.)

Nickelsberg did not decide whether the Board has authority to reserve jurisdiction to award temporary total disability indemnity more than 5 years after the date of the original injury. *Hartsuiker v. Work. Comp. App. Bd.* (1993) 12 C.A.4th 209, 15 C.R.2d 719, held that, in the absence of an insidious progressive disease (supra, §290), the Board does not have this authority.

(a) The doctrine of *General Foundry Service v. Work. Comp. App. Bd.* (1986) 42 C.3d 331, 228 C.R. 243, 721 P.2d 124, supra, §290, allows the reservation of jurisdiction beyond the 5-year period of *Lab.C. 5410* and *5804* when an application is made within that period in the case of an insidious progressive disease. The doctrine did not apply in this case, because the employee's injury was a specific back injury not involving an insidious progressive occupational disease with remote and undramatic causes and long latency periods. If the Board could reserve jurisdiction beyond the 5-year period in a case such as this, the limitations of *Lab.C. 5804* and *5410* would no longer have any effect. (12 C.A.4th 215.)

(b) *Nickelsberg* correctly interpreted the 1978 amendment of *Lab.C. 4656*, which removed the 240 weeks from the date of injury limitation on the payment of temporary total disability awards, to apply only to an applicant who is continuously temporarily totally disabled. The amendment does not allow payment of temporary total disability arising more than 5 years from the date of injury. (12 C.A.4th 217.)

In *Martino v. Work. Comp. App. Bd.* (2002) 103 C.A.4th 485, 126 C.R.2d 812, while the insurer's petition to terminate vocational rehabilitation (VR) services was pending before the rehabilitation unit (RU), M petitioned the Board under *Lab.C. 5410* to reopen for new and further disability. The petition was filed within 5 years of M's injury. While the petition to reopen was pending, the RU terminated the VR services. The Board later granted M's petition to reopen, but subsequently denied M's petition to reconsider denial of reinstatement of VR services on the ground that the petition was barred by the statute of limitations. *Held*, order denying reconsideration vacated. The RU found that M's petition to reopen was not timely under *Lab.C. 5410* because the petition was chronologically out of sequence in that the rehabilitation process was closed *after* the petition was filed. This was error. The petition to reopen was filed with the Board, not the RU. The only issue before the RU was whether to grant the insurer's petition to terminate VR services, and that decision had no effect on the Board's continuing jurisdiction "to act on the timely filed petition to

reopen containing the request to reinstate VR. A timely petition to reopen remains pending and is not affected by the statute of limitations where there has been no decision of any kind by the WCAB on the specific form of benefits at issue." (103 C.A.4th 490.) Moreover, neither statutory nor case law requires an injured employee to adhere to strict chronological sequence when filing documents in administrative proceedings. (103 C.A.4th 490.)

(2) *Award Despite Employee's Failure To Petition.* In *Zurich Ins. Co. v. Work. Comp. App. Bd.* (1973) 9 C.3d 848, 109 C.R. 211, 512 P.2d 843, no party in interest petitioned before the end of the 5-year period. However, within the period, the referee issued a notice of intention to increase compensation awarded on the ground that the disability had increased. *Held*, the resulting increased award was valid. (9 C.3d 852.)

(3) *Award Where Benefits Are Furnished.* Lab.C. 5410 may be applied where, although there was no prior award, benefits (e.g., medical treatment) were voluntarily furnished after notice of the industrial injury. (*Pizza Hut of San Diego v. Work. Comp. App. Bd.* (1978) 76 C.A.3d 818, 822, 824, 143 C.R. 131; see *supra*, §383.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Sarabi v. Work. Comp. App. Bd.* (2007) 151 C.A.4th 920, 925, 927, 60 C.R.3d 189 [Board had continuing jurisdiction to award temporary total disability benefits after 5-year period where employee timely filed petition to reopen, and condition had worsened, thus constituting "new and further disability"].



87 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

E. Continuing Jurisdiction of Board.

2. Award for New and Further Disability.

b. Effect of Original Award.

2 *Witkin Sum. Cal. Law Work Comp* § 431

[§ 431] Effect of Original Award.

(1) *Original Classification Is Not Controlling.* In *Casualty Ins. Co. v. Industrial Acc. Com.* (1964) 226 C.A.2d 748, 38 C.R. 364, F was injured, sought compensation, and was given temporary disability. His application described his occupation as "a manager of hardware Dept.," and the parties stipulated to that fact before the referee. Within the 5-year period F sought permanent disability, and the Commission, after the period had passed, made its award. However, the award was made for a different occupation--"hardware store clerk," because the Commission's rating schedule did not list "Department Manager"; it did list "retail store manager or department or production manager" which would have given a lower rating than the clerk classification. The insurer contended that the occupational classification previously made on stipulation was binding. *Held*, it was not binding. (a) The temporary disability award is measured by wage loss, and the finding of occupation was superfluous and meaningless. (b) The permanent disability award does call for classification, and the issue properly arose for determination by the Commission at that time. (226 C.A.2d 757.)

(2) *Original Award Based on Stipulation Is Not Controlling.* An award based on a compromise and settlement approved by the Board is res judicata and cannot be set aside except on a petition to reopen for fraud or other good cause. (See *supra*, §426 et seq.) However, an award based on a *stipulation* as to the amount of disability is distinguishable. In *Draper v. Work. Comp. App. Bd.* (1983) 147 C.A.3d 502, 507, 195 C.R. 248, the parties stipulated that petitioner's disability was 90%. Later, petitioner sought to reopen, to show total disability, and the workers' compensation judge denied the petition, on the ground that medical evidence of total disability existed prior to the stipulation, and therefore petitioner had failed to sustain his burden of proof of *increased disability*. The Board affirmed the denial. *Held*, reversed. Even though there was evidence from which the workers' compensation judge and the Board could have reasonably inferred that petitioner's disability was 100%, they did not draw that inference. (147 C.A.3d 508.) Hence, the Board abused its discretion in determining that petitioner failed to establish new and further permanent disability. (147 C.A.3d 509.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

E. Continuing Jurisdiction of Board.

3. Procedure in Reopening Case.

2 Witkin Sum. Cal. Law Work Comp § 432

[§ 432] Procedure in Reopening Case.

An extremely liberal approach to procedural requirements is taken by the courts, and technical defects are frequently brushed aside.

In *Beaida v. Work. Comp. App. Bd.* (1968) 263 C.A.2d 204, 69 C.R. 516, petitioner was given a permanent disability award with further medical care. He had an attorney of record in the proceeding. Before the end of the 5-year limitations period of *Lab.C. 5410* (supra, §430) and *Lab.C. 5803* (supra, §426), one of petitioner's treating physicians wrote a letter to the Board calling attention to petitioner's protracted symptoms and suggesting an adjustment in the disability rating. The Board referred the letter to the attorney of record, but nothing happened until after the 5-year period ran. Then petitioner, by new counsel, requested a hearing, on the theory that the physician's letter was a timely petition to reopen. It was stipulated that petitioner had asked the physician to write without realizing that his original attorney remained of record. The Board denied relief. *Held*, order annulled. (a) The term "petition" in the two statutes, liberally construed, covers the letter the physician wrote at the request of plaintiff, and its content was sufficient. (263 C.A.2d 209.) (b) The Board's Rule 10312 (now 8 Cal. Code Reg. §10774), incorporating the statutes on substitution and dismissal of attorneys (supra, §353), has the same object as the general law--convenience; it does not deprive the tribunal of the power to dispense with compliance. In failing to consider this power, the Board acted unreasonably. (263 C.A.2d 210.)

In *Bland v. Work. Comp. App. Bd.* (1970) 3 C.3d 324, 90 C.R. 431, 475 P.2d 663, the petition to reopen was on a standard Board form, and seemingly sought only permanent disability. The Board therefore concluded that the issue of additional temporary disability was not before it and precluded such an award. *Held*, order annulled. The petitioner "need not request any particular classification of compensation" and the prayer that the Board "take such steps as may be necessary to a redetermination of this matter" was sufficient to invoke unlimited jurisdiction of the Board. (3 C.3d 331.)

