

"Wild & Crazy Guys" PSYCHIATRIC INJURIES

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INTRODUCTION

Wide variety of claims!

Serious & Legit: homicide

Fraudulent: you've seen 'em

Downright silly:
"Recent death of syblinig contribute to stress?"

"[Applicant] has many siblings so the impact of the death of just one wouldn't be terribly significant"



Approaches:

1. Legits

- Friendly
- Supportive
- as little discovery as is needed



Approaches:

2. Fraud/Silly

- take off the gloves
- depose re "relevant" factors

What are they?
EVERYTHING
(empty that closet)

Toughest question ever...?



Defending against psych w/out organic brain injury

(no worries...unless you're in CA—surprise!)

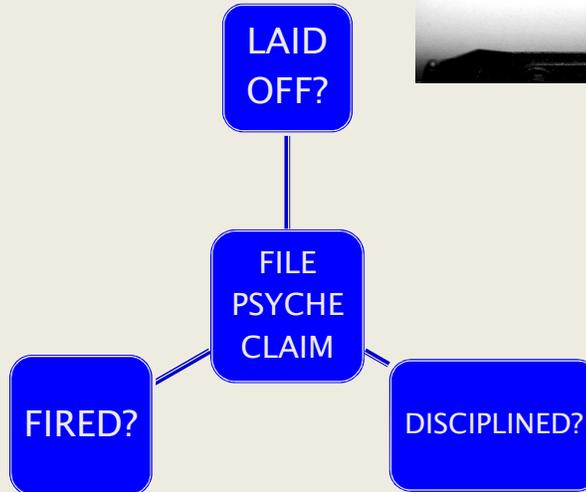
lots of fraud opportunities (can't "see" broken
psyche)

Result: much abuse

Result: lots of legislative changes



Bad old days...



1989 answer:



LC 3208.3 to...

"establish a new and higher threshold of compensability for psychiatric injury"

1993 answer:

LC 3208.3 amend to cover:

1. post term claims
2. good-faith personnel action claims



Want to file a psych claim?

1. prove injury AOE/COE
2. finagle your way around LC 3208.3, esp proving:
 - a. actual disorder diagnosed (in accord w/accepted med standards)
 - b. injury caused by "actual events of employment."
 - c. "actual events" = "predominant cause" of psychiatric injury (more of a cause than any nonindustrial factors)



LC 3208.3 – Affirmative defenses only applying to psych



Someone Hurt Your Feelings?

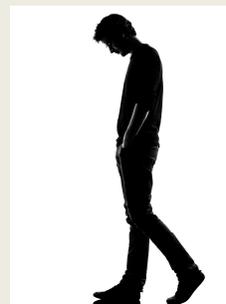
Sad?



Angry?



TOUGH
LUCK!!



Needed: Actual diagnosable disorder per...

American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)

or

“other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.”

Keep psychiatrist on his/her toes:
Google!



Actually says...

LC 3208.3 "a mental disorder which causes disability or need for medical treatment" that is diagnosed in accordance with criteria prescribed in LC 139.2(j)(4).

LC 139.2(j)(4), "diagnosis...[must] be expressed using the terminology and criteria of the [APA's] Diagnostic and Statistical Manual of Mental Disorders, ... or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine."

Does this make establishing AOE/COE tougher for psych?

YOU BET!
(exactly what SAC wanted)



3 kinds of psych injuries

1. "**Physical-mental**" physical result in psychic symptoms (aka "compensable consequence") (don't forget 4660.1!!!)
2. "**Mental-mental**" psychic trauma gives rise to psych injury
3. "**Mental-physical**" psychic trauma produces physical injury



Most psych problems result in
physical symptoms
(head or stomach aches, crying, heart attack)

Does LC 3208.3 apply to these physical
problems?

Case law is confusing!



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Some cases say LC 3208.3 rules don't apply
to physical problems that are mental-
physical (only applies to psyche issue)

LC 3208.3 applies only to psychiatric
illnesses/injuries

See *Freeman Decorating/Sullivan Transfer v. WCAB (Chavez)* (2000) 66 CCC 178 (writ denied); *National Union Fire Insurance Co. v. WCAB (Clinton)* (2001) 66 CCC 415 (writ denied); *Acorn Engineering Co. v. WCAB (Banuelos)* (2015) 80 CCC 736 (writ denied)

ALL WRIT DENIED



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BUT

County of San Bernardino v. WCAB (McCoy)
(2012) 77 CCC 219

McCoy facts:

- ▶ disgruntled EE
- ▶ subject to good-faith personnel
- ▶ action claims upset stomach, headaches, sleeplessness
- ▶ not an injury to the psyche (physical conditions not expressly covered by LC 3208.3(h))

By enacting LC 3208.3, the "Legislature made quite clear that it intended to *limit* claims for psychiatric benefits due to their proliferation and their potential for fraud and abuse. Therefore, any interpretation of the section that would lead to more or broader claims should be examined closely to avoid violating express legislative intent."

