

# Quarterly Review

Third Quarter 2002

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A Legal Update for the Claims Professional

## IN THIS ISSUE

Insurance Fraud

How To Get 'Em  
For Perjury

2

C&amp;R

Boilerplate Bars  
FEHA Action

3

Vocational Rehabilitation

Retro-VRMA Order:  
\$200,000

4

One Poke Over the Line...

## Not All Employer Torts Breach the Exclusive-Remedy Rule

### Keep It in Comp by Proving Lack of Intent, Risks of Employment

By *Thomas L. Hathaway, Orange County office*

**H**ollywood - Is a supervisor's requirement that an employee be photographed in a sexual harness, submit to being struck with a riding crop, and wear a leather collar sufficiently egregious behavior to breach the exclusive remedy of workers' compensation and allow the filing of a civil claim for sky's-the-limit damages? The Court of Appeal thought so in *Briseno v. Diamond Video World, Inc.* (2002) 67 Cal. Comp. Cases 738, holding that even for a sales clerk in an adult-video store it constituted sexual harassment—a court-created exception to the exclusive-remedy rule.

Generally, workers' compensation is the exclusive remedy for an industrial injury. Lab. Code, § 3602(a). This exclusivity arises out of the legal fiction of the "compensation bargain," which requires the employer to assume liability for industrial personal injury or death without regard to fault in exchange for limita-

tions on the amount of that liability. The employee receives relatively swift and certain payment of benefits without having to prove fault, while giving up the potentially wider range of damages available in tort.

#### Statutory Exceptions

Not surprisingly, there are statutory exceptions to the exclusive-remedy rule: Labor Code section 3602(b) (willful physical assault by the employer; injury aggravated by employer's fraudulent concealment of injury and its connection with employment; injury caused by defective product manufactured by the employer, sold to a third person, and provided to the employee by a third person); section 3706 (employer failing to secure payment of compensation); and section 4558 (injury proximately caused by employer's knowing removal or failure to install

See *Exclusive Remedy* – Page 2

## WINNING BRIEFS

*Santa Monica*

### Red-Handed Policeman's Lot Not a Happy One

In a case handled by *Timothy E. Kinsey* of our *Greater Los Angeles* office, a City police officer agreed to pay all liens as part of a *zero-dollar C & R* after he was discovered to be managing a pizza restaurant while receiving full-salary disability benefits on a claim of work injury. Also convicted of insurance fraud, the officer was sentenced to jail and community service—and ordered to make restitution of \$50,000. ■

*Riverside*

### Lung Injury Found Related to Smoking, Not Desert Job

A desert-hospital anesthesia technician was ordered to *take nothing* on his major claim of pulmonary fibrosis/Legionnaire's Disease allegedly caused by a

"dusty" operating room, when evidence presented by *Joanne M. Thomas* of our *Inland Empire* office persuaded a WCALJ that causation was attributable to heavy smoking instead. The employee's testimony downplaying his smoking history was dismissed as "not completely credible." ■

*Santa Rosa*

### Radical Reopening Defeated by Depos

A flight attendant's petition to reopen a knee-injury award for disability to the back and total hip replacements was *denied* after *David J. Chun*, now of our *Fresno/Bakersfield* office, established by deposition testimony of the claimant and her doctor that the \$200,000 "new and further disability" did not emerge until two years after the original injury—and one year after the employee had retired. ■

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## 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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### Exclusive Remedy – Continued from Page 1

power press guard).

Case law also supports a separate civil action where the injury is a result of conduct deemed to fall outside the compensation bargain. In these cases an employee must show either (1) injury while the employee was not performing service incidental to the employment, (2) injury resulting from events not reasonably seen as a risk of the employment, or (3) employer misconduct where the employer is acting outside his proper role.

### Egregious Conduct

Beyond-the-bounds behavior by an employer is exemplified by *McFeters v. Amplicon* (2000) 28 CWR 250, where the CEO physically assaulted the employee, ordered him not to leave a chair, and subjected him to repeated physical and verbal indignities over the next several months. The civil trial resulted in a verdict of \$730,000 in compensatory and punitive damages against the CEO and \$140,000 in damages against the company.

