Updates for April 2011

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As a participant in the California's workers' compensation system, you know that the law is a dynamic arena. Keeping up with its constant change demands vigilance. The writers of "Sullivan on Comp" strive to ensure that you have the most up-to-date treatise available. The online edition is updated regularly to incorporate new and important changes in the law.

As a subscriber, you receive emails outlining the material changes to the "Sullivan on Comp." Detailed discussions of the cases enumerated below by chapter can be found online at www.workcompcentral.com; they include an explanation of how each case fits within the workers' compensation scheme.

(Be mindful that some of the referenced citations are subject to change as the cases become published in the California Compensation Cases or other publications.)

CHAPTER 2: JURISDICTION AND SUBROGATION

Section 2.17 Statutory Exceptions to the Exclusive Remedy Rule. The discussion concerns the power press exception under LC 4558.

In *LeFiell Manufacturing Co. v. Superior Court*, 2011 Cal. App. LEXIS 374, the 2nd District Court of Appeal held that under LC 4558 the power press exception is narrow, has a heightened standard of proof and does not permit other tort causes of action requiring a lesser standard of proof. If an employee establishes a power press injury, however, and meets the heightened standard of proof, the employee's spouse may also recover for loss of consortium.

Section 2.23 Effect of a Settlement. The discussion concerns whether the parties simultaneously may settle a workers' compensation claim and a civil claim arising from the same injury.

In *Steller v. Sears, Roebuck and Co.* (2010) 75 CCC 1146, the 2nd District Court of Appeal held that if the parties seek to settle both a civil action and a related workers' compensation claim at a Superior Court settlement conference, it must be conditional on WCAB approval. LC 5001 provides in relevant part: "No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee."

CHAPTER 4: EMPLOYMENT

Section 4.59 Contractor Licensing Requirements. The discussion concerns LC 2750.5, which establishes a rebuttable presumption that a worker who performs services that require a contractor's license is an employee, not an independent contractor.

Previously, the case law had established that a homeowner was not automatically liable for violations of the safety standards imposed by Cal/OSHA because of the "household domestic service" exception in LC 6303(b). So homeowners who hired unlicensed tree trimmers were not liable to them for violations of Cal/OSHA.

In *Cortez v. Abich et al.* (2011) 76 CCC 81, the California Supreme Court held that a residential remodeling project in which significant portions of a house were demolished and rebuilt, and new rooms were added, does not fall within the relevant statutory provision. "Household domestic service," according to the court, "is commonly associated with services relating to the *maintenance* of a household or its premises and does not connote work contracted for in connection with an extensive home remodeling project for which a building permit must be issued, significant portions of the house are demolished and rebuilt, and entirely new rooms are framed and constructed."

Section 4.73 General and Special Employment. The discussion concerns the special employment relationship that may be established when an employer lends an employee to another employer and both have the right to exercise certain powers of control over the employee.

In *Angelotti v. The Walt Disney Co. et al.* (2011) 76 CCC 102, the 2nd District Court of Appeal held that when a special employment relationship exists, generally the employee is limited to workers' compensation remedies for injuries received in the course of employment with the special employer, and may not bring a separate tort action against either employer.

CHAPTER 5: INJURY

Section 5.27 Off-Duty Recreational Activities. The discussion concerns LC 3600(a)(9), under which injuries are not compensable when they result from "voluntary participation in any off-duty recreational, social, or athletic" activities that do not constitute "part of the employee's work-related duties."

In *City of Oakland v. WCAB (Kroushour)* (2010) 76 CCC 33 (writ denied), the appeals board held that a police officer who was injured while lifting weights off duty sustained a compensable injury because the department rules required officers to remain fit to perform their duties.

Section 5.31 Psychiatric Injury — Six-Month Rule. The discussion concerns how, under LC 3208.3(d), a psychiatric claim will be barred if the worker has been employed for fewer than six months unless the injury was caused by a sudden and extraordinary employment condition.

