

# Workers' Comp. 102

## PARMA 2018

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# DISCLAIMER

**The content of this presentation is NOT intended to be used as a substitute for specific legal advice or opinions.**

**The rights and liabilities of the parties will vary depending on facts.**

**Also, new statutes, cases and regulations occur regularly so  
*check with your attorney.***

**At the 2017 conference, in Workers' Comp. 101, these panelists gave an overview of the legislative and procedural structure of WC, compared the WC system to the civil tort system, and they reviewed the benefits available through comp.**

**You can find a link to that program on the PARMA website at:**

**[https://parma.com/sites/default/files/files/images/conference/17p\\_w101\\_workcomp\\_101.pdf](https://parma.com/sites/default/files/files/images/conference/17p_w101_workcomp_101.pdf)**

# EMPLOYMENT

- **Who is an employee?**
- **Presumption of employment**
- **Independent contractor**
- **Dual employment scenarios**
- **Volunteers**
- **Prisoners**
- **Uninsured employers**

# Who Is An Employee?

- **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...**
- **Lots more!**
  - **See Labor Code section 3351**

# Presumption of Employment:

- Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is *presumed* to be an employee.
  - See Labor Code section 3357

# Independent Contractor

- **"Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.**
- **See Labor Code section 3353**

# Independent Contractor

- The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.
- Strong evidence in support of an employment relationship exists where an employer has direct control over the work performed as well as the right to discharge at will, without cause.



# Independent Contractor

- a) distinct occupation or business;
- b) work done under the direction of the principal or by a specialist without supervision;
- c) higher skill required in the particular occupation;
- d) supplies his/her own instruments, tools, and place of work
- e) length of time for which the services are to be performed;
- f) method of payment, whether by the time or by the job;
- g) whether or not the work is a part of the regular business of the principal; and
- h) whether or not the parties believe they are creating the relationship of employer-employee
- See *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989), 48 Cal. 3<sup>rd</sup> 341, 54 Cal.Comp.Cases 80 for a complete list of factors.

# Dual Employment Scenarios

- Employees may have more than one employer—think temp agencies i.e.: Kelly Services, or contemporaneous jobs.
- General / Special employment
  - Liability for WC follows paycheck = general employer
  - special employer generally has no liability for WC or civil damages unless by contract or a failure to exclude special employees.
    - See *Marsh v. Tilley Steel Co.* (1980) 26 Cal 3<sup>rd</sup> 486, 45 Cal. Comp. Cases 193

# Volunteers

- Rule for public agencies ~ Labor Code section 3365:
- A person who is designated and authorized by the governing body of the agency or its designee...
- ...who performs voluntary service without pay...
- ... and is injured while performing such service.
- ...may be deemed an employee if the governing agency passes a resolution.

# Volunteers

## “Voluntary service without pay”

- **Services performed by any person, who receives no remuneration other than payment of meals, transportation, lodging, or reimbursement for incidental expenses.**
- **Recreation and park districts - Labor Code section 3361.5**
- **Volunteer firefighters- Labor Code section 3361**
- **Lots of special rules for volunteers.**

# Prisoners

- Each inmate of a state penal or correctional institution shall be entitled to the workers' compensation benefits provided by this division for injury arising out of and in the course of assigned employment and for the death of the inmate if the injury proximately causes death, subject to several conditions.
  - Labor Code section 3351(e)
  - Where prisoners are required to work as part of their sentence they may not be covered for workers' compensation.
    - *Espinoza v. WCAB* (2013) 78 Cal. Comp. Cases 89 (unpublished Court of Appeal opinion).

