

CALIFORNIA
WORKERS' COMPENSATION COMPENDIUM

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1. Citation for the state's workers' compensation statute.

California Labor Code Division 3, section 2700 through Division 4.7, section 6208.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

a. An "employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. Cal. Lab. Code § 3351. A person who renders service to another, other than as an independent contractor, is presumed to be an employee. *Id.* § 3357.

b. The term "employee" includes: (1) aliens and minors; (2) all elected and appointed paid public officers; (3) all officers and members of boards of directors of quasi-public or private corporations while rendering actual service for the corporations for pay; (4) persons employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, 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; (5) persons incarcerated in a state penal or correction facility while engaged in assigned work or work performed under a contract; (6) working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company. *Id.* § 3351.

c. Persons generally excluded from employee status include: (1) any domestic employee

employed by his or her parent, spouse, or child; (2) deputy sheriffs or deputy clerks; (3) persons performing services in return for aid or sustenance only, received from any religious, charitable, or relief organization; (4) persons participating in, or officiating for, amateur sporting events (including intercollegiate or interscholastic sports events); and (5) any person performing voluntary services at or for a non-profit recreational camp or as a ski patroller, who receives no compensation for those services other than meals, lodging, and transportation. *Id.* § 3352.

d. In addition, the employee of a joint venture is an employee of each individual member of the joint venture. *Horney v. Guy F. Atkinson Co.*, 190 Cal. Rptr. 18, 22-23 (Ct. App. 1983). However, an employee of one party in a joint venture is not as a matter of law an employee of the joint venture itself or the other joint venturers. *Rogness v. English Moss Joint Venturers*, 239 Cal. Rptr. 387, 388-89 (Ct. App. 1987).

e. To fall within the purview of the workers' compensation statute, the injurious conduct of the partner or joint venturer must have occurred "while such party 'was acting on behalf of the partnership'" or joint venture. *Id.* at 21.

3. Identify and describe any "statutory employer" provision.

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. Cal. Lab. Code § 3300.

California has long recognized that the employer-employee relationship exists for purposes of awarding compensation whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished. *State Comp. Ins. Fund v. Indus. Accident Comm'n*, 116 P.2d 173, 175 (Cal. Ct. App. 1941). Specifically, the determinative factor is whether the purported employer has the *right* to control rather than the *amount* of control exercised. *Id.* The right to exercise complete or authoritative control rather than mere suggestion concerning details must be shown. *Id.*

"An employer may secure the payment of compensation on employees provided to it by agreement by another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact obtained workers' compensation coverage for those employees." Cal. Lab. Code § 3602(d)(1).

4. What types of injuries are covered and what is the standard of proof for each:

The Act compensates for injuries arising out of and in the course of employment ("AOE/COE"). *Id.* § 3600(a); *see also id.* § 3208. For an injury to arise out of the employment, it must occur by reason of a condition incident to the employment. *Id.* § 3600(a). That is, the employment and the injury must be linked in some causal fashion. *Id.* However, such connection need not be the sole cause of the injury; it is sufficient if the

employment is a contributory cause of the injury. *Maher v. Workers' Comp. Appeals Bd.*, 190 Cal. Rptr. 904, 906 (1983). “Where the injury occurs on the employer's premises, while the employee is in the course of the employment, the injury arises out of the employment unless the connection is so remote from the employment that it is not an incident of it.” *Madin v. Indus. Accident Comm'n*, 292 P.2d 892, 895 (Cal. 1956) (*en banc*).

The test for the “arising out of” element has been gradually liberalized. Witkin, 2 Summary of California Law, Workers' Compensation § 221 (9th ed.). The requirement is satisfied where the employee's work brings him or her into a position of danger at the time and place of the injury. The risk need not be foreseeable or peculiar to the employment. *Emp't. Mut. Liab. Ins. Co. v. Indus. Accident Comm'n*, 263 P.2d 4, 6 (Cal. 1953) (*en banc*); *Indus. Indem. Co. v. Indus. Accident Comm'n*, 214 P.2d 41, 47-48 (Cal. Ct. App. 1950).

The employee has the burden of proof by a preponderance of the evidence that there is a causal relationship between work and disability. Cal. Lab. Code § 3202.5; *see also McAllister v. Workmen's Comp. Appeals Bd.*, 71 Cal. Rptr. 697, 702 (1968) (*en banc*). However, Section 3200, *et seq.* (the “Act”) “shall be liberally construed” to extend “benefits for the protection of persons injured in the course of their employment.” Cal. Lab. Code § 3202.

When an employee's death takes place at work, in the absence of any evidence of what caused the death, most courts will infer that the death arose out of the employment, since the occurrence of the death at the place of employment at least indicates that the employment brought the employee within the range of harm, and the cause of harm, being unknown, is not personal. *See Clemmons v. Workmen's Comp. Appeals Bd.*, 68 Cal. Rptr. 804, 806 (Ct. App. 1968). Also, when the death removes the only witness who could prove causal connection, fairness suggests some softening of the rule requiring the claimant to provide affirmative proof. *Id.*

In most cases, the employee's burden to show causation must be sustained with medical evidence. *See Lundberg v. Workmen's Comp. Appeals Bd.*, 71 Cal. Rptr. 684, 686 (1968) (*en banc*); *Peter Kiewit Sons v. Indus. Accident Comm'n*, 44 Cal. Rptr. 813, 817-18 (Ct. App. 1965). Supporting testimony of a single physician may be sufficient, even if it conflicts with the testimony of several others. *Allied Comp. Ins. Co. v. Indus. Accident Comm'n*, 17 Cal. Rptr. 817, 821 (1961) (*en banc*); *Mkt. Basket v. Workers' Comp. Appeals Bd.*, 149 Cal. Rptr. 872, 876 (Ct. App. 1978).

There is but one cause of action for each injury coming within the provisions of this division – all claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion of the appeals board, be joined in the same proceeding at any time. Cal. Lab. Code § 5303.

All questions of fact and law regarding either specific injuries or cumulative injuries, or both, shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the

cost of medical treatment, and any death benefit. *Id.* § 3208.2. No injury, whether specific or cumulative, shall merge into or form part of another injury. *Id.* § 5303.

A statutory presumption of industrial causation applies to certain law enforcement and firefighting personnel with specified conditions, including hernia, heart trouble, cancer, pneumonia, meningitis, tuberculosis, Lyme disease, and back problems, if the condition developed or manifested itself during the employment period. *Id.* §§ 3212-3213.2. The presumption applies to all hospital, surgical, and medical treatment, disability benefits, and death benefits. *Zipton v. Workers' Comp. Appeals Bd.*, 267 Cal. Rptr. 431, 432 n. 1, 436-37 (Ct. App. 1990). In order to be entitled to the presumption, the employee must show that the condition exists and that it developed or manifested itself during the period in which the employee worked for the public agency. *Smith v. Workers' Comp. Appeals Bd.* 260 Cal. Rptr. 327, 329 (Ct. App. 1989).

No workers' compensation claim shall be denied because the employee's injury or death was related to the employee's race, religious creed, color, national origin, age, gender, marital status, sex, sexual orientation, or genetic characteristics (i.e., violent acts perpetrated against an employee because of an immutable characteristic). Cal. Lab. Code § 3600(c).

A. Specific and cumulative trauma claims.

A "compensable injury" is one that causes disability or a need for medical treatment. *Livitsanos v. Superior Court*, 828 P.2d 1195, 1201 (Cal. 1992). Compensable injuries may be emotional or physical. *Id.*; see also Cal. Lab. Code § 3208.3 (establishing the threshold of compensability for psychiatric injuries).

"Injury" includes any injury or disease arising out of the employment, including injuries to artificial members, dentures, hearing aids, eyeglasses and medical braces. Cal. Lab. Code § 3208. The injury may be either "specific," occurring as the result of one incident or exposure, or may be "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time. *Id.* § 3208.1. A compensable injury may arise out of a combination of both specific insult and cumulative trauma. The number and nature of the injuries suffered are questions of fact for the workers' compensation appeals board to determine. In *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.*, 20 Cal. Rptr. 2d 26, 32 (Ct. App. 1993), the court of appeal explained that "Under section 3208.1, an injury causing a need for medical treatment is compensable even in the absence of disability. In this case Austin had a compensable injury from 1985 onward. Although he had two periods of disability, i.e., the inability to work, those two periods of disability were connected by a continuous need for medical treatment all caused by a single work-related cumulative injury, stress-induced depression."

The California Supreme Court addressed the question of how to determine the date of injury in *Fruehauf Corp. v. Workmen's Comp. Appeals Board*, 68 Cal. Rptr. 164 (1968). "For the purposes of discussion, we observe that compensable injuries under the workmen's compensation law generally fall into four categories: (1) specific injuries incurred as the

result of one incident or exposure in the employment, the effects of which are immediately realized or realizable; (2) industrial injuries suffered as the result of a specific incident or exposure but which have latent effects; (3) continuous cumulative traumatic injuries, such as that involved here, suffered as the result of a number of minor strains over a period of time; (4) cumulative injuries, such as silicosis, resulting from continuous exposure to harmful substances.” *Id.* at 167. The definition of cumulative trauma includes contagious and infectious diseases, and diseases that are products or aggravations of discogenic diseases. *See Chavez v. Workmen's Comp. Appeals Board*, 106 Cal. Rptr. 853, 859 (Ct. App. 1973).

B. Occupational disease (including respiratory and repetitive use).

Although "occupational disease" is not specifically defined by the Labor Code, "any injury or disease arising out of the employment" qualifies as an injury. Cal. Lab. Code § 3208. California has long recognized that an occupational disease is the cumulative effect that results from continually absorbing small quantities of a deleterious substance from the environment of the employment ultimately results in manifest pathology. *Associated Indem. Corp. v. IAC*, 12 P.2d 1075, 1076 (Cal. Ct. App. 1932), *disapproved of on other grounds by Colonial Inc. Co. v. Indus. Accident Comm'n*, 172 P.2d 884, 888 (Cal. 1946) (*en banc*).

