

WORKERS' COMPENSATION: CASE LAW UPDATE



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INTRODUCTION

This presentation will cover significant 2016 and 2017 workers' compensation related case law and legislation (both state and federal) impacting workplace policy and compliance on workers' compensation.

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| AGENDA




INJURY
AOE-COE



INSURANCE
COVERAGE



TD, PD -
APPORTIONMENT




MEDICAL CARE
AND MPN ISSUES

| AGENDA



PENALTIES &
EXTRAORDINARY
REMEDIES



PQME, UR, IMR
AND IBR PROCESS

INJURY AOE-COE

**JEFFREY FUJIMOTO V. CALIBER COLLISION CENTERS; HARTFORD
ACCIDENT AND INDEMNITY COMPANY**
(April 2014 panel decision)

- QME Must Rate Each Event of Stress
- WCJ Instructed QME to “to assign a percentage of causation separately to each individual work-related and/or non-industrial event(s) and/or issue(s) that, when combined, equal 100% of the causation”
- HELD: Reconsideration denied

| SOUTH COAST FRAMING V WCAB. (MAY 2015)

- WC and Tort Causation Differ.
- Injured worker on multiple drugs dies in his sleep. Autopsy says it was combined effects of four drugs, but only two were industrial. WCJ awards benefits. WCAB denies recon, but Court of Appeal reverses
- HELD Supreme Court reinstates award. Tort and WC Causation are different. Tort is “substantial factor” comp is “contributing cause”

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| RADIATOR USA V. WCAB. (FEB 2015)

- Missing History Invalidates AOE/COE Finding.
- Admitted back injury with psyche add-on. Ortho said back 50% caused by pre-existing bone disease. Psyche did not get this history, and ended up with more than 51% causation of psyche based upon back injury. WCJ finds AOE-COE & WCAB denied recon.
- HELD: Reversed. Not substantial evidence without this history.
- Note: Unpublished case

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TRUCK INSURANCE EXCHANGE V WCAB (AUG 2016)

- Failure to Provide DWC-1
- Worker falls off ladder in 2005 checking roof leak, and is quadriplegic. Restaurant manager tells owner who does not provide DWC-1. Application filed 7 years later after wife sees television add. Carrier raises laches defense.
- HELD: notice to employer is deemed notice to insurer. Laches not applicable.

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INSURANCE COVERAGE

COURT OF APPEAL UNPUBLISHED CASE OF LOPEZ V. DELGADILLO (MARCH 2014)

- Intoxication No Defense For Uninsured Employer.
- Employee files civil action against uninsured employer under Labor Code, §§ 3700, 3706. Employer was denied jury instruction pertaining to employee intoxication as a defense.
- HELD: Uninsured employer cannot benefit from intoxication defense in civil action.

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AMERICAN HOME ASSURANCE CO. V. 99 CENTS ONLY STORES (JUNE 2015)

- Carrier May Rescind Policy for Misrepresentation.
- Carriers covered Optima Staffing who represented it was not a PEO, but hired its own people. After 175 claims they discovered this was a lie. Carriers rescind policies. Court rules in favor of Optima, carriers appeal.
- HELD: reversed. Carrier may rescind policies based upon misrepresentation.
- Unpublished case of American Home Assurance Co. v. 99 Cents Only Stores (June 2015)

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TD, PD –APPORTIONMENT

| BROWER V SCIF (MAY 2014) WCAB EN BANC

- PTD Starts When TD Ends
- Claimant had TD terminated at 104 week cap. 4 years later was P&S with total disability.
- HELD: LC 4650(b)(1) requires total disability to be paid retroactively to date TTD terminates. COLA is to be calculated on January 1 of the following year.

JOHN LARKIN V WCAB AND THE CITY OF MARYSVILLE **(JAN 2014)**

- Earning Presumption Applies Only to Volunteers
- Regular police officer had less than maximum earnings. Claimed LC 4458.2 and 3362 presumption of max earnings for voluntary police applied to him.
- HELD: Earnings presumption applies to volunteer peace officers only.