# Uninsured Employers

- **If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply.**
- **Exception to WC Exclusive Remedy**
- **Huge penalties and fines against employer**
- **UEF involvement**
  - **Labor Code section 3706**

# Other Concerns

- **Presumption of negligence**
- **No comparative fault—Labor Code section 3708**
  - **Though employer's negligence may reduce its right to recover a third party credit.**

# Who is Not an Employer or Employee?

- Sponsors of bowling teams (not employer)
- Family members
- Ski patrol
- Ski lift operators skiing on their own time
- Student athletes
- Some referees at sporting events
- Household employees (with exceptions)





# **CONDITIONS OF COMPENSATION: AOE/COE**

# Conditions of Compensation: AOE/COE

- No fault system:
  - “Where the injury is proximately caused by the employment, either with or without negligence.” (emphasis added)
    - Labor Code section 3600(a)(3)

# Causation of Disability

- “Apportionment of permanent disability shall be based on causation.” (emphasis added)
  - Labor Code section 4663(a)
- Note: Must distinguish causation of the injury from causation of the ultimate disability.
  - (more on this later)

# Conditions of Compensation: AOE/COE

- Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person ... shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur... (see next slides)
  - *See* Labor Code section 3600(a)(1 – 10).
  - *See also* Labor Code sections 3602, 3706, and 4558 for exceptions to the general rule.

# Conditions of Compensation: AOE/COE

- Both the employer and the employee must be subject to the compensation provisions of this division.
  - *See Labor Code section 3600(a)(1)*

# Conditions of Compensation: AOE/COE

- **The employee must have been performing service growing out of and incidental to his or her employment *and* must have been acting within the course of his or her employment at the time of injury.**
  - **See Labor Code section 3600(a)(2)**

# OTHER AOE/COE CONCEPTS AND AFFIRMATIVE DEFENSES

- **AOE/COE Issues and Defenses**
  - **Voluntary Intoxication**
  - **Self-Inflicted Injuries**
  - **Drug overdose and Suicide**
  - **Irresistible Impulse**
  - **Initial Physical Aggressor**
  - **Felony Conviction**
  - **Off-Duty Recreational Activity**
  - **Post-Termination Cases**

# OTHER AOE/COE CONCEPTS

- **Psychiatric Cases**
- **Death Under Mysterious Circumstances**
- **Horseplay / Skylarking**
- **Personal Comfort Doctrine**
- **Normal Bodily Movement**
- **Compensable Consequences**



# Compensable Consequence Injuries

- Further injury results from the original injury
- Note: This is where a lot of cases get very expensive!
- E.g.: employee strains his left knee and while in treatment has to put more pressure on the right knee to support his body weight. If the right knee later becomes strained/injured that is a compensable consequence of the original left knee injury.
- For DOI on/after 1/1/13: no additional permanent disability for compensable consequence sleep, psyche or sexual dysfunction injuries per SB863, though treatment may still be required.
  - Labor Code section 4660.1(c)(1)

# Compensable Consequence Injuries

- **Typical cases:**
  - **Car accidents on way to and from doctor appointments, but not personal travel to WCAB hearings or appointments with applicant's lawyers;**
  - **Reactions to medications;**
  - **Falling while going to get medications;**
  - **Exercising as a form of physical therapy;**
  - **Opposite body part injured due to overuse necessitated by first injury;**
  - **Knee “gives out” resulting in further injury.**

# Compensable Consequence Injuries

- **Not-so-typical cases (but still compensable):**
  - **Getting hit by car while a pedestrian because employee misjudged time to cross street due to effects of prior industrial injury.**
  - **Cutting off finger with saw caused by vision problems from prior industrial injury.**
- ***See Hanna section 4.94***



# **GOING & COMING RULE**

# GOING & COMING RULE

- **General Rule**
- **Commuting**
- **Special Mission**
- **Commercial Travelers**
- **Bunkhouse Rule**
- **Special Risks, Left Turn Exception**
- **Extension of Employer Premises**
- **Employer-Required Vehicle**

# Going and Coming: The General Rule

- The going and coming rule “precludes compensation for injury suffered during the course of a local commute to a fixed place of business at fixed hours in the absence of exceptional circumstances.”
- In other words, while *en route* to or from work, an employee is not considered as being on the job, (i.e., is not in the course of employment.)
  - *General Ins. v WCAB (Chairez)* (1976) 16 Cal. 3d 595; 41 Cal. Comp. Cases 162.
  - *See also Herlick*, 1-8 *Herlick*, California Workers' Compensation Handbook section 8.11, and *Hanna* 4.150.

