HANNA BROPHY

hannabrophy.com

Bakersfield
Fresno
Los Angeles
Oakland
Orange
Redding
Riverside
Sacramento
Salinas
San Diego
San Francisco
Santa Rosa
Stockton

# Hanna & Brophy

## Workers' Comp Bingo 2015

Produced and Created by:


**Keith Epstein**
Hanna Brophy Oakland Office
Kepstein@hannabrophy.com

**Greg Stanfield**
Hanna Brophy Oakland Office
Gstanfield@hannabrophy.com

**Jessie Zaylia**
Hanna Brophy Los Angeles Office
Jzaylia@hannabrophy.com

**Charlette Crissman**
Hanna Brophy Bakersfield Office
Ccrissman@hannabrophy.com

**Katie Nowak**
Hanna Brophy Orange County Office
Knowak@hannabrophy.com

**Greg Choate**
Hanna Brophy San Diego Office
Gchoate@hannabrophy.com

**Roberto Gonzalez**
Hanna Brophy Salinas Office
Rgonzalez@hannabrophy.com

**James Liu**
Hanna Brophy Orange County Office
Jliu@hannabrophy.com

**Austin Sung**
Hanna Brophy Riverside Office
Asung@hannabrophy.com

**Jeannette (Orozco) Herrera**
Hanna Brophy Sacramento Office
Jorozco@hannabrophy.com

**Justine Buan**
Hanna Brophy Sacramento Office
Jbuan@hannabrophy.com

**Matthew Barravecchia**
Hanna Brophy San Francisco Office
Mbarravecchia@hannabrophy.com

**Andrew Levine**
Hanna Brophy Oakland Office
Alevine@hannabrophy.com

**Glenn Miller**
Hanna Brophy Oakland Office
Gmiller@hannabrophy.com

**Quintin Lucas**
Hanna Brophy Redding Office
Qlucas@hannabrophy.com

**David Sabin**
Hanna Brophy Redding Office
Dsabin@hannabrophy.com

**Cindy Kim**
Hanna Brophy Los Angeles Office
Ckim@hannabrophy.com

**Heather Marks**
Hanna Brophy San Diego Office
Hmarks@hannabrophy.com

**Elizabeth Gately**
Hanna Brophy Los Angeles Office
Egately@hannabrophy.com

**Ish Bhanu**
Hanna Brophy Riverside Office
Ibhanu@hannabrophy.com

**Britni Hageman**
Hanna Brophy San Diego Office
Bhageman@hannabrophy.com

**Kate Holland**
Hanna Brophy Salinas Office
Kholland@hannabrophy.com



Hanna Brophy, LLP
Firm (510) 839-1180
Scanning Center
P.O. Box 12488
Oakland, California 94604-

## Apportionment

**An Apportionment Opinion by an AME or QME Must Be Supported with Medical Reasoning -** Indiana Jones was an archeologist professor, and while searching for a treasure, he injured his lumbar spine. The AME, Dr. Menace, issued a report providing 30% non-industrial apportionment to pre-existing degenerative disc disease with a full discussion and basis for his opinion. Indiana's attorney wrote to Dr. Menace asking him to rethink apportionment, and Dr. Menace then issued a supplemental report stating that there was no apportionment, but he provided no explanation. As the trial judge, do you find in favor of 30% apportionment? **Answer: C -** AME Dr. Menace's finding of 30% apportionment was supported by sufficient evidence and prevails over the supplemental report, which gave no basis for the change of his opinion and was not based upon any new or different medical evidence. (*Radman v. WCAB* (2013) 79 Cal. Comp. Cases 91, *writ denied*.)

## Discovery & Procedure, Attorney Fees

**Video Evidence Must Be Disclosed Prior to MSC -** Cinderella sustained injuries during the course and scope of her employment as a maid. Her attorney made multiple demands for Defendant to produce any surveillance videos that it had. Later, Defendant obtained surveillance videos of Cinderella dancing at the ball. Defendant disclosed the videos for the first time at the mandatory settlement conference approximately 7 months later. Should the videos be admitted into evidence? **Answer: A** - The surveillance videos are excluded from evidence at trial because Defendant did not disclose the videos until the MSC. This is true despite the fact that the applicant's demands for surveillance videos were made prior to Defendant obtaining them. (*Monsanto Co. v. WCAB* (2014) 79 Cal. Comp. Cases 730, *writ denied*.)

**Defendants Select the Interpreter When They Notice the Deposition of Applicant -** Chewbacca claimed that he sustained an industrial injury as a pilot in a galaxy far, far away. Defendant scheduled Chewbacca's deposition. Chewbacca's attorney requested that he be allowed to select his own interpreter. Defendant denied this request. Is Chewbacca permitted to select an interpreter of his choice? **Answer: D.** Under the plain meaning of the term "producing party" in Labor Code § 5811(b)(1), and pursuant to WCAB's decision in *Contreras v. Gibson Farms*, 2013 Cal. Wrk. Comp. P.D. LEXIS 462, the defendant, not the applicant, has a duty to select and provide certified interpreters for the depositions that it notices. Further, Labor Code § 5811(b)(2) prohibits certified interpreters from disclosing confidential communications. (*Solano v. Workers' Compensation Appeals Bd.* (2014) 79 Cal. Comp. Cases 1092, *writ denied*.)