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SUPREME COURT AFFIRMED **LARKIN V WCAB. (OCT 2015)**

- 4458.2 Max Rates Not Applicable to Sworn Officers
- Injured City of Marysville Officer was below TD max. LC 4458.2 provides that volunteer officers are paid at max, thus so should sworn officers. WCJ, WCAB and Court of Appeal said it applies only to volunteers.
- HELD: California Supreme Court agreed it does not apply.

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POWELL V WCAB. (NOV 2014)

- Rate at Highest Occupation Category
- Director of Fleet Management and Operations was injured. He also did clerical functions. **Was he classified as manager (group 212), or clerical (group 112) because of use of his hands?** WCAB picked 212.
- HELD: Reversed. **When two occupations apply, must be rated at category that has highest factor.**
- Unpublished

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CONTRA COSTA COUNTY V WCAB (DAHL) (SEPTEMBER 2015)

- Ogilvie DFEC Method Clarified
- VR expert's opinion that his method more accurately measured Dahl's diminished future earnings increased 59% scheduled rating to 79%. No evidence of inability to rehabilitate.
- HELD: Under Ogilvie, may not rebut rating merely by offering an alternative calculation of diminished future earning capacity.
- NOTE: 2005 DOL

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MEDICAL CARE AND MPN ISSUES

| HERNANDEZ V GENEVA STAFFING (JUNE 2014)

- Home Health Care “Prescription” Broadly Defined
- SB 863 requires a “prescription” before employer is obligated to provide home health care. Applicant had a handwritten note on St. Mary’s Medical Center letterhead.
- HELD: A prescription is either an oral referral, recommendation or order or, a signed and dated written referral, recommendation or order.
- WCAB en banc

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RODRIGUEZ V HAGEMANN MEAT COMPANY (FEBRUARY 2014)

- OMFS Now Applies in Denied Cases
- Employer denied injury. WCJ then found injury and ordered bills to be paid at “usual and customary” instead of OMFS.
- HELD: WCAB not bound by prior writ denied cases and now says OMFS applies to injury denied cases.
- Panel decision

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SHAWL V STEVE'S AUTOMOTIVE. (FEB 2015)

- Stipulation Binds Non-MPN Physician to Claim
- EE treats with non-MPN physician. At MSC carrier stipulates he is PTP. Later carrier tries to transfer EE into MPN. WCJ found employer properly transferred EE into MPN.
- HELD: WCAB reversed. Stipulations at MSC are binding. Physician-patient relationship is important and should be preserved.
- Panel decision

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MURPHY V PETSMAART. (MARCH 2015)

- Advanced Payment of Medical Care Not Required
- UR authorized surgical dental implants. Oral surgeon wanted advance payment because of cost to buy implants. Carrier refused. WCJ said this was unreasonable and ordered 5814 penalties.
- HELD: Reversed in split panel decision. No obligation to pay for applicant's dental treatment in advance. 4603.2 allows 45 days.
- Split panel decision

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BAUTISTA V ARLON GRAPHICS.(DECEMBER 2015)

- MPN 2nd/3rd Opinion Process Restricted
- Claimant treating for physical injury with PTP, seeks MPN 2nd opinion about his psyche. WCJ Ordered him to return to PTP and ask him/her about anxiety first.
- HELD: Right to 2nd/3rd opinion only if worker disputes either the diagnosis or the treatment prescribed by the treating physician.
- Split panel decision

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SOTO V SAMBRAILO PACKAGING; ZENITH INSURANCE CO. (FEB 2016)

- Routine Back Injury Does Not Require Orthopedist
- PTP referred claimant to orthopedist. Of 9 in MPN, only 1 would treat backs, and this did not meet MPN access standards of 3. WCJ ordered she could treat outside MPN.
- HELD: WCAB reversed. A specialist was not required to treat her back, and there were 79 non-specialist providers who could. This met the standard.
- Panel decision