# Going and Coming Commuting

- If the employer pays the employee to drive to work it's probably compensable.
  - Injuries during participation in an alternative commute programs are not compensable.
    - Labor Code section 3600.8
- Is the trip an ordinary local commute?
  - TEST: whether or not the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.
- Compensation/salary paid during commute may render injury during commute compensable, but simple reimbursement for costs of a commute will not.
- *Hanna* 4.151.

# Going and Coming Rule: Special Mission

- **Be careful how you use your employees!**
- **An injury suffered by an employee during their regular commute is compensable if employee was also performing a special mission for the employer.**



# Going and Coming Rule: Special Mission Examples

- **Boss asks employee to come in on a Saturday to collate a key report – compensable as a special mission.**
- **Boss asks employee to go to his house and feed his dogs over her lunch hour – compensable as a special mission.**

# Going and Coming Rule: Special Mission Examples

## **CASE STUDY:**

- **Employee, a WC Defense attorney, slips and falls while putting files back into her car after returning home from a WCAB appearance.**
- **QUESTION:**
  - **Is this a compensable injury?**

# Going and Coming Rule: Special Mission Examples

## Additional facts:

- **Employer, a WC defense law firm, provided Applicant defense attorney with a car allowance and a gas card and a Blackberry to be used for office-related telephone calls, texting, and e-mails.**
- **Applicant was carrying the Blackberry when she fell.**
- **The day before the fall, Applicant made an afternoon appearance at the Marina Del Rey WCAB District Office and from there went directly home.**
- **The Marina Del Rey WCJ had ordered Applicant to file and serve the Minutes of Hearing from that day's proceedings, and those Minutes, in addition to other documents, were in the banker's box Applicant was carrying when she fell.**

# Going and Coming Rule: Special Mission Examples

- **ANSWER: Not compensable**
  - The act of bringing home the files and carrying them to/from her car was not a special mission, but instead was purely a matter of convenience for the employee.
    - See *Gellman v WCAB* (2013) 78 Cal. Comp. Cases 236 (writ denied).
    - See also *Hanna* 4.157.

# Going and Coming Rule: Commercial Travelers

- As long as the employee's trip is necessitated *in part* by the employment, the dual existence of a personal reason for engaging in the injurious activity does not take the employee out of the course of employment.
- However, if the injury occurs during a personal activity that is of no benefit to the employer it may not be compensable.
  - Employee had a heart attack while traveling for work and dies from a bacterial infection.
    - *LaTourette v WCAB* (1998) 17 Cal. 4<sup>th</sup> 644, 63 Cal. Comp. Cases 253.
- *See Hanna* 4.117

# Going and Coming Rule: Bunkhouse Rule

- “When the employer provides the employee with a place to live as part of the employment contract, the living place becomes part of the employer’s premises subject to the same rules of compensability for injuries as the portion of the premises where the employee works.”
  - Employee (Park Ranger) had compensable injury while residing on his employer's premises and *engaged in an activity that was incidental to his employment with the State.*
    - *See Vaught v State of California* (2007) 157 Cal. App. 4th 1538, 73 Cal. Comp. Cases 125.
    - *See Hanna* 4.62

# Going and Coming Rule: Special Risk Exception

- Two-pronged test for the special risk exception to apply:
  - (1) if but for the employment the employee would not have been at the location where the injury occurred
  - and
  - (2) if the risk is distinctive in nature or quantitatively greater than risks common to the public.
- See *Hanna* 4.156.