However, the cause of action for the occupational disease does not arise until the employee knows of the effect of the exposure. For example, silicosis is not an "injury" until the employee knows, or by due care and diligence is presumed to know, that he has an occupational disease which has progressed to the extent that he is so disabled that the efficiency of his work is appreciably affected thereby, and such injury may not arise until after the employment proximately causing it has ceased. *Bonner v. Indus. Accident Comm'n*, 140 P.2d 1000, 1003 (Cal. 1943) (rehearing granted).

Exposure to infectious disease in the work environment can also result in compensable injury. "For example, recovery was available for kerato-conjunctivitis, an infectious eye disease, contracted during a workplace epidemic; poliomyelitis from contact with patients in a hospital; dermatitis from cinnamon exposure; and HIV from exposure to the HIV virus." 1-4 CA Law of Employee Injuries & Workers' Comp. § 4.71.

5. What, if any, injuries or claims are excluded?

Injuries caused by the employee's intoxication, either by alcohol or the unlawful use of a controlled substance, are not covered. Cal. Lab. Code § 3600(a)(4). In addition, the Act excludes intentionally self-inflicted injuries, suicide, injuries arising out of an altercation in which the employee is the initial aggressor, injuries caused by commission of felonious acts for which the employee has been convicted, and injuries from voluntary participation in any off-duty recreational, social or athletic activity not constituting part of the work-related duties, except where the activity is reasonably expected of the employee. *Id.* § 3600(a)(5)-(9).

In case of aggravation of any disease existing prior to a compensable injury, permanent disability benefits are only allowed for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury. *Id.* § 4663. However, there is no apportionment of medical treatment or temporary indemnity benefits to the preexisting condition. *Granado v. Workmen's Comp. Appeals Bd.*, 71 Cal. Rptr. 678 (1968).

Except for psychiatric injuries, claims filed after termination of the employment for injuries occurring prior to termination are barred, if the employer was unaware of the injury, the employee's medical records do not contain evidence of the injury prior to termination, the date of injury as that is defined for cumulative traumas, is subsequent to the date of notice of termination or layoff. *Id.* §3600(a)(10). The date of injury for a cumulative trauma is the first date of disability and knowledge or "in the exercise of reasonable diligence [when the employee] should have known that such disability was caused by his present or prior employment." *Id.* § 5412.

Claims for psychiatric injury filed post termination are subject to a higher threshold of compensability. *See State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 139 Cal. Rptr. 3d 215, 218-19 (Ct. App. 2012); *see discussion infra* at paragraph 6.

6. What psychiatric claims or treatments are compensable?

A psychiatric injury is compensable if it is a mental disorder which causes disability or need for medical treatment. Cal. Lab. Code § 3208.3. For injuries on or after July 16, 1993, an employee must demonstrate by a preponderance of the evidence that actual events of employment are predominant as to all causes combined of the psychiatric injury. *Id.* § 3208.3(b)(1). This means that the work related cause of the injury must be greater than 50 percent of the entire set of causal factors. *Dep't of Corr. v. Workers' Comp. Appeals Bd.*, 90 Cal. Rptr. 2d 716, 720 (Ct. App. 1999). In determining all the causes of the injury, no compensation is payable if the psychiatric injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. Cal. Labor Code § 3208.3(h). Under that circumstance, the burden of proof rests with the party asserting the good faith personnel action. *Id.*

Two conditions must be satisfied before a particular factor can support an award of workers' compensation benefits for a psychiatric injury. *Pac. Gas & Elec. Co. v. Workers' Comp. Appeals Bd.*, 8 Cal. Rptr. 3d 467, 472 (Ct. App. 2004). First, the factor must be an "event" (i.e., it must be something that takes place in the employment relationship). *Id.* Second, the event must be "of employment" (i.e., it must arise out of an employee's working relationship with his or her employer). *Id.* The Legislature's intent to limit claims for psychiatric benefits due to their proliferation and their potential for fraud and abuse "should be considered when determining whether an award for benefits is warranted." *Id.* at 473. Thus, "any interpretation of the section 3208.3 that would lead to more or broader claims should be examined closely to avoid violating express legislative intent." *Id.* (citing *Dyna-Med, Inc. v. Fair Emp't. Hous. Comm'n.*, 241 Cal. Rptr. 67, 70 (1987)).

In cases where the injury resulted from a violent act, the employee only has to show by a preponderance of the evidence that actual events of employment were a *substantial* cause of the injury. Cal. Lab. Code § 3208.3(b)(2). The term “substantial” means at least 35 to 40 percent of the causation from all sources combined. *Id.* § 3208.3(b)(3); *Sonoma State Univ. v. Workers' Comp. Appeals Bd.*, 48 Cal. Rptr. 3d 330, 332-34 (Ct. App. 2006).

A psychiatric injury is only compensable if the employee has been employed by that employer for at least six months. Cal. Lab. Code § 3208.3(d). However, the 6 month qualification does not apply if the injury is caused by a sudden and extraordinary employment condition. *Id.* There remains tension over the meaning of "sudden and extraordinary" in this context. The Court of Appeal denied review of a WCAB determination awarding benefits to a lumber loader who lost several fingers while arranging wood on a conveyor belt and caught his hand in the chain attached to a saw mechanism. *Redwood Empire Sawmill v. Workers' Comp. Appeals Bd.*, 78 Cal. Comp. Cases 498 (Cal. App. 1st Dist. 2013). Yet, the Court of Appeal reversed the WCAB and denied compensation for the psychiatric consequences of serious injuries suffered by an avocado picker/high tree worker who fell from a 24' ladder approximately two months after being hired. *State Comp'n Ins. Fund v. Workers' Comp. Appeals Bd.*, 139 Cal. Rptr. 3d 215, 221 (Ct. App. 2012).

Claims for psychiatric injury filed after termination of the employment for injuries alleged to have occurred prior to termination are barred unless the employee proves by a preponderance of the evidence that one or more of the following conditions exist: sudden and extraordinary events of employment were the cause of the injury; the employer has notice of the psychiatric injury prior to the notice of termination; the employee's medical records prior to the notice of termination contain evidence of treatment; a finding of sexual or racial harassment by any trier of fact; or, the date of injury in the case of a cumulative trauma is after the date of termination or layoff. Cal. Lab. Code § 3208.3(e).

7. What are the applicable statutes of limitations?

The California Labor Code provides that a claim for specific or cumulative trauma must be filed within 1 year from the last of any of the following events: (1) date of injury; (2) date of the last indemnity payment; or (3) date of the last furnishing of any medical benefit. Cal. Lab. Code § 5405. In practice the operation of the statute is complicated by the definition of date of injury. "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability there from and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." *Id.* § 5412. The California Supreme Court has determined that a claimant cannot be imputed to have knowledge of industrial causation until the information is conveyed by a physician. "It would be unreasonable to hold that although an employee who has suffered an injury resulting from several minor traumas is deemed not to be injured for the purposes of the statute of limitations until the minor traumas result in disability, once the injury has ripened into disability he is required to know immediately that such disability was caused by his employment." *Fruehauf Corp. v. Workmen's Comp.*

Appeals Bd., 68 Cal. Rptr. 164, 169 (1968) (*en banc*).

New & Further Disability Benefits: Once the WCAB issues an order, it has continuing jurisdiction to amend that order within 5 years from the date of injury. Cal. Lab. Code § 5804. A petition for new and further permanent disability may be filed within 5 years of the date of injury, regardless of the date of the award. *Id.* §5410. However, the jurisdiction of the WCAB to enforce its awards of future medical care extends for the life of the injured worker. *Id.* § 5803; see Barnes vs. Workers' Comp. Appeals Bd., 97 Cal. Rptr. 2d 638, 644 (2000).

Subsequent Injuries Benefits: Five years from the date of injury if during that period the employee knows, or can reasonably be deemed to know, that there is a substantial likelihood that he or she will be entitled to subsequent injury benefits. *Subsequent Injuries Fund v. Workers' Comp. Appeals Bd.*, 465 P.2d 28, 33 (Cal. 1970).

Death Benefit or Burial Expense: One year from the date of death where death occurs within one year from the date of injury; or one year from the last furnishing of benefits when the death occurs more than one year from the date of injury; or one year from the date of death, where death occurs more than one year after the date of injury and benefits have been furnished. Cal. Lab. Code § 5406. No proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury. *Id.*

Serious and Willful Misconduct of Employer: Twelve months from the date of injury. *Id.* § 5407. This period cannot be extended by payment of compensation, agreement, or the filing of application for compensation benefits. *Id.*

Serious and Willful Misconduct of Employee: Twelve months from the date of injury, but there is no time limit if employee has commenced proceedings for serious and willful employer misconduct. *Id.* § 5407.5.

Vocational Rehabilitation: The vocational rehabilitation statutes, Labor Code sections 4635 to 4647, were repealed in 2003. Thus, the WCAB has no jurisdiction to award benefits regardless of the date of injury or to enforce an award of vocational rehabilitation benefits that was not final by January 1, 2009, when California Labor Code section 139.5 was repealed. Beverly Hilton Hotel v. Workers' Comp. Appeals Bd., 99 Cal. Rptr. 3d 50, 54-57 (Ct. App. 2009).

Change of Prior Award: Five years from date of injury to file petition to rescind, alter, or amend prior award. Cal. Lab. Code § 5804; see also Barnes v. Workers' Comp. Appeals Bd., 97 Cal. Rptr. 2d 638, 644 (2000).

Employer Discrimination: One year from date of discrimination or date of termination. Cal. Lab. Code §132a.

8. What are the reporting and notice requirements for those alleging an injury?

Written notice signed by the employee must be served upon the employer within thirty days after the injury. *Id.* § 5400. An employer's knowledge of the injury, however, obtained from any source (e.g., managing agent, superintendent, foreman, or other person in authority) or the employer's knowledge of assertion of a claim of injury sufficient to afford the employer opportunity to investigate, is equivalent of service required by the statute. *Id.* § 5402.