LC 3208.3(h) ("good faith personnel action" defense) precludes recovery for physical manifestations solely resulting from good-faith personnel actions.

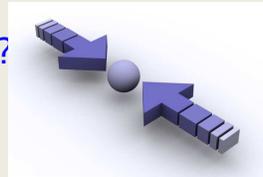


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A few more *McCoy* insights...

The point, please?



McCoy is limited holding

physical portions aren't subject to LC 3208.3, except to the extent that they were directly and solely caused by good-faith personnel actions (*more about this later!*)



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ADDITIONAL AFFIRMATIVE DEFENSES

If a psych injury is dx'd via DSM IV
&
is predominantly caused by actual events of
employment

Def can argue:

1. not employed at least six months
2. not the result of "*sudden or extraordinary*" event
3. post-termination
4. lawful, nondiscriminatory, good-faith personnel action.



HIGHER THRESHOLD OF PROOF

LC 3208.3 established a new and higher psych
threshold

Req'd= "actual events of employment" are the
"predominant" cause as to all causes combined.

(as opposed to EE's imagination!)

County of Sacramento v. WCAB (Brooks) (2013)
215 Cal. App. 4th 785, 790, 78 CCC 379



stress from dealing w/angry customers

=

"actual event of employment"



anxiety over ER's business future, corporate downsizing and voluntary investment and retirements funds where ER stock lost value

NOT =

"actual events of employment"

PG&E v. WCAB (Bryan) (2004) 69 CCC 21



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Actual Events of Employment:



Causation or Correlation?

"work circumstances did not create or aggravate her psychiatric problems but rather [she] brought her problems to the workplace and unconsciously projected them to the conditions and circumstances of her work."

Hanna v. WCAB (Pac. Tel. & Tel. Co.), 45 CCC 1174 (WCAB Panel 1980, writ denied)



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Actual Events of Employment:



Causation or Correlation?

“nature of the employee’s duties ‘merely provided a stage’ for the injury,” employment “a mere passive element that a nonindustrial condition happened to have focused on”

Atascadero Unified School Dist. v. WCAB
(Geredes), 67 CCC 519 (Ct. App. 2002)



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What Are Not Actual Events of Employment?

- ▶ “Generalized anxiety over one’s future in a company struggling to survive during difficult economic times...is not a discrete ‘event’ that takes place in the employment relationship.”
- ▶ “fear of job loss due to management strategies to achieve increased profitability... cannot support a compensable claim...”

Pacific Gas and Electric Co. v. WCAB (Bryan), 69
CCC 21, 25 (Ct. App. 2003)



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Litigation is Not an Actual Event of Employment!

“...an employee’s emotional reaction to an agreed medical examiner’s opinion...is not a compensable consequence of the original industrial injury”



Rodriguez v. WCAB (Jersey-maid Milk Products), 59 CCC 14, 24 (Ct. App. 1994)



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Substantial Cause

- ▶ Exception to predominant cause requirement
- ▶ If “injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act,” actual events of employment must be a “substantial cause of the injury.”
 - Labor Code §3208.3(b)(2)



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Substantial Cause

- ▶ “[S]ubstantial cause’ means at least 35 to 40 percent of the causation from all sources combined.”
 - Labor Code §3208.3(b)(3)
- ▶ Example: 35% of psychiatric injury caused by robbery at work. Claim is compensable under ‘substantial cause’ standard.



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Predominant Cause & "Actual Events of Employment"

History of LC 3208.3

- ▶ 1/1/90–7/15/93 burden = 10% work related
- ▶ (3 inch putt)
- ▶ post 7/15/93 > 50%

"order to establish that a psychiatric injury is compensable...shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined," unless the injury resulted from a "violent act"



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Predominate Cause

Not defined by LC 32083
HOLDING

- ▶ "predominant as to all causes" requires that the work-related factors constitute more than 50 percent of the causal factors
- ▶ *Department of Corrections/State of California v. WCAB (Garcia)* (1999) 64 CCC 1356



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only 50% won't do it!



Oliver v. Astrazeneca PLC, 2012 Cal. Wrk.
Comp. P.D. LEXIS 529



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Got two or more separately diagnosable psychiatric components?

Math problem!