# Going and Coming Rule: Special Risk Exception

- Due to location of parking area, employees were forced to jaywalk to get from parking area to workplace entrance. employer was aware of and condoned jaywalking. Since applicant would routinely jaywalk to get to workplace entrance when she parked in employer's north lot or the adjacent road, which had limited purpose and use, the employee's risk was greater than that of general public.
- Compensable.
  - See *Elba Capitulo v Providence Holy Cross Medical Center* (2008) W.C.A.B. No. ADJ 1801681 (Noteworthy Panel decision)



# Going and Coming Rule: Special Risk Exception

- Employee was struck and killed by a passing motorist while walking from a public parking space to the employer's premises. This time it was held that the special risk exception did not apply because in this case it was a risk that the public is subject to daily and nothing indicated that the deceased was exposed to a greater risk from motorists than was anyone else on the street that morning.
- Not compensable.
  - See *Brown v Save-Mart Supermarkets* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 412 (ADJ8610560).

# Going and Coming Rule:

## Left Turn Exception

- Injury sustained while making a left turn onto the employer's premises from a public street in front of oncoming traffic is compensable.
- The public is not generally exposed to the risk of making a left turn at this location whereas the employee in this case was required to endure the particular risk of making a left turn in order to reach the employer premises.
  - See *Greydanus v IAC (Basterretche)* (1965) 63 Cal. 2d 490; 30 Cal. Comp. Cases 376
- *Hanna* 4.156[3]

# Going and Coming Rule:

## Extension of Employer Premises

- Employee parking lots, areas of reasonable access and egress, and streets and sidewalks adjacent to the premises are generally considered within an "extended zone of employment."
- *Hanna* 4.152[3]

# Going and Coming Rule: Employer Required Vehicle

- Supreme Court case held that when his employer required employee Hinojosa to use a car for work, the employer derived a benefit and thereby placed an extraordinary requirement upon the employee, re-establishing the employment relationship in the case of transit.
  - *Hinojosa v. WCAB* (1972) 8 Cal. 3d 150, 37 Cal. Comp. Cases 734.
- The employer was held liable for car accident involving social worker whose job required regular use of vehicle during work hours to visit clients in the field.
  - *Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814, 33 Cal. Comp. Cases 771.

# Going and Coming Rule: Employer Required Vehicle

- Create and adhere to company policy regarding use of company vehicle!
- Where availability of employer's car had become an expectation, the injury sustained while employee was running errands was found AOE/COE.
  - *County of Tulare v WCAB* (1985), 170 Cal App 3d 1247, 50 Cal. Comp. Cases 43.



# APPORTIONMENT

# Apportionment and Causation of Disability

- When determining the level / value of permanent disability, the employer is only responsible for the disability directly caused by an industrial event.
- Any “other” factor, prior award, or even simultaneous industrial injury is not “directly” caused by the industrial event and should be separated out of the final disability → apportioned away from the current industrial disability.
  - *See Labor Code sections 4663, 4664*

# Apportionment: Leading Cases

- *Benson v. WCAB* (2009) 170 Cal.App. 4<sup>th</sup> 1535, 72 Cal. Comp. Cases 113—apportionment between injuries.
- *E.L. Yeager Construction V. WCAB (Gatten)* (2006) 145 Cal.App. 4<sup>th</sup> 922, 71 Cal. Comp. Cases 1687 – standard of substantial evidence, five key steps (next slide).
- *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board *en banc* opinion)—apportionment factors.

(Note: we will discuss the new 2017 Apportionment cases on a later slide.)



