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Case Law Update

Disclaimer

The following presentation describes some recent cases. The purpose is to describe legal trends, but not to provide legal advice pertaining to your case. Some of the cases described are "unpublished" and cannot be relied on in legal proceedings. If you have questions related to the facts of your case be sure to consult with legal counsel.

Statute of Limitations - *Sylves*

Facts:

1998–2010 – Sylves worked for Riverside County as deputy
2010-2014 – Sylves worked for Pauma Band of Luiseno Indians

In 2013, a doctor found injury to the left shoulder, bilateral knees, GERD, and sleep.

The WCAB lacks jurisdiction over the Pauma Tribe.

In July 2014 Sylves filed application against Riverside County for hypertension, GERD, left shoulder, low back, both knees.

Statute of Limitations - *Sylves*

In June 2015 the case went to trial and in July 2015 the trial judge wrote a ruling that had a heading "Statute of Limitations" stating that "pursuant to Labor Code section 5500.5, applicant's continuous trauma is limited to the last year of industrial exposure, even if it is with the Pauma Tribal Police."

Both Sylves and the County appealed the decision – Riverside County said "not us – it's Pauma" and Sylves argued that 5500.5 had nothing to do with the statute of limitations, and since the WCAB does not have jurisdiction it has to go back to Riverside County.

Statute of Limitations - *Sylves*

District Court found:

1. County did not give the DCA any reason to find that the application was untimely. He filed within a year of when the doctor told him about it.
2. Even if his work for the Pauma Police Department was as strenuous as his work for Riverside County, it was the same kind of work that would expose him over time, in the words of 5500.5(a) to "the hazards of the occupational disease or cumulative trauma."
3. Using a CIGA type approach, the court applied language from the code that states, "In the event that none of the employers during [last year] of occupational disease or cumulative injury are insured for workers' compensation coverage, or an approved alternative thereof, liability shall be imposed …" on the last viable carrier.

Statute of Limitations - *Sylves*

District Court found:

4. In other words, since the WCAB didn't have coverage of Pauma, it was "uninsured" for purposes of the statute, and liability therefore passes back to Riverside County which was insured.

CONCLUSION: The one-year statute of limitations begins to run when a doctor tells an applicant that he sustained an industrial injury (with some exceptions) and if the applicant has the same kind of job over time, even if the subsequent employer is "uninsured," it goes back to the previous employer.

Statute of Limitations - *Sylves*

District Court found:

4. In other words, since the WCAB didn't have coverage of Pauma, it was "uninsured" for purposes of the statute, and liability therefore passes back to Riverside County which was insured.

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Body parts not listed in AOE/COE decision

Iniguez (Enrique) v. WCAB (Blue Rose Concrete Contractors) – unpublished 2nd DCA

Body parts not listed in AOE/COE decision

Facts:

In April 2010 applicant claimed head, neck, back, shoulders and legs.

At AOE/COE trial, he claimed foot, shoulder, and right arm, but didn't mention the neck or back.

In February 2012, the WCJ found compensable injury to the right shoulder and left knee. Didn't mention other claimed body parts.

Neither party appealed.

Body parts not listed in AOE/COE decision

Facts:

Later on, applicant sought AOE/COE findings on the other body parts, but the judge said that since the 2012 decision didn't mention other body parts, there was an implicit finding that they were not compensable.

However, the original ruling did not say that the right shoulder and the left knee were the *only* compensable body parts.

Body parts not listed in AOE/COE decision

Facts:

On appeal, the WCAB panel agreed with the judge that the other body parts were implicitly non-compensable because they hadn't been mentioned. But one commissioner dissented saying that the unmentioned body parts had not actually been "dismissed."

Body parts not listed in AOE/COE decision

RULING

The 2nd DCA found that the claimed body parts had not been the issue in 2012 at that the unmentioned parts were left for future hearings. "It is one thing to conclude that there were industrial injuries to the right shoulder and left knee. It is quite another decision that these were the only injuries."

Body parts not listed in AOE/COE decision

TAKEAWAY

Just because the parties and the judge are silent on certain claimed body parts during an AOE/COE hearing and in the ruling doesn't mean that they are off the table.