**The WCAB Has No Authority to order "In Camera" Review of Privileged Documents -** Nosy Applicant sustains an injury in 2003 and files a workers' comp claim, which is administered by Incognito Claims United ("ICU"). In 2007 Nosy says that she aggravated the 2003 injury and requests that ICU produce copies of all unprivileged documents pertaining to the 2003 claim. ICU produces some documents and a privilege log for the remainder. Nosy isn't satisfied, so this matter is directed to a status conference, where the judge orders an in camera review of the privilege-log documents by a special master in order to assess the validity of the claim of privilege. Is this judge's order proper? **Answer D:** The WCAB has no authority to have the claimed privileged

documents reviewed, even if done by a special master. While the WCAB is free to adopt rules of practice, which can ignore the rules of evidence, the WCAB determined in this case that it was nevertheless bound by the statutory requirements of privilege, including those found in Evidence Code section 915. (*Regents of UC v. WCAB (Lappi)* (2014) 226 Cal. App. 4th 1530.)

**Expedited Hearing Can Go Forward Before Claim is Accepted, and on MPN Issues -** Jay Waiter slipped on a banana peel while serving a customer and hurt his back. He immediately filed a claim and began treating with his local doctor. Defendant employer sent Jay a timely delay notice, and sent Jay a notice outlining the details of the employer's MPN. Jay continued to treat with his local doctor, who was not in the employer's MPN. Defendant filed a request for an expedited hearing on the issue of Jay's treatment outside of the MPN. Will the request for an expedited hearing be rejected? **Answer**: C. An expedited hearing *can* be requested and heard prior to a claim's acceptance in order to address the issue of whether an applicant's treatment must fall within the employer's MPN. (*Kim v. BCD Tofu House* (2014) 79 Cal. Comp. Cases 140.)

**No LC 5710 Applicant Attorney Fees for Attending Defense Vocational Evaluation -** Applicant Ron Swantsome suffered injury to his arm and face (his glorious mustache) while working for the City of Pawnee. Due to the horrific injury, Ron's attorney, Letsee Knope, obtained a vocational expert to evaluate Applicant's loss of earning capacity pursuant to *Ogilvie*. Defendant sought to have Ron evaluated by its vocational expert. AA objected, stating that her client could not be evaluated unless Defendant followed the deposition procedures set forth in Labor Code § 5710, including payment of attorney's fees for her presence at the vocational interview. Does Knope get the fees? **Answer B** - Applicant's attorney does not get a fee for attending a Defense vocational evaluation, because a vocational expert is not a party, and therefore Labor Code § 5710 is inapplicable. (*Fetner v. WCAB* (2014) 79 Cal. Comp. Cases 1204, *writ denied*.)

## Injury AOE/COE, Presumptions

**Injury During Unpaid & Off-Premises Lunch Not Compensable -** Sue was finishing her third week of training for her new position as head cashier with Don, the company's traveling trainer. Just before an unpaid half-hour lunch, Don asked Sue whether she wanted to go out to lunch rather than eat the lunch that she brought from home. Sue agreed, they went to Beni-HaHa's in Don's company-provided rental car, and after a filling lunch of bento boxes, they were involved in a motor vehicle accident on the way back to the office. Are Sue's injuries from the MVA compensable under workers' compensation? Answer D - The injuries are not compensable, as the WCAB has found that, in such a situation, there is no basis to deviate from the well-established general rule that an injury sustained during an unpaid, off-premises lunch period is not compensable regardless of the fact that the applicant happened to be riding in a rental car provided to a co-employee by the employer. (*Aguilar v. WCAB* (2014) 79 Cal. Comp. Cases 699.)

**Injuries While Exercising At home Can Be Compensable if Employer Guidance Not Provided -** After watching Sgt. Lou being outrun by a peg-legged pirate suspect, Police Chief Wiggum issued a department order requiring his officers to get into shape. Chief Wiggum provided no guidance on the type of exercises or activities considered appropriate, and he also put the officers on round-the-clock shifts to find the hollow legged bandit. Because of the round-the-clock shifts, Sgt. Lou had no time to exercise at work, so he practiced yoga at home, which he learned from a DVD. One morning, while performing his sun salutations, Lou felt an extreme stabbing pain in his left knee and filed a work injury claim. Should this claim be denied? **Answer D** - Sgt. Lou's injury is industrial

due to the department order requiring officers to get into shape so that they could perform their work as police officers because the department did not provide the officers with an opportunity to exercise at work, and because there was no guidance provided as to what type of exercise was acceptable. (*Young v. WCAB* (2014) 227 Cal. App. 4th 472.)