- ▶ NOT sufficient if only one components
=predominantly aoe/coe
- ▶ MUST prove "events of employment" were
predominant as to all causes of the
psychiatric disability taken as a whole

*Sonoma State University v. WCAB
(Hunton) (2006) 71 CCC 1059, 1063*



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EVIDENCE



Lay testimony can support occurrence AOE/COE
injurious incidents

NOT
psychiatric injury

*Ins Co. of North America v. WCAB (Kemp) (1981) 46
CCC 913*

MUST have "competent medical evidence"

*Rolda v. Pitney Bowes, Inc. (2001) 66 CCC 241, 245
(en banc)*



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Psych report needs:

1. history of all events alleged to have contributed to psych injury
2. opinion as to causation (whether employment events = predominant cause)
3. discussion of all causes (aoe/coe and non-aoe/coe)
4. statement that actual events of employment were predominant as to all causes combined.



Psych report needs:

5. explanation why predominant aoe/coe causation
6. medical evidence must be consistent & specifically explain its basis and reasoning.

NOT ENOUGH to discuss non-aoe/coe factors when addressing apportionment

REASON:

causation & apportionment of disability = separate issues



Predominant Cause Requirement

FACTS:

- ▶ psych injury b/c:
 - a. 40% = viewing dead co-worker, digging grass w/co-worker's blood on it, driving home the person who had run over the coworker
 - b. 40%: industrial back injury
 - c. 20% non-aoec/coe

Trugreen Landcare v. WCAB (Gomez)
(2010) 75 CCC 385 (writ denied)



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Gomez

ER says, not compensable; predominant cause requirement was not met for each injury

WCAB: compensable

REASON:

- ▶ predominant cause requirement may be satisfied by combining separate aoe/coe causes of the psychiatric injury
- ▶ LC 4663 can't be used to apportion causation of injuries; it's limited to causation of PD



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Co-defendants

FACTS:

- ▶ construction foreman at Browning
- ▶ 4 injuries aoe/coe
- ▶ no psych tx sought/req'd
- ▶ later, worked for Elite
- ▶ MVA
- ▶ AME (ortho): 35% ortho = Browning
65% Elite
- ▶ AME (psych): 65% = Elite MVA
35% = Browning



Lewis v. WCAB (2011) 77 CCC 108 (writ denied)



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Lewis

HOLDING: Browning psych barred by 3208.3(b)(1)

REASONING:

successive injuries with different ERs may not be combined to meet the predominant cause requirement

- ▶ contrary ruling would allow EE to reach back into "the dark recesses of his or her employment history" and "draw on ancient and minor injuries to combine them



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PD: causation vs disability

causation \neq disability

causation: factors contributing to creation of psych injury

apportionment: applies only after P&S/MMI



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PD: causation vs disability

FACTS:

- ▶ Psych AME: depression/pain disorder predominantly caused by ortho injury
- ▶ PD = 20% from pre-existing anxiety; 30% from nonindustrial cancer; 50% from ortho pain

ISSUE:

Is psych compensable even though PD is not predominantly caused by aoe/coe factors?

County of LA v. WCAB (Reed) (2011) 76 CCC 806 (writ denied)



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Reed

HOLDING: yes



REASONING:

although PD was not predominantly aoe/coe, causation of injury was predominately aoe/coe



"Actual Events of Employment"

LC 3208.3:

- ▶ psych injury must arise from "actual events of employment"
- ▶ factual/legal issue for WCJ, not a medical issue



Rolda v. Pitney Bowes, Inc. (2001) 66 CCC 241, 245 (appeals board en banc)



What does "actual events of employment" mean?

2 prong test:



1. "event" (something must happen in employment relationship)
2. "of employment" (must result from EE's working relationship w/ER)

Pacific Gas and Electric Co. v. WCAB (Bryan)
(2004) 69 CCC 21, 25



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"of employment"?

- ▶ injury may not result from a purely personal issue, even if it occurred at work (not work related)
- ▶ job must play an "active" or "positive" role in causing the psych problem (not merely provide a stage)



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"of employment"?