Beaida and *Bland* were followed in *Blanchard v. Work. Comp. App. Bd.* (1975) 53 C.A.3d 590, 126 C.R. 187. Two weeks before the 5-year period expired, petitioner filed an application under *Lab.C. 5803* and *5804*, stating the ground (change in condition) and adding that a medical evaluation report would be filed at a later date. The report was not filed until several months later. The Board concluded that the petition was fatally defective for failure to set forth in detail the facts relied on to establish good cause under *Lab.C. 5803* and Rule 10454 (8 Cal. Code Reg. §10454). *Held*, order

annulled. (a) The Board's rules of practice and procedure do not deprive it of the power to dispense with compliance when the violation is formal and does not substantially prejudice the other party. (53 C.A.3d 595.) (b) The petition could not have misled defendants, for its title and citation of a compensation case disclosed the ground. (53 C.A.3d 594.) (c) Although it would have been better practice to have moved to amend the petition to conform to proof, failure to do so was not fatal to the award. (53 C.A.3d 596.)

In *Liberty Mut. Ins. Co. v. Work. Comp. App. Bd.* (1980) 109 C.A.3d 148, 167 C.R. 57, the Board awarded applicant a 78% permanent disability for an injury to his spine. The employer's insurer petitioned to reopen, alleging that applicant's condition had changed "in that his disability is substantially less," and asking leave to offer medical evidence in support of this allegation. The workers' compensation judge, without notice to petitioner, denied the petition for failure to present documentary evidence in its support. *Held*, order annulled. (a) The liberal rules of pleading in compensation cases are not restricted to employees' petitions. (109 C.A.3d 153.) (b) In *Blanchard*, the failure to attach documentary evidence was held not fatal to an employee's petition. Moreover, although employers' and insurers' petitions need not necessarily be viewed as liberally as those of an employee, the present petition clearly states the issue. (109 C.A.3d 154.) (c) The summary denial was, in effect, the granting of a demurrer, contrary to the *Board's* rules. (109 C.A.3d 154.) (See *Granite Const. Co. v. Work. Comp. App. Bd.* (2003) 112 C.A.4th 1453, 1457, 5 C.R.3d 828 [letter sent to presiding workers' compensation judge 3 years after injury that merely complained of insurer's failure to comply with terms of settlement was ineffective as claim for further disability or to reopen case; distinguishing *Bland* and *Blanchard*].)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law
X. PROCEDURE

E. Continuing Jurisdiction of Board.

4. Termination of Temporary Disability Indemnity.

2 Witkin Sum. Cal. Law Work Comp § 433

[§ 433] Termination of Temporary Disability Indemnity.

When the Board makes a continuing award of temporary disability, it is anticipated that eventually the employee's entitlement will terminate when the employee either becomes permanent or stationary or improves sufficiently to return to work. Pursuant to Board rules (*8 Cal. Code Reg. §10462 et seq.*), the employer may file a petition to terminate, which notifies the injured employee of the claimed basis, and gives the employee the opportunity to object. On timely objection, and where it appears that the employee may not be working and may not be receiving disability indemnity, the petition to terminate is heard on a priority basis. (See *Maples v. Work. Comp. App. Bd. (1980) 111 C.A.3d 827, 833, 168 C.R. 884* [unilateral termination without notice to worker or Board was violation of rules and employer was estopped to claim credit for overpayment].)

The court in *Maples* emphasized the importance of complying with the Board's procedural requirement of filing the reports of the employer's physician with the Board and serving them on the applicant. "When the injured worker, who is unaware that the employer's physician has declared him permanent and stationary or able to return to work, continues to receive temporary disability payments, he is obviously not cognizant that he should attempt to seek employment. Not only would there be the lost permanent disability indemnity if the overpayment credit were allowed, but unknown loss of employment opportunities and lost wages (perhaps substantially in excess of disability benefits). Also, an injured worker on a continuing award of temporary disability may need vocational rehabilitation. But when the employer fails promptly to serve medical reports which indicate a need for consideration of vocational rehabilitation, a delay in the injured worker's receipt of these benefits would result, thereby causing a delay in the injured worker's commencement of an actual retraining program and his eventual return as a productive member of the labor market." (*111 C.A.3d 837.*)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

1. In General.

a. Writ of Review in Court of Appeal.

2 Witkin Sum. Cal. Law Work Comp § 434

[§ 434] Writ of Review in Court of Appeal.

The only method by which a decision of the Board may be attacked, even on jurisdictional grounds, is by an application to the Supreme Court or Court of Appeal for a *writ of review*. (See Cal. Const., Art. XIV, §4; *Lab.C.* 5950, 5955; *North Pac. Steamship Co. v. Soley* (1924) 193 C. 138, 140, 223 P. 462; *Thaxter v. Finn* (1918) 178 C. 270, 273, 173 P. 163; Cal. Civil Practice, 1 Workers' Compensation, §11:2; C.E.B., 2 Workers' Compensation Practice 4th, §22.1 et seq.; 2 Hanna 2d (2004 ed.), §34.01 et seq.; 2 Herlick 6th, §20.01 et seq.; 82 *Am.Jur.2d* (2003 ed.), *Workers' Compensation* §632 et seq.; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §17.)

Although *Lab.C.* 5950 provides that the application for writ of review may be made to "the Supreme Court or to the court of appeal," the Supreme Court, by minute order, transfers original petitions filed with it. Thus, as a practical matter, application should be made to the appropriate Court of Appeal (*infra*, §436). (See C.E.B., 2 Workers' Compensation Practice 4th, §22.19; 2 Hanna 2d (2004 ed.), §34.12.)

West's Key Number Digest, Workers' Compensation k.1822 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §17.



91 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

1. In General.

b. No Superior Court Jurisdiction.

2 Witkin Sum. Cal. Law Work Comp § 435

[§ 435] No Superior Court Jurisdiction.

In *Loustalot v. Superior Court* (1947) 30 C.2d 905, 186 P.2d 673, an attorney was adjudged in contempt by the Commission, and, on refusal to pay his fine, was incarcerated. He sought habeas corpus from the superior court. In a proceeding by the sheriff, the Supreme Court granted prohibition to restrain the superior court from releasing the prisoner. The opinion makes the following distinctions: (a) Although *Lab.C. 5955* mentions only the writs of *review* and *mandamus*, and therefore only these are available to review awards and safety rules, an order of contempt is different and may be reviewed on *habeas corpus*. (b) Nevertheless, *Lab.C. 5955* is controlling as to the courts that may review or otherwise interfere with any orders of the Commission, and, under that statute, only the Supreme Court or Court of Appeal may act. (c) Hence, habeas corpus will lie, in the present case, to review the contempt order, but the writ can only issue from an appellate court. (30 C.2d 908.)

In *Pizarro v. Superior Court* (1967) 254 C.A.2d 416, 61 C.R. 923, the employee had judgment entered on his award, and levied execution. The judgment debtor obtained a restraining order staying execution on the ground that there had been a compromise agreement. *Held*, prohibition granted; only the Supreme Court or Court of Appeal may stay or modify an award. (254 C.A.2d 418.) (See *Abraham v. Work. Comp. App. Bd.* (2003) 113 C.A.4th 1087, 6 C.R.3d 820 [superior court lacked jurisdiction to entertain writ petition challenging Board's industrial causation decision].)

In *Greener v. Work. Comp. App. Bd.* (1993) 6 C.4th 1028, 25 C.R.2d 539, 863 P.2d 784, plaintiffs filed an action in superior court seeking a declaration that amendments to the Workers' Compensation Act prohibiting awards of fees to nonattorneys were unconstitutional and an injunction prohibiting the amendments from taking effect. Defendant Board moved for dismissal, arguing that, under *Lab.C. 5955*, the superior court had no jurisdiction over the Board. *Held*, the superior court had personal jurisdiction but lacked subject matter jurisdiction; therefore, the action was properly dismissed.

(a) *Lab.C. 5955* limits the types of actions that can be heard in superior court but does not withhold personal jurisdiction over the Board from that court. *Loustalot* and the other cases relied on by the Board all involved subject matter, not personal, jurisdiction. (6 C.4th 1035, 1036.)

