

# Quarterly Review

Second Quarter 2002

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A Legal Update for the Claims Professional

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## WINNING BRIEFS

### Stockton

#### Psych Disorder No Worse After Work Injury

A 22-year-old fast food worker with a psychotic family background was ordered to *take nothing* on her \$33,000 claim that an admitted industrial back injury aggravated her preexisting suicidal-depressive mental disorder, when *Tuen Y. Wong* of our *Stockton/Modesto* office established that psychiatric- and drug-abuse treatment records both before and after the injury reflected identical symptoms. ■

### Orange

#### High-Voltage PD Bulldozed

An “electrocuted” bulldozer operator who contended that disability from backing it into a 40,000-watt power pole entitled him to \$150,000 left court *empty-handed*, despite a display of uncontrollable shaking while using a walker. *Robert J.*

*Chimits* of our *Orange County* office showed that following the incident the claimant had walked to the supervisor’s office and reported no injury—and that the bulldozer was unscathed. ■

### Sacramento

#### Longterm Employer Goes Free, 3-Day Job Gets CT

A hospital which had employed a drywall installer for 2 1/2 years *escaped liability* for \$151,000 in compensation benefits for alleged cumulative upper-extremity and spinal injuries, after *Ted L. Richards* of our *Sacramento* office proved that the injuries were wholly caused by three days of subsequent employment with a codefendant. The presumption of compensability resulting from the hospital’s late denial was held rebutted by the testimony of the employee himself. ■

Temp Agencies Especially...

## “General/Special Employment” Offers Pitfalls, Pratfalls

### Ruling Awaited on CIGA Dismissal Notwithstanding Underlying Coverage Contract; Despite Shared Liability, Often One Carrier Gets Stuck

**S**ilicon Valley – With more and more industries filling their need for workers through the use of temporary-employment agencies, a workers’ compensation claims administrator must be aware of the doctrine of *dual employment*—and its double-edged side effects.

A dual employment relationship arises when an employer lends a worker to another employer and relinquishes to the borrowing em-

ployer some right of control over the worker’s activities. The borrowed worker is held to have two employers: his original, or *general*, employer and a second, or *special*, employer. Factors for determining whether a dual employment relationship exists include whether the borrowing employer may do more than merely suggest details of how work is to be done; whether the worker is doing the borrowing employer’s work; and whether the borrowing employer furnishes tools and a workplace.

By *Kathleen L. Roberts*, San Jose office

#### “Joint and Several” Liability

As a practical matter, a general and special employment relationship may arise in two ways. One is *intentional*, such as when a temp service places a worker with a site employer. The other may be *unintentional*, such as when a worker is at a site and assists in a task of the

See *General/Special*—Page 2

## Quarterly Review

This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and labor law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

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### QUOTE OF THE QUARTER

**“Success doesn’t have an  
 autopilot. You need both  
 hands on the wheel  
 every day.”**

—Gordon Bethune,  
 CEO, Continental Airlines

### General/Special—Continued from Page 1

site employer. This can happen, for example, when a delivery driver helps to move items into a warehouse if they are too heavy for the warehouse's dockworker to handle alone. Any notice to both workers' employers of such a custom or practice may be sufficient to give rise to a finding of dual employment.

When a dual-employment worker is injured in the course of carrying on the special employment, there exists joint and several liability (meaning each party is both separately and co-liable for the entirety of the award). See *State Comp. Ins. Fund v. IAC (Rodgers)* (1945) 10 Cal. Comp. Cases 96. The worker may not bring a civil suit against either employer and is limited to the exclusive remedy of workers' compensation. *Brassinga v. City of Mountain View* (1998) 63 Cal. Comp. Cases 987. While the injured worker is, typically, fully compensated, there may be questions regarding the liability between the two employers.