If a claim for benefits asserted under section 5402 is denied by the employer within 90 days of receiving a Notice of Claim, an Application for Adjudication of Claim must be filed within the applicable statute of limitations. *Id.* § 5404; see *supra* question 7 for the applicable statutes of limitations.

9. Describe available defenses based on employee conduct:

"Employee misconduct, whether negligent, willful, or even criminal, does not necessarily preclude recovery under workers' compensation law. In the absence of an applicable statutory defense, such misconduct will bar recovery only when it constitutes a deviation from the scope of employment. [Citations.] In determining whether particular misconduct takes an employee outside the scope of his employment, 'A distinction must be made between an unauthorized departure from the course of employment and the performance of a duty in an unauthorized manner. Injury occurring during the course of the former conduct is not compensable. The latter conduct, while it may constitute serious and willful misconduct by the employee [citation], does not take the employee outside the course of his employment. [Citations.][Citations.]" *Westbrooks v. Workers' Comp. Appeals Bd.*, 252 Cal. Rptr. 26, 27-28 (Ct. App. 1998).

A. Self-inflicted injury.

An employee who intentionally injures himself or herself is not entitled to workers' compensation benefits. Cal. Lab. Code § 3600(a)(5)-(6). However, the distinction between what is intentional in contrast to volitional but impulsive will affect the determination of compensability. "Employees who merely act rashly or impulsively neither expect nor intend to necessarily hurt themselves nor are their resulting work-related injuries automatically noncompensable." *Smith v. Workers' Comp. Appeals Bd.*, 94 Cal. Rptr. 2d 186, 193 (Ct. App. 2000).

B. Willful misconduct, "horseplay," etc.

Serious and willful misconduct reduces compensation by one-half, except when the injury results in death, or the injury results in permanent disability of at least 70%, or the injury is caused by an employer's safety violation, or when the employee is under age 16. Cal. Lab. Code § 4551. "The employee's transgression of rules, instructions, or established custom, as the case may be, is wholly within the sphere of the employment. It may constitute serious and willful misconduct of the employee, but it does not take him out of the course of his

employment." *Williams v. Workers' Comp. Appeals Bd.*, 116 Cal. Rptr. 607, 609 (Ct. App. 1974).

Furthermore, injuries suffered by an employee who was a willing participant in "horseplay" are not compensable, unless the employer knowingly condoned the activity. *See Hodges v. Workers' Comp. Appeals Bd.*, 147 Cal. Rptr. 546, 552-53 (1978).

C. Initial Physical Aggressor

Injuries arising out of an altercation in which the injured employee is the initial physical aggressor are not compensable. Cal. Lab. Code §3600(a)(7).

D. Injuries involving drugs and/or alcohol.

Injuries caused by intoxication (alcohol or controlled substance) are not compensable. *Id.* § 3600(a)(4). However, only if the intoxication is proved to be a substantial cause of the injury will this bar apply. "Published California court decisions do not fully explain what kind of causation is required to prove the defense of intoxication. However, the results reached in the cases indicate that the courts interpret the statutes as requiring that intoxication must be shown to be a proximate cause or substantial factor in causing injury, but not necessarily the sole cause." *Smith v. Ed Smith Welding*, 176 Cal. Rptr. 843, 848 (Ct. App. 1981).

E. Suicide.

Death caused by the willful and deliberate actions of the employee is not compensable. Cal. Lab. Code §3600(a)(6). However, the California Supreme Court has determined that a suicide resulting from an uncontrollable impulse generated by an industrial injury is compensable, "Recovery is proper if it is shown that without the injury there would have been no suicide." *Ballard v. Workers' Comp. Appeals Bd.*, 92 Cal. Rptr. 1, 4 (1971) (*en banc*).

F. Criminal Conduct

Injuries arising out of the employee's commission of a felony for which the employee is convicted are not compensable. Cal. Lab. Code §3600(a)(8).

10. What, if any, penalties or remedies are available in claims involving fraud?

An employee may be subject to fines and imprisonment for knowingly making a fraudulent oral or written material statement for the purpose of obtaining, or discouraging a party from obtaining, workers' compensation benefits. Cal. Ins. Code § 1871.4(a); Cal. Lab. Code § 3820(b). Any person convicted of such violation is ineligible to receive benefits and restitution will be ordered. Cal. Ins. Code §§ 1871.4(b), 1871.5. Labor Code section 3820(d) provides for a penalty of not less than \$4,000 nor more than \$10,000 for violations.

However, the benefits that the employee is disqualified from receiving or may be obligated to reimburse are only those benefits "directly stemming from the fraud." *Farmers Ins. Group of Companies/Truck Ins. Exchange v. Workers' Comp. Appeals Board (Sanchez)*, 128 Cal. Rptr. 2d 353, (Ct. App. 2002).

For injuries occurring on and after January 1, 2005, an illegal alien who is not able to return to his or her usual and customary occupation, modified, or alternative work with an employer is not be permitted to receive a 15% increase in permanent disability benefits under Labor Code section 4658(d) because of his or her illegal alien status. *Farmer Brothers Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23 (Ct. App. 2005)

A party, including health care professionals and attorneys, may be subject to fines and imprisonment for the use of third parties to engage in fraudulent activities. Cal. Ins. Code § 1871.7; Cal. Bus. & Prof. Code §§ 2273, 6152, 6153. A health care provider presenting a false claim for treatment may be subject to fines and imprisonment. Cal. Penal Code § 550(b). A physician may not refer an injured worker to a diagnostic or treatment facility in which the physician or the physician's immediate family has a financial interest. Cal. Lab. Code § 139.3(a). An insurance claims adjuster's solicitation or acceptance of anything of value to refer or settle a claim may be subject to fines and imprisonment. *Id.* § 3219(a)(2). Offering or accepting any benefit for referring patients or clients for workers' compensation services or benefits may be subject to fines and imprisonment. *Id.* §§ 3215, 3218.

11. Is there any defense for an employee's falsification of employment records regarding medical history?

Although there does not appear to be any such penalty. However, falsification intended as part of a fraudulent attempt to gain workers' compensation benefits is subject to the penalties described in paragraph 10, *supra*.

12. Are injuries sustained during recreational activities paid for, or supported by, the employer compensable?

Generally, injuries arising from "voluntary participation" in off-duty recreational, social, or athletic activities are not compensable. *Id.* § 3600(a)(9). The narrow exception is where the activities are "a reasonable expectancy of," or "are expressly or impliedly required by," the employment. *Id.*; *Ezzy v. Workers' Comp. Appeals Bd.*, 194 Cal. Rptr. 90, 92 (Ct. App. 1983).

13. Are injuries caused by co-employees compensable?

Yes, if the injury arises out of and in the course of employment, regardless of negligence. Cal. Lab. Code § 3600(a). An exception to this general rule is where the injury arises out of an altercation in which the employee is the initial physical aggressor. *Id.* § 3600(a)(7).

14. Are acts by third parties unrelated to work but committed on the premises,

compensable (e.g. "irate paramour" claims)?

No. The employee must show a causal connection between the employment and the injury-producing event and must further demonstrate that the risk of harm was somehow limited to the place of employment. *See, e.g., Rogers v. Workers' Comp. Appeals Bd.*, 218 Cal. Rptr. 662, 665 (Ct. App. 1985); *W. Airlines v. Workers' Comp. Appeals Bd.*, 202 Cal. Rptr. 74, 75 (Ct. App. 1984).

However, if the assailant's identity or motive is not purely personal, then the risk is said to be neutral and the injuries sustained from the assault are compensable. The WCAB *en banc* wrote, "Injuries occurring because of a neutral risk in the course of one's employment have been held to arise out of the employment and are thus compensable." *Ephraim v. Certified Sandblasting Co.*, 33 Cal. Comp. Cases 599, 604 (1968).

BENEFITS

15. What criterion is used for calculating the average weekly wage?

Where employment is for 30 or more hours per week, and for five or more days per week, the average weekly wage ("AWW") is the number of working days multiplied by the daily earnings at the time of the injury. Cal. Lab. Code § 4453(c)(1). When the employee is working for more than one employer, AWW is the aggregate of the earnings from all employers computed in terms of one week. *Id.* § 4453(c)(2). If earnings are at an irregular rate, AWW is the average AWW as may conveniently be taken to determine an average weekly rate of pay. *Id.* § 4453(c)(3).

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

Temporary Total Disability ("TTD") is two-thirds of the AWW during the period of such disability, subject to statutory minimum and maximum rates. *Id.* §§ 4453, 4653-4654. Temporary Partial Disability is two-thirds of the weekly loss in wages during the period of such disability. *Id.* § 4654. However, such payment is reduced by the sum of unemployment compensation benefits and extended duration benefits received by the employee during the period of disability. *Id.* Further, for injuries on or after January 1, 2006, the maximum AWW is the greater of \$1,260 or 1.5 times the state average weekly wage. *Id.* §4451(a)(10). From January 1, 2007, the maximum AWW is increased by an amount equal to the percentage increase in the state average weekly wage as compared to the prior year." *Id.*

In cases of temporary partial disability the weekly loss in wages consists of the difference between the average weekly earnings and the weekly amount which the injured worker will "probably be able to earn during the disability" *Id.* §4657.

17. How long does the employer/insurer have to begin temporary disability benefits from the date disability begins?

The first payment of temporary disability must be made no later than 14 days after knowledge of the injury and disability, unless liability for the injury has already been denied. *Id.* § 4650(a). The claims administrator must provide notice to the employee of the amount of disability benefits, how it was calculated, and the duration/schedule of payment. Cal. Code Regs. tit. 8, § 9812(a)(1). Subsequent temporary total disability payments are made every two weeks following the first payment on the day designated with the first payment. Cal. Lab. Code § 4650(c). If payments are not made on time, they are automatically increased by 10%. *Id.* § 4650.

18. What is the "waiting" period for temporary disability benefits (e.g. must be out ___ days before recovering benefits for the first ___ days)?