**Injury Driving Home after Working Double Shift Barred by Going & Coming Rule -** Sgt. Smith was informed one day that he would have to work back-to-back shifts, which he had done in the past. After his second shift, while driving home, Sgt. Smith fell asleep and suffered injuries in a car accident. Sgt. Smith filed an injury claim, which was denied based upon the "going and coming" rule. What will be the trial result when Sgt. Smith challenges the claim denial? **Answer C -** Sgt Smith's claim will likely be barred by the "going and coming" rule. The special mission exception to the "going and coming" rule requires that the reason for the commute that caused the injury be extraordinary in relation to an employee's routine duties. Here, the work reasonably could be found to be routine because it was performed at the usual location, did not require an extra trip, and was not necessarily more demanding. (*Lantz v. WCAB* (2014) 226 Cal. App. 4th 298.)

**Injury Not Compensable AOE/COE When Shift Ends, Returns Later for Personal Reason -** Applicant returned to the Cotton Club approximately five hours after her shift ended. At the club, she was assaulted by a co-worker. She testified she was on the job site only to retrieve her husband's keys, but was "on call" to assist during emergencies. Did Applicant sustain injury AOE/COE? **Answer C:** The injury is not compensable AOE/COE, because Applicant had re-entered the job site for a purely personal motive. The 2nd District Court of Appeal also noted that being "on call" to assist during emergencies did not, in itself, place Applicant in the course of employment at the time she re-entered the job site. *Campos v. University of Southern California* (2014 NPD) 79 Cal. Comp. Cases 927.

## Temporary Disability & LC § 4850

**TTD Minimum and Maximum Rates Increase for 2015, Mileage Rate Increase -** Labor Code section 4453(a) requires the TTD rate to be increased by an amount equal to the percentage of increase in the State's average weekly wage (SAWW) as compared to the prior year. The SAWW for 2015 is $1,095.70; it was $1,067.25 in 2014. For cases that are two or more years old, the increase must be made starting 01/01/2015. The Cost of Living Adjustment (COLA) for 2015 is 2.66%; it was .743% in 2014. Based upon these figures, the 2015 minimum TTD rate of 4161.19 and maximum TTD rate of $1,074.64 increased to: **Answer B:** The minimum TTD rate increased from $161.19 to $165.49 per week, and the maximum TTD rate increased from $1,074.64 to $1,103.29 per week. Note: Mileage has also increased as of 01/01/2015 to .575 cents per mile.

**The Board Can Rely upon a Rating Given by a PQME Even if the Body Part Rated is Outside of the PQME's Specialty -** Applicant sustained an admitted back injury which "evolved" into injuries to multiple body parts, including the eyes. Dr. Superman, a board-certified ophthalmologist, evaluated Applicant and issued a report that addresses impairment. The Panel QME is Chiropractor Quincy Magoo, who provided an opinion as to impairment that included vision. Dr. Magoo opined that the impairment by Dr. Superman is not adequate, and he provided increased eyesight impairment. The trial judge relied upon Dr. Magoo's eyesight impairment. Was this proper? ANSWER - C - Yes, all QMEs are trained and tested to use the AMA guides. If the opinion is supported, and if the judge determines it to be substantial evidence, then even a chiropractor "can legitimately opine on all impairments found within the four corners of the AMA guides." (*Tallent v. Infinite Resources* 2014 Cal. Wrk. Comp. P.D. LEXIS 141, *panel decision denying reconsideration.*)

**LC § 4850 is to be Paid For A Year Based upon Days or Weeks, not Based upon Hours, if the Safety Officer Works Part-Time -** Sheriff Rick Grimes sustained an injury while rescuing hostages, Maggie and Glenn. Rick worked modified duties on a part-time basis for one calendar year, during which time he worked 1,000 hours and also received 1,080 hours' worth of Labor Code § 4850 benefits so that he received his full salary for the year. Rick argues that he is entitled to 1,000 more hours of 4850 benefits while he continues to work part-time, reasoning that the entitlement to 1 year of 4850 pay means that he should receive a total of 2,080 hours of 4850 pay since 2,080 hours is equal to a full year's salary. Is Rick right? **ANSWER: B** - The WCAB recently held that Labor Code § 4850 can clearly be broken down to non-continuous periods of weeks and days. However, there is no authority to further break down the period of benefits on an hourly basis. The court further reasoned that LC § 4850 makes no distinction between temporary partial and temporary total disability when providing the benefits that are to be paid for a year. (*James v. City of Santa Rosa* 2014 Cal. Wrk. Comp. P.D. Lexis 408, *panel decision denying reconsideration*.)