# Apportionment: Substantial Medical Evidence

- 1. Doctor **must make a specific apportionment determination**, using percentages, based on the permanent disability that existed at “the time of his (or her) evaluation of applicant.” (It’s fine if one of the percentages is 0% and the other is 100%, but there must be a specific determination.)
- 2. Doctor must analyze permanent disability **based on causation of disability (rather than causation of injury)**;
- 3. Doctor opinion “must not be speculative, it must be based on pertinent facts and on an adequate examination and history;”
- 4. Doctor opinion must be based on “*reasonable medical probability*;”
- 5. Doctor must explain *how and why* he or she arrived at his conclusion.
  - See *E.L. Yeager Construction V. WCAB (Gatten)* (2006) 145 Cal.App. 4<sup>th</sup> 922, 71 Cal. Comp. Cases 1687

# Apportionment: Key 2017 Cases

- ***Hikida v. WCAB*, (2017) 12 Cal.App.5<sup>th</sup> 1249, 82 Cal.Comp.Cases 679 – Apportionment to specific body parts versus the date of injury. employee may be found 100% disabled even where there is apportionment to one body part.**

# Apportionment: Key 2017 Cases

- ***City of Jackson v. WCAB (Rice)* (2017) – Apportionment of permanent disability caused by genetic factors is lawful when supported by substantial medical evidence. Must show causal connection between the genetic factors and the resulting permanent disability.**
- ***Padilla v. WCAB* (2017) 82 Cal. Comp. Cases 400 (writ denied) - physician has a duty to refer the matter to another physician to make the final determination on apportionment if the physician is “unable.” (see also Labor Code section 4663)**

# Apportionment: Key 2017 Cases

- ***Padilla v. WCAB* (2017) 82 Cal. Comp. Cases 400 (writ denied) - physician has a duty to refer the matter to another physician to make the final determination on apportionment if the physician is “unable.” (see also Labor Code section 4663)**

# Benefits Not Subject to Apportionment

- Temporary Disability: *Granado v. WCAB* (1968) 69 Cal. 2d 399, 33 Cal. Comp. Cases 647
- Medical Treatment:
  - See *Granado* re: non-apportionability
  - Also, employer may have to treat non-industrial conditions in order to cure/relieve.
    - *Braewood Convalescent Hospital v. WCAB (Bolton)* (1983) 34 Cal.3d 159, 48 Cal. Comp. Cases 165. Applicant with life-long obesity should have weight loss program to relieve from effects of back injury.
- Death benefits: Any industrial causation is enough.
  - *Pacific Gas & Elec. Co. v. I.A.C. (Drew)* (1961) 56 Cal. 2d 218, 58 Cal. Comp. Cases 760. (but employer may still have defenses)

# Apportionment: “Other Factors”

- “Other factors”: Apportionment per Labor Code section 4663:
- **Broad scope: just about anything the employer can prove via substantial medical evidence.**
- **In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination.**
  - Labor Code section 4663(c).

# Apportionment: Pre- and Post-Injury Disability

- A physician shall make an apportionment determination by finding:
  - The approximate percentage of the permanent disability caused by the direct result of injury arising out of and occurring in the course of employment and,
  - The approximate percentage of the permanent disability caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries...
- Labor Code section 4663(c): it is permissible to apportion to disability factors before and after the injury (retroactive prophylactic restrictions).

# Apportionment: Prior Awards

- If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury.
  - Labor Code section 4664
- This presumption is a presumption affecting the burden of proof. (Generally, the employer must prove this).
  - Labor Code section 4664(b)



# Apportionment: Impact in Safety Cases

- Apportionment rules may not be applied to disability in safety officer presumptive injury cases.
  - “Anti-Attribution Clause”
    - Labor Code section 4663(e).
- Note: If the defendant is able to rebut the presumption, where applicable, then apportionment may be applied where the record supports apportionment by substantial evidence.



# ENHANCED BENEFITS

# Enhanced Benefits

- **Serious and Willful Misconduct of the employer (50% increase in benefits)**
  - **Note: may also apply to the employee.**
- **Labor Code section 132a / Discrimination**
- **Special Rules for Public Safety officers**
- **Life Pension, COLA's, and SAWW Impact**
- **Death Benefits for Dependents**
- **Penalties**
- **Subsequent Injuries Benefit Trust Fund**

# Thank you for attending!

## Questions?

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