No temporary disability benefits are recoverable for the first 3 days of an employee's temporary disability period. *Id.* § 4652. However, this three-day rule does not apply if the temporary disability period continues for more than 14 days, the injury requires hospitalization, or the disability results from a violent criminal act against certain state employees. *Id.* §§ 4652, 4650.5. For purposes of calculating the waiting period, the day of the injury shall be included unless the employee was paid full wages for that day. *Id.* § 4652.

19. What is the standard/procedure for terminating temporary disability benefits?

Temporary disability is payable until the employee can return to work or reaches a permanent and stationary status. *Huston v. Workers' Comp. Appeals Bd.*, 157 Cal. Rptr. 355, 362 (Ct. App. 1979).

Where there is a prior continuing award of temporary disability issued by the Workers' Compensation Appeals Board, the employer must file a petition to terminate temporary disability before terminating benefits. Cal. Lab. Code § 4651.1; Cal. Code Regs. tit. 8, § 10462. There is a rebuttable presumption that the employee's temporary disability continues for at least one week following the filing of such a petition unless the employee has returned to work before the petition was filed. Cal. Lab. Code § 4651.1.

For injuries that occurred on or after April 19, 2004, aggregate temporary disability payments are limited to a maximum of 104 weeks within 2 years from the date temporary disability payments began. *Id.* § 4656(c)(1). For a single injury occurring on or after January 1, 2008, aggregate disability payments causing temporary disability are limited to a maximum of 104 weeks within a period of five years from the date of injury. *Id.* § 4656(c)(2). For certain types of injuries, including hepatitis, amputations, severe burns, HIV, pulmonary fibrosis, chronic lung disease, and eye injuries, the employee may receive a maximum of 240 weeks within a period of 5 years from the date of injury. *Id.* § 4656(c)(3).

20. Is the amount of temporary total disability paid to the employee credited toward the amount entitled for permanent disability?

No; an injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability. *Id.* § 4661.

21. What disfigurement benefits are available and how are they calculated?

Workers' compensation permanent disability benefits are intended to reflect an employee's diminished earning capacity. *Id.* §4660(b)(2). There is no separate disfigurement benefit. Disfigurement is taken into account when determining the percentage of permanent disability. *See id.* § 4660(a).

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

A. How many weeks are available for scheduled members/parts, and the standard for recovery?

The number of weeks paid for permanent disability are derived from a range propounded by the legislature. *Id.* § 4658. The number of weeks awarded for each body part is determined by converting the whole person impairment from the AMA Guides for Evaluating Permanent Disability, Fifth Edition, to a permanent disability percentage utilizing the Schedule for Rating Permanent Disabilities compiled by the administrative director of the Division of Workers' Compensation. *Id.* §§4660-4660.1. The ultimate permanent disability rating is based on various factors modifying the AMA whole person impairment, the employee's occupation, and the employee's age at the time of injury. *See id.* § 4660(a). For injuries occurring on or after January 1, 2013, a new schedule will be adopted that will omit modification for loss of future earning capacity. *Id.* §4660.1. The modification for future earning capacity was in place only beginning January 1, 2005 and was removed as a part of the reform act of 2012 known as SB 863.

When the final permanent disability rating is calculated, it is applied to the tables set forth in Labor Code section 4658. For example, a 25% permanent disability for a 2005 injury to any body part provides 100.75 weeks of benefits at a maximum of \$220 per week for a total of \$22,165.00 . The same disability in 2013 results in an award of 100.75 weeks of benefits paid at a maximum of \$230 per week for a total of \$23,172.50. When the final permanent disability rating is 70% or greater, but less than 100%, then the employee receives a life pension at the end of the payment of the full rate weeks of benefits. *Id.* § 4659. The life pension rate is 1.5 percent of the average weekly earnings (with statutory maximums unique to this purpose), for each 1 percent of disability in excess of 60 percent. *Id.* For example, a 75% disability for a 2005 injury of an employee earning \$300 per week will qualify for a life pension of \$57.98 per week. The same disability and earnings for an injury occurring in 2013 qualifies for a life pension of \$67.50 per week.

B. Number of weeks for "whole person" and standard for recovery.

For injuries occurring on or after January 1, 2005, permanent disability is no longer based on the employee's capacity to compete in the open labor market. *Id.* § 4660, *et seq.* Instead the disability is based on a percentage of whole body impairment as provided in the fifth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides") and diminished future earning capacity. *Id.* The AMA Guides also apply to claims arising before January 1, 2005 when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by section 4061 to the employee. *Id.* § 4660(d).

Compensation for total permanent disability (100%) is paid at the temporary total disability rate at the date of injury for the remaining life of the employee. *Id.* §4659(b). For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity shall have that payment increased annually commencing on January 1, 2004. *Id.* § 4659(c). The method of determining the extent of disability is discussed at paragraph 22.A., *supra*.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

For injuries occurring before January 1, 2004, employees are entitled to vocational rehabilitation. *See id.* § 5405.5 (repealed 2003). An employee may request vocational rehabilitation within one year from the date of the last finding of permanent disability, or one year from the date the appeals board approved a compromise and release. *Id.* The employee is entitled to vocational rehabilitation if: (1) the permanent impairment precludes or is likely to preclude him or her from engaging in the occupation he or she had at the time of the injury; and (2) vocational rehabilitation is reasonably expected to return the employee to suitable gainful employment. *Id.* § 4635(a) (repealed 2003). During vocational rehabilitation, the employee receives temporary disability indemnity until his or her medical condition becomes permanent and stationary. *Id.* § 139.5(c) (repealed 2003). When the condition becomes permanent and stationary, the employee may receive a vocational rehabilitation maintenance allowance. *Id.*

As of January 1, 2004, no "vocational rehabilitation" exists as the empowering statute was repealed. Instead, for injuries on or after January 1, 2004, the employee may be entitled to supplemental job displacement benefits in the form of nontransferable voucher for educational training, tuition, books, career counseling, and/or skill enhancement at certain state approved institutions if the employee does not return to work within sixty days after the termination of temporary disability benefits. *Id.* §§ 4658.5(a), 4658.6, 4658.7. The value of the voucher was tied to the extent of permanent disability for injuries occurring between January 1, 2004 and December 31, 2012. For injuries occurring thereafter the value of the voucher is \$6,000, regardless of the extent of disability. *Id.* § 4658.7(d).

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

An employee who is permanently totally disabled (100%) receives weekly indemnity for the remainder of his or her life at the temporary total disability rate established on the date of injury. *Id.* §§ 4453, 4658, 4659(b). For injuries occurring on or after January 1, 2003, indemnity paid for total permanent disability is increased annually on January 1 of the year following the start of the benefit by an amount equal to the percentage increase in the state average weekly wage as compared to the prior year. *Id.* § 4659(c); *see also Baker v. Workers' Comp. Appeals Bd.*, 129 Cal. Rptr. 3d 133, 138-39 (2011).

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

The statutory maximum burial expense is \$2,000 for death resulting from injuries occurring on or before December 31, 1990, \$5,000 for death resulting from injuries occurring from January 1, 1991 through December 31, 2012, and up to \$10,000 for dates of injury on or after January 1, 2013. Cal. Lab. Code § 4701.

B. Dependency claims.

In order to qualify as a dependent, a person must in good faith be a member of the family, or be the deceased worker's spouse, child, grandchild, parent, father-in-law, mother-in-law, sibling, uncle or aunt, brother-in-law or sister-in-law, nephew or niece. *Id.* § 3503.

Children under 18 years of age, or over that age but physically or mentally incapacitated from earning, are conclusively presumed to be wholly dependent for support upon the deceased employee-parent with whom the child is living at the time of the injury or for whose maintenance the parent was legally liable at the time of injury. *Id.* § 3501(a). A spouse is presumed to be totally dependent if the surviving spouse earned \$30,000.00 or less in the 12 months preceding the death. *Id.* § 3501(b). In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency are determined in accordance with the facts as they exist at the time of the injury to the employee. *Id.* § 3502.

The maximum amounts for total dependency benefits vary depending upon the date of injury, and number of dependents. *Id.* § 4702. For injuries occurring on or after January 1, 2006, the maximum amounts in cases of total dependency are as follows: \$290,000 for two total dependents and regardless of the number of partial dependents; not more than \$290,000 for one total and one or more partial dependents; \$250,000 for one total dependent and no partial dependents; \$250,000 for no total dependents and one or more partial dependents; and \$320,000 for three or more total dependents regardless of the number of partial dependents. *Id.* § 4702; *but see Six Flags, Inc. v. Workers' Comp. Appeals Bd.*, 51 Cal. Rptr. 3d 377, 382-83 (2006) (holding section 4702(a)(6)(B) unconstitutional, which provides benefits for a deceased employee's estate).

In the case of one or more totally dependent minor children, payment of death benefits shall continue until the youngest child attains age 18, or until the death of a child physically or mentally incapacitated from earning. Cal. Lab. Code § 4703.5 (a). Under certain circumstances, a child of a law enforcement officer can receive death benefits until age 19. *See id.* § 4703.5(b)(1).

26. What are the criteria for establishing a "second injury" fund recovery?

The requirements for recovering from the Subsequent Injuries Benefits Trust Fund are: (1) the employee had a pre-existing permanent disability; (2) the employee receives a subsequent industrial injury which results in permanent partial disability; (3) the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone; (4) the combined effect of the subsequent injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of the total disability; and (5) either (a) the previous disability affected a hand, arm, foot, leg, or eye, and the disability resulting from the subsequent injury affects the opposite member, and such latter disability is equal to 5 percent or more of the total, or (b) the permanent disability resulting from the subsequent industrial injury is 35 percent or more of the total. *Id.* § 4751; *see also Subsequent Injuries Fund v. Indus. Accident Comm'n*, 366 P.2d 496 (Cal. 1961).