In a panel decision, *Jackson v. City of Los Angeles Department of Transportation* (2010) 38 CWCR 306, the appeals board concluded that a traffic officer who was struck by an automobile while trying to cite the driver did not suffer an injury that was sudden and extraordinary. It was deemed that dealing with irate individuals was common for traffic officers, and that they were trained for such conditions.

Section 5.33 Psychiatric Injury — Good-Faith Personnel Actions. The discussion concerns LC 3208.3(h), under which a psychiatric claim may be barred if the injury was substantially caused by a lawful, nondiscriminatory, good-faith personnel action.

In *Moreno Valley Unified School District v. WCAB (Baladaray)* (2010) 75 CCC 1444 (writ denied), the appeals board concluded that an employer did not meet its burden of proving good-faith personnel actions under LC 3208.3(h) when it determined that the employer's actions toward the applicant were "arbitrary or pretextual" and not objectively reasonable. The appeals board determined that: (1) management personnel appeared intentionally to misinterpret and distort the applicant's efforts to fulfill his job duties; (2) the AME's report of the employer's unreasonable actions was corroborated by the applicant's credible testimony and unrebutted by the defense witness; and (3) the employer's stated goal of streamlining operations to save money due to budget constraints did not constitute good-faith personnel action because of the employer's unfair and harassing personnel acts.

Section 5.46 Regular Place of Employment. The discussion concerns how the going and coming rule does not apply when the employee does not have a regular or normal place of employment.

In *Winkleblack Construction v. WCAB (Catugda)* (2010) 75 CCC 1300 (writ denied), the appeals board held that an employee sustained a compensable injury on the way to work. He did not report to and work at a specific job site, but at various job sites, not only day to day, but within the same work day. The appeals board concluded that the nature of the work made it necessary for the employee to have transportation from one location to another during the work day, and that it was to the employer's benefit that the employee provided transportation.

Section 5.65 Compensable Consequence Injuries. The discussion concerns how subsequent injuries caused by an industrial injury are compensable. In *Rodriguez v. WCAB* (1994) 59 CCC 14, the Court of Appeal held that a psychiatric injury from the litigation process is not compensable.

In *Patrick v. SCIF* (2010) 38 CWCR 153, an appeals board panel held that a cardiovascular disability that was consequent to the workers' compensation process was compensable. The panel explained that *Rodriguez* was distinguishable because it involved a psychiatric claim that required a significantly higher standard for compensability, and that employment need only be a contributory cause to a physical injury.

CHAPTER 7: MEDICAL TREATMENT

Section 7.3 Scope of Care — Applied Cases. The discussion concerns the types of medical treatment that may be allowed under LC 4600, including attendant care.

In *State Farm Ins. Co. v. WCAB (Pearson)* (2011) 76 CCC 69, the 2nd District Court of Appeal annulled an award of $1,520,640 for 24-hour attendant care services provided by an injured employee's husband because the award was not supported by substantial evidence. It noted that many of the

services provided by the husband did not constitute treatment that the employer was required to provide. The court then concluded that the compensation rate of $30 per hour was not justified because some of the services provided by the husband were not LVN services. The court remanded for the appeals board to determine which of the caregiver services the husband provided were medical treatment under LC 4600, and to determine the compensation to be awarded to the husband after appointment of a new IME.

Section 7.4 Reasonable Expenses Incidental to Treatment. The discussion concerns expenses that may be paid to an applicant incidental to medical treatment under LC 4600.

In *Guitron v. Santa Fe Extruders* (2011) ADJ163338 (LAO 0873468) (appeals board *en banc*), the appeals board decision held that: (1) pursuant to the employer's obligation under LC 4600 to provide medical treatment reasonably required to cure or relieve the injured worker from the effects of his or her injury, the employer must provide reasonably required interpreter services during medical treatment appointments for an injured worker who is unable to speak, understand or communicate in English; and (2) to recover its charges for interpreter services, the interpreter lien claimant has the burden of proving, among other things, that the services it provided were reasonably required, that the services were actually provided, that the interpreter was qualified to provide the services and that the fees charged were reasonable.