Examples of non-compensable fact patterns:

1. gossip about a personal matter in the workplace
2. rejection of romantic overtures by one EE to another
3. EE's psychiatric injury stemming from wife's rape by one of his co-workers and her long-term affair with another co-ee



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Actual Event of Employment — Specific Findings

Actual events of employment can

=

cumulative effect of each day's stresses/strains

- a. work duties
- b. rotating shift schedule
- c. increased job duties
- d. reprimands
- e. being placed in the middle of a ER dispute are actual events of employment for the purposes of LC 3208.3

See *Neighborhood Legal Services of Los Angeles County v. WCAB (Rivera)* (2002) 67 CCC 1367 (writ denied)



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precipitating physical injury may also

=

"actual events of employment"

psychiatric injuries from physical injuries are compensable

(except for PD) if the physical injury is predominant cause

Lockheed Martin v. WCAB (McCullough) (2002) 67 CCC 245, 253



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County of Contra Costa v. WCAB (Guthery) (2005) 70 CCC 1496 (writ denied)

FACTS:

- ▶ physical injury
- ▶ resulted in financial difficulties
- ▶ resulted in psychiatric injury



- ▶ ISSUE: psych proximately caused by physical injury
- ▶ HOLDING: yes

"While Labor Code Section 3208.3 mandates that 'an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury,' it does not follow that secondary or downstream effects of the injury—here, unemployment due to physical injuries sustained—are to be treated as a non-industrial cause."



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Don't be afraid to vigorously litigate!

No psych aoe/coe
(no matter how tough you are!)
(aka no "actual event of employment")

Rodriguez v. WCAB (1994) 59
CCC 14



What about

"actual events" = yes

vs.

subjective misperception?



Verga v. WCAB (2008) 73 CCC 63

FACTS:

- ▶ IW claimed psyche resulted from "harassment and persecution by her supervisor and co-workers"



WCAB finds:

- ▶ [Verga] was not actually subject to harassment or persecution, she instead brought upon herself the disdain of her co-workers"...[she] was "a difficult person to get along with"; she was impolite, unpleasant...



Verga

HOLDING:

misperceptions—even honestly held do

NOT =

"actual events of employment"



REASONING:

1. To allow an employee to harass co-workers and, when they respond unfavorably, to claim a stress-related injury to the employee's psyche would increase, not reduce, workers' compensation claims
2. "predominant cause" was EE's intentional abuse of co-EEs



How to defend...?

Testimony of co-ees/supervisors = essential
(for either side)

EE's testimony can help him/her,
BUT NOT ESSENTIAL

What is needed...?



Dayrit v. Walgreens, 2010 Cal.
Wrk. Comp. P.D. LEXIS 181

"Defendant...argues that a finding of industrial injury based solely on medical reports, without defendant having the chance to ever cross-examine applicant on discrepancies and inaccuracies potentially found in those medical reports, does not meet the substantial evidence test and denies defendant due process.

Defendant's due process claim is utterly without merit...



Dayrit v. Walgreens

- ▶ "does not require the applicant to testify. It can be sufficient if the medical evidence supports the conclusion that applicant's perceptions of workplace stress were objectively reasonable."



Be nice to the person who

will be judging
CREDIBILITY
(the WCJ!)



FACTS:

- ▶ IW alleged harassment by co-EE(H)
- ▶ asserted H "micromanaged"

H testified:

- ▶ not EE's manager
- ▶ never discussed job performance with EE

EE claimed being "singled out"

- ▶ supervisor, S, testified she "supervised applicant no different than other employees."



HOLDING: no predominant cause

REASON: ER wins on credibility issue



Hmmmmmmmm....

obj evidence of actual events needed for psyche
obj not req'd for physical injuries caused by stress

Example

FACTS:

- ›doctors attribute stroke to aoe/coe stress
- ›no finding that stress was caused by objective factors of harassment, persecution, etc.

Acorn Engineering Co. v. WCAB (Banuelos) (2015)
80 CCC 736 (writ denied)



ACORN

HOLDING: stroke compensable

REASONING:

only requirement for physical injuries is that aoe/coe stress be a contributing cause of the injury

The WCAB explained that, to support a finding of injury AOE/COE:

"Applicant was required to establish only that he genuinely perceived his work conditions to be stressful and did not need to show that the job duties were objectively or extraordinarily stressful:



"actual events of employment"

need NOT be
attributable to ER

FACTS:

- ▶ grand jury investigation re misappropriating fundraising \$
- ▶ no charges brought
- ▶ co-ee sent email to other co-ees accusing IW

ISSUE: actual events of employment?

HOLDING: yes, including:

- a. Fundraising
- b. Email
- c. Grand jury investigation



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Careful with those fraud referrals!

FACTS:

- ▶ accused of w/c fraud
- ▶ arrested
- ▶ acquitted



ISSUE:

can these events, which aren't attributable to ER
=
"actual events of employment"?

HOLDING: you'd better believe it!



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It doesn't!

- ▶ Irritating behavior doesn't do it!
- ▶ white correction fluid:
 - on IW's chair
 - on IW's family photographs

does NOT = "violent act"

Hampton v. WCAB (1998) 63 CCC 1195 (writ denied)



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What is a "violent act"?