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PENALTIES & EXTRAORDINARY REMEDIES

SALEM V COUNTY OF RIVERSIDE (MAY 2014)

- Reliance on UR no justification.
- PTP request for long standing prescription opiate pain killers (Norco) for injured sheriff was denied by UR. Carrier abruptly cut off meds. MTUS suggests gradual tapering off. UR was silent as to how to taper off.
- HELD: Abrupt termination was unreasonable. 5814 penalties, and 5814.5 attorney fees awarded.
- WCAB panel with dissenting opinion

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KING V COMPPARTNERS INC. (JAN 2016).

- Malpractice of UR Physician
- Was on Klonopin (an antianxiety medication) after having back injury. UR physician abruptly discontinued this, and he had seizures and further injury. Sued the UR doctor and CompPartners for damages.
- HELD: Claim not preempted by WC law, demurrer w/o leave overruled.
- Supreme Court will hear the case.

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PQME, UR, IMR AND IBR PROCESS

RAZO V LAS POSAS COUNTRY CLUB (MARCH 2014)

- SB 863 Allows Five Extra Days to Strike QME
- On January 15, 2013 applicant struck a QME off of a January 3 panel. Defense said that was too late.
- HELD: SB 863 amended LC 4062.2(c). Parties now have ten days, plus five days for mailing to strike a QME.
- The 2007 Alvarado v WCAB case was distinguished.
- Panel decision

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KINNEY V. UNITED PARCEL SERVICE (JULY 2014)

- Report of Suspended QME Admissible
- After PQME evaluation, QME was suspended by the DWC medical unit. His medical license was still valid. Applicant objected to use of report that found no injury.
- HELD: Report of suspended QME is admissible. Only revocation of license can preclude admission of report.
- Panel Decision

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PANEL DENIAL OF REMOVAL, FERNANDO MARTINEZ V SANTA CLARITA COMMUNITY COLLEGE DISTRICT. (FEB 2015)

- One QME at a Time!
- Applicant simultaneously filed three separate requests for QME panels in the specialties of orthopedic, psychiatric and internal medicine. WCJ limited her to one.
- HELD: The applicant must first complete an initial PQME examination prior to obtaining PQME evaluations in other specialties.

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HERNANDEZ V. FREMONT BANK (SEPTEMBER 2015)

- Claimant alleges psyche add-on to knee injury case. Parties use AME for ortho. WCJ orders psyche panel for add-ons. Defendant says not needed because of 4660.I(c)(I) limits on add-ons.
- HELD: Psyche panel ordered. Still has right to care and TTD for psyche injury.
- Panel decision

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BERTRAND V COUNTY OF ORANGE (AUGUST 2014)

- OK to Stipulate to AME Instead of UR
- 2004 stipulated award said parties would resolve treatment disputes by returning to AME. ER now wants to use UR/IMR process. WCJ ruled that UR process not applicable.
- HELD: WCAB agreed. Parties may stipulate to bypass statutory review in favor of submitting their disputes to the AME
- Panel decision

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CHANCHAVAC V LB INDUSTRIES (OCTOBER 2016)

- Each Defendant Gets PQME
- CT filed against two carriers. No election, each was active participant. Employer effectively dismissed per LC 3757. Applicant said “lead defendant” already picked PQME thus precluding the other from a panel
- HELD: Applicant could have elected against one but did not. Each carrier can defend it’s own interests.
- Panel decision

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MAXHAM V CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION SERVICE (JAN. 2017)

- Advocacy Letter to AME Okay, Over Objection
- AA sent advocacy letters to 3 AMEs over defense objection.
- HELD: consent needed to send “information” but not a “communication.” WCAB has broad discretion to see what advocacy letter accomplishes. If not “information” no consent needed.
- En Banc decision

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DUBON V. WORLD RESTORATION, INC (FEBRUARY 2014)