Section 7.49 Predesignation of Treating Physician. The discussion concerns the right of an employee to predesignate a physician under LC 4600(d).

In a panel decision, *Scudder v. Verizon California, Inc*. (2011) ADJ916063 (VNO 0541860), the appeals board concluded that if an applicant has predesignated a physician, but an MPN exists, the applicant must be referred to other treating physicians by the predesignated physician. The panel concluded that a referral to a physician by the applicant's attorney was invalid, and such physician's reports were inadmissible as evidence.

Section 7.56 MPN — Escaping the Network. The discussion concerns how an applicant may treat outside of an MPN. One way is if an employer does not have an MPN physician within a reasonable geographic area.

In *Menicucci v. State of California Department of Transportation* (2010) 38 CWCR 272 (panel decision), the appeals board held that an injured worker is not required to choose a physician within the minimum distances. The panel concluded that LC 4616.3(b) and CCR 9767.6(e) allow an injured employee to be treated by any MPN physician, wherever located, after a first visit with a treating physician within that MPN.

CHAPTER 10: PERMANENT DISABILITY

Section 10.37 The Wilkinson Rule and Benson. The discussion of LC 4663 concerns how the disability for separate injuries must be rated separately and may be combined only in the limited circumstance in which a physician is unable to apportion between or among successive injuries.

In one panel decision, *Cocio v. Mountain View School Dist.* (2010) 38 CWCR 150, the appeals board held that in a claim involving CIGA, if a physician is unable to parcel out the causal contribution of the two injuries, the solvent insurer would be liable for the full amount of the PD.

Section 11.4 Adjustment of Permanent Disability Payments for an Offer of Work. The discussion concerns how PD benefits may be increased or decreased by 15 percent pursuant to LC 4658(d)

depending on whether the employer offers the injured employee regular work, modified work or alternative work within 60 days of the disability becoming permanent and stationary.

In a panel decision, *Quintero v. City of Sebastopol* (2011) ADJ7219970, the appeals board concluded that an offer of work after an applicant had been returned to regular work but before he was P&S entitled the employer to the incentive offered by LC 4658(d)(3)(A).

Section 11.8 Discrimination Under LC 132a. The discussion concerns an LC 132a provision that prevents an employer from discriminating against an injured employer "in any manner."

In *Mezhiburskaya v. Sunny Medical Transportation, Inc.*, 2010 Cal. Wrk. Comp. P.D. LEXIS 369 (panel decision), the appeals board concluded that an employer violated LC 132a by filing a civil complaint against an injured worker in retaliation for filing a workers' compensation claim.

Section 11.26 Enforcement of the ADA. The discussion concerns how an employee must file a timely EEOC complaint against the employer before bringing an ADA lawsuit in federal court.

In *Stiefel v. Bechtel Corp.* (2010) 75 CCC 1271, the 9th U.S. Circuit Court of Appeal held, with respect to ADA complaints, that when an employee files a disability complaint with a state agency (in California, it's the Department of Fair Employment and Housing), that office acts as an agent of the EEOC. The employee receives a right-to-sue letter from the state agency, which entitles him or her to an EEOC right-to-sue letter, obviating the need to file a separate complaint with the EEOC and to receive an EEOC right-to-sue letter in order to file suit.

CHAPTER 14: DISCOVERY AND SETTLEMENT

Section 14.12 Depositions. The discussion concerns how LC 5710 authorizes depositions in workers' compensation proceedings.

In a panel decision, *Armando v. Endodontic Associates Corp.*, 2010 Cal. Wrk. Comp. P.D. LEXIS 216, the appeals board concluded that before being deposed, an applicant may require the employer to produce certain documents such as witness statements, recorded observations by the private investigator and the claims examiner's notes.