UR/IMR Process is still valid

Ramirez (Daniel) v. WCAB

Ramirez sustained a leg and ankle injury. State Fund authorized more than 24 acupuncture sessions and a doctor requested more. State Fund submitted the request to UR and UR recommended non-certification.

Ramirez appealed to IMR and IMR agreed with UR.

UR/IMR Process is still valid

Ramirez complained that rules that keep the name of the IMR reviewer confidential prevented him from completing necessary discovery and violated his due process rights. He also argued that the UR decision wasn't based on the medical treatment utilization schedule (MTUS).

3rd DCA concluded the process was constitutional and that Ramirez should address any complaints through the IMR process. He filed for reconsideration with the 3rd DCA on April 11, 2017 and the Court denied the request so the decision stands.

Injury due to after-hours drinking at restaurant site non-compensable.

Carrillo (Aaron) v. WCAB (writ denied)

On April 18, 2011 business was slow at the restaurant where Carrillo worked as a busperson, and his boss sent him home early. Carrillo decided to wait for his girlfriend's shift to end and changed into his street clothes and began drinking at the restaurant.

Injury due to after-hours drinking at restaurant site non-compensable.

He was so noisy and obnoxious that his boss asked him to leave. He got in a car and got into an accident after he drove away.

Of course he filed a claim. And of course he lost. And he lost on appeal. And the DCA denied his writ. And the California Supreme Court denied certiorari. It's not compensable.

Post-Stipulation Subrosa and reduction in PD

City of Santa Maria v. WCAB (Gowing, Sean) (writ denied)

The parties stipulated that a police officer sustained permanent disability for the back and knee.

Afterwards, defendant obtained surveillance showing the applicant engaged in activities not consistent with the PD stipulation.

Post-Stipulation Subrosa and reduction in PD

The AME looked at the surveillance and agreed that the applicant did not appear to have any back disability.

However…

Post-Stipulation Subrosa and reduction in PD

The WCJ found that there was no reason for reduction in PD unless there was (1) some reason to show that the applicant's condition had changed from the time the disability awards were issued; or that (2) there was a reason sub-rosa videos could not have been obtained and reviewed before awards were issued.

The WCAB agreed. There was no demonstrated "change" in the applicant's condition and the DCA denied the writ.

Post-Stipulation Subrosa and reduction in PD

Takeaway – a reduction in PD means that it is reduced after the case is settled (not easy). Do discovery before stipulating to PD.

A 100% Voc Expert opinion doesn't override everything else

Padilla (Maria) v. WCAB (writ denied)

Applicant filed a claim for the back, left shoulder, urinary system, gastrointestinal system, and psyche for specific 2000 and CT 2000-2003.

AMEs in ortho, internal, and urology, and an IME in psychiatry all found industrial injury but that there was some apportionment to non-industrial factors.

A 100% Voc Expert opinion doesn't override everything else

AA also got a Vocational Expert who found the applicant was 100% disabled since she couldn't compete in the open labor market.

But the Expert didn't even bother to address the apportionment factors in the AMEs and IME.

The WCJ found that even though there was *Benson*-style apportionment between the injuries and to non-industrial factors, the voc expert's 100% finding was enough for Permanent Total Disability.

A 100% Voc Expert opinion doesn't override everything else

The WCAB rescinded the WCJ's findings at to PD and apportionment and said the record needed further development. The WCAB found the WCJ had not properly considered *Benson* and *Escobedo* and that since the voc expert had not considered apportionment at all, it was not substantial evidence.

A 100% Voc Expert opinion doesn't override everything else

Takeaway – A 100% voc expert report can be rebutted at the trial level and isn't the easy path to permanent total disability that applicant attorneys like to think it is. A voc expert still needs to address medical evidence and apportionment.

Can an AME override UR/IMR?

Payne v. Federal Express
("not a significant panel decision")

Applicant was a handler/sorter who sustained low back, bilateral knee, bilateral feet, bilateral carpal tunnel injury in 1997.

In 2003 the case resolved via C&R with future medical left open. The parties stipulated "that AME Mandel will be the ultimate medical arbiter regarding the medical necessity for claimed industrial treatment."

Can an AME override UR/IMR?

Fast forward from 2003 to 2016 when the applicant's PTP says the applicant needs total left knee replacement and a weight loss program so she can have the surgery.