**Part-Time Police Officers Who Are Not Volunteers Can Get Less Than Max TTD Rate -** Sherri works as a part-time police officer in a small California town. While patrolling her beat, she injured her leg as she was detaining a criminal. Only full-time police officers receive LC § 4850 full salary in lieu of temporary disability. Volunteer part-time police officers are entitled to TTD at the maximum rate under LC §§ 4458.2 and 3362. Sherri's part-time earnings were not sufficient to support a maximum TD rate. Sherri's attorney contends at trial that, because she is a police officer, her part-time work entitles her to the maximum TTD rate while off work because there is no distinction for the purposes of work injury benefits between being a part-time volunteer and a part-time regular police officer. What benefits does Sherry get? **Answer: C-** Lab. Code §§ 4458.2 and 3362 apply only to active volunteer peace officers, not regularly sworn, salaried peace officers, even if they are part-time. Sherri's TD rate would be 2/3 of her average weekly wage within the statutory minimum and maximum limits. (*Larkin v. WCAB* (2014) 223 Cal. App. 4th 538. Note: The California Supreme Court granted review of this decision, so this holding could very well change in the near future. It may be worth asking the WCAB for a stay relative to any decision regarding this issue until the Supreme Court renders its final decision.)

**Police Officer Does Not Get LC 4850 Differential Pay After Returning to Work -** Sam was a deputy sheriff who suffered a right-shoulder injury in 2011 while working during her night shift. The night shift entitled him to 5% in shift-differential pay. Sam remained off work for 3 months during which time he was paid his full salary pursuant to Labor Code § 4850, including the 5% shift differential that he would have received for being on the night shift. Sam was then released to modified duty while recovering from surgery and was placed on the day shift since department policy was to put officers on day shifts when returning to temporary modified duty. While working the modified duty day shift, Sam demanded that he be paid the 5% differential as part of his entitlement to LC § 4850 full salary benefits. Does Sam get the differential? **Answer B:** Sam does not get the differential pay since LC § 4850 pays the full salary at the time of injury rate only while the safety officer is on "leave of absence" from the injury, and once he returns to work (either full or modified duty) the "leave of absence" ends, the LC § 4850 benefit ends, and the safety officer is then only owed what his/her current work assignment salary pays. (*County of Nevada v. WCAB (Lade)* (2014) 223 Cal. App. 4th 579.)

# Permanent Disability & Rating

**Permanent Total Disability Starts at the End of TTD; COLA starts January 1st of the Year Afterwards -** Fred worked for Henry Cabot Henhouse III as a butler. On March 1, 2008, after Fred prepared the "Super Sauce" for Henry to become super, the two drove in the Super Coop to rescue a damsel in distress. Henry suggested that Fred jump out of the Super Coop to stop the bad guy. Fred reluctantly got out to run after the bad guy and Henry accidently ran over Fred. Henry reminded Fred, "You knew that the job was dangerous when you took it, Fred!" Fred was TTD from the date of injury, out of work for five years, and declared MMI and permanently totally disabled (PTD) on March 1, 2013. Pursuant to LC § 4656, TTD was paid from March 1, 2008 to March 1, 2010. PPD was paid from March 2, 2010 to March 1, 2011. From what point should PTD payments begin, and from which date should the COLA be calculated? **Answer B:** The Labor Code requires PTD to be paid starting from the end of the TTD period, which was March 1, 2010, and the COLA will be calculated from January 1st of the following year. (*Brower v. David Jones Construction* (2014) 79 CCC 550, *en banc*.)

**Rating by Analogy Permitted Where Patient Has Only Subjective Symptoms -** While working for the City, police officer Paul injured his left heel. Agreed Medical Examiner, Dr. Amy evaluated Paul but could not find any objective abnormalities. However, Paul continued to complain of tenderness in his heel. Based solely upon his subjective complaints of pain, Dr. Amy rated the impairment by analogy, finding that Paul's condition was equivalent to a limp with arthritis. Accordingly, she found 7% WPI. Is Dr. Amy's rating permissible? **Answer D:** Yes. The *AMA Guides* do not provide impairment for conditions with only subjective symptoms. Instead, it calls for a physician to exercise his/her clinical judgment to assess the impairment most accurately. A physician can provide for impairment by analogy within the four corners of the *Guides* when a strict application of the *Guides* does not accurately reflect the doctor's assessment of impairment. (*City of Sacramento v. WCAB* (2014) 22 Cal. App. 4th 1360.)