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

A petition to re-open must state specific facts to establish good cause for re-opening. Cal. Code Regs. tit. 8, § 10455 (“Workers’ Compensation Appeals Board – Rules and Practice Procedure”). To re-open a claim, the employee must have received compensation benefits from the employer/insurer, either voluntarily or pursuant to a Board award. *Standard Rectifier Corp. v. Workmen's Comp. Appeals Bd.*, 54 Cal. Rptr. 100, 102-03 (1966); *see also* Cal. Lab. Code § 5410.

The WCAB has continuing jurisdiction to reopen its awards for new and further disability within five years after the date of injury. Cal. Lab. Code § 5410. The date of injury for occupational diseases or cumulative injuries is that date upon which the employee first suffered disability and either knew or by the exercise of reasonable diligence should have known that the disability was caused by employment. *Id.* § 5412.

28. What situation would place responsibility on the employer to pay an employee's attorney fees?

In certain circumstances where the employer has caused the employee to obtain legal services, the employer may be ordered to pay the reasonable value of those services. The employer may be required to pay a reasonable fee for the services of an employee's attorney when: (1) a petition for writ is filed without reasonable basis, *id.* § 5801; (2) the employer is uninsured, *id.* § 4555; (3) an unsuccessful petition to reduce permanent disability indemnity

is filed, *id.* § 5410.1; or (4) the employer/insurer deposes an employee or any person claiming benefits as a dependent, *id.* § 5710(b)(4). Additionally, if the employer files an application for adjudication when applicant is unrepresented, the employer is liable for any attorney's fees incurred by the employee in connection with the application. *Id.* § 4064(c). The workers' compensation appeals board is empowered to assess "reasonable expenses, including attorney's fees and costs" as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. *Id.* § 5813. Further, when payment of compensation has been unreasonably delayed or refused subsequent to an award, the appeals board "shall, in addition to increasing the order, decision or award pursuant to Section 5814, award reasonable attorneys' fees' incurred in enforcing the payment of compensation." *Id.* §5814.5.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Workers' compensation is the employee's sole remedy for injuries arising out of and occurring in the course of employment so long as the employer has secured the payment of compensation. *See id.* § 3600.

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

There are exceptions to exclusivity when: (1) the employee's injury or death is proximately caused by a willful physical assault by the employer; (2) the employee's injury is aggravated by the employer's fraudulent concealment of the existence of an injury and its connection with the employment; (3) the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and the product is thereafter provided for the employee's use by a third person; or (4) 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, and the removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death. *Id.* §§ 3602(b), 4558.

A cause of action may be concurrently maintained before the appeals board for violation of Calif. Lab. Code § 132a (discriminatory retaliation for making a claim) and at law under the Fair Employment and Housing Act proscriptions against discrimination against people with a disability as set forth in Cal. Gov't. Code §12940 et. seq. *City of Moorpark v. Superior Court* 959 P.2d 752 (Cal. 1998)

30. Are there any penalties against the employer for unsafe working conditions?

Every California employer is obligated to provide a safe place to work and is subject to the

provisions of the California Occupation Safety and Health Act, Cal. Lab. Code § 6300 *et. seq.* The Division's duties and powers under the Act extend to administering and enforcing all laws and lawful standards and orders or special orders, including imposing fines and penalties. *Bendix Forest Prods. Corp. v. Div. of Occupational Safety & Health*, 600 P.2d 1339, 1342 (Cal. 1979).

The employee may also claim that the employer's failure to provide a safe place to work constituted serious and willful misconduct as defined by Labor Code section 4553. *Abron v. Worker's Comp. Appeals Board*, 109 Cal. Rptr. 778, 781-82 (1973). To do so, the employee must establish that the employer: (1) knew of the dangerous condition; (2) knew that the probable consequences of its continuance would involve serious injury to an employee; and (3) deliberately failed to take corrective action. *Johns-Manville Sales Corp. v. Worker's Comp. Appeals Bd.*, 158 Cal. Rptr. 463, 468 (Ct. App. 1979).

If an employee establishes serious and willful misconduct, the amount of compensation otherwise recoverable by an employee may be increased by 50%, together with costs and expenses not to exceed \$250. Cal. Lab. Code § 4553. The increase applies to every benefit payment, including medical treatment costs as well as indemnity. *Ferguson v. Workers' Comp. Appeals Bd.*, 39 Cal. Rptr. 2d 806, 810-11 (Ct. App. 1995).

31. What is the penalty, if any, for an injured minor?

If an employer has illegally employed a minor who is under 16 years of age, the employer will be liable for an additional 50% of the amount of compensation awarded to the employee. Cal. Lab. Code § 4557. This additional compensation may not exceed the maximum amount outlined in Labor Code section 4553 for additional compensation recoverable as a result of the employer's serious and willful misconduct. *Id.*

An additional "penalty" involving a minor awards an employee under the age of 18, whose incapacity is permanent, the average weekly earnings that he or she would ordinarily be able to earn at the age of 18, in the occupation at the time of the injury, or in any occupation to which he or she would reasonably have been promoted had the injury not occurred. *Id.* § 4455.

32. What is the potential exposure for "bad faith" claims handling?

Separate "bad faith" actions based on an insurer's delay or unreasonable refusal to settle a claim, or to pay an award, are barred by the exclusive remedy doctrine. *Id.* § 3602; *Cervantes v. Great Am. Ins. Co.*, 189 Cal. Rptr. 761, 764 (Ct. App. 1983). It is unclear, however, whether the Act bars employee suits against an insurer for conduct outside of the normal investigation and processing of claims. *Unruh v. Truck Ins. Exch.*, 498 P.2d 1063, 1073 (Cal. 1972) (superseded by statute on other grounds). The facts to be considered include: (1) whether the conduct was "socially objectionable" as opposed to what would reasonably be expected; (2) whether the injuries caused were separate and distinct from an otherwise compensable claim; and (3) whether an independent action is necessary to

adequately deter harm. *Cont'l Cas. Co. v. Superior Court*, 235 Cal. Rptr. 260, 262 (Ct. App. 1987). If a separate tort action is allowed, there may be an offset against any award. *Young v. Libbey-Owens Ford Co.*, 214 Cal. Rptr. 400, 405 (Ct. App. 1985).

Persons other than “employers” or “insurers,” including the independent administrator of a permissibly self-insured employer, are not protected by exclusivity. Cal. Lab. Code § 3850(b); *Marsh & McLennan, Inc. v. Superior Court (Silvestri)*, 774 P.2d 762, 764 (Cal. 1989). For example, in *Unruh*, an investigator employed by the insurer was subject to a civil suit as a third party. *Unruh*, 498 P.2d at 1069-70.

The Workers' Compensation Act provides a 25% penalty not to exceed \$10,000 against employers for unreasonable delay or refusal to pay a claim. Cal. Lab. Code § 5814(a). This penalty may be avoided, if within 90 days of discovery of violation of section 5814 and before the employee gives notice of a claim of penalty, the employer pays the amount unreasonably delayed or refused plus a 10% self-imposed penalty. *Id.* § 5814(b).

33. What is the exposure for terminating an employee who has been injured?

Any employer who discriminatorily discharges, threatens to discharge an employee who has filed a claim or made known an intention to do so, or has received an award, is guilty of a misdemeanor. *Id.* § 132a(1). Additionally, the employee is entitled to reinstatement and reimbursement for lost wages and all awarded workers' compensation benefits are increased by one-half, not to exceed \$10,000. *Id.* Costs and expenses will also be awarded, not to exceed \$250. *Id.* The same misdemeanor charges apply to any insurer who advises or directs their insured to discharge an employee, or threatens an insured that their policy will be canceled or premiums raised. *Id.* § 132a(2).

Labor Code § 132a does not provide the exclusive remedy for the wrongfully terminated employee. A cause of action may be concurrently maintained at law based on the Fair Employment and Housing Act proscriptions against discrimination against people with a disability as set forth in Cal. Gov't. Code §12940 *et. seq.* *City of Moorpark v. Superior Court* 959 P.2d 752 (Cal. 1998)

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes; however, an employee who brings an action against a third party must provide a copy of the complaint to the employer by personal service or certified mail. Cal. Lab. Code §§ 3852, 3853.

35. Can co-employees be sued for work-related injuries?

Only in limited circumstances. An employee can recover civil damages from a co-employee if: (1) the injury was proximately caused by the co-employee's willful and unprovoked

physical act of aggression or intoxication; or (2) the co-employee, when causing the injury, was not acting within the scope of his or her employment. *Id.* §§ 3600, 3601(a).

36. Is subrogation available?

Yes. An employer or workers' compensation insurance carrier who pays benefits, or is obliged to pay benefits, may bring an action against a third person, and may recover, in addition to the total amount of compensation benefits, any damages including salary, wage, pension or other emolument paid to the employee or his or her dependents. *Id.* § 3852.

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

The reasonable cost of necessary medical treatment provided or authorized by the primary treatment physician and submitted with all required documentation must be paid within 45-working days after receipt of an itemization of medical services provided. *Id.* § 4603.2(b)(1). If not paid within this time limit, the bill must be increased by 15% with interest retroactive to the date of submission of the proper bill unless the employer properly contests the expenses. *Id.* An exception to this rule is electronic receipt of itemized electronic billing for services at or below the maximum fees provided in the official medical fee schedule adopted per section 5307.1. *Id.* § 4603.4(d). The employer must pay these bills within 15-working days after electronic receipt of the billing. *Id.* If the billing is contested, denied or incomplete, payment is to be made in accordance with section 4603.2. *Id.*

Medical-legal expenses that are incurred in accordance with the limiting provisions of the Labor Code must be paid within 60 days after receipt by the employer of the billing and report. *Id.* § 4622; *see also id.* § 4620(a) (defining “medical-legal expense”). If not paid within this time limit, the rate of service must be increased by 10% with interest retroactive to the date of the submission of the proper bill unless the employer properly contests the expenses. *Id.* § 4622.