(b) In the exercise of its normal jurisdiction with respect to awards or safety rules, decisions of the Board are

subject to review only by the methods set forth in the Act. (6 C.4th 1041.) Under *Lab.C.* 5955, only the Supreme Court and the Courts of Appeal have jurisdiction to review awards or to interfere with the Board in the performance of its duties. (6 C.4th 1043.) Because the relief sought by the plaintiffs would interfere with the Board in carrying out its duty to restrict fee awards to attorneys, the superior court was without subject matter jurisdiction. (6 C.4th 1042, 1044.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 1062, Line 8, citation to *Abraham* case should be *Abraham v. Work. Comp. App. Bd. (2003) 113 C.A.4th 1082, 1087, 6 C.R.3d 820.*



92 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

1. In General.

c. Appellate District.

2 *Witkin Sum. Cal. Law Work Comp* § 436

[§ 436] Appellate District.

Lab.C. 5950 authorizes a petition to the Court of Appeal for the appellate district in which the petitioner "resides." In *Argonaut Ins. Co. v. Work. Comp. App. Bd.* (1967) 247 C.A.2d 669, 55 C.R. 810, the petitioning insurer was not a resident of the Fourth Appellate District within the meaning of the statute. However, the employer, employee, and petitioner's local office were located there, the injury and original proceedings took place there, and the petitioner had in the past been permitted to file in districts other than its residence. *Held*, "Such a combination of factors is sufficient to confer jurisdiction and venue in this tribunal." (247 C.A.2d 672.)

Filing in the wrong district is not a jurisdictional defect. In *National Kinney of Calif. v. Work. Comp. App. Bd.* (1980) 113 C.A.3d 203, 169 C.R. 801, the employee and employer were residents of the Second Appellate District and all proceedings were held there, but counsel for the employer had his office in the Fourth Appellate District and mistakenly filed the petition there within the 45-day period. He discovered his mistake after the time had expired and requested transfer to the proper district. The Fourth Appellate District clerk made the request to the Supreme Court and that court transferred the matter to the Second Appellate District. The employee then for the first time objected that the petition was untimely filed. *Held*, the court had jurisdiction. Filing of a petition within the 45-day period is jurisdictional (see *infra*, §438), but other procedural steps may not be. Thus, the requirement of service of a copy of the petition "is more directory than mandatory." (113 C.A.3d 207.) Moreover, if the correct appellate district were a jurisdictional requirement, the court in *Argonaut*, *supra*, could not have found a substitute basis for jurisdiction. Hence, residence of the petitioner is a directory requirement; and, upon discovery of the venue error, the appropriate procedure is for the appellate district to request the Supreme Court to transfer the matter--as was done here. (113 C.A.3d 209.) The opinion adds: "This is not to say, however, that the clerk of an appellate district may not question the appropriateness of filing in that appellate district. The petition for writ of review should state the petitioner's county of residence (as opposed to a statement that the petitioner is a resident of that judicial district); and, if the petitioner is not a resident of a county within that appellate district, the petition must state the factors which are claimed to establish a sufficient basis for filing in that district." (113 C.A.3d 209.)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

1. In General.

d. Review of Reconsideration Order.

2 Witkin Sum. Cal. Law Work Comp § 437

[§ 437] Review of Reconsideration Order.

Lab.C. 5950 authorizes review of "an order, decision, or award of the appeals board." In *Safeway Stores v. Work. Comp. App. Bd.* (1980) 104 C.A.3d 528, 163 C.R. 750, the issue was whether the applicant came within the special mission exception to the going and coming rule (see *supra*, §203). The workers' compensation judge held a bifurcated hearing on this threshold issue and decided that the applicant's injury did not arise out of or in the course of the employment. The applicant petitioned for reconsideration. The Board found the injury compensable and ordered the matter remanded for further hearing and decision on the other issues. The employer then filed this petition for review. *Held*, review was proper. Review of Board orders determining threshold issues (such as that presented here) may in many cases better serve the statutory scheme and its objectives. "Thus, where the employer or carrier asserts in good faith and with reasonable cause that it has no statutory liability at all, and the Board has decided that issue on review after a bifurcated hearing, prompt judicial review, whatever the court decides, may avoid the necessity of further litigation." (104 C.A.3d 534.) In addition, the liability of an employer for attorneys' fees for filing a petition without reasonable basis is a protection against abuse of the review process. (104 C.A.3d 534.) (See *Maranian v. Work. Comp. App. Bd.* (2000) 81 C.A.4th 1068, 1078, 97 C.R.2d 418 [Board's order after reconsideration containing specific findings regarding applicant's mailing and employer's receipt and handling of compensation claim was pivotal to question of applicant's benefit entitlement and was thus reviewable under *Lab.C. 5950* because it conclusively determined substantial issue; following *Safeway Stores*].)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

2. Procedure.

a. Petition, Answer, and Reply.

2 Witkin Sum. Cal. Law Work Comp § 438

[§ 438] Petition, Answer, and Reply.

(1) *Petition.* A petition for writ of review must be filed within 45 days after the Board's denial of reconsideration (see *supra*, §423) or the filing of the order, decision, or award following reconsideration (see *supra*, §422). (*Lab.C.* 5950; see *Cal. Civil Practice*, 1 Workers'; Compensation, §§11:13 et seq., 11:29 et seq.; *C.E.B.*, 2 Workers' Compensation Practice 4th, §22.18 et seq.; on service of petition, see *Lab.C.* 5954; *C.R.C.*, Rule 57(a).)

The time period specified in *Lab.C.* 5950 is jurisdictional and runs from filing, not service. The mailed notice provisions of *C.C.P.* 1013 do not extend the time for appeal. (*Camper v. Work. Comp. App. Bd.* (1992) 3 *C.4th* 679, 684, 12 *C.R.2d* 101, 836 *P.2d* 888.)

The petition must include, as exhibits, copies of matters to be reviewed and the findings and decision, including the report and recommendation on the petition for reconsideration. (*C.R.C.*, Rule 57(a).)

Filing the petition does not give an automatic stay, but the reviewing court may grant a stay on a written undertaking. (*Lab.C.* 5956, 6000 et seq.; see *Ulrich v. Work. Comp. App. Bd.* (1975) 50 *C.A.3d* 643, 649, 650, 123 *C.R.* 435 [bond is normally not required under *Lab.C.* 6000 because liability of insurers and self-insured employers is already secured].)

(2) *Answer and Reply.* Within 25 days after the petition is filed, the Board and any real party in interest may serve and file an answer and relevant exhibits not included in the petition; and, within 15 days after the answer is filed, the petitioner may serve and file a reply. (*C.R.C.*, Rule 57(b); *Lavore v. Industrial Acc. Com.* (1938) 29 *C.A.2d* 255, 259, 84 *P.2d* 176 [right to file answer]; *C.E.B.*, 2 Workers' Compensation Practice 4th, §22.53 et seq.) (On importance of employee's answer, see *Johnson v. Work. Comp. App. Bd.* (1984) 37 *C.3d* 235, 239, 207 *C.R.* 857, 689 *P.2d* 1127, *infra*, §439.)

(3) *Delay in Filing Petition.* Although the period prescribed by *Lab.C.* 5950 is jurisdictional, a slight excusable delay is not fatal. In *Litzmann v. Work. Comp. App. Bd.* (1968) 266 *C.A.2d* 203, 71 *C.R.* 731, the petition was presented on the last day for filing. The clerk refused to accept it because it was not in the proper form and on proper size sheets. It was filed in correct form 1 day late. *Held*, under the liberal attitude toward practice in workers' compensation, the

petition should be accepted as filed within the required time. (266 C.A.2d 204.)