**Rating by Analogy Permitted Even If Condition is Not Complex or Extraordinary -** Defense attorney Dan received a report from AME Dr. Art. Dr. Art found only subjective complaints of pain and diagnosed the injured worker with plantar fasciitis. Plantar fasciitis does not have a standard rating under the AMA Guides, so Dr. Art found 10% WPI by analogy to an entirely different condition. Defense attorney Dan seeks to rebut this report by arguing that a rating by analogy is permissible only in a **complex or extraordinary case**. Assuming that the case is **not** complex or extraordinary, will Defense attorney Dan succeed? **Answer B:** The defense will not succeed. There is no requirement that a case be complex or extraordinary in order for a physician to rate by analogy. Syndromes that are poorly understood, are manifested by subjective symptoms, and cannot be rated by adhering to a strict application of the *AMA Guides* can be rated by analogy to other impairments that impact activities of daily living, so long as the analogy falls within the four corners of the *Guides*. (*City of Sacramento v. WCAB* (2014) 22 Cal. App. 4th 1360.)

**No Basis for Petition to Reopen When Evidence of Higher PD Rating Existed Prior to Award -** Danny hurt his back in 2006, and in 2007, the AME found a DRE category-four lumbar strain. In 2008, an EMG was performed and indicated an abnormal study. Nonetheless, one month later, the parties entered into a stipulated agreement based upon a category-four lumbar sprain, and the judge issued an award accordingly. In 2010, Danny filed a timely petition to re-open. The AME saw Danny again and found that there was indeed a new and further injury, pointing to the 2008 EMG study. The AME then concluded that Danny had a DRE category-five lumbar strain. Is there good cause to reopen the case? **Answer: D -** There is no good cause for the petition to reopen. Under LC § 5410, Danny had not sustained a new and further disability because the decline in his medical

condition occurred prior to the stipulated award. There is also no good cause to reopen because nothing in the record suggests that Applicant was unable to send the 2008 EMG to the AME before the award was issued. (*Benavides v. WCAB* (2014) 227 Cal. App. 4th 1496.)

**Judge Can Find PD Within the "Range of Evidence" -** Moka was a lead accordionist for Pepper and Spice, at the world renowned polka music house in Eureka, California. After years of pounding out tunes, Moka developed tinnitus and depression, and she filed a workers' compensation claim for injury to her hearing and psyche. The PQME reports of Dr. Hearsalot and Dr. Hugsalot provided impairment that rated at a combined 53% PD. Moka's vocational expert, Mike Makesitup, was uncontested at trial, testified that Applicant's combination of injuries caused her to sustain 85% PD, and was found to be credible by the judge. Further, he testified that, because she could no longer work at Pepper and Spice, she was permanently and totally disabled. What should the judge find? **Answer D** - The evidence supports an 85% level of permanent disability based on the vocational expert's testimony, which was found to be credible and was uncontested. The vocational expert's testimony did not support a finding of 100% disability as he failed to provide substantial evidence that Applicant could not work for any employers due to the injuries. A judge is allowed to find a rating within the "range of evidence" presented at trial. (*Burke v. WCAB* (2014) 79 Cal. Comp. Cases 713, *writ denied*.)

## Medical/Legal Evaluations, AME, Panel QMEs

**No Replacement QME Panel if QME is "Available" -** Defendant sent a letter to PQME Dr. Wolfson on 5/29/13, and 62 days later, after having not received a response, Defendant requested a replacement panel from the Medical Unit. Having not heard from the Medical Unit for some time, Defendant served a second request. At the MSC, the judge ordered Applicant to send the 5/29/13 letter to the PQME. The PQME was deposed a few weeks later on 10/8/13; the PQME had moved hers office, and she never received the 5/29/13 letter. At trial, on 11/1/13, Defendant, again, moved for a replacement panel. How should the judge rule? **Answer D:** The replacement panel should be denied, as the PQME was unaware of the letter, yet available as shown by her deposition being scheduled within a few weeks after the request by Defendant. Other than objecting to the reporting of the PQME and requesting a new panel, Defendant did nothing to notify the PQME of the letter, such as verifying receipt by way of phone calls or reminder letters. (*Illinois Midwest v. WCAB* (2014), 79 Cal. Comp. Cases 585, *writ denied*.)

**Parties Can Request New QME Panel on Subsequent Injury Claims -** For the last ten winters, the City of Arendelle hired professional ice sculptors Elsa and Olaf to design miniature ice castles. Elsa sustained an injury to her right hand. Five years earlier, Elsa had another right-hand injury with the same city, and that claim resolved with a Panel QME evaluation. Rule 35.5(e) requires the parties to use the same evaluator when an injury involves the same parties and same body parts. The City did not like the prior PQME and wants a new one. Does the City have to use the prior QME for the new claim? **ANSWER - B:** The City may obtain a new PQME. The Labor Code does not require an employer and/or employee to utilize the same PQME for a *subsequent* claim. The requirement in Rule 35.5(e) that an employee must return to the same PQME when a new injury is claimed involving the same body parts was found to be inconsistent with the Labor Code and thus invalid. When a rule and a code section conflict, the code section trumps. (*Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418, *writ dismissed; review denied*.) ***Special recognition to Hanna Brophy's Jeannette (Orozco) Herrera, who successfully argued this case!**