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

After the filing of an application for adjudication, a party or lien claimant may request another party to serve copies of medical reports. Cal. Code Regs. tit. 8, § 10608. The party receiving the request must serve the reports within six days of the request and must serve a copy of any subsequently received reports within six days of receipt of the report. *Id.* The obligation to serve all medical reports and medical legal reports applies during the continuing jurisdiction of the Appeals Board. *Id.* at § 10615. Medical records may be subpoenaed and the workers' compensation judge may issue a discovery order to compel discovery. Cal. Lab. Code § 4055.2.

39. What is the rule on (a) Claimant's choice of physician; and (b) Employer's right to a second opinion?

A. Employer's initial control over treatment.

Absent advance written predesignation of the employee's personal physician, who agrees to be predesignated, the employer controls and directs medical treatment for the first 30 days from the date of the report of injury. *Id.* § 4600(c). However, during the period of employer control of medical treatment, the employee may request a one-time change of physician and the employer must provide the alternative physician, acupuncturist or chiropractor within five working days from the date of the request. *Id.* § 4601. After 30 days from the date the injury is reported, the employee may be treated by a physician or facility of his or her choice unless the employer has established a Medical Provider Network (MPN). *Id.* § 4600(c).

B. Medical Provider Network.

As of January 1, 2005, an insurer or self-insured employer may establish or modify a medical provider network. *Id.* § 4616. The network must include enough physicians treating nonoccupational injuries and physicians treating occupational injuries to provide treatment in a timely manner. *Id.* § 4616. The goal is to have at least 25% of the physicians primarily engaged in the treatment of nonoccupational injuries. Cal. Code Regs. tit. 8, § 9767.3(d)(8).

After the first visit with a physician from the medical provider network, the employee may select a physician of his or her choice from within the network. Cal. Lab. Code § 4616.3(b).

If the employee disputes the diagnosis or treatment of treating physician, the employee may seek the opinion of a second or third physician in the medical provider network. *Id.* § 4616.3(c).

When an employee disputes the diagnosis or treatment, the employee must notify the employer, either orally or in writing that he or she disputes the treating physician's opinion and requests a second opinion, make an appointment within 60 days from a physician in the medical provider network and inform the employer of the appointment date. Cal. Code Regs. tit. 8, § 9767.7(b). The employer must provide a regional area listing of network providers to the employee, provide a copy of records to the second opinion physician prior to the appointment and to the employee on request and notify the second opinion physician in writing that he or she has been selected and the nature of the dispute with a copy to the employee. *Id.* The same process is used if the employee disagrees with the diagnosis or treatment of the second opinion physician and seeks the opinion of a third physician within the medical provider network. *Id.* § 9767.7(d).

If, after the third physician's opinion, the treatment or diagnosis remains disputed, the employee may request an independent medical review. Cal. Lab. Code § 4616.4(b). The independent medical reviewer shall issue a written report to the administrative director indicating whether the disputed diagnostic service or treatment was consistent with the medical treatment utilization schedule established in Labor Code section 5307.27 or the

American College of Occupational and Environmental Medicine's Occupational Medicine (ACOEM) Practice Guidelines. *Id.* If deemed consistent with Labor Code section 5307.27 or the ACOEM guidelines, the employee may seek the disputed diagnostic service or treatment from a physician from within or outside the medical provider network. *Id.* § 4616.4(i). The parties may appeal the decision by filing a petition with the Workers' Compensation Appeals Board and serving a copy on the Administrative Director, within 20 days after receipt of the decision. Cal. Code Regs. tit. 8, § 9768.16(b).

C. Employee's right to receive treatment outside of the Medical Provider Network.

An employee is not limited to obtain treatment with a provider within the Medical Provider Network if the employee notified his or her employer in writing prior to the date of injury that he or she predesignates a personal physician to provide treatment for an industrial injury and the doctor agrees to the predesignation. Cal. Lab. Code § 4600(d). The personal physician must be the employee's regular physician and surgeon, licensed pursuant to Chapter 5 of Division 2 of the Business and Professions Code; must be the employee's primary care physician who has previously directed the medical treatment of the employee and who retains the employee's records; and must agree to be pre-designated. *Id.*

If the employee is treating with a physician within the employer's established MPN and the physician's contract with the MPN terminates, the employee may request completion of treatment by a terminated provider if the employee, at the time of the contract's termination, was receiving services from that provider for one of the following conditions: (1) an acute condition; (2) a serious chronic condition; (3) a terminal illness; or (4) performance of a surgery or other procedure authorized by the employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days of the contract's termination date. *Id.* § 4616.2(d)(3).

An employee who is being treated outside of the medical provider network for an occupational injury that occurred prior to coverage of the network must be provided completion of treatment under the four circumstances identified above as set forth in Labor Code section 4616.2(d). Cal. Code Regs. tit. 8, § 9767.9(e).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

An employee is entitled to all necessary medical, surgical, chiropractic and hospital treatment reasonably required to cure or relieve the effects of the injury. Cal. Lab. Code § 4600. This specifically includes nursing, medicines, medical and surgical supplies, crutches, and apparatus, including prosthetic devices includes but is not limited to services and supplies by physical therapists, chiropractic practitioners, and acupuncturists, as licensed by California state law and within the scope of their practice as defined by law. *Id.* § 3209.5. The definition of physician includes physicians and surgeons holding an M.D. or D.O. degree, optometrists, dentists, podiatrists, chiropractic practitioners, and certain licensed psychologists. *Id.* § 3209.3.

Treatment by marriage, family and child counselors and clinical social workers is covered if the employee is referred by a licensed physician or surgeon, with the employer's approval. *Id.* § 3209.8. The services and supplies by licensed physical therapists are also included. *Id.* § 3209.5. Any other form of therapy, treatment, or healing practice agreed upon voluntarily, in writing, by the employee and the employer is covered. *Id.* § 3209.7.

Whether treating within the MPN or outside, for injuries occurring on and after January 1, 2004, an employee is entitled to no more than 24 chiropractic, 24 physical therapy and 24 occupational therapy visits per industrial injury. *Id.* § 4604.5(c)(1). That limit is waived for postsurgical physical medicine or rehabilitation provided in accordance with the postsurgical treatment utilization schedule. *Id.* § 4604.5(c) (3).

The determination of the necessity of a particular medical treatment is based on the medical treatment utilization guidelines promulgated by the Administrative Director. The guidelines are "presumptively correct on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of the injury." *Id.* § 4604.5(a).

Employers are required to establish a utilization review process in compliance with Labor Code section 4610. *Id.* § 4610(b). The utilization review process must be consistent with the medical treatment utilization guidelines promulgated by the Administrative Director. *Id.* § 4610.

For injuries occurring on or after January 1, 2013 and for all utilization review decisions communicated after July 1, 2013, an employee who disagrees with the utilization review decision that denies, modifies or delays a treatment recommendation, may request an independent medical review ("IMR"). *Id.* § 4610.05(d). The utilization review decision may only be reviewed by independent medical review. *Id.* § 4610.5(e). The decisions of the IMR are deemed to be the determination of the administrative director and are binding on the parties. *Id.* § 4610.6(g). "The determination of the administrative director is presumed to be correct and may be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal: (1) The administrative director acted without or in excess of the administrative director's powers. (2) The determination of the administrative director was procured by fraud. (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5; (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color or disability. (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that he mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion." *Id.* § 4601.6(h)(1)-(5). Further, "In no event shall a workers' compensation administrative law judge, the appeals board or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization." *Id.* § 4610.6(i).

41. Which prosthetic devices are covered, and for how long?

Covered prosthetic devices include crutches and apparatus, including artificial members, which are reasonably required to cure or relieve the effects of the injury. *Id.* § 4600. An "artificial member" has been defined as a substitute for a natural part, organ, limb or separable part of the body. *Cal. Cas. Indem. Exch. v. Indus. Accident Comm'n*, 90 P.2d 289, 289 (Cal. 1939). Although "apparatus" has not been specifically defined, eyeglasses would be considered an apparatus if provided to relieve the effects of an injury to the eye. *Id.* at 290-91. Thus, it would appear that any apparatus which would help rehabilitate or cure the employee is covered. Injuries to artificial members are covered like any other injury. Cal. Lab. Code § 3208.

42. Are vehicle and/or home modifications covered as medical expenses?

Such modifications may be compensable if they are reasonable and necessary as part of medical recovery or treatment for the industrial injury. *Id.* § 4600; *see, e.g., Smyers v. Workers' Comp. Appeals Bd.*, 203 Cal. Rptr. 521, 524 (Ct. App. 1984) ("The test then is whether [expenditures] are medically necessary and reasonable. If the claimant can produce evidence to answer this question in the affirmative, then the expenses . . . are recoverable as a 'medical treatment' under section 4600.").

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Labor Code section 5307.1(a)(1) mandates implementation of a medical treatment fee schedule that is periodically revised. "Except for physician services, all fees shall be in accordance with the fee-related structure and rules of the relevant Medicare and Medi-Cal payment systems." In 2012 the fee schedule for physician services was to be revised "based on the resource-based relative value scale for physician services and nonphysician practitioner services" Cal Labor Code § 5307.1(a)(2)(A). As part of the revision the code establishes that "maximum reasonable fees paid shall not exceed 120 percent of estimated annualized aggregate fees prescribed in the Medicare payment system for physician services as it appeared on July 1, 2012." *Id.*

Notwithstanding the existence of the fee schedule, an employer or insurer may contract with a medical provider for reimbursement rates different from those prescribed. *Id.* at § 5307.1(h).

Prior to the 2012 changes to Cal. Labor Code §5307.1, a medical provider was permitted to charge fees in excess of the schedule when the fee: (1) was reasonable; (2) did not exceed the provider's usual fee; and (3) was accompanied by itemization and explanation. *Id.* § 5307.1; *see also Gould v. Workers' Comp. Appeals Board*, 6 Cal. Rptr. 2d 228, 232 (Ct. App. 1992).