In *State Farm Fire & Cas. Co. v. Work. Comp. App. Bd.* (1981) 119 C.A.3d 193, 173 C.R. 778, the Board filed its order denying reconsideration on June 10; but, despite repeated inquiries, petitioner did not receive notice of the order until October 27, after the 45-day period had expired. *Held*, a petition filed December 10 (within 45 days after notice was received) was timely. Although the period is jurisdictional and begins to run from filing of the order or decision, due process requires notice before a party may be deprived of a substantial right. Hence, "where, as here, notice of the order to be reviewed was not afforded until after expiration of the statutory period in which review could be sought, the running of the statutory period must be deemed to commence with the receipt of notice." (119 C.A.3d 197.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition*. C.R.C., Rule 57(a) was renumbered C.R.C., Rule 8.494(a) in 2006.

C.R.C., Rule 8.494(a) was renumbered C.R.C., Rule 8.495(a) in 2008.(2) *Answer and Reply*. C.R.C., Rule 57(b) was renumbered C.R.C., Rule 8.494(b) in 2006.

C.R.C., Rule 8.494(b) was renumbered C.R.C., Rule 8.495(b) in 2008.



95 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

2. Procedure.

b. Writ, Hearing, and Judgment.

2 Witkin Sum. Cal. Law Work Comp § 439

[§ 439] Writ, Hearing, and Judgment.

(1) *Writ*. The writ directs the Board to certify its record to the court, and the case is heard on the record alone, without additional evidence. (*Lab.C. 5951, 5952*.) It is returnable "at a time and place then or thereafter specified by court order." (*Lab.C. 5951*; see *C.E.B., 2 Workers' Compensation Practice 4th, §22.77*.)

(2) *Hearing*. The Board and each party to the proceeding before the Board may appear in the review proceeding. (*Lab.C. 5953*.)

(3) *Judgment*. The judgment may affirm or annul the Board's decision or award, or may remand the case for further proceedings. (*Lab.C. 5953*; on order for attorneys' fee where petition is not substantial, see *Lab.C. 5801, supra, §358*.)

(4) *Cost Award on Summary Denial of Petition*. In proceedings before the Board, costs as between the parties may be allowed by the Board. (*Lab.C. 5811(a)*.) In *Johnson v. Work. Comp. App. Bd. (1984) 37 C.3d 235, 207 C.R. 857, 689 P.2d 1127, Lab.C. 5811* was liberally construed to authorize an award by the Board to an employee for the cost of printing an answer to an employer's petition for review that was summarily denied by the Court of Appeal without opinion. Employee J was given separate awards of permanent disability for two work-related injuries. He sought a higher single award, contending that the two injuries became permanent at the same time. The Board granted the relief requested, and the employer's insurer petitioned for review. J filed a printed answer, the insurer's petition was summarily denied by the Court of Appeal, and J applied to the Board for reimbursement of the cost of printing the answer. The Board denied this application on the ground that it lacked jurisdiction to award costs incurred in a judicial proceeding. J then filed a petition for writ of review, requesting the Court of Appeal to order the insurer to reimburse him. The Court of Appeal summarily denied this petition, and J petitioned for review in the Supreme Court. The writ was granted and the cause was remanded to the Board with directions to hold an evidentiary hearing and award the reasonable cost of printing the answer. (*37 C.3d 243*.)

(a) Although the Board once defended its awards against petitions for review, now the *injured employee* must file an answer to an employer's petition or run the risk that the court will assume that the petitioner's statement of facts is accurate, and that the contentions have merit. (*37 C.3d 239*.)

(b) An appellate court normally awards costs through issuance of a remittitur after a cause has been considered on the merits and an opinion has been rendered. However, when a petition for a writ has been summarily denied without an opinion, no remittitur issues. (37 C.3d 239, 240; see 9 Cal. Proc. (4th), *Appeal*, §732.) Summary denial of petitions in Board cases is the usual practice, and there is no mechanism in such cases for an appellate award of costs to the prevailing employee. (37 C.3d 240.)

(c) In this situation, a liberal construction of *Lab.C. 5811*, in accordance with the constitutional directive (Cal. Const., Art. XIV, §4) and the long established policy of the courts (see *supra*, §§6, 7), supports the Board's jurisdiction to award costs. The statute refers to costs incurred in proceedings "before the appeals board." "Technically, proceedings remain before the board and subject to its jurisdiction unless and until this court or the court of appeal *grants* a petition for writ of review. Where, as here, the appellate court summarily denies the petition for writ of review without opinion and without remittitur, the jurisdiction of the board is uninterrupted." (37 C.3d 241.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Cost Award on Summary Denial of Petition.*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §843.



96 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

2. Procedure.

c. Rehearing and Review in Supreme Court.

2 Witkin Sum. Cal. Law Work Comp § 440

[§ 440] Rehearing and Review in Supreme Court.

(1) *Rehearing in Court of Appeal.* If the petition for writ of review is denied, the decision of the Court of Appeal becomes final immediately (C.R.C., Rule 24(b)), and no rehearing may be sought (C.R.C., Rule 25(a)). If the Court of Appeal grants the petition, a party may seek a rehearing of the court's decision affirming or annulling the Board's award by filing a petition within 15 days after the decision is filed. (C.R.C., Rule 27(b)(1)(A).) The Court of Appeal may also grant a petition for rehearing on its own motion before its decision becomes final. (C.R.C., Rule 25(a).) (On procedure for seeking rehearing before Court of Appeal, see C.E.B., 2 Workers' Compensation Practice 4th, §22.85 et seq.; 2 Hanna 2d (2004 ed.), §34.22; 9 Cal. Proc. (4th), *Appeal*, §852 et seq.)

Although a petition for rehearing is not a requirement for seeking review in the Supreme Court, the Supreme Court normally will not consider omissions or misstatements of an issue or fact that could have been raised in the petition. (C.R.C., Rule 28(c)(2).)

(2) *Review in Supreme Court.* If review by the Supreme Court is sought (see 9 Cal. Proc. (4th), *Appeal*, §860 et seq.), a petition for review must be filed within 10 days after the decision of the Court of Appeal becomes final. (C.R.C., Rule 28(e)(1).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Rehearing in Court of Appeal.* C.R.C., Rule 24(b) was renumbered C.R.C., Rule 8.264(b) in 2006.

C.R.C., Rule 8.264(b) was amended in 2008, and the provisions regarding the immediate finality following denial of a petition for writ of review were deleted. Those provisions are now in C.R.C., Rule 8.490(b)(1), added in 2008.

C.R.C., Rule 25(a) was renumbered C.R.C., Rule 8.268(a) in 2006.

C.R.C., Rule 25(b)(1)(A) was renumbered C.R.C., Rule 8.268(b)(1)(A) in 2006.

C.R.C., Rule 28(c)(2) was renumbered C.R.C., Rule 8.500(c)(2) in 2006.

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §907 et seq.

(2) *Review in Supreme Court.* C.R.C., Rule 28(e)(1) was renumbered C.R.C., Rule 8.500(e)(1) in 2006.

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §913 et seq. *Correction:* Line 7 of section, "C.R.C., Rule 27(b)(1)(A)" should be "C.R.C., Rule 25(b)(1)(A)".



97 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

3. Scope of Review.

a. In General.

2 Witkin Sum. Cal. Law Work Comp § 441

[§ 441] In General.

The review by the court may only determine, based on the entire record certified by the Board, whether (1) the Board acted without or in excess of its powers; (2) the order, decision, or award was procured by fraud, (3) the order, decision, or award was unreasonable; (4) the order, decision, or award was not supported by substantial evidence; (5) whether findings of fact support the order, decision, or award under review. The court cannot hold a trial de novo, take evidence, or exercise its independent judgment on the evidence. (*Lab.C. 5952*; Cal. Civil Practice, 1 Workers' Compensation, §11:8 et seq.; C.E.B., 2 Workers' Compensation Practice 4th, §22.6 et seq.; *82 Am.Jur.2d (2003 ed.)*, *Workers' Compensation* §651 et seq.) (On substantial evidence rule, see *infra*, §442; on conclusiveness of Board's findings, see *infra*, §443.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

3. Scope of Review.

b. Substantial Evidence Rule.

2 Witkin Sum. Cal. Law Work Comp § 442

[§ 442] Substantial Evidence Rule.