Intentional acts such as withholding information from an employee regarding the hazards of exposure to arsenic, even though the employee complained of symptoms of arsenic poisoning to his supervisor for years (*Foster v. Xerox Corp.* (1985) 40 Cal.3d 306), or withholding the true danger of continuous exposure to carcinogenic chemicals for more than 10 years—in spite of skin rashes and discoloration which eventually resulted in testicular

cancer and stage III metastasis to the abdominal and chest areas (*Palestini v. General Dynamics Corp.* (2002) 67 Cal. Comp. Cases 754)—are further examples of stepping over the exclusive-remedy line.

### Two Settlements in One

If these cases demonstrate anything, it is that the behavior must be sufficient to shock the conscience of the court. If lack of intent can be shown, or if the behavior can be construed as that which would normally be a risk of the employment, it is

likely that the battle can be kept within the workers' compensation arena.

However, if the civil cause of action cannot be eliminated before trial, as by demurrer or motion for summary judgment, every effort should be made to include a release of the action as part of a compromise and release agreement settling the usually-accompanying workers' compensation claim. The recent case of *Jefferson v. California Dept. of Youth Authority* (2002) 67 Cal. Comp. Cases 727 [*Adventures in Fantasyland*, page 3] provides a guide: Add an attachment which clearly manifests the intention of the parties to not exclude the civil cause of action, quotes and waives Civil Code section 1542 (which protects parties from inadvertently settling unknown claims), and presents sufficient evidence for a judge to assess the fairness of the agreement.

That adult-video store could use a lawyer who knows this. ■

**“The CEO physically assaulted the employee, ordered him not to leave a chair, and subjected him to repeated physical and verbal indignities over the next several months....”**

### QUOTE OF THE QUARTER

“A government agency does not render legal language somehow less operative by standardizing it in a preprinted form, and a party (especially one represented by counsel) can just as easily read and understand a preprinted form as one specially drafted for a particular purpose.”

—Brown, J., for the California Supreme Court in *Jefferson v. California Dept. of Youth Authority* (2002) 67 Cal. Comp. Cases 727

### Insurance Fraud

## When Transcript Unsigned, False Depo Testimony Brings Charge of “Attempted” Perjury Only

By Suzanne K. Patton, Inland Empire office

**R**iverside - A recent Court of Appeal decision has declared that a conviction of felony perjury for a workers' compensation claimant's false deposition testimony requires the actual signature and delivery of the deposition transcript by the deponent (Pen. Code, § 124). When only an unexecuted copy is placed in evidence before the jury, a conviction of perjury must be reduced to the lesser offense of attempted perjury—despite the traditional stipulation of the parties that the deposition transcript would be deemed signed and corrected if not signed within 30 days, as allowed by the Code of Civil Procedure. *People v. Post* (2001) 66 Cal. Comp. Cases 1503 (executed copy in existence but unfiled at trial; separate conviction of insurance fraud upheld based on *sub rosa* videotape).

Deploring this anomalous result itself, the Court urged the Legislature to promptly bring California into line with federal law, which provides that the crime of perjury is committed when a deponent lies as to a material issue at a deposition. Meanwhile, comp defense attorneys are scrapping the customary end-of-depo stipulation and demanding the deponent's actual signature, even if it takes a WCAB order. ■

## ADVENTURES IN FANTASYLAND

*Boilerplate Explodes*

## Fine Print in Stress-Claim C & R and Its Addendum Bars Later Related FEHA Sexual-Harassment Action, Rules Supreme Court

**Potential Claim Was Known By Injured Worker, But Was Not Carved Out of Settlement Releasing “All Claims Resulting From the Injury”; No Other Evidence Presented of Parties’ Intent to Exclude It From Release**

**S**an Bernardino – Mary, a part-time high school teacher’s assistant, filed a workers’ compensation stress claim against her employer and an FEHA sex-discrimination claim with the California Department of Fair Employment and Housing (DFEH) arising out of the same allegations: derogatory language about women used by the classroom teacher and his pupils. The DFEH issued a right-to-sue letter.