44. What, if any, provisions or requirements are there for "managed care"?

"On or after January 1, 2005, an insurer, employer, or entity that provides physician network services may establish or modify a medical provider network for the provision of medical treatment to injured employees." Cal. Labor Code § 4616. Administrative director approval of an application to establish a medical provider network (MPN) requires, among other requirements, that "the number of physicians in the medical provider network shall be sufficient to enable treatment for injuries or conditions to be provided in a timely manner." *Id.* § 4616(a)(1). "Every medical provider network shall establish and follow procedures to continuously review the quality of care, performance of medical personnel, utilization of services and facilities, and costs." *Id.* at (b)(2). "Physician compensation may not be structured in order to achieve the goal of reducing, delaying, or denying medical treatment or restricting access to medical treatment." *Id.* at (c). "All treatment provided shall be provided in accordance with the medical treatment utilization schedule." *Id.* at (e). Commencing January 1, 2014, the MPN must provide a "medical access assistant" to "help an injured employee find an available physician of the employee's choice, and subsequent physicians if necessary." *Id.* at (a)(5).

Contracting With Health Care Organizations

Notwithstanding Labor Code section 4600, any workers' compensation insurer or self-insured entity may contract with two or more health care organizations that are certified pursuant to Labor Code section 4600.5 for health care services to be rendered to injured employees. *Id.* § 4600.3(a)(1). The employer must give the employee an affirmative choice at the time of employment and at least annually thereafter in order to designate a health care organization or personal physician. *Id.* By designating a personal physician or chiropractor prior to injury, employees may opt out of treatment programs offered by such contracting facilities. *Id.* Any employee, who does not affirmatively choose between the health care organization provided by the employer and designation of a personal physician, will be permitted to choose only between the health care organizations contracting with the employer. *Id.* At least one of the health care organizations with whom the employer or insurer contracts must be compensated on a fee-for-service basis. *Id.* § 4600.5(e).

Labor Code section 4600.3 has specific provisions regarding contracted for health services based on the status of the employee; whether the employee is receiving health care coverage for nonoccupational injuries and whether the employee is eligible to receive health care coverage for nonoccupational injuries. The employee's status and whether the employee designated a personal physician prior to injury will determine how much time the employee has to notify the employer that the employee wishes to receive treatment from someone other than the health care organizations with whom the employer has contracted. *See id.* § 4600.3(c).

Collective Bargaining

Any employer required to bargain with an exclusive or certified bargaining agent representing employees, must obtain a bargained for agreement from the bargaining agent or must have bargained to impasse before the employer can contract with particular health care

organizations and limit employee choice. *Id.* § 4600.3(b).

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

An employer is obligated to make a decision on the compensability of all or part of a claim within 90 days of receipt of a claim form (form DWC 1) filed in accordance with Labor Code section 5401. "If liability is not rejected within 90 days after the date the claim form is filed . . .the injury shall be presumed compensable . . . The presumption is rebuttable only by evidence discovered subsequent to the 90 day period" *Id.* §5402(b).

Although an answer to an application for adjudication is not required, in the absence of a claim form it is the appropriate method for a defendant to deny liability and raise issues with or defenses to the claim, and must be made within 10 days after service of the application. *Id.* § 5505; *Argonaut Ins. Exch. v. Indus. Accident Comm'n*, 260 P.2d 817, 822 (Cal. Ct. App. 1953). A general denial will not suffice, and the form must conform to California Code of Regulations title 8, section 10484. Cal. Code Regs. tit.8, § 10484. A copy of the answer must be served on all parties. *Id.* Failure to file an answer is not an admission of facts alleged in the application and no default is permitted. Cal. Lab. Code § 5506; *Peak v. Indus. Accident Comm'n*, 187 P.2d 905, 909 (Cal. Ct. App. 1947). Affirmative defenses, however, are deemed waived if not set up by a responsive pleading. Cal. Code Regs. tit. 8, § 10484.

Once a claim is denied in accordance with Labor Code section 5402, the employee must file an application for adjudication of claim within the applicable statute of limitations. It is the filing of the application that establishes the jurisdiction of the appeals board and commence proceedings for the collection of benefits. Cal. Lab. Code 5500.

46. What is the method of claim adjudication?

A. Administrative level.

The Workers' Compensation Appeals Board has exclusive jurisdiction over claims for compensation and related issues. *Id.* §§ 5300(a), 5301. The Workers' Compensation Appeals Board consists of 7 members appointed by the Governor with the advice and consent of the Senate. Five of the members shall be experienced attorneys at law. The remaining two need not be attorneys. *Id.* §§ 111-112.

B. Trial court.

Workers' Compensation Appeals Board acts as the trial court. *Id.* §§ 5300, 5301. It directs that trials are held before a workers' compensation administrative law judge or itself. *Id.* §§ 5309-5310.

A mandatory settlement conference shall be conducted at least 10, but no more than 30 days

after the filing of the Declaration of Readiness to Proceed. *Id.* § 5502(d)(1). However, many offices do not meet this statutory goal. If the dispute is not resolved, a trial shall be held not more than 75 days after the declaration of readiness to proceed was filed. *Id.*

After trial, the workers' compensation administrative law judge "shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties." *Id.* § 5313.

A person aggrieved by a final order, decision or award of a workers' compensation administrative law judge or the appeals board may petition to the appeals board for reconsideration within the time limits set by law. *Id.* § 5900. A petition for reconsideration from a decision of the workers' compensation judge must be filed within 20 days of service. *Id.* § 5903.

C. Appellate.

Any person aggrieved by a decision of the Workers' Compensation Appeals Board may apply to the District Court of Appeal for the appellate district in which he or she resides, or to the Supreme Court of California, for a writ of review. *Id.* § 5950. On appeal, the court reviews for errors of law. *Id.* An application for writ of review must be made within 45 days after a petition for reconsideration is denied. *Id.* Alternatively, if a petition is granted or reconsideration is had on the appeals board's own motion, the writ of review must be made within 45 days after the filing of the order, decision, or award following reconsideration. *Id.*

47. What are the requirements for stipulations or settlements?

The parties may submit an issue or issues for a decision on a stipulation of facts. *Id.* § 5702; Cal. Code Regs. tit. 8, § 10496; *see Sacramento v. Workers' Comp. Appeals Bd.*, 92 Cal. Rptr. 2d 290, 292-93 (Ct. App. 2000). The Board may: (1) make its finding and award based upon the stipulation; (2) schedule a hearing and take further testimony; or (3) make further investigation necessary for it to determine the matter in controversy. Cal. Lab. Code § 5702.

Any employee or dependent may compromise and release any claim. *Id.* § 5000. A Compromise and Release ("C&R") will be accepted by the appeals board and entered as an award. *Id.* § 5002. A compromise and release must be set out using a form promulgated by the administrative director. Cal. Code Regs. tit. 8, §§ 10205.2, 10874. For a release or compromise to be valid, it must be in writing and signed by both parties. Cal. Lab. Code § 5003. The signature of the employee or other beneficiary must be attested by two disinterested witnesses or acknowledged before a notary public. *Id.* It must be approved by the workers' compensation judge. *Id.* § 5001. "Agreements that provide for the payment of less than the full amount of compensation due or to become due and undertake to release the employer from all future liability will be approved 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." Cal. Code Regs., tit. 8, § 10870.

The C&R must specify: (1) the date of the accident; (2) the average weekly wage; (3) the nature of the disability, whether total or partial, permanent or temporary; (4) the amount paid, or due and unpaid, up to the date of the release or agreement or death, and the amount of the payment or benefits thereafter; (5) the length of time such payment or benefit is to continue; and (6) in the event a claim of lien has been filed, the number of days and the amount of temporary disability which should be allowed to the lien claimant. Cal. Lab. Code § 5003.

48. Are full and final settlements with closed medicals available?

Yes. Nothing in the statute impinges upon the right of compromise a claim for future medical treatment. *Id.* §§ 5000-5001.

49. Must stipulations and/or settlements be approved by the state administrative body?

Yes, stipulations and settlements must be approved by the California Workers' Compensation Appeals Board. *Id.* § 5001. The Board must inquire into the adequacy of all compromise and release agreements, unless it makes a finding that there is a good faith issue which, if resolved against the employee, would defeat the right to recover benefits. *Id.* § 5001; *see also* Cal. Code Regs. tit. 8, §§ 10870, 10882.

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required; and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

Every employer is required to secure the payment of benefits, either by insurance or by qualifying as a self-insurer. Cal. Lab. Code § 3700. Private insurance, certified self-insurance for private or public employers, and pooling arrangements under joint exercise of powers agreements for public employers only, are available. *Id.*

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

The requirements for self-insurance are the same for all private entities (individual, groups or "pools"). *See id.* Each must secure from the Director of Industrial Relations a certificate of consent to self-insure. *Id.* Such a certificate will be issued only upon the employer's furnishing satisfactory proof that it is able to self-insure and to pay any compensation benefits that may become due. *Id.*

Employers seeking to self-insure must apply with the State of California, Office of Self Insurance Plans. ("SIP"). In order to qualify, applicant must demonstrate: (1) \$5 million

shareholders equity, (2) Average net profits of \$500,000 per year for the last five years, and (3) produce certified, independently audited financial statements. State of California Department of Industrial Relations, Self Insurance Plans – Requirements for Becoming Self Insured (Aug. 29, 2013), <http://www.dir.ca.gov/osip/apprequirements.htm>.

If the state approves an application, the self-insured entity must still file an annual report to SIP which describes: (1) Claims paid in indemnity and medical, (2) Future Liability on open claims, (3) Average number of employees and total wages for each adjusting location, and (4) A list of all open indemnity claims. *Id.*

B. For groups or "pools" of private entities.

See supra answer 51A.

52. Are "illegal aliens" entitled to benefits of workers' compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?

The Immigration Reform and Control Act makes it unlawful to knowingly hire or continue to employ an alien and does not provide for or prohibit state compensation for injured workers. 8 U.S.C. § 1324(a). As such, Congress has not occupied the field of workers' compensation. *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23, 28 (Ct. App. 2005). Thus, an alien's eligibility for benefits under California's workers' compensation laws is not preempted by the federal statute. *Id.* Illegal aliens are specifically included in the Labor Code's definition of an "employee," which therefore makes them entitled to receive workers' compensation benefits. *See* Cal. Lab. Code § 3351(a).