### Liquidated Carriers

In the intentional general and special employer relationship, there is usually a *contract of indemnification*, or an agreement to provide insurance by the general employer. In this way, the special employer can feel assured of having no liability for workers' compensation claims by temporary workers. However, when the general employer's carrier is placed into liquidation—an event of recent frequency—the issue of liability between the liquidated carrier and the carrier for the site employer arises.

**“A sub can’t be an ‘independent contractor’ if he is doing work that requires a license and he doesn’t have one.”**

Insurance Code Section 1063.1 allows the California Insurance Guarantee Association (CIGA), which steps in for liquidated carriers, to avoid liability for “covered claims” for which there is another viable carrier. A decision is pending on whether CIGA, acting for the liquidated carrier of the general employer, may be dismissed where viable coverage was provided by a carrier for the special employer. This could theoretically be the result even in the face of a contract requiring indemnification by the general employer.

### Uninsured and Unlicensed

Another scenario arises when the special employer is not insured for workers' compensation. Here, courts have concluded that the special employer may be subject to a civil lawsuit by the injured worker. See, e.g., *Douglas Oil Co. v. Western Asphalt Service* (1993) 59 Cal. Comp. Cases 197. The carrier for the general employer would also have rights of contribution against the uninsured special employer.

Dual employment may also be found in the case of an *unlicensed* subcontractor working for a general contractor. In the event of a work-related injury to the sub or his employees the general contractor becomes the employer of the injured worker by operation of law, since the general contractor's defense that the sub was an “independent contractor” is lost where the sub is doing work requiring a license but doesn't have one. *Lab C Sec 2750.5*. While technically the general contractor's carrier would be jointly and severally liable with an unlicensed (and usually uninsured) sub, the burden of paying the benefits—not at all unusual in the law of general and special employment—generally falls solely on the general contractor's carrier. ■

Labor Code Section 132a

## WCAB Sets Fair “Business Necessity” Standard For Public Entities

**S**an Francisco – School districts have expressed concern about the effects of *Merced City School Dist. v. WCAB (Karr)* (2002) 67 Cal. Comp. Cases 192 (writ denied), a recent WCAB panel decision which found Labor Code Section 132a job-injury discrimination when the employer terminated an injured worker's health benefits while she was out on industrial leave and placed on the 39-month “inactive list.” Now, a precedent-setting decision of another panel involving a similar situation offers relief for public entities.

After the Court of Appeal had reversed a WCAB nondiscrimination order and remanded the case for additional evidence on the county employer's “business necessity” defense, a WCALJ awarded Section 132a benefits on retrial—finding that the employer had failed to prove its defense because health-benefit funds were available from “flexible costs,” even if services such as libraries and parks had to be cut as a result.

On reconsideration, the Board *rescinded the award*. Interpreting a governmental entity's “business necessity” as a *reasonable belief* that the allocation of demonstrably limited financial resources compelled it to take the action it did, the Board concluded: “The reality is that the County, unlike a business, does not have the ability to generate additional revenue by increasing prices to offset rising costs.” *Abratte v. County of Los Angeles* (May 28, 2002) LBO 280253 (opinion after reconsideration). ■

—Norin T. Grancell, CEO

## ADVENTURES IN FANTASYLAND

Truth or Consequences

## WCAB Holds 51%-Causation Threshold Inapplicable to Psych Injury Resulting From Physical Injury; Appeals Court Reverses, Finds Legislature Had Repealed Exception

By Aaron D. Hemmings, Greater Los Angeles office

**W**alnut Creek – Virginia filed a pulmonary and internal injury claim against GE, amending it to plead an associated psychiatric injury. She later sustained an admitted injury to her right arm and neck at Lockheed Martin and alleged a resulting psychiatric and internal injury. After trial, the WCALJ denied the entire claim against GE and the psychiatric and internal claim against Lockheed Martin, ruling that Virginia had not met the compensability requirement of Labor Code Section 3208.3(b)(1), as amended in 1993, that *actual events of the employment must be the predominant (51%) cause of a psychiatric injury*—which he ruled was applicable to *all* psychiatric injuries, even those incurred as a consequence of a physical work injury.