After receiving TD, PD and medical-treatment comp benefits, Mary settled the stress claim for a net \$41,639, signing a WCAB standard-form C & R containing a preprinted release of the employer from “all claims or causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of [the claimed] injury.” An attachment

used similarly broad release language and waived the quoted provisions of Civil Code section 1542, which protects parties from inadvertently settling unknown claims. The WCAB approved the settlement.

Mary then filed an FEHA civil action alleging emotional and mental anguish, emotional distress and humiliation. The employer moved for summary judgment on the ground that the C & R barred the civil action. The Superior Court granted the motion, and the Court of Appeal affirmed the judgment.

On review, the California Supreme Court *affirmed the decision*. *Held*: When an employee has knowledge of a potential claim against the employer at the time of executing a C & R and has not yet initiated litigation of that claim, but

fails to expressly except it from the release, a court will enforce general language releasing all claims including civil claims in the absence of extrinsic evidence of the parties’ intent to exclude the claim from the release.

**Comment:** Mary will likely be communicating with her comp attorney’s malpractice insurance carrier. One may expect that applicants’ attorneys in alarm will now make sure to inquire about any related potential civil claims at the time a C & R is negotiated—and, if there are any, that they will either carve those claims out of the C & R or seek more money before allowing their client to sign it.

*Jefferson v. California Dept. of Youth Authority* (2002) 67 Cal. Comp. Cases 727.

*Hold That Tiger*

## N. Cal. Website Keeps Comp Duffers Honest

**And: “Good Faith” Standard For Personnel Decisions Can Shield Employers From Psych Claims; Stress From Work Gossip About Claimant’s Affair With Co-Employee is Unrelated to Employment, Says Appeals Court**

**Q:** Joe (Tiger) Irons, an Oakland back-injury claimant, must have “burned” my *sub rosa* investigator, because he just volunteered at his deposition that he still plays a little golf—but swears that as a result of the injury his scores have soared from 82 to 125, costing him bets. I’m hearing rumors to the contrary. Isn’t there any way to check on this?

—*Wondering in Walnut Creek*

**A:** Click on [www.ncga.org](http://www.ncga.org) (Northern California only). If Tiger has signed up at a golf course for an official scoring index—which helps in betting—this website will tell you how often he plays and what scores he’s been getting. Go to the handicap index and scroll down to look up a player by name. It’s a useful club to have in your bag. ■

—*Stewart R. Reubens,*  
Greater San Francisco office

**Q:** Two of my employees, Gigolo and Gigolette, were having an extramarital affair which became the talk of the office. I quashed the gossip, but Gigolette quit and filed a stress claim arising out of a “hostile work environment.” Since all this was connected to the job, for how many visits does my claims administrator have to pay Gigolette’s psychotherapist?

—*Tense in Temecula*

**A:** None – yet. In *Atascadero Unified School Dist. v. WCAB (Geredes)*, 30 CWC 121 (June 2002) the Court of Appeal held non-compensable a psychiatric injury caused by on-the-job gossip stemming from an affair between co-employees. These events were deemed to relate only to the injured worker’s personal life, with the employment merely providing a stage for the injury. An appeal to the Supreme Court is predicted. ■

—*Kenneth A. Martinez,*  
Inland Empire office

**Q:** I assure Division-Head Dan that if he’d accept a demotion to assistant manager, he’ll be spared from the axe resulting from our dot-com’s reorganization. Dan accepts but after two months is terminated anyway, when the CEO tells me I’d lacked the authority to make the representation. Devastated, Dan files a psychiatric-injury claim—contending that the “false hopes” I’d created disproves our defense of good faith. Should we concede?

—*Quaking in Quartz Hill*

**A:** No. Labor Code Section 3208.3(h) excepts from compensability a psychiatric injury substantially caused by a lawful, nondiscriminatory, good faith personnel action. In *City of Oakland v. WCAB (Gullet)*, 2002 DJDAR 6539 (June 11, 2002), the Court of Appeal held that if a regular and routine personnel decision is made in subjective good faith and the employer’s conduct meets a standard of objective reasonableness, the statutory exception is not nullified by the employee’s expectations. ■

—*R. Jeffrey Stander,*  
Greater Los Angeles office

## CASENOTES

**Vocational Rehabilitation** - Psychiatrically-injured engineer entitled to \$200,200 in retroactive VRMA at the TD "delay" rate of \$490 per week from February 15, 1993 through December 14, 2000 (less five weeks for back surgery), notwithstanding receipt during this period of \$3,040 a month in long-term disability, social security disability, and disability retirement benefits for a nonindustrial back injury. *Boeing North American, Inc. v. WCAB (Welder)* (2002) 67 Cal. Comp. Cases 648 (writ denied).