However, an undocumented worker might not be entitled to the panoply of benefits offered through the workers' compensation system. For example, job reinstatement remedy prohibited by federal law cannot be ordered. *Id.* § 1171.5. For instance, for injuries occurring on and after January 1, 2005, an illegal alien who is not able to return to his or her usual and customary occupation, modified, or alternative work with an employer is not permitted to receive a 15% increase in permanent disability benefits under Labor Code section 4658(d) because of his or her illegal alien status. *Farmer Bros. Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23 (Ct. App. 2005).

53. Are terrorist acts or injuries covered or excluded under workers' compensation law?

A terrorist act would be subject to the same principles for compensability applicable to injuries committed by other third parties. *See supra* answer 14.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

Although the Act does not set out requirements that must be satisfied, the following excerpt comes from JUDGE ALAN ESKENAZI, CALIFORNIA CIVIL PRACTICE: WORKERS' COMPENSATION § 6:25 (2007):

Settlement by Compromise and Release can be delayed or even made virtually impossible in certain cases because of the Federal Government's current rules involving what is normally referred to as a Workers' Compensation Medicare Set-Aside (WCMSA), normally referred to as a "Medicare Set-Aside" or a "MSA Trust".

The interests of Medicare must be considered in all Compromise and Release agreements in which the injured worker is either receiving Medicare benefits or is likely to receive them. For injured workers already receiving Medicare benefits, Medicare will only require a WCMSA where the total settlement amount is greater than \$25,000.00. In cases where the injured worker is not yet receiving Medicare benefits, Medicare will require a WCMSA only when the injured worker has a reasonable expectation of becoming Medicare eligible within 30 months of the date of settlement, and the anticipated total settlement amount for future medical expenses and disability/lost wages over the life of the injured worker is expected to be greater than \$250,000.00. This will normally be true if the injured worker is already receiving Social Security Disability Indemnity (SSDI) or where the injured worker is between 62 1/2 and 65 years old.

The Set-Aside procedure essentially requires a specified breakdown of how much consideration was included in the settlement for future medical care because Medicare will not pay for treatment that should be covered by the workers' compensation insurer. In effect, Medicare will assert a "credit" against the settlement based upon the anticipated or estimated cost of future medical care for the industrial injury. If Medicare accepts the proposed estimated "set-aside" amount, the Applicant must spend the entire amount on treatment for the industrial injury before Medicare will cover the cost of additional treatment for that injury. The amount to be "set-aside" must be based on actual medical evidence, and the parties normally use a professional service for doing this type of work-up and computing an ostensibly appropriate figure.

Judge Eskenazi also provides the following California practice tip:

Since, from the applicant's perspective, one of the basic advantages of settlement by Compromise and Release is that he or she will be receiving a "lump sum" payment, one which is significantly higher than the amount of permanent disability alone, the "set aside" may, in the mind of Applicant, defeat the entire purpose of the Compromise and Release since it will be

deducted from the settlement amount. However, if the amount set aside is small enough compared to the total amount of the Compromise and Release, the applicant may still be receptive to this procedure. Of course, the procedure does involve additional time and effort, generally entailing a delay of at least six months which would not otherwise take place.

The WCMSA can be either professionally administered or administered by the injured worker.

Since the amount required to be "set-aside" will reduce the Applicant's net recovery, many practitioners will have the insurance company retain a professional WCMSA service to put together a tentative WCMSA amount in advance so that Applicant and counsel will have an idea as to the amount that they may want to demand for a Compromise and Release. This should avoid further unnecessary delay at the time of final settlement negotiations.

The issue of a WCMSA only comes into play when the Applicant is settling his or her right to further medical care. Obviously, Stipulations with Request for Award will not trigger Medicare involvement. The parties may also want to consider a Compromise and Release with open medical.

Id.

Under Medicare regulations, Medicare is secondary payer to the payment of workers' compensation by a workers' compensation carrier or self-insured employer. 42 C.F.R. § 411.46. The obligation to pay medical expenses for a compensable condition cannot be shifted to Medicare. *Id.*

CMS defines individuals with a "reasonable expectation" of Medicare enrollment within 30 months as including, but not limited to, an individual who: (1) has applied for SSDI benefits; (2) has been denied SSDI benefits but anticipates appealing that decision; (3) is in the process of appealing and/or refiling for SSDI benefits; (4) is at least 62 and six months old; or (5) has end stage renal disease (ESRD) but does not yet qualify for Medicare based on ESRD. Memorandum to All Regional Administrators from Director, Center for Medicare Management, Medicare Secondary Payer-Workers' Compensation (WC) Additional Frequently Asked Questions (April 21, 2003), <http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Downloads/April-21-2003-Memorandum.pdf>.

If the employee meets the criteria for Medicare qualification, Medicare must be notified in the event of a settlement of the workers' compensation future medical benefits.. *See* 42 C.F.R. §§ 404, 411. Upon review of the file, Medicare may conclude that the settlement does not meet its criteria, it may require a Medicare set aside trust for large settlements, or it may require merely a custodial self-administered trust account. *See* 42 C.F.R. §§ 404, 411.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires States to include the following provisions in their plan for medical assistance: (1) the individual will assign to the State any rights to payment for medical care from any third party; and (2) the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C. § 1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. *Id.* § 1396k(b).

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

HIPAA, 45 C.F.R. parts 160-64, establishes Federal protections for the privacy of protected health information (PHI). The law expressly allows "covered entities" including employers and insurers to use or disclose PHI to the extent necessary to comply with the law. 45 C.F.R. § 164.512(a).

The disclosure of PHI by covered entities is limited to the "minimum necessary to accomplish the intended purpose of the use, disclosure, or request." *Id.* § 164.502(b).

A number of exceptions to this requirement, enumerated in 45 C.F.R. § 164.502(b)(2), include: (1) disclosures to a health care provider; (2) disclosures or uses made pursuant to an individual's authorization; (3) disclosure or uses that are required by law as described by 45 C.F.R. section 164.512(a).

The claim administrator "is prohibited from disclosing or causing to be disclosed to an employer, any medical information" as it is defined in the California Civil Code. Cal. Lab. Code §3762(c). The two exceptions to this general rule are (1) "the diagnosis of the mental or physical condition" for which benefits are claimed or (2) information "that is necessary for the employer to have in order for the employer to modify the employee's work duties." *Id.* at (c)(1)-(2).

57. What are the provisions for "Independent Contractors"?

Independent contractors are generally excluded under the Act. *Id.* § 3357. 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. *Id.* § 3353. Section 2750.5 creates a rebuttable presumption that an unlicensed contractor is an employee rather than an independent contractor and will therefore fall under the Act. *See, e.g., State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 706 P.2d 1146, 1150-54 (Cal. 1985). However, "any person performing any function or activity for which a license is required under [certain provisions of] the

Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status." Cal. Lab. Code § 2750.5(c). This obligation is not rebuttable. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* 706 P.2d 1146, 1153 (Cal. 1985).

An employer and an independent contractor may jointly elect to come under the Act. Cal. Lab. Code § 4150. The employer elects by either taking out workers' compensation insurance or by filing a statement of acceptance of the Act with the Administrative Director. *Id.* § 4151. The independent contractor is then deemed to have elected unless he or she gives notice of rejection. *Id.* § 4154.

The burden of proof rests upon the employer to establish them that an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer. *Id.* § 5705; *see S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations* 256 Cal. Rptr. 543, 547-50 (Cal. 1989).

58. Are there any specific provisions for “Independent Contractors” pertaining to professional employment organizations/temporary service companies/leasing companies?

An employer who contracts with another employer to provide employees may procure coverage by "entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees." Cal. Labor Code §3602(d)(1). For the two employers to be covered the obligated employer must in fact obtain the coverage and it must remain in effect for the duration of the employment. *Id.*

In *Santa Cruz Poultry, Inc. v. Superior Court*, 194 Cal. App. 3d 575 (Ct. App. 1987) however, an employee referred by a temporary employment agency for a one-day job assignment brought a negligence action against the employer to whom the employee was temporarily assigned. The employee claimed damages for industrial injuries and the employee's insurer claimed lien for workers' compensation benefits paid to employee. *Id.* at 579-80. The trial court denied the temporary employer's motion for summary judgment made on grounds of exclusivity of the employee's workers' compensation remedy. *Id.* at 579. The appellate court held that the trial court erred in denying the employer's motion for summary judgment because the employer controlled the result of the temporary employee's work and the means by which it was accomplished. *Id.* at 583. As such, the temporary employer was immune from a negligence action and the employee's exclusive remedy was workers' compensation. *Id.* at 583-84.

59. Are there any specific provisions for “Independent Contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

There are no specific provisions for independent contractors who own or operate their own vehicles for driving or delivery of people or property. The threshold question, however, in determining whether an independent contractor falls under the Act is the injured person's status.

To determine status, courts place greatest emphasis on whether the hirer had the right to control the detailed manner and means by which the work was to be performed. *Millsap v. Federal Express Corp.*, 277 Cal. Rptr. 807, 811 (Ct. App. 1991). If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established. *Id.* at 811. In *Millsap*, the court found that a package delivery driver was the delivery company's independent contractor where the driver used his own car, furnished his own gas and oil and liability insurance, assumed the costs of necessary car repairs, was paid on a "per route" basis and received no employee benefits, and the company did not withhold taxes from his paychecks or instruct driver how to make deliveries or how to drive his car. *Id.* at 811. Once an injured person is found to be an independent contractor, he or she is generally exempted from the Act. Cal. Lab. Code § 3357; *see also supra* answer 57. Although determining status is ordinarily a question of fact, it is a question of law when all the facts lead to only one inference. *Torres v. Reardon*, 5 Cal. Rptr. 2d 52, 56 (Ct. App. 1992).