UR approves 6 months of a weight loss program, but denies a 6 month extension of the program. AA appeals to IMR which upholds UR.

Can an AME override UR/IMR?

The AA also asks AME Dr. Mandel what he thinks, and Dr. Mandel says that the applicant needs to lose weight to the point where she can have the surgery, and enough of a weight loss program to get her to that point.

AA filed a DOR for an expedited hearing on the issue and the WCJ says that the WCAB lacks jurisdiction because of UR/IMR.

Can an AME override UR/IMR?

Case went up to the WCAB and the defendant argued that the UR/IMR statutes overrode the 2003 stipulation to use the AME. The WCAB disagreed stating that the WCJ needed consider the contractual agreement and weigh the opinion of the AME so long as the AME's opinion constituted "substantial evidence."

Can an AME override UR/IMR?

TAKEAWAY – A contract in a settlement to use an AME to decide medical treatment issues can supersede UR/IMR even if the contract was written years before the UR/IMR process was in place.

Secondly, the WCAB did not completely take away WCAB jurisdiction and say that the AME automatically will prevail. It left room for the WCJ to decide whether the AME's determination presents "substantial evidence."

This could be a logistical mess as AMEs cost more and don't respond as quickly as UR/IMR so carriers in this situation would need to figure out how to address PTP treatment requests.

$155,823.70 lien knocked out

Frontline Medical Associates, Inc., Petitioner v. WCAB (Curt Wheeler) (writ denied)

Frontline Medical Associates filed a lien for the above amount. But the WCAB found that treatment was unauthorized, not reasonable and necessary, and improperly provided outside the defendant's valid medical provider network. Frontline's writ was denied.

$155,823.70 lien knocked out

Takeaway – If you're a medical provider – get authorization, provide reasonable and necessary treatment, and don't improperly provide treatment outside the MPN.

This may be the easiest case we're discussing today.

Applicant's Refusal to Answer Relevant Questions at Deposition

Intercare Holding Insurance Company, Petitioner v. WCAB (Matthew Smith)

Applicant was a roofer who sustained an admitted right shoulder injury in 2011 and to his back and right hip in a CT ending in 2013.

Defendant learned that while applicant was on TTD, he was also playing softball.

Applicant's Refusal to Answer Relevant Questions at Deposition

At deposition, applicant refused to answer any questions about playing softball and asserted a Fifth Amendment right against self-incrimination and that the questions about playing softball violated his right to privacy.

Defendant sought an order compelling testimony or, in the alternative, that the right to collect further benefits be suspended and that applicant pay restitution and that credit be taken for benefits paid.

Applicant's Refusal to Answer Relevant Questions at Deposition

The issue went to trial, and applicant again refused to answer questions about whether he played softball.

The WCJ found that the applicant could not be compelled to testify as it could affect his Fifth Amendment right to self-incrimination and that aside from potential testimony there was otherwise insufficient evidence to terminate his benefits.

Applicant's Refusal to Answer Relevant Questions at Deposition

The case went to the WCAB which found that the WCJ did not have authority to compel an Applicant to self-incriminate.

One commissioner dissented in party finding that he would order the Applicant to submit to another deposition and if Applicant asserted his privilege against self-incrimination, he would stay the claim until further order.

Applicant's Refusal to Answer Relevant Questions at Deposition

Defendant filed a Petition for a Writ of Mandate asserting that the applicant should not be entitled to maintain a workers' compensation case while refusing to respond to reasonable questions, and that the WCAB indeed has discretion to compel responses to questions or suspend benefits based on Applicant's actions.

Applicant's Refusal to Answer Relevant Questions at Deposition

Applicant's counsel raised a technical response that the Defendant had sought review of a non-final order over which the DCA would not have jurisdiction.

The DCA used its broad discretion to deny the writ on May 18, 2017.

Applicant's Refusal to Answer Relevant Questions at Deposition

TAKEAWAY – This issue remains unsettled at the present time, an applicant could theoretically use this reasoning to refuse to answer any questions related to activities of daily living on grounds that the applicant may incriminate himself or herself without putting his or her benefits in jeopardy.