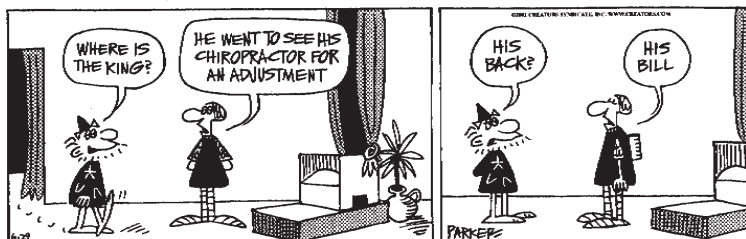
**Safety Officers' Cancer Presumption** - Employer failed to rebut presumption of compensability of police officer's lung cancer (Lab. Code, § 3212.1) by medical report stating that secondhand smoke "did not play a contributory role" in the cancer's development, as statute required doctor to state that the known carcinogen to which the officer was exposed was "not reasonably linked" to the disabling cancer. *County of Monterey v. WCAB (Robinson)* (2002) 67 Cal. Comp. Cases 463 (writ denied).

**Medical Control** - Sixteen-week extension by physician's assistant of PTP-prescribed myofascial release treatment held within the permissible scope of practice of the assistant as "providing treatment under supervision of a physician" rather than "determining eligibility for compensation"; petition to Administrative Director for removal of the PTP denied. *Villanueva v. Zenith Ins. Co.*, 4 WCAB Rptr 10,173 (June 2002).

**CIGA Liability** - Liens filed by EDD for SDI benefits paid to job-injured workers pending WCAB adjudication are not "obligations to [the] state" but obligations to the injured workers, thus not excluded from "covered claims" for which CIGA is liable under Insurance Code Section 1063.1. *Karaiskos v. Metagenics, Inc.*, AHM 70712/*Viveros v. North Ranch Country Club*, VEN 102712 (opinion and decision after reconsideration, *en banc*, July 15, 2002). ■

—*Tod M. Pritchett, Central Valley office*

**WIZARD OF ID** By Brant Parker and Johnny Hart



## ANNOUNCEMENTS

The firm's website has been changed from [www.glsbr.net](http://www.glsbr.net) to [www.glsbr.com](http://www.glsbr.com). Our individual e-mail addresses have been changed likewise, though ".net" will still get your message through.

**Kathleen L. Roberts**, managing attorney of our **San Jose** office, announces its relocation to 6840 Via del Oro, Suite 290, San Jose, California 95119-1357. The new telephone and fax numbers are (408) 224-2689 and (408) 224-2698, respectively.

**Lawrence Kirk**, shareholder/managing attorney of our **Central Coast** office in Ventura, announces its re-designation as **Central Coast - South** (serving the WCAB branch offices in Oxnard and Goleta) and the opening of our **Central Coast - North** office at PMB 120, 960-A West Grand Avenue, Grover Beach, California 93433-2261 (serving the WCAB branch office in Grover Beach for the Santa Maria-San Luis Obispo-Pismo Beach area). The telephone and fax numbers are (805) 473-1888 and (805) 473-1556, respectively.

**Dennis M. Kemp**, shareholder/managing attorney of our **San Diego County** office, announces the association of **James E. Kramer**. Mr. Kramer, who ranked first in his 1987 graduating class at Western Sierra School of Law, is a former senior partner of a prominent San Diego workers' compensation defense firm.

**Rich Ellis**, a 1993 juris doctor graduate of the University of Northern California, has joined our **Stockton/Modesto** office, announces **Tuen Y. Wong**, managing attorney. Mr. Ellis, an experienced workers' compensation defense attorney, is a former law school professor and a certified physician assistant.

## IN THE NEXT ISSUE

*Injured Workers' Attorney Fees: How to Pay Out of Their Pocket, Not Yours*

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