(1) *Nature of Rule.* *Lab.C. 5952(d)* (supra, §441) restates the "substantial evidence rule" that generally applies to administrative bodies exercising quasi-judicial functions: The reviewing court's inquiry ends when the court finds substantial evidence to support the Board's decision. (See *Columbia-Geneva Steel Div. v. Industrial Acc. Com.* (1953) 115 C.A.2d 862, 863, 253 P.2d 45 [effect of contradictory evidence and matters tending to discredit applicant's testimony were for panel to weigh and determine, not reviewing court]; *Havel v. Industrial Acc. Com.* (1957) 154 C.A.2d 737, 742, 316 P.2d 680 [cardiologist's opinion that employee's heart condition was not industrially caused constituted substantial evidence to controvert presumption in favor of petitioner]; *Argonaut Ins. Exchange v. Industrial Acc. Com.* (1958) 49 C.2d 706, 713, 321 P.2d 460 [record contained substantial evidence]; *Jones v. Work. Comp. App. Bd.* (1968) 68 C.2d 476, 478, 67 C.R. 544, 439 P.2d 648, infra, §449; *Patterson v. Work. Comp. App. Bd.* (1975) 53 C.A.3d 916, 923, 126 C.R. 182 [single physician's report was substantial evidence of finding of lack of industrial causation]; *Mendoza v. Work. Comp. App. Bd.* (1976) 54 C.A.3d 820, 824, 127 C.R. 173 [evidence established lack of total dependency on deceased siblings]; *Lewis v. Work. Comp. App. Bd.* (1976) 56 C.A.3d 938, 952, 953, 128 C.R. 752 [medical expert opinion rejecting debatable claim of industrial causation constitutes substantial evidence]; C.E.B., 2 Workers' Compensation Practice 4th, §22.10; 2 Hanna 2d (2004 ed.), §34.16[1]; 2 Herlick 6th, §20.04; 9 Cal. Proc. (4th), Appeal, §363 et seq.)

(2) *Review of Entire Record.* The proper scope of judicial review is found in the explicit language of *Lab.C. 5952* which mandates that the court's "sole obligation ... is to review the entire record to determine whether the board's conclusion was supported by substantial evidence." (*LeVesque v. Work. Comp. App. Bd.* (1970) 1 C.3d 627, 636, 637, 83 C.R. 208, 463 P.2d 432 [disapproving cases employing loose language inconsistent with substantial evidence rule; e.g., "any evidence," "any substantial evidence," "entire lack of evidence"].) The following cases are instructive:

Garza v. Work. Comp. App. Bd. (1970) 3 C.3d 312, 317, 90 C.R. 355, 475 P.2d 451 [test of substantiality must be measured on basis of entire record rather than by simply isolating evidence that supports Board and ignoring other relevant facts that rebut or explain that evidence].

Lamb v. Work. Comp. App. Bd. (1974) 11 C.3d 274, 281, 113 C.R. 162, 520 P.2d 978 [although Board "may choose to disbelieve irrelevant uncontradicted and unimpeached evidence if it has grounds other than mere speculation and

conjecture to do so ... it may not disregard such evidence"].

Greenberg v. Work. Comp. App. Bd. (1974) 37 C.A.3d 792, 799, 112 C.R. 626 [award annulled where Board ignored physician's testimony and overturned referee's finding of work-causation].

Amico v. Work. Comp. App. Bd. (1974) 43 C.A.3d 592, 598, 117 C.R. 831 [court conducted extensive review of entire record; Board decision annulled].

Hulbert v. Work. Comp. App. Bd. (1975) 47 C.A.3d 634, 639, 121 C.R. 239 [examination of entire record disclosed no substantial evidence that claimant suffered from preexisting permanent disability or physical impairment that authorized apportionment; award annulled].

National Convenience Stores v. Work. Comp. App. Bd. (1981) 121 C.A.3d 420, 425, 426, 175 C.R. 378 ["we must examine the reasoning of the judge and the WCAB in this case in which the finding of psychiatric injury is based solely on the testimony of a single physician who admits that applicant is exaggerating his physical injury"].

Insurance Co. of North America v. Work. Comp. App. Bd. (1981) 122 C.A.3d 905, 909, 176 C.R. 365 [psychiatric injury].

Santa Ana v. Work. Comp. App. Bd. (1982) 128 C.A.3d 212, 219, 180 C.R. 125 [Board's reliance on "isolated bit of testimony" by physician ignored entire record].

Bracken v. Work. Comp. App. Bd. (1989) 214 C.A.3d 246, 254, 262 C.R. 537 [Board erroneously relied on isolated fragmentary portions of physician's deposition and later report while disregarding substantial evidence that contradicted those fragments].

Rosas v. Work. Comp. App. Bd. (1993) 16 C.A.4th 1692, 1701, 20 C.R.2d 778 [substantial evidence did not support Board's conclusion that employee's occupational exposure to raw sewage did not cause his injury].

(3) *Inquiry into Fairness and Reasonableness of Award.* "[E]ven where undisputed operative facts meet the statutory basis of entitlement, a court of review must, as a part of the review in the light of the entire record, examine other facts which may seem statutorily irrelevant or inoperative. Such facts may well be relevant and important when the result is examined for fairness, reasonableness and proportionality in the overall scheme of the law and the purposes sought to be accomplished by that law. ... [W]e conclude here that the award is so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair. On the evidence available in this record, the award demonstrates a windfall not just and fair compensation." (*Universal City Studios v. Work. Comp. App. Bd.* (1979) 99 C.A.3d 647, 658, 160 C.R. 597.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Rule.*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §369 et seq.



99 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

3. Scope of Review.

c. Conclusiveness of Findings.

2 Witkin Sum. Cal. Law Work Comp § 443

[§ 443] Conclusiveness of Findings.

Supplementing the substantial evidence rule (*Lab.C. 5952(d)*, *supra*, §442) is the rule of conclusiveness of the Board's findings of fact: "The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals Board." (*Lab.C. 5953*; *Coborn v. Industrial Acc. Com. (1948) 31 C.2d 713, 717, 192 P.2d 959*; *Havel v. Industrial Acc. Com. (1957) 154 C.A.2d 737, 742, 316 P.2d 680*; see *C.E.B., 2 Workers' Compensation Practice 4th*, §22.10.)

The rule has the following consequences:

(1) An award may be affirmed on testimony of the employee alone, despite contradictory evidence of his own conduct and statements indicative of a nonindustrial injury. (*Firestone Tire & Rubber Co. v. Industrial Acc. Com. (1954) 122 C.A.2d 627, 628, 265 P.2d 147* [employee testified in explanation that he was told he would lose his job if this were an industrial accident].)

(2) Although expert testimony is generally required on medical or other scientific issues (see *infra*, §445), an exception is recognized where the matter is within a layperson's understanding. In that case, the award may be affirmed without medical testimony. (*Los Angeles v. Industrial Acc. Com. (1936) 14 C.A.2d 134, 137, 57 P.2d 1341* [issue whether strain following former arthritis caused permanent disability; award upheld, though no physician was questioned on it]; *Employers' Liab. Assur. Corp. v. Industrial Acc. Com. (1941) 42 C.A.2d 669, 671, 109 P.2d 716* [issue whether employee was disabled because of pain suffered when trying to work]; see *1 Cal. Evidence (4th)*, *Opinion Evidence*, §86.)

In *Liberty Mut. Ins. Co. v. Industrial Acc. Com. (1948) 33 C.2d 89, 199 P.2d 302*, a carpenter received a compensable injury to his right hand, which impaired its grasping power. His own testimony and that of medical experts varied widely as to the extent of the impairment, and the Commission gave him a 321/4% disability rating. In affirming the award, the court held: (a) Though the cause of the loss of grasping power might be a scientific question, its extent, i.e., the nature and consequences of the injury, does not require scientific proof. (b) Even if the issue is one to be resolved from medical evidence alone, where the experts give divergent views the Commission may make a determination different from any one of them but within the range of the evidence, just as a trier of fact does in deciding

the issue of value in the light of conflicting expert opinions. The court adds, with unusual candor: "Arriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily involves some measure of conjecture and compromise by the finder of fact as certainly would occur in the mental processes of a so-called expert witness." (33 C.2d 93.)