Section 14.33 Second Opinions on Spinal Surgery. The discussion concerns the procedure for dealing with a request for spinal surgery under LC 4610 and LC 4062(b).

In a panel decision, *Andrews v. Law Offices of Kenneth Reynolds* (2011) ADJ6575307, the appeals board concluded that the spinal surgery process under LC 4610 and LC 4062(b) was triggered by the receipt of any treating physician's request for surgery, not just the primary treating physician.

Section 14.41 Communications with AME and QME. The discussion concerns the rules that govern communications with agreed medical examiners and qualified medical examiners.

In *Ferniza v. Rent A Center, Inc.* (2010) ADJ1644999 (LAO 0880435) (panel decision), the panel majority concluded that advocacy letters to a panel QME were nonmedical records for the purposes of LC 4062.3(b) and that a party who sends one despite a timely objection is liable for attorney's fees and cost pursuant to LC 4062.3(g). The dissent would have found that advocacy letters do not violate LC 4062.3(b), and did not give rise to fees and costs under LC 4062.3(g).

Section 14.42 Timeliness Requirements. The discussion concerns the time limits for an AME or QME to complete a medical report.

In one panel decision, *Senenoi v. Nor Cal Metal Fabricators* (2010) ADJ1162016 (SAC 0343805), the appeals board refused to allow a new AME, based solely on a failure to timely issue a supplemental report. The panel concluded that the only express consequence of an AME's failure to issue a supplemental report within 60 days is that the AME might not be reappointed as a QME by the administrative director.

CHAPTER 15: LITIGATION

Section 15.61 Evidence at Trial — The Independent Medical Examiner. The discussion concerns the rules regarding the use of IMEs appointed pursuant to LC 5701.

In *State Farm Ins. Co. v. WCAB (Pearson)* (2011) 76 CCC 69, the 2nd District Court of Appeal annulled an award of $1,520,640 for 24-hour attendant care services provided by an injured employee's husband when the employee violated CCR 10718 by improperly communicating with the IME. The court agreed with the employer that the IME should be stricken and that a new medical examiner should be appointed.

Section 15.74 Legal Representation Before the Appeals Board. The discussion concerns a party's right to legal representation in workers' compensation proceedings.

In *Advantage Workers' Compensation Ins. Co. v. WCAB (Baum)* (2010) 75 CCC 1415 (writ denied), the appeals board refused to disqualify an attorney from representing his ex-wife when the employer had failed to establish that the applicant's attorney violated any ethical rules, or that he had a conflict of interest due to the divorce. The appeals board added that the employer failed to show that the representation would prevent full and impartial discovery, or that it would suffer any significant prejudice or irreparable harm.

Section 15.96 Attorney's Fees — Lien Against the Employee's Compensation. The discussion concerns how an applicant's attorney may file a lien for reasonable attorney's fees for legal services pertaining to any claim for compensation, and the criteria to be used in awarding such fees.

In a panel decision, *Hamill v. Martinez Unified School District*, 2010 Cal. Wrk. Comp. P.D. LEXIS 361, the appeals board found that in awarding fees in a 100 percent case, the WCJ still must apply the principles established by LC 4906(d) and CCR 10775. That is, the WCJ must consider the responsibility assumed by the attorney, the care exercised by the attorney, the time expended by the attorney and the results obtained by the attorney. The WCJ must consider its attorney's fee guidelines — whether the case, according to the panel, is of "average," "above-average" or "below average" complexity. The WCJ must also consider whether, in addition to obtaining a 100 percent permanent disability award for the applicant, the attorney's efforts helped the applicant obtain temporary disability and/or out-of-pocket medical costs. Finally, although the WCJ may take into consideration the actuarial present value of the employee's permanent total disability indemnity award, the appeals board should not award a fee that is grossly disproportionate to an attorney's fee in a 99.75 permanent disability case of similar complexity.