- WCAB Decides Medical Necessity if UR Defective
- Employer refers treatment request to UR, but WCJ said it was “invalid” because of failure to send appropriate medical file for review. WCJ however sent case to IMR to decide.
- HELD: When employer causes “material procedural defect” in UR process, WCAB (Not IMR) is to decide medical necessity.
- En banc decision

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WEILMANN V UNITED TEMPORARY SERVICES (APRIL 2014)

- Unsigned UR Report “Invalid”
- Claimant had stipulated award and future medical care. UR declined treatment authorization request. Claimant sought to invalidate UR.
- HELD: Among other reasons, failure of UR doctor to sign UR report rendered it invalid.
- Panel decision

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| DUBON II (OCTOBER 2014)

- With the exception of timeliness, "all other requirements go to the validity of the medical decision or decision-making process."
- "With the exception of timeliness, all defects in the UR process can be remedied when appealed to IMR."
- The legislature has made it abundantly clear that medical decisions are to be made by medical professionals. To allow a WCJ to invalidate a UR decision based on any factor other than timeliness and substitute his or her own decision on a treatment request violates the intent of SB 863."

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| BODAM V SAN BERNARDINO COUNTY DEPARTMENT OF SOCIAL SERVICES. (NOVEMBER, 2014)

- Failure to Communicate Invalidates UR
- UR denies treatment request, notifies applicant and his attorney, but not the PTP. WCJ held that failure to timely communicate UR result "invalidates" UR process.
- HELD: WCAB affirmed. Time limits run from time UR decision is made, even if it is done in two days.
- Removal was denied

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GREEN V ELLE PLACEMENT DBA GOLDEN GATE STAFFING (APRIL 2016)

- RFA was received after 5:30 by fax on a Friday. The WCJ counted days from Friday, and ruled that the notice to the physician was untimely, and awarded the care.
- HELD: It was timely. If received after 5:30 it is deemed to be received the “next business day” which was a Monday. Count from there plus 24 hours to serve the notice.
- WCAB split panel

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ARROYO V INLAND CONCRETE ENTERPRISES. (2016)

- Claimant’s motorized scooter wore out. PTP asks for a new one. UR said there was no “medical necessity” for the scooter in the first place. WCJ said there as no jurisdiction.
- HELD: WCJ reversed. The question was to replace the scooter or not. UR did not answer the correct UR question. Thus “invalid” UR.
- UR Must Answer the Request
- WCAB panel decision

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ELVIN SALGUERO V CHARLES GEMEINER CABINETS AND INSURANCE COMPANY OF THE WEST, JANUARY 2014.

- Home Health Care Requires Treatment Guideline Citation
- Psychiatrically injured worker claimed home care to mitigate suicide risk. Employer had not undergone UR. WCJ rejected request.
- HELD: Home health care opinion in med report must be supported to citation to treatment guideline, even if UR has not been completed.
- Panel decision

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JARED CARNES V AUTO ZONE. (MARCH 2015)

- Citation to Treatment Guideline NOT Needed
- UR was not timely. WCJ ordered a sleep number bed that cost \$5,325.86 for use after a pending surgery. PTP, nor any other doctor cited a treatment guideline supporting this.
- HELD: Reconsideration denied, with Commissioner Zelewsky dissenting. Opinion otherwise silent about problem with no guideline.
- Panel decision

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SANDOVAL V SAN DIEGO UNIFIED SCHOOL DISTRICT (2016)

- WCJ Can Apply ACOEM Guideline
- PTP requested authorization for rotator cuff repair. UR was not timely. WCJ applied the MTUS and the medical file and determined that ACOEM Chapter 9 supported the request. Defendants argued only a physician can do that.
- HELD: It was appropriate for WCJ to have made that determination.
- WCAB panel

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CHAMBERLAIN V HUMPHREY AND GIACOPUZZI, (AUGUST 2014)

- UR Not Required in Denied Injury Case
- SCIF went to UR for treatment of admitted injury only. WCJ ordered care claiming failure to have UR circumvents IMR process, and that UR was late.
- HELD: UR not required in denied injury cases. 9792.9(b)(2) starts UR time limit from date of receipt, not date of mailing.
- Panel decision

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STOCK V CAMARILLO STATE HOSPITAL. (SEPT 2014)

- UR Applies to MPN
- SCIF MPN physician request for hospital bed was denied by UR. Claimant argued that ER cannot use UR for its own MPN PTP. WCJ disagreed and upheld UR.
- HELD: WCAB agreed that the law does not preclude the UR process for an MPN PTP.