Larsen v. Securitas Security Services
2016 Cal. Wrk. Comp. P.D. LEXIS 237

FACTS:

- ▶ accepted ortho; denied psych
- ▶ hit by car in parking lot
- ▶ fell, hit head, lost consciousness
- ▶ defense argues: not "violent act" b/c not criminal



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Larsen

HOLDING: wrong!

REASONING:

For purposes of LC 3208.3(b), “violent act” may include acts involving:

- ▶ “strong physical force”
- ▶ “extreme or intense force”



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More "violent acts"

Clacherv. WCAB (80 CCC 182)

2015 *writ denied*

HOLDING “violent act” = being “forcefully punched on back and knocked on the floor by a coworker.”



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More "violent acts"

Soberon v. Orange County Pizza

violent act = assaulted by ER



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Dreher v. WCAB

- ▶ "If the argument were made that an accidental injury constitutes a 'sudden and extraordinary employment condition,' we would reject it. For one thing, such an interpretation would mean that psychological injuries resulting from accidents would not be subject to the six-month rule, but such injuries arising from cumulative physical injury would be governed by that limitation;
- ▶ "Accordingly, although Dreher's injury was more serious than might be expected, it did not constitute, nor was it caused by, a sudden and extraordinary employment event within the meaning of section 3208.3, subdivision (d). The evidence showed that Dreher routinely walked between buildings on concrete walkways at the work site and that he slipped and fell while walking on rain-slicked pavement."



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Six Month Rule

Effective 7/16/91:

"[N]o compensation shall be paid...for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months."

- ▶ needn't be continuous
- ▶ trumped by a "sudden and extraordinary"



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What is "Sudden and extraordinary?"

"In our view, the 'sudden and extraordinary' language is limited to occurrences such as gas main explosions or workplace violence - the type of events which would naturally be expected to cause psychic disturbances even in a diligent and honest employee"



Wal-Mart v. WCAB (Garcia)

68 CCC 1575, 1579 fn 9 (Ct. App. 2003)



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More "violent acts"

Wal-Mart Stores, Inc., v. WCAB/Garcia

FACTS:
"orthopedic injury to her back"

HOLDING:
not enough to defeat a six-month employment rule

DCA says:
"[i]n our view, the 'sudden and extraordinary' language is limited to occurrences such as gas main explosions or workplace violence - the type of events which would naturally be expected to cause psychic disturbances even in a diligent and honest employee."



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More "violent acts"

Dreher v. WCAB

FACTS:
▶ slipped on wet sidewalk
▶ very serious ortho injuries

ISSUE:
"sudden and extraordinary"?

HOLDING:
▶ sudden, yes, extraordinary, no
▶ extent of injuries doesn't dictate whether event was S&E



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Why Six Months?

"in many employer–employee contracts the new employee is customarily on probation during the first six months of employment. It is during that period when problems between the employee and the employer or supervisor often occur. Those problems often result in disciplinary action, resignation, or termination and lead to claims of psychiatric injury due to stress."

Hansen v. WCAB (1993) 58 CCC 602, 605



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Rule applies to all psych claims

(even those resulting from aoe/coe physical injuries!?!?)

Though "a claim for psychiatric injury which rests on an objective physical injury may be somewhat less likely to be fraudulent than one based on 'stress,' there remains a substantial potential for the fraudulent inflation of a claim by adding alleged psychiatric injuries."

Wal-Mart Stores, Inc. v. WCAB (Garcia) (2003) 68 CCC 1575, 1579



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Six Month Rule Surprises

Even if 6 month rule applies...
can get psych tx as compensable consequence

IF

"necessary to cure or relieve" effects of physical injury

Molina v. Zenith Ins. Co. (2004) 32 CWCR 293



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FACTS:

- ▶ six month rule applies
- ▶ barred by 3208.3(d)
- ▶ EE nevertheless obtains ML
- ▶ you object

ISSUE: Result?
ANSWER: duh...

who pays...?
YOU PAY!
(of course)



Lal v. US Airways Group, Inc. dba America West Airlines, 2012
Cal. Wrk. Comp. P.D. LEXIS 191



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Six Months of Employment

"Let me count the ways"

Needed: six months of actual service

Ex.

time accrued while TD doesn't apply
(even if remains "on the books")

Wal-Mart Stores, Inc. v. WCAB (Garcia) (2003) 68 CCC 1575,
1580



Show me the math...

calculate calendar months...?

actual days worked...?

weeks worked...?

Stay tuned!