**WCAB Can Order an IME if the Panel QME Does Not Adequately Develop the Record -** Charlie Brown hired Snoopy to play in his ball club. During his first game, Snoopy was beaned and suffered head and psychiatric injuries. Snoopy was evaluated by a psyche Panel QME, but the report was not very elaborate with regards to Snoopy's WPI or apportionment. The defense made several requests for supplemental reports, but none satisfied Defendant. At trial, the WCAB judge found that the reports were inadequate, and he eventually appointed psychiatrist Dr. Lucy to conduct an evaluation. Dr. Lucy reviewed the entire record, including the PQME reports, and issued a report that displeased Charlie Brown's lawyers, as it failed to find apportionment. The WCJ issued a finding and award based upon Dr. Lucy's report. Defendant filed a petition for reconsideration. The petition will likely be: **Answer D -** Denied, because the judge has the power to develop the record, which includes taking depositions and appointing an independent medical examiner. The Judge has the power pursuant to Labor Code § 5701 to have an employee evaluated by an IME and to rely upon that report, provided that the IME incorporates the entirety of the medical record. The WCJ may utilize the IME's findings despite detriment to one party. (*Consolidated Disposal Service v. WCAB* (2014) 79 Cal. Comp. Cases 434, *writ denied*.)

## Medical Treatment, Utilization Review & IMR Issues

**Requests for Treatment Must Be Submitted on an RFA After 07/01/2013 -** Ivan Wendell is an injured worker. Dr. Donnybrook is Wendell's primary treating physician, who referred Wendell for a specialist consultation. The specialist consult, Dr. Hullabaloo, evaluated Wendell on September 9, 2013 and, that same day, requested treatment in a narrative report. On September 23, 2013, Dr. Hullabaloo's office served a DWC Form PR-2 repeating the request for authorization of treatment. Utilization Review de-certified the request, and the non-certification letter was sent on September 29, 2013. Will Wendell's challenge of the UR denial succeed? Answer: B. Wendell cannot challenge the UR denial for any alleged lack of timeliness when the secondary treating physician did not submit the request for treatment on the proper form. Under 8 Cal. Code Reg. § 9792.6(b), all requests for treatment authorization submitted after July 1, 2013 must be accompanied by DWC Form RFA. (*Torres v.* Contra Costa Schools Ins. Grp. (2014) 79 Cal. Comp. Cases 1181.)

**WCAB (not IMR) Resolves UR Dispute When UR Not Timely -** Dr. Malcontent submitted a proper request for authorization of treatment on July 8, 2013, and a utilization review (UR) non-certification letter issued on July 28, 2013. The denial was from a Board-certified doctor in the relevant specialty based upon a complete review of all of the relevant medical records. Malcontent requested an internal UR review, which issued on August 8, 2013 and confirmed the prior denial. The internal review was also from a Board-certified doctor in the relevant specialty, who considered all of the medical records. Applicant filed for an expedited hearing, asserting that the UR denial was invalid based upon a lack of timeliness. Can the WCAB render a decision as to this issue? Answer: B. Yes, when a utilization review decision is alleged to be untimely, there is no dispute regarding reasonable medical necessity for independent medical review to resolve. (Labor Code §§ 4610(g)(3)(A)-(B) & 4610.5(a)-(b), (k).) Legal issues regarding the timeliness of a utilization review decision must be resolved by the WCAB. (*Dubon v. World Restoration, Inc. (Dubon II)* (2014) 79 Cal. Comp. Cases 1298, *en banc*.)

**Nurse Case Manager Services are Medical Treatment -** Meredith is a nurse case manager in a work comp case, who interacts and coordinates with the injured employee, the employee's physician(s), the claims adjuster(s), the attorney(s), and others who are related to the employee's need for medical care. Meredith facilitates care along a continuum through effective resource

coordination. Are Meredith's services a form of medical treatment that would fall under Labor Code section 4600?
**Answer:** Yes, Labor Code section 4600 extends to any medically related services that are reasonably required to cure or relieve the effects of the industrial injury, even if those services are not specifically listed in that section. Furthermore, this Labor Code section expressly includes "nursing" services, which encompass the services of nurse case managers. (*Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910.)

**Long-Standing Narcotic Prescriptions Should Not Abruptly Be Discontinued by UR –** A singer, T-Pain, suffered an industrial injury to his neck and back in 1980. T-Pain received a stipulated award of further medical treatment in 1984. For decades, T-Pain has been taking four Norco per day to control his back pain. UR non-certification of continued pain medication was issued before 7/1/2013, so the IMR appeal does not apply. The UR physician felt that, because Applicant had experienced improvements in pain levels after receiving injections, he was essentially MMI. UR, thus, concluded that continued narcotic pain medications were not needed, especially given the high potential for abuse and addiction. Will the UR denial hold up? **Answer: C -** No, the UR denial will not hold up. The UR physician's non-certification fails to recognize that prescribed pain medication has been effectively controlling T-Pain's back pain for years. The court held that under this circumstance, Defendant cannot reasonably rely upon the UR non-certification because there is no genuine doubt from a medical or legal standpoint to cut off the longstanding prescription. (*Salem v. County of Riverside* (2014) 79 Cal. Comp. Cases 946, *writ denied*.) Note: Even though such a question of medical necessity must now go through the IMR process, it is important to understand that **defendants may not abruptly discontinue opioids (a.k.a. pain medications)**; there needs to be a weaning process put in place. (8 CCR § 9792.24.2.)