(3) An award may be affirmed although some essential element, such as the manner in which the injury occurred, was established by hearsay evidence. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1924) 195 C. 174, 177, 231 P. 996; see 1 *Cal. Evidence* (4th), *Introduction*, §67.)

(4) An award may be affirmed though an essential element rests only on probable inferences drawn from circumstantial evidence. (*Union Oil Co. v. Industrial Acc. Com.* (1931) 211 C. 398, 401, 295 P. 513; *Woolworth Co. v. Industrial Acc. Com.* (1941) 17 C.2d 634, 637, 111 P.2d 313; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1942) 19 C.2d 622, 629, 122 P.2d 570; *Fireman's Fund Indem. Co. v. Industrial Acc. Com.* (1949) 93 C.A.2d 244, 246, 208 P.2d 1033; *Travelers Ins. Co. v. Industrial Acc. Com.* (1949) 33 C.2d 685, 687, 203 P.2d 747; *State Employees' Retirement System v. Industrial Acc. Com.* (1950) 97 C.A.2d 380, 382, 217 P.2d 992; *Patterson v. Work. Comp. App. Bd.* (1975) 53 C.A.3d 916, 923, 126 C.R. 182; cf. contrary approach in *Freedman v. Industrial Acc. Com.* (1945) 67 C.A.2d 629, 630, 154 P.2d 922 [award against two persons annulled because of erroneous finding of joint adventure, though evidence would have sustained finding of dual employment or agency].)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

3. Scope of Review.

d. Decision Without Examination of Record.

2 Witkin Sum. Cal. Law Work Comp § 444

[§ 444] Decision Without Examination of Record.

The doctrine of *Morgan v. United States* (1936) 298 U.S. 468, 56 S.Ct. 906, 911, 80 L.Ed. 1288, 1295, that "he who decides must hear" (see 8 *Summary* (10th), *Constitutional Law*, §673), has been applied in several California cases. In *Deter v. Industrial Acc. Com.* (1941) 45 C.A.2d 664, 116 P.2d 112, three referees participated in the decision, and the third decided for the claimant without reading all the evidence previously introduced. *Held*, the Commission's decision, based on this recommendation, was in excess of its jurisdiction. (45 C.A.2d 665.)

In *Power v. Industrial Acc. Com.* (1954) 123 C.A.2d 591, 267 P.2d 85, the first referee found that the injury was not compensable; the second on reconsideration found that it was compensable; and the Commission, without a full record, held it noncompensable, and sought to justify its order on the ground that it had examined the second referee's summary. Without deciding whether the Commission could have relied upon an accurate summary, the court annulled the order on the ground that this summary was inaccurate and misleading, and hence no substitute for the record. (123 C.A.2d 596.)

On the other hand, the procedure was upheld where the hearing before a second referee related to a single new issue and the prior evidence not examined was not material (*Santa Maria Gas Co. v. Industrial Acc. Com.* (1941) 46 C.A.2d 775, 777, 117 P.2d 951), and where a second referee read the transcript of the prior testimony (*Helmick v. Industrial Acc. Com.* (1941) 46 C.A.2d 651, 656, 116 P.2d 658). (See *National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1949) 34 C.2d 20, 29, 206 P.2d 841 [Commission may follow referee's recommendation without reading record, or it may, on review of record, reach *different* conclusion].)

The requirement of a "hearing" may be satisfied, even if the Board does not actually hear or read all of the evidence; it may rely on an accurate and complete summary or analysis by a referee. (*Allied Comp. Ins. Co. v. Industrial Acc. Com.* (1961) 57 C.2d 115, 119, 17 C.R. 817, 367 P.2d 409; *Durae v. Industrial Acc. Com.* (1962) 206 C.A.2d 691, 697, 23 C.R. 902.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

4. Annulment of Award.

a. Lack of Substantial Evidence.

2 Witkin Sum. Cal. Law Work Comp § 445

[§ 445] Lack of Substantial Evidence.

If there is "no competent evidence" or "no substantial evidence" to sustain it, the award will be annulled. (*Pacific Freight Lines v. Industrial Acc. Com.* (1945) 26 C.2d 234, 240, 157 P.2d 634; *Hulbert v. Work. Comp. App. Bd.* (1975) 47 C.A.3d 634, 638, 121 C.R. 239; *National Convenience Stores v. Work. Comp. App. Bd.* (1981) 121 C.A.3d 420, 426, 428, 430, 175 C.R. 378; *Insurance Co. of North America v. Work. Comp. App. Bd.* (1981) 122 C.A.3d 905, 910, 937, 176 C.R. 365; *Santa Ana v. Work. Comp. App. Bd.* (1982) 128 C.A.3d 212, 220, 221, 180 C.R. 125; *Republic Indem. Co. v. Work. Comp. App. Bd.* (1982) 138 C.A.3d 42, 44, 47, 187 C.R. 636; *Georgia-Pacific Corp. v. Work. Comp. App. Bd.* (1983) 144 C.A.3d 72, 75, 76, 192 C.R. 643.)

The following circumstances are illustrative:

(1) Where the testimony of the employee is overcome by contradictory evidence. In *West v. Industrial Acc. Com.* (1947) 79 C.A.2d 711, 180 P.2d 972, a nurse asserted that she was unable to work because of pain from a back injury suffered when she fell. However, the medical evidence against her was overwhelming, and it was shown that she had pursued normal routine activities following the accident. *Held*, the award was without substantial evidence to support it. "The power of the commission to make determinations of fact is indeed broad, but it may not be exercised in disregard of fundamental concepts as to what constitutes legal proof and of the duty to fairly weigh evidence." (79 C.A.2d 720.)

(2) Where the decision rests not on probable inferences drawn from facts proved (see *supra*, §443) but simply on conjecture, surmise, or speculation. (*Hartford Acc. & Indem. Co. v. Industrial Acc. Com.* (1934) 140 C.A. 482, 486, 35 P.2d 366.) Thus, if the facts are not in dispute, and but one inference may properly be drawn from them, the question of sufficiency of the evidence becomes one of law, and the Board's erroneous legal conclusion may be annulled. (*National Auto. & Cas. Ins. Co. v. Industrial Acc. Com.* (1947) 80 C.A.2d 769, 772, 182 P.2d 634 [facts established dual employment; Commission's award against one employer alone was based on erroneous legal theory]; *Reinert v. Industrial Acc. Com.* (1956) 46 C.2d 349, 358, 294 P.2d 713 [question whether injury was suffered in course of employment was one of law for court to decide].)

(3) Where the finding on a material issue rests on hearsay that is incompetent to establish it. In this connection, the courts have indicated that, although hearsay is admissible and competent for some purposes (see *supra*, §398), it should

be received with caution and it is no stronger than testimony of a lay witness. Hence, where the only support for a determination of a medical issue was the employee's statement that various unidentified persons, including a physician, had told her that her condition was due to an industrial injury, the award was annulled. (*Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1941) 47 C.A.2d 494, 499, 118 P.2d 334; see 1 *Cal. Evidence* (4th), Introduction, §67.)

(4) Where the issue is one of medicine or science within the exclusive knowledge of experts and there is no expert evidence to support the award. (*William Simpson Const. Co. v. Industrial Acc. Com.* (1925) 74 C.A. 239, 243, 240 P. 58; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1941) 47 C.A.2d 494, 500, 118 P.2d 334; *San Francisco v. Industrial Acc. Com.* (1953) 117 C.A.2d 455, 459, 256 P.2d 81; see *Beaty v. Work. Comp. App. Bd.* (1978) 80 C.A.3d 397, 405, 144 C.R. 78 [report and evaluation unclear on crucial issue of causation of subsequent injury]; *Callahan v. Work. Comp. App. Bd.* (1978) 85 C.A.3d 621, 630, 149 C.R. 647 [medical report apportioning between nonindustrial and industrial psychiatric disability based on "mere legal conclusion"]; *Market Basket v. Work. Comp. App. Bd.* (1978) 86 C.A.3d 137, 147, 149 C.R. 872 [report failed to discuss issue of apportionment]; *Duthie v. Work. Comp. App. Bd.* (1978) 86 C.A.3d 721, 731, 150 C.R. 530 [recommended percentage of apportionment based on "pure guess work"]; *Huston v. Work. Comp. App. Bd.* (1979) 95 C.A.3d 856, 868, 157 C.R. 355 [medical opinion based on erroneous legal assumption]; *Guerra v. Work. Comp. App. Bd.* (1985) 168 C.A.3d 195, 199, 214 C.R. 58 [medical opinion based on speculation and unwarranted assumptions]; on conclusiveness of medical experts' testimony, see *Guarantee Ins. Co. v. Industrial Acc. Com.* (1948) 88 C.A.2d 410, 413, 199 P.2d 12; 1 *Cal. Evidence* (4th), Opinion Evidence, §§86, 87.)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

4. Annulment of Award.

b. Curtailment of Evidence or Cross-Examination.