Hamilton v. WCAB
(2011) 76 CCC 817 (writ denied)

FACTS:

- ▶ CT claim
- ▶ DOH: 9/14
- ▶ First day worked: 9/15
- ▶ Working period: 5 months, 26 days
- ▶ Filled out new hire form: 8/20
- ▶ Picked up computer from office for training: 9/12
- ▶ On books until 1/25



Hamilton

ISSUE: 6 month bar?

HOLDING: barred!

REASONING:

- ▶ not paid for picking up laptop
- ▶ lack of "formal termination" and keeping EE on ER's health plan does not add "actual days of service"



Hamilton

Think about the public policy considerations...

...is this a good decision?

(You best....but why?)

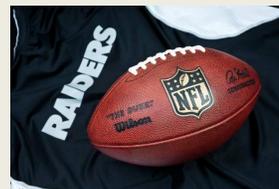


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Horton v. Oakland Raiders, 2014 Cal. Wrk. Comp. P.D. LEXIS 592

FACTS:

- ▶ NFL player
- ▶ oral employment contract; 3/2
- ▶ (shook hands)
- ▶ contract signed: 3/16
- ▶ trained in off season training
- ▶ termination notice: 9/9



ISSUE: Does shaking hands or signing contract
=
"actual performance"?



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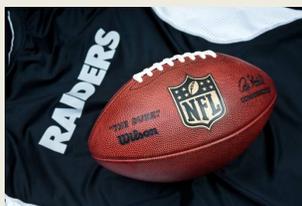
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Horton v. Oakland Raiders, 2014
Cal. Wrk. Comp. P.D. LEXIS 59

HOLDING: no; barred by 6 month rule

REASONING:

- ▶ actual services didn't begin until began working in off-season program



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"I was sick..."

"I couldn't come to work...the dog ate my homework"

Do days off work for non-industrial illnesses count as part of the 6 months?



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CIGA v. WCAB (Mills) (2007) 72 CCC 1146 (writ denied)

FACTS:

- ▶ worked precisely 6 months
- ▶ off work 2 weeks for non-aoe/coe pancreatitis

ISSUE: 6 month defense apply?

HOLDING: no

"applicant was off every weekend, and it would be unreasonable to interpret the statute as counting weekends against her in determining whether she completed six months of 'performance of actual service for the employer' under *Garcia*"



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How does TD count?

Get this...don't need all six months before the
DOI!?!?



Guzman v. Select Electric, 2012 Cal. Wrk. Comp.
P.D. LEXIS 629



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FACTS:

- ▶ worked 4/6 – 6/8/06 (two months)
- ▶ 6/9/06 started TD (three months)
- ▶ RTW 9/11/06
- ▶ LDW: 11/06 (two months)

ISSUE:

Has EE performed "actual service" for 4 or 7 months?

HOLDING: SEVEN!?!? No 6 month defense

REASONING:

post-injury employment can count towards six-months if RTW after injury



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Dracco v. Anova Education and Behavioral

2015 Cal. Wrk. Comp. P.D. LEXIS 518

FACTS:

- ▶ 11/4: DOH
- ▶ 4/24: DOI
- ▶ 4/24–5/13: TD
- ▶ 5/14–5/16: RTW then left
 - off work for Thanksgiving
 - ...Spring break
 - ...Christmas



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Dracco

HOLDING:

entire employment (first day of work) to LDW
(193 days) counts



The defense does win...sometimes!

Gutierrez v. Viking Co., 2012 Cal. Wrk. Comp.
P.D. LEXIS 130

FACTS:

- ▶ ee given work restrictions
- ▶ offered to work w/in restrictions (didn't accept)



Gutierrez

er refused

- ▶ if worked w/restrictions, wld have had 6 months

HOLDING: claim barred; didn't have six months of

"actual service"

- ▶ Is this a good case from a public policy perspective?



Special employment

Example:

- ▶ temp agency work (works as "temp employee")
- ▶ later full-time employment w/ER to whom had been assigned

ISSUE

Does period of special employment count towards 6 months?



Martinez v. Tarrant Apparel dba Fashion Resource

2010 Cal. Wrk. Comp. P.D. LEXIS 192

FACTS:

- ▶ worked as temp of ER-1 assigned to ER-2
- ▶ worked for special (ER-1) 6+ months
- ▶ Hired by general (ER-2)
- ▶ DOI: 2 days later

ISSUE:

six month rule apply?
aka
does time with temp count against general?