On reconsideration, the WCAB rescinded the judge's decision, relying on its panel decision in *Rebello v. Washington Hospital* (1999) 27 CWCRCR 159 that the "predominant cause" threshold does not apply to a psychiatric condition which is a compensable consequence of a physical injury.

Granting Lockheed Martin's petition for writ of review, the Court of Appeal *reversed* the Board's decision. Applying uniform principles of statutory interpretation, the Court rejected *Rebello* and a CAAA *amicus* brief in concluding that when the Legislature in 1993 deleted the statutory language, "Nothing in this section shall be construed to mean that there shall not be compensability for any psychiatric in-

jury which is related to any physical injury in the workplace," it intended to *repeal* a compensable-consequence exception to the psychiatric-injury threshold.

**Comment:** This decision may be of limited help. Since the Court added that a precipitating physical injury becomes an "*actual event of employment*," the burden would arguably shift to the employer to establish at least one nonindustrial element as an additional causation factor for a consequential psychiatric injury. ■

*Lockheed Martin v. WCAB (McCullough)* (2002) 67 Cal. Comp. Cases 245.



## 2-Year Kickup

### Check All Dates of Injury For Looming TD-Rate Change And: Substance Prevails Over Form on Undocumented Worker's VR; No Distinction Between Agricultural Worker's Off-Season TTD, VRMA Rates

**Q:** I know that the maximum TD rate is being raised from \$490 to \$602 effective January 1, 2003. Does that mean that I can keep paying at \$490 tops for injured workers with dates of injury before then?

—Secure in Santa Monica

**A:** No. Regardless of the date of injury, an injured worker whose earnings qualify is entitled to an automatic increase on the second anniversary of the date of injury if the rate has been raised in the interim, with the rate being determined as of the time the TD is actually paid. *Lab C* Sec 4661.5; *Hofmeister v. WCAB* (1984) 49 Cal. Comp. Cases 438. To avoid penalty claims, commencing January 1, 2003 adjust at their two-year anniversary the TD rate of workers injured prior to that date whose weekly earnings were between \$735.01 and \$903 (or more). ■

—Antony Loo,  
Greater Los Angeles office

**Q:** Loophole Lorenzo quits after working for years at modified duties following a final QIW medical report, agitating for a \$16,000 VR retraining plan while admitting he's an undocumented worker because I never provided him with an RU-94 offer of permanent modified or alternate work. Which rehab counselor should I appoint?

—Embarrassed in El Monte

**A:** Since an employer cannot be required to offer illegal employment to an undocumented worker, the formality of an RU-94 is not required. *Pinzon v. WCAB* (2002) 67 Cal. Comp. Cases 12. Instead, file an RU-105 for termination of the employer's VR liability, under its constitutional right to equal protection of the law [*see Quarterly Review*, 4<sup>th</sup> Q. 1998]. ■

—Jacqueline Clemett,  
Greater Los Angeles office

**Q:** Nomadic Norma, a job-injured agricultural worker, only worked in the pear-picking season. I know I'm allowed to pay her TTD at a zero rate during the off-season, but her lawyer is yelling that since she's now in VR I have to pay her VRMA at up to \$246 per week whether it's in-season or not—because the "success-enhancement" purpose of VRMA is different than the "wage-loss" purpose of TD. Persuasive argument?

—Dubious in Delano

**A:** Not to the WCAB. In *Jimenez v. Superior Nat'l Ins. Co.* (January 24, 2002) 30 CWCRCR 12 (decision after reconsideration, *en banc*), the

Board rejected that contention in ruling that seasonal workers get a two-tiered award of VRMA at their in-season and off-season TTD rates, subject to the \$246 per week VRMA ceiling. ■

—David J. Chun,  
Fresno/Bakersfield office

**"Since an employer cannot be required to offer illegal employment...an RU-94 is not required."**

## NEW DECISIONS

Failure of TPA to identify its true principal to WCAB as self-insurer or insurance carrier could subject it to sanctions. *Coldiron v. Compuware Corp.* (2002) 67 Cal. Comp. Cases 289.