2 Witkin Sum. Cal. Law Work Comp § 446

[§ 446] Curtailment of Evidence or Cross-Examination.

The denial of the right of a party to complete the presentation of evidence in support of the party's case, or the denial or unreasonable curtailment of the right of cross-examination of opposing witnesses, is an error justifying the annulment of an award. The following cases are illustrative:

Bascom v. Industrial Acc. Com. (1938) 25 C.A.2d 334, 335, 77 P.2d 305 [defendant was not permitted to conclude testimony tending to show that he was not employer].

Walker Mining Co. v. Industrial Acc. Com. (1939) 35 C.A.2d 257, 261, 95 P.2d 188 [submission of case and award against employer without opportunity to take deposition of absent employee].

Massachusetts Bonding & Ins. Co. v. Industrial Acc. Com. (1946) 74 C.A.2d 911, 913, 170 P.2d 36 [defendant was improperly denied opportunity to produce rebuttal testimony and to cross-examine claimant's physicians].

Langendorf United Bakeries v. Industrial Acc. Com. (1948) 87 C.A.2d 103, 104, 195 P.2d 887 [error to permit submission of physicians' reports at close of hearing but to deny employer's request to cross-examine].

National Auto. & Cas. Ins. Co. v. Industrial Acc. Com. (1949) 95 C.A.2d 10, 15, 212 P.2d 1 [failure to permit employer opportunity to be heard on question of wilful failure to insure].

Kaiser Co. v. Industrial Acc. Com. (1952) 109 C.A.2d 54, 57, 240 P.2d 57 [denial of employer's application to take testimony either by hearing or deposition of witness outside of California was violation of due process].

Argonaut Ins. Exchange v. Industrial Acc. Com. (1953) 120 C.A.2d 145, 152, 260 P.2d 817 [denial of leave to cross-examine employer's spouse about persons present at time of accident was violation of due process].

Columbia-Geneva Steel Div. v. Industrial Acc. Com. (1953) 115 C.A.2d 862, 865, 253 P.2d 45 [employer was deprived of due process where physician's report was adopted without giving employer opportunity to rebut and cross examine].

Caesar's Restaurant v. Industrial Acc. Com. (1959) 175 C.A.2d 850, 853, 1 C.R. 97 [right to cross-examine physician or rating expert].

Casualty Ins. Co. v. Industrial Acc. Com. (1964) 226 C.A.2d 748, 760, 38 C.R. 364, *supra*, §431 [change of occupational classification without allowing insurer opportunity to present evidence].

SUPPLEMENT: [This section is current through the latest supplement]



103 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

4. Annulment of Award.

c. Reliance on Undisclosed Evidence.

2 *Witkin Sum. Cal. Law Work Comp* § 447

[§ 447] Reliance on Undisclosed Evidence.

Reliance by the Board on a confidential report from one of its administrative experts, without an opportunity to cross-examine, is improper. "The award must be based on evidence ... legally and properly introduced. The Commission, as trier of the fact, has no legal right to predicate its award upon the opinion of its own or any other expert, when such opinion does not appear in the record." (*Young v. Industrial Acc. Com.* (1940) 38 C.A.2d 250, 257, 100 P.2d 1062; see *Holmes Eureka Loan Co. v. Industrial Acc. Com.* (1940) 41 C.A.2d 150, 152, 106 P.2d 23; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1941) 47 C.A.2d 713, 715, 118 P.2d 848; *National Auto. Ins. Co. v. Industrial Acc. Com.* (1944) 67 C.A.2d 178, 181, 153 P.2d 808; *Massachusetts Bonding & Ins. Co. v. Industrial Acc. Com.* (1946) 74 C.A.2d 911, 913, 170 P.2d 36; *Lab.C.* 5703, 5704.)

In *Fidelity & Cas. Co. v. Work. Comp. App. Bd.* (1967) 252 C.A.2d 327, 60 C.R. 442, the employee sustained a permanent disability for which the rating expert suggested a 141/2% rating. However, the referee had included in his instructions to the Permanent Disability Rating Bureau a factor of disability with no support in the evidence. Through inadvertence the referee's instructions and recommended rating were not served on petitioner insurer until after the award was made. Nevertheless the Board, relying on medical evidence in the record to support other factors of disability, adopted the ultimate finding of 141/2%. *Held*, award annulled.

(a) Instructions to the Rating Bureau, setting forth the factors of disability and recommended rating, are in effect findings of fact by the referee on these issues unless superseded by later findings. (252 C.A.2d 331.) The instructions must be served on the parties, to inform them of the criteria to be considered; and a party objecting may write to the fact finder or file a motion to strike, serving the opposing party. (252 C.A.2d 332.) If the objection is only to the percentage rating, a party may cross-examine the rating expert and offer rebuttal evidence. (252 C.A.2d 333.)

(b) Although the Board is not bound to accept the findings of the referee, it may not rely on secret findings of probative facts. Moreover, "it is impossible to determine whether a rating was made in the exercise of a sound discretion or was strictly arbitrary when the particular disability or combination of disabilities sustained by the applicant as a result of the industrial injury is not established. For all practical purposes, to uphold an award based solely on an ultimate finding of the percentage of disability would be to foreclose all review." (252 C.A.2d 334.)

However, the error is cured where the Board grants a reconsideration (*supra*, §422) and the opportunity for cross-examination is afforded at a subsequent hearing. (*Gonzales v. Industrial Acc. Com.* (1958) 50 C.2d 360, 363, 325 P.2d 993.)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

4. Annulment of Award.

d. Other Examples.

2 Witkin Sum. Cal. Law Work Comp § 448

[§ 448] Other Examples.

Despite the informality of the Board proceedings, a substantial departure from fair methods of procedure may be considered an excess of jurisdiction. (See *Boswell Co. v. Industrial Acc. Com.* (1944) 67 C.A.2d 347, 349, 154 P.2d 13 [bias of referee]; *Fibreboard Paper Products Corp. v. Industrial Acc. Com.* (1962) 57 C.2d 844, 847, 22 C.R. 489, 372 P.2d 321 [refusal to consider evidence properly in record].)

Because *Lab.C. 5313* (supra, §404) calls for findings "upon all facts involved in the controversy," the rule that governs trial courts is applicable; i.e., the award may be annulled for failure to find on a material issue. (*Pierson v. Industrial Acc. Com.* (1950) 98 C.A.2d 598, 601, 220 P.2d 794 [no finding on whether petitioner was employed jointly by individual and corporation]; see 7 *Cal. Proc.* (4th), *Trial*, §398 et seq.)

Where the issue decided is one of law rather than fact, the rule of conclusiveness of the Board's findings (supra, §443) does not apply and the award may be annulled for an erroneous determination. (*Dimmig v. Work. Comp. App. Bd.* (1972) 6 C.3d 860, 864, 101 C.R. 105, 495 P.2d 433; *Western Elec. Co. v. Work. Comp. App. Bd.* (1979) 99 C.A.3d 629, 644, 160 CR. 436.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 7 *Cal. Proc.* (5th), *Trial*, §389 et seq.



105 of 107 DOCUMENTS

Witkin Summary of California Law, Tenth Edition
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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

5. Annulment of Order Denying or Limiting Award.

a. Lack of Substantial Evidence.