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Martinez

HOLDING: EE wins

1. "[i]t has long been recognized that an employee may have more than one employer at the same time."
2. before DOH as "regular" EE, was "employed" as a "special" employee
3. payment by temp not determinative (performance of duties all under general's direction)
4. duties as ee of special similar to those as general



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Martinez v. Mass Precision, 2014
Cal. Wrk. Comp. P.D. LEXIS 577

FACTS:

- ▶ worked for special > 6 month
- ▶ worked for temp < 6 months

HOLDING: ERs are jointly and severally liable



Martinez

"A contrary holding would only serve to provide employers with a means of gaming the system to avoid potential liability for temporary or leased employees, without extending workers' compensation benefits for the protection of persons injured in the course of their employment."



Martinez

Do you believe ERs would "game the system"

a little too cynical!?!?

how many ERs would even know this rule...

...did YOU know this rule?



Dixon v. Apple One, 2012 Cal. Wrk. Comp. P.D. LEXIS 569

FACTS:

- ▶ worked for temp (general) 2.5 months for special ER
- ▶ then hired by special (turning special into general)
- ▶ 5 months after becoming a perm ee, filed CT psych against second ER
- ▶ 2nd ER settled; sought contribution per 5500.5



Dixon

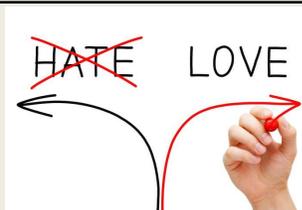
HOLDING: no contribution

REASONING:

- ▶ LC 3208.3(d) requires EE be employed "by that [ER] for six months"
- ▶ temp ER had < 6 months



I hate my job...



I love my job...

aka

I really miss you

aka

Hire me (again) please!



You work for ER 1 for 2 months

You work for ER 2 for 3 months

Return to ER 1 for 5 months

Injured

Now what?



*Gottschalks Department Stores v.
WCAB (Garcia) (1998)*

63 CCC 315 (writ denied)

FACTS:

- ▶ work for ER-1 for 2.5 years
- ▶ leaves and works for ER-2 for ONE YEAR
- ▶ returns to ER-1
- ▶ injured < 6 months from RTW

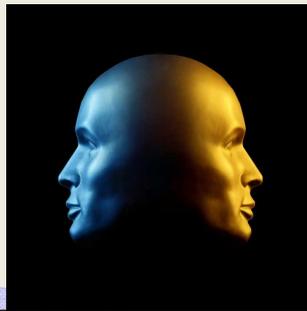
ISSUE: barred by six month rule?



Garcia

HOLDING:

- ▶ no bar; EE wins
- ▶ But don't believe it (WCAB is schizophrenic)



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Arias v. Farmers Rice Cooperative

2012 Cal. Wrk. Comp. P.D. LEXIS 222
(aka WCAB has split personality)

FACTS:

- ▶ seasonal EE
- ▶ stipulated: "applicant worked 154 days between September 26, 1999 and September 19, 2004."
- ▶ IW claims: "using a five-day workweek this number of days would meet the minimum requirement of 130.5 days (six months of five-day workweeks)"

HOLDING: claim barred



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Arias

REASONING:

WCAB says, although "LC 3208.3(d) provides that "[t]he six months of employment need not be continuous"...



Arias

- ▶ ...in this case, there was a complete severance of the employment relationship between the time periods applicant was employed by defendant and performed actual service.
- ▶ Thus, applicant did not have one "employment" with defendant, he had five, and none of them extended to six months as required by section 3208.3(d).
- ▶ Our conclusion is in accord with the intent of the Legislature to establish a new and higher threshold of compensability for psychiatric injury by adopting the six month employment requirement contained in section 3208.3(d).



Look for the union label

Aguirre v. WCAB (2005) 70 CCC 1487 (writ denied)

FACTS:

- ▶ union ee approx 6 years
- ▶ assigned each job via union hall
- ▶ never worked an assignment w/any one ER for 6 months

ISSUE:

Does union membership/assignment count towards 6 months?

HOLDING: no; 3208.3(d) bars claim

REASON:

defendant ER in this case didn't employ for 6 months



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SUDDEN & EXTRAORDINARY

Escape hatch from 6 month rule?



"a sudden and extraordinary employment condition"

IW's burden of proof

just because an injury is "accidental" doesn't qualify (maybe...see Matea)

more like "gas main explosions or workplace violence—the type of events which would naturally be expected to cause psychiatric disturbances even in a diligent and honest employee."