**Defendant Responsible for Home Healthcare Going Back 14 Days from Date of Oral or Written Prescription -** Andy, a landscaper, cut his left hand while trimming bushes. He was rushed to a hospital, where he stayed for 22 days. Upon release from the hospital, Andy stayed at home and required homecare during his recovery. Andy's attorney demanded that Defendant pay for the homecare, but it refused, arguing that a prescription was required. After 28 days, Andy's doctor called Defendant with the prescription for the home healthcare. Is the defendant responsible to pay for the home health care? **Answer B:** Defendant is responsible for home healthcare going back 14 days from the date of the prescribing call. Labor Code § 4600(h) provides that a prescription for home healthcare may be provided either orally by the physician directly to the defendant employer or in writing by the physician. The defendant is then liable for the home healthcare up to 14 days prior to receipt of the oral or written prescription. (*Neri-Hernandez v. Geneva Staffing* (2014) 79 Cal. Comp. Cases 682.)

**Employer Cannot Terminate Approved Nurse Case Manager Services Without Change In Circumstances or Condition -** Fats Waller sustained significant industrial injury to his head, neck, lumbar spine, and psyche when pinned under his piano following a particularly lively performance. Nurse case manager services were initially authorized and provided by the defendant, but were later terminated, even though there was no change in circumstances or Fats' condition. Fats' primary treating physician did not submit a request for authorization for nurse case manager services, either initially or following termination. Was it proper for the employer to terminate nurse case manager services? **Answer C:** An employer may not unilaterally terminate approved nurse case manager services when there is no evidence of a change in circumstances or condition showing that services are no longer reasonably required to cure or relieve from the effects of the industrial injury. *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910.

## Psychiatric Claims

**Psyche Claim Barred if IW Employed Fewer Than 6 Months and Event Not Extraordinary Even If Sudden -** In the Summer of 2003, John Carpenter was carrying his tool bag at a job site where he had started working 5 months prior. While walking past one of the many trusses at the site, his tool bag got caught on a heavy truss, causing it to fall on him, breaking his leg. John was so traumatized by the event that he filed a psyche claim in addition to his orthopedic claim. The psyche aspect was denied under the rule that psyche claims are barred if employment prior to the injury lasted fewer than 6 months. Will John's psyche claim prevail? **Answer C -** The claim will be barred. Labor Code § 3208.3(d)'s exception to the 6-month employment rule requires a "sudden and extraordinary" employment condition. To be "extraordinary" it must be the type of event such as a gas main explosion or workplace violence that would cause psychic disturbances even in a diligent and honest employee. If a "sudden" event is a typical or expected type of accident for the occupation, it generally will not be considered "extraordinary." (*Alves v. WCAB* (2014) 79 Cal. Comp. Cases 430, 432, *writ denied*.)

**Being Attached By A Lion is Not Extraordinary To Serve as an Exception to the 6 Month Employment Rule for Psyche Injuries -** Larry got his dream job a month ago as a lion trainer at the zoo. He worked with a lion named Simba on a daily basis inside of Simba's cage. One day, a loud noise startled Simba, and she lunged at Larry, taking off his arm. In addition to filing a claim for his arm injury, Larry filed a psychiatric claim. The zoo denied the psyche claim because Larry had been an employee for fewer than 6 months. Will Larry succeed on the psychiatric claim? **Answer: B** - Larry loses the psyche claim. Under Labor Code §3208.3(d), an employee without a requisite 6 months of employment can bring a psychiatric claim only if the injury was the result of a sudden and extraordinary employment condition. Larry would succeed in establishing the attack was sudden, but he would not be able to show the lion attack was an extraordinary employment condition because lion trainers interact with lions, and being attacked by a lion isn't extraordinary in that line of work. (*Oak River Ins. Co. v. WCAB* (2013) 79 Cal. Comp. Cases 85, *writ denied*.)