2 Witkin Sum. Cal. Law Work Comp § 449

[§ 449] Lack of Substantial Evidence.

Where the showing made by the applicant is not overcome by substantial evidence, an order denying or limiting the award will be annulled. (*Winthrop v. Industrial Acc. Com.* (1931) 213 C. 351, 355, 2 P.2d 142; *Singer v. Industrial Acc. Com.* (1930) 105 C.A. 374, 376, 287 P. 567; *Thoreau v. Industrial Acc. Com.* (1932) 120 C.A. 67, 70, 7 P.2d 767; *Blankenfeld v. Industrial Acc. Com.* (1940) 36 C.A.2d 690, 697, 98 P.2d 584.) The following cases illustrate the rule:

Larsen v. Industrial Acc. Com. (1950) 34 C.2d 772, 775, 215 P.2d 16 [uncontradicted evidence showed partial dependency; order based on finding of no dependency annulled].

Chambers v. Work. Comp. App. Bd. (1968) 69 C.2d 556, 561, 72 C.R. 651, 446 P.2d 531 [referee awarded only 75% disability for emphysema, attributing 25% to cigarette smoking; improper, in absence of medical evidence].

Place v. Work. Comp. App. Bd. (1970) 3 C.3d 372, 378, 90 C.R. 424, 475 P.2d 656 [petitioner's uncontradicted evidence showed industrial injury; contrary medical testimony was based on speculation].

Redner v. Work. Comp. App. Bd. (1971) 5 C.3d 83, 95, 95 C.R. 447, 485 P.2d 799 [order based on improperly obtained evidence and physicians' reports relying on it].

Lamb v. Work. Comp. App. Bd. (1974) 11 C.3d 274, 283, 113 C.R. 162, 520 P.2d 978 [Board ignored competent and substantial evidence].

National Auto. & Cas. Ins. Co. v. Industrial Acc. Com. (1947) 80 C.A.2d 769, 772, 182 P.2d 634 [facts established dual employment; award against one employer alone was based on erroneous legal theory].

Collins v. Work. Comp. App. Bd. (1970) 8 C.A.3d 618, 623, 87 C.R. 601 [undisputed evidence pointed to industrial causation; Board improperly substituted its own determination not supported by evidence].

Adams v. Work. Comp. App. Bd. (1971) 22 C.A.3d 214, 217, 99 C.R. 269 [employee was not given benefit of all reasonable doubts].

Greenberg v. Work. Comp. App. Bd. (1974) 37 C.A.3d 792, 799, 112 C.R. 626 [Board considered physician's report but ignored his testimony].

Turner v. Work. Comp. App. Bd. (1974) 42 C.A.3d 1036, 1044, 117 C.R. 358 [Board relied on report based in part on conjecture and which did not consider relevant facts].

Amico v. Work. Comp. App. Bd. (1974) 43 C.A.3d 592, 605, 117 C.R. 831 [Board ignored evidence that prior operation had not caused loss of a single day of work].

Gross v. Work. Comp. App. Bd. (1975) 44 C.A.3d 397, 403, 118 C.R. 609 [no evidence that dormant back condition, without injuries, would have developed disability].

Muznik v. Work. Comp. App. Bd. (1975) 51 C.A.3d 622, 637, 124 C.R. 407 [medical testimony relied on was not substantial evidence when based on misconstruction of statutory language].

Abril v. Work. Comp. App. Bd. (1976) 55 C.A.3d 480, 487, 127 C.R. 483 [rating based on assumption that worker would not heed recommended work restrictions].

Kyles v. Work. Comp. App. Bd. (1987) 195 C.A.3d 614, 620, 240 C.R. 886 [opinion of employer's physician, who had not reviewed numerous medical reports by employee's orthopedist, was not substantial evidence].

Because the Board's factual determinations are binding if supported by substantial evidence (see *supra*, §231), it may choose the most persuasive among conflicting medical reports. However, it cannot base a decision on medical reports that are no longer germane. In *Jones v. Work. Comp. App. Bd.* (1968) 68 C.2d 476, 67 C.R. 544, 439 P.2d 648, petitioner suffered a severe back injury in 1961. In its decision in November 1965, the Board found that he had a 42% disability, and none from a claimed traumatic psychoneurosis. Subsequently he was committed to Patton State Hospital for the mentally ill, and in December 1965, instituted a proceeding, claiming new and further disability based on mental illness. The case was reopened and the referee found a 100% permanent disability from traumatic psychoneurosis. The Board, on conflicting medical evidence, reversed the referee on that point. *Held*, order annulled. The physicians who found no psychoneurosis disability were those who testified at the initial hearing. At the second hearing the only medical testimony, from an independent medical examiner and the employee's physician, was to the effect that petitioner was totally disabled by reason of mental and emotional instability resulting directly from the injury. Thus, the Board based its decision on evidence not related to the employee's subsequently developed mental condition, i.e., evidence not probative on the issue before it, and disregarded uncontradicted testimony directly on that issue. (68 C.2d 480.)

In *Garza v. Work. Comp. App. Bd.* (1970) 3 C.3d 312, 90 C.R. 355, 475 P.2d 451, G, 50 years old, was working as an airplane painter. He claimed that he injured his back attempting to push a large paint stand. The medical evidence showed a back injury, but it also appeared that he did not report it until 19 days after the incident, and that he had a prior history of back injuries. G testified that he hoped the condition would improve and that, because of his age, he was afraid of losing his job. The referee gave credence to G's testimony, but the Board concluded that the circumstantial evidence (delay in reporting and failure to reveal prior injuries) overcame the direct testimony, and denied an award. *Held*, order annulled. The Board made no effort to impeach G's testimony by a showing that the injury could not have occurred in the manner he described; i.e., it did not attempt to resolve doubts, but merely rejected his uncontradicted testimony in favor of speculative circumstantial evidence, and in doing so failed to give proper weight to the referee's determination of G's credibility. (3 C.3d 318.)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 107 DOCUMENTS

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CHAPTER III - Workers Compensation

Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

5. Annulment of Order Denying or Limiting Award.

b. Curtailment of Evidence.

2 Witkin Sum. Cal. Law Work Comp § 450

[§ 450] Curtailment of Evidence.

A number of decisions have annulled orders for infringement of the applicant's right to present rebuttal evidence (supra, §446). (See *Pence v. Industrial Acc. Com.* (1965) 63 C.2d 48, 50, 45 C.R. 12, 403 P.2d 140 [testimony for purposes of showing claimant's diminished ability to compete in labor market]; *Edgar v. Work. Comp. App. Bd.* (1966) 246 C.A.2d 660, 665, 667, 56 C.R. 37 [evidence to rebut report of independent medical examiner on which award was based]; *Hegglin v. Work. Comp. App. Bd.* (1971) 4 C.3d 162, 174, 93 C.R. 15, 480 P.2d 967 [testimony of claimant and claimant's physician to rebut defendant's physicians' testimony].)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 107 DOCUMENTS

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Witkin Summary of California Law

X. PROCEDURE

F. Judicial Review.

6. Effect of Annulment of Award or Order.

2 Witkin Sum. Cal. Law Work Comp § 451

[§ 451] Effect of Annulment of Award or Order.

When an appellate court annuls the Board's order or award, the matter is again before the Board "at large," and it may retry all the issues of fact that were before it on the prior hearing. Hence, where the Board denies compensation on the ground that an injury does not arise out of the employment, and its order is annulled, it has the power at the new hearing, on consideration of further evidence, to reach the same conclusion. (*Winthrop v. Industrial Acc. Com.* (1934) 220 C. 114, 116, 29 P.2d 850; *Nielsen v. Industrial Acc. Com.* (1934) 220 C. 118, 120, 29 P.2d 852; on similar rule on reversal of trial court, see 9 *Cal. Proc.* (4th), *Appeal*, §758.)

Annulment on petition of one of several parties has no greater effect than reversal by one of several appellants in a civil appeal; i.e., the award becomes final against the nonpetitioning parties. (*Marsh v. Work. Comp. App. Bd.* (1968) 257 C.A.2d 574, 579, 65 C.R. 69.)

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Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §869.