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REYES V TARGET INC. (NOV 2014)

- UR Good for 12 Months
- PTP Sobol requested same treatment multiple times. UR did not respond to latter requests. WCJ at expedited hearing denies treatment.
- HELD: WCAB affirms. In the absence of changed circumstances a UR decision remains valid for one year. No changed circumstances was shown.
- Panel decision

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TORRES V CONTRA COSTA SCHOOLS INSURANCE GROUP AND SCIF. (AUG 2014)

- AA files IMR appeal of UR decision denying Duragesic patches. Appeal was signed but not verified as required by LC 4610.6(h). WCJ dismissed appeal.
- HELD: “lack of verification does not necessitate automatic dismissal” (citations) “strong public policy favoring the disposition of cases on their merits”.
- Panel decision

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MATUTE V LAUSD (SEPT 2015)

- 30 Day IMR Appeal Extended by 5 Days
- Request for 24 hour home health rejected by UR and IMR. Attorney files appeal 34 days after IMR determination. WCJ said not timely.
- HELD: Reversed: 30-days to appeal IRM is extended by five days per L.C. 5316 and C.C.P. section 1013(a).
- Panel decision

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ARREDONDO V TRI-MODAL DISTRIBUTION SERVICES, SCIF. (MAY 2015)

- Does the WCAB have jurisdiction to determine a medical treatment dispute where the IMR/administrative director has failed to issue a determination within the statutory 30 days.
- HELD: IMR is governmental action and the timeframes set forth in section 4610.6(d) are directory and not mandatory. (Sweeny dissents)
- Split panel decision

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CALIFORNIA HIGHWAY PATROL AND SCIF V WCAB (MARGARIS) (JUNE 2016).

- Maximus failed to issue IMR decision within the 30-day time period provided by section 4610.6(d) and was 13 days late.
- WCJ held untimely IMR determination does not confer jurisdiction, but the WCAB disagreed and reversed.
- Court of Appeal reversed the WCAB. Time limits applicable to government action are deemed to be directory.

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MCATEE V BRIGGS AND PEARSON CONSTRUCTION. (SEPTEMBER 2015)

- IMR Reversed for “Clear” Error
- PTP requests continued Duragesic prescription for 100% disabled worker. UR/IMR rejects, guidelines advise discontinuing opiates without documentation of improved function. WCJ denied appeal.
- HELD reversed. Records showed improved function and reduced pain, clearly a “mistake of fact” as a matter of ordinary knowledge.
- Panel decision

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GONZALEZ-ORNELAS V COUNTY OF RIVERSIDE (2016)

- New IMR for “Plainly Erroneous Finding”
- PTP requested Synvisc injections in both knees. Denied by UR & IMR because “[t]here is no documentation that the patient failed conservative therapies.” But indeed she had.
- HELD: Good grounds under 4610.6(h)(I) “a plainly erroneous express or implied finding of fact.” Another IMR was ordered (NOTE: WCJ still had no authority to decide the issue)
- Panel decision

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MCKINNEY V ENTERPRISE RENT A CAR (NOV 2016)

- No Sanctions for UR Documentation Problem
- On four occasions carrier sent only actual RFA and the treating physician's contemporaneous progress report to UR. AA asked for sanctions saying they should have sent more documentation. WCJ agreed.
- HELD: Sanctions reversed. PTP - not claims adjuster - knows what documentation to send with RFA.
- Panel decision

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CONCLUSION

SPEAKER BIOS

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