Treating-physician presumption need not necessarily be raised as an issue for trial in order to be considered by WCALJ; QME can become PTP. *Gee v. WCAB* (2002) 67 Cal. Comp. Cases 236.

CIGA liable for payment of penalties imposed on insolvent carrier for delays prior to insolvency. *California Ins. Guar. Ass'n v. WCAB (Novak)* (2002) 67 Cal. Comp. Cases 315.

Labor Code Section 132a preempted by Federal law where employer terminates contributions to group health benefits pursuant to ERISA plan after work-injured employee is off work for 90 days. *Navarro v. A&A Farming* (2002) 67 Cal. Comp. Cases 145 [see *Quarterly Review*, 4<sup>th</sup> Q. 2001].

—Dennis M. Kemp,  
San Diego County office

### IN THE NEXT ISSUE

*When the Boss Steps Over the Line: Keeping Comp the Exclusive Remedy*

## A N N O U N C E M E N T S

*Stewart R. Reubens*, shareholder/managing attorney of our *Greater San Francisco* office in Novato, announces the association of *Paul Epstein*, *Elan Consuella Lambert*, and *Gary A. Ward*. *Mr. Epstein* is a 1999 *juris doctor* graduate of the University of San Francisco School of Law and served as an extern to a U.S. Bankruptcy Court judge. *Ms. Lambert*, who speaks fluent Spanish, is a 1998 *juris doctor* graduate of Willamette University College of Law and is an experienced worker's compensation defense attorney. *Mr. Ward* received his *juris doctor* degree from University of California, Hastings College of the Law in 1991 and has an extensive background in worker's compensation defense and subrogation.

*Teresa Schantz*, a 2001 honors graduate of Santa Clara University School of Law, has joined our *San Jose* office, announces managing attorney *Kathleen L. Roberts*. *Ms. Schantz* has practiced civil litigation and has extensive experience at financial institutions.

*Joanne M. Thomas*, shareholder/managing attorney of our *Inland Empire* office, announces the association of *Kenneth A. Martinez* and *Suzanne K. Patton*. *Mr. Martinez*, a 1997 *juris doctor* graduate of University of California, Hastings College of the Law, is a former law firm department head and is proficient in Spanish. *Ms. Patton* is a 2000 honors graduate of Southwestern University School of Law, with a background which includes service in the Major Crimes Division of the Los Angeles County District Attorney's Office.

*Joan S. Sheppard*, an honors graduate of San Fernando Valley College of Law, has become associated with our *Central Coast* office, announces *Lawrence Kirk*, shareholder/managing attorney. *Ms. Sheppard* is a former managing partner of a firm representing insurance carriers in subrogation claims.

*Angel Barnes*, shareholder/managing attorney of our *Orange County* office, announces the association of *Ray Biddle*. *Mr. Biddle*, a 1991 State Bar of California admittee, is a *juris doctor* graduate of South Texas College of Law (Texas A & M University) and a veteran worker's compensation defense attorney.

*Timothy E. Kinsey*, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of *Demetrius T. Martin*. A 2001 *summa cum laude* graduate of Whittier Law School, *Mr. Martin* was most recently associated with the Los Angeles City Attorney's Office and is fluent in French and Greek.

*M. Lucy Tan*, a 1997 State Bar of California admittee and a graduate of Loyola School of Law, has become associated with the firm, announces *Anthony J. Fink*, a shareholder/team manager in our *Greater Los Angeles* office. *Ms. Tan's* background is notable for preparation of briefs to the California Courts of Appeal.

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