Coming and Going Rule

Yu Qin Zhu v. Department of Social Services (6/20/2017) 2nd DCA

Home care provider who rode her bicycle from one home (morning) to another (afternoon) and got hit by a vehicle at noon. The DSS would give her referrals and she worked for her clients (patients).

Her practice was to eat her lunch at the afternoon patient's house before she started working.

Defendant denied the claim stating that she was not injured while performing services due to the employment.

Coming and Going Rule

Yu Qin Zhu v. Department of Social Services (6/20/2017)

Trial judge found that her bike riding as transportation between homes was a mandatory part of her employment and that the injury was AOE/COE.

The WCAB addressed this in light of the "coming and going rule."

Coming and Going Rule

Yu Qin Zhu v. Department of Social Services (6/20/2017)

Coming and Going Rule per the WCAB (found in *Hinojosa* case) – "The rule provides that an injury suffered during a local commute en route to a fixed place of business at fixed hours, in the absence of special or extraordinary circumstances, is not within the course of employment."

Here the applicant was paid by the jobs and not for her transportation between the clients' houses. The WCJ had relied on the *Smith* case to argue that the bicycle was a "required vehicle" that qualified for an exception to the rule.

Coming and Going Rule

Yu Qin Zhu v. Department of Social Services (6/20/2017)

WCAB disagreed and distinguished from *Hinojosa* and *Smith*. In this case, applicant used the defendant to get client referrals. Travel between the houses was for her own convenience and benefits – she had two jobs and two commutes. Coming and going rule applied. (Commissioner Razo dissented.)

Coming and Going Rule

Yu Qin Zhu v. Department of Social Services (6/20/2017)

However! In June 2017, the 2nd DCA disagreed and said that the travel between the sites was a benefit to the Department of Social Services and was at the "implied request" of the department. The 2nd DCA ruled that the commute was "part and parcel of Zhu's job."

Applicant as Trial Witness

Dole Bakersfield, Inc., v. WCAB (Isaias Arguelles) -
(Decided June 2017)

Applicant claimed a back injury. At MSC, in the pre-trial conference statement, the applicant's attorney listed the applicant as a witness, but the defense attorney listed three witnesses but did not name the applicant.

At trial, applicant's counsel submitted on the record rather than put his client on the stand, but defendant called applicant to the stand and applicant's attorney objected. The judge sustained the objection.

After the F&A, the defendant filed for reconsideration and the WCAB denied the Petition.

Applicant as Trial Witness

Dole Bakersfield, Inc., v. WCAB (Isaias Arguelles) -
(Decided June 2017)

Defendant appealed the decision to the DCA which annulled the WCJ's award and remanded the case to the WCJ and asked the WCJ to reconsider the award after requiring the applicant to testify on cross-examination.

The DCA ruled that the judge erred in refusing to allow the defendant to cross-examine the worker even though the defendant had not listed him as a witness since the applicant's attorney had listed him as a witness.

Applicant as Trial Witness

Dole Bakersfield, Inc., v. WCAB (Isaias Arguelles) –
(Decided June 2017)

The DCA noted that a party can call any witness disclosed at the MSC and that parties to civil proceedings have a due process right to cross-examine and confront witnesses.

(Practice note: List the applicant as a witness.)

Applicant as Trial Witness

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(Practice note: List the applicant as a witness.)

Laches and Liens

Manuel Callegas, Applicant v. Candice, Inc. (CIGA)

Dr. Elena Konstat provided psychiatric treatment from November 1998 to March 2000. The case resolved via C&R in 2001.

Dr. Konstat's representative appeared at least at one of two lien conferences in 2001 and a lien trial was set for December 2001.

More than 10 years later, Dr. Konstat filed a DOR and the matter was set for a lien conference in November 2012 and continued to May 2013. At a lien conference in December 2013 the matter was set for lien trial in April 2014 and trial continued to August 2014.

Laches and Liens

Manuel Callegas, Applicant v. Candice, Inc. (CIGA)

Finally!!! At the August 7, 2014 trial, the lien claimant submitted 9 exhibits and defendant submitted 1 exhibit. The WCJ issued an F&I dismissing the lien with prejudice and imposed sanctions of $2,000 on Dr. Konstat.

The WCJ found that the lien was "patently unmeritorious" and that the defense of laches applied.