## DFEH, FEHA, Civil Litigation and Subrogation

**Employer Must Conduct Reasonable Accommodation before Terminating Employee who is on TTD -** Eva did not respond to an ADA packet sent by the adjuster after her knee injury. She felt that the ADA did not apply to her because she had returned to work after her first knee surgery. Two months after her second knee surgery, Eva was terminated after only having received a total of 4 months' worth of TTD. The employer cited the following: "Under the administrative termination policy, employees who are unable to perform essential functions of his or her regular positions for more than 12 months will be terminated." The termination was: **Answer C:** Discriminatory. The plaintiff must show that he/she suffered a disability, could perform the essential job duties with or without reasonable accommodation, and was subject to an adverse action because of the disability or perceived disability. The burden then shifts to the employer to prove that its actions were legitimate and nondiscriminatory. FEHA requires the employer to take all reasonable steps to prevent discrimination or harassment from occurring. (*UPS v. Department of Fair Employment and Housing* (2014) 79 Cal. Comp. Cases 526 (not certified for publication).)

**Civil Statute of Limitations Can Be Tolled While Employee Pursues Workers' Compensation Claim -** Betty was terminated by her employer and filed both a workers' compensation psyche claim and a Labor Code § 132a claim. The WCAB found for the employer and dismissed Betty's claims. Betty then filed a claim against her employer in *civil* court, alleging employment discrimination. However, the lawsuit was filed after the statute of limitations had run for filing this

type of civil claim. Betty argues that the statute of limitations would have been equitably tolled while she pursued her workers' compensation benefits. Will Betty prevail on her tolling argument?

**Answer C**: Yes, Betty can pursue the civil claim. In order for equitable tolling to apply, there must be timely notice, a lack of prejudice to the defendant, and reasonable and good-faith conduct from the plaintiff. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal. 4th 88.) Here, Betty's work comp case provided the employer with notice that she was arguing that her termination was wrongful, which placed the employer in a position to adequately defend the civil claim of employment discrimination. In other words, the defendant was not prejudiced. (*Massound Kaabinejadian v. Robobank* (2014) 79 Cal. Comp. Cases 18 (not certified for publication).)

**Employee Status is Rebuttably Presumed when Work Does Not Require a License -** Calvin occasionally pays his best friend Hobbes to do odd jobs around his house, like painting, cleaning and keeping Susie away. There is no contract, and no more than $300 per month was ever paid to Hobbes. Calvin asked Hobbes to trim a gnarly tree, which was ideal for a tree house. Hobbes said he did not have a license to trim trees, but Calvin assured him that a license was not needed because the value of this job was only $700. Hobbes agreed, started the work, and fell out of the tree, which caused injury. Is Hobbes an employee, or can he sue Calvin in Superior Court? **Answer C:** Hobbes is presumed to be Calvin's employee, but this can be rebutted if he is found to be an independent contractor. There is a conclusive presumption a worker is an employee if the work requires a license and the worker did not have one. Here, the value was too low to require a license to do the work, so the employee presumption is rebuttable. (*Yacoub v. Talia*(2014) 79 Cal. Comp. Cases 409 (not certified for publication).)

**No Employee Comparative Negligence When Employer Uninsured and Civil Suit Filed -** After a weekend of intense partying, Jim Morrison headed to a job site, and was injured on the job when his hand became mangled by a machine. Medical records showed that, at the time of the accident, Jim had an extremely low blood-alcohol level but that he had used cocaine over the weekend. Jim's employer did not carry workers' compensation insurance, so Jim filed a civil action against employer. Will the civil court have jurisdiction? **Answer A** - Jim may bring his claim in civil court because, under Labor Code § 3706, the employer's failure to be insured on the DOI means that the workers' compensation scheme not the employee's exclusive remedy. The employer is presumed to have acted negligently. (LC § 3708.) Further, failure to carry insurance means that an employee's comparative negligence (i.e., alcohol and/or drug use) will not bar the claim as it might have otherwise. (*Lopez v. Delgadillo* (2014) 79 Cal. Comp. Cases 381 (not certified for publication), citing *Logan v. Masters* (1981) 120 Cal. App. 3d 145, 147-148.)

**Power Press Exception Does Not Apply When Removal of Machine Part is not at Point of Operation -** Swaggy P. owns and operates a "swagging machine" for making wire ropes. Swaggy removed the door from the machine to allow quick access to the dies, and a week later while Swaggy was operating the modified machine, a metal object shot out from the space where the door had been removed and hit his lovely co-worker/girlfriend, Iggy, in the face. Iggy suffered only minor wounds, but knowing the "meager" recovery that is possible in the workers' compensation system, Iggy filed a civil lawsuit against Swaggy under Labor Code § 4558, the "Machine Press Exception," which is an exception to the workers' compensation "exclusive remedy" rule when an injury results from the removal of a point of operation guard on a machine press. Does Iggy get to pursue her big-bucks civil case? **Answer C** – The machine press exception of Labor Code § 4558 does not apply because the injury occurred away from where the die shapes the material, and the removed door did not guard a point-of-operation injury, even though the door would have protected the operator from a die shooting out of the machine. (*LeFiell Manufacturing Co. v. Superior Court* (2014) 79 Cal. Comp. Cases 1026.)