Dr. Konstat appealed and applied the *Torres* decision to discuss the burdens of proof of lien claimants.

Laches and Liens

Manuel Callegas, Applicant v. Candice, Inc. (CIGA)

The WCAB noted:

Lien claimants have the burden of establishing, by the preponderance of the evidence:

1) injury arising out of and in the course of employment when not previously established or admitted;
2) medical necessity of the treatment at issue;
3) reasonableness of fees;
4) that the treatment was by the primary treating physician or a treater authorized by the PTP; and
5) that the lien claimant's billings were properly documented and served on defendant.

Laches and Liens

Manuel Callegas, Applicant v. Candice, Inc. (CIGA)

The appellate court noted:

In this case, the lien claimant did not meet its burden of establishing these points. All the lien claimant had presented were a number of Dr. Konstat reports, an itemized bill, a request for authorization, an appointment letter, and proofs of service of reports and invoices.

This evidence was, per the appellate court, "indisputably incapable of establishing its claim thus wasting the resources of the WCAB and squandering valuable calendar time."

Laches and Liens

Manuel Callegas, Applicant v. Candice, Inc. (CIGA) (WCAB decision) 2014 Cal. Wrk. Comp. P.D. LEXIS 671 *

THEN… The appellate court got around to the defense of laches. It applies to lien claims that are "excessively delayed." In this case Dr. Konstat had not pursued her lien claim for over 10 years, and had done nothing since the December 2001 trial. "There has been no explanation as to why the lien was not timely pursued after the matter was taken off calendar in 2001…"

Dr. Konstat had argued that there was no evidence of prejudice to defendant, but the court noted that the defendant had destroyed its file given the passage of time and inactivity and *that this alone* can constitute prejudice to defendant. The dismissal and sanctions remain!

Administration of MSA

Muniz Villalpando v. Doherty Brothers, 2017 Cal. Wrk. Comp. P.D. LEXIS --, (WCAB)

A pro per applicant (who had been represented when the case settled) wanted to transfer the Medicare Set-Aside trust administration from a vendor to himself.

Applicant had 3 cases resolved via C&R in 2011, and future medical was provided for in an MSA through which the defendant would fund future medical treatment. It was a large amount – over $500,000 funded through an annuity-type system.

Administration of MSA

Muniz Villalpando v. Doherty Brothers, 2017 Cal. Wrk. Comp. P.D. LEXIS --, (WCAB)

In the settlement, the applicant agreed that a vendor would administer the MSA and released defendant carrier (State Fund) from further liability for administering the MSA properly.

Applicant wasn't happy with the third-party administrator of the fund and filed for hearing. The issues were 1) whether the vendor appropriately administered the MSA; and 2) if so, whether the WCAB had jurisdiction to set aside the MSA and self-administer the account.

Administration of MSA

Muniz Villalpando v. Doherty Brothers, 2017 Cal. Wrk. Comp. P.D. LEXIS --, (WCAB)

The trial judge found that the applicant had not established that the vendor had administered the MSA inappropriately, and applicant argued that two of his expensive medications were not paid out of the MSA and that he had not been fully aware of the terms of the MSA when it was initially prepared. He wanted to produce evidence including cell phone conversations to establish that he should be able to administer his own MSA.

Administration of MSA

Muniz Villalpando v. Doherty Brothers, 2017 Cal. Wrk. Comp. P.D. LEXIS --, (WCAB)

The WCAB found that the WCJ should consider the nature of the agreement between SCIF and the vendor, and evaluate the applicant's contractual rights under the C&R. The applicant should also establish his competency to manage his affairs and comply with the CMS requirements for self-administration.

Administration of MSA

Muniz Villalpando v. Doherty Brothers, 2017 Cal. Wrk. Comp. P.D. LEXIS --, (WCAB)

This case isn't yet concluded but it is important because it enters unchartered territory – now with MSA issues lasting the rest of an applicant's lifetime, the role of the WCAB (or even its jurisdiction) over the lifetime of the applicant remains in question, particularly if a third-party vendor is contracted to provide services that are paid for out of an ongoing annuity program. What if the vendor of the carrier goes out of business? If the applicant self-administers, what happens if they lose their mental capacity to do so? These are questions that we will likely face in the future as these settlements mature.

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