Wal-Mart Stores, Inc. v. WCAB (Garcia) (2003)
68 CCC 1575, 1579, fn. 9



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attacks of sexual harassment count

Rojas v. Springfield Ins. Co.
(2000) 28 CWCR 136

pranks and harassment do not

Sack v. WCAB (1998)
63 CCC 482 (writ denied)



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Matea v. WCAB (2006) 71 CCC 1522, 1531

FACTS:

- ▶ shelf of lumber at Home Depot fell suddenly
- ▶ hit IW's leg
- ▶ not a "regular and routine event"

HOLDING:

"sudden and extraordinary" exception applies to injuries caused by something other than a "regular or routine employment event"



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Matea

"sudden" = "happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen [*sic*] or prepared for."

"extraordinary" = "having little or no precedent and usu[ally] totally unexpected."



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SCIF v. WCAB (Garcia) (2012) 77 CCC 307

FACTS:

- ▶ avocado picker (on high trees) falls from
- ▶ 24' ladder
- ▶ < 6 months
- ▶ never previously fell
- ▶ no evidence of other pickers falling



ISSUE:

"sudden and extraordinary"?

WCAB: IW wins; no evidence not "sudden and extraordinary"

DCA says, "You've got the burden of proof confused"



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Garcia

"[T]he... fall was not extraordinary within the meaning of Lab. Code, § 3208.3, subd. (d). It was an occupational hazard of picking avocados while standing on a ladder, and thus was not uncommon, unusual or unexpected. No evidence existed that something particularly unusual happened to cause the fall or that respondent suffered an injury one would not expect from a fall from that height. Respondent had the burden to prove that his psychiatric injury was caused by a sudden and extraordinary employment event. He did not meet that burden."



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Garcia

This is not a Home Depot scenario

Presumably falling lumbar is rare
(esp. given general public's exposure)

(POOR HOME DEPOT...WHAT WHERE THEY
SUPPOSED TO PROVE?!?)

VS

falling avocado pickers...



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Garcia

Garcia's observations during his brief employment at Cole Ranch and his prior unspecified fruit-picking experiences do not establish his injury was caused by an event that was uncommon, unusual and totally unexpected.



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Travelers Casualty & Surety Co. v. WCAB (Dreher)

(2016) 81 CCC 402



FACTS:

- ▶ slip and fall on slippery concrete sidewalk
- ▶ worked 74 days
- ▶ very serious injuries (IW argued "catastrophic")

HOLDING: 6 month bar prevails



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Dreher

REASONING:

- ▶ slip and fall accident not extraordinary
- ▶ IW routinely walked on walkways
- ▶ testimony that he was surprised by the slick surface, did not demonstrate that his injury was caused by an “uncommon, unusual, or totally unexpected event”



What is “Sudden and extraordinary?”

“[Applicant] suggests that the unexpectedly catastrophic nature of the injury can support a finding of an extraordinary employment condition. We disagree.”

Travelers v. WCAB (Dreher), 2016 Cal. App. LEXIS 321 (Ct. App. 2016)



"Sudden and Extraordinary"

Guzman v SCIF
(Panel, 12/16)

FACTS:

- ▶ construction laborer's soil compactor hit rock, flew up and landed on IW
- ▶ result: psych
- ▶ not employed 6 months
- ▶ testified:
 - first time he operated on hill
 - never heard of compactor falling on someone
 - never previously lost control of compactor



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"Sudden and Extraordinary"

Guzman

ISSUE:

6 month rule defense defeated by sudden & extraordinary exception?

HOLDING: yes!



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Guzman

"sudden" =
event which occurs unexpectedly without previous notice and not foreseen or prepared for (see ee's un rebutted testimony)

"extraordinary" =
"going beyond what is usual, regular, common, or customary...having little or no precedent and usually totally unexpected" (see ee's un rebutted testimony)



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Guzman

Malpractice?

Defense offered...

- ▶ no testimony re how common
- ▶ no evidence (w/c rates!?! injury reports!??!)
- ▶ no nothing!



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Other Defense Wins

roofer's fall from a roof



Bayanjargal v. WCAB (2006) 71 CCC 1829 (writ denied)

avocado picker who fell from a ladder was not a sudden and extraordinary event



SCIF v WCAB (Garcia) (2012) 77 CCC 307



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Electrician's fall from ladder

while installing cable



Romero v. Labor Connection, 2005 Cal. Wrk. Comp. P.D. LEXIS 7



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Limo driver's MVA



Diaz v. WCAB (2004) 69 CCC 618 (writ denied)



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Probationary officer injured demonstrating how to hit

Reason: neither sudden nor extraordinary



Smith v. WCAB (2008) 74 CCC 71 (writ denied)



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Other Defense Wins

hit by car while jaywalking



Providence Holy Cross Medical Center v. WCAB (Capitulo) (2009) 74 CCC 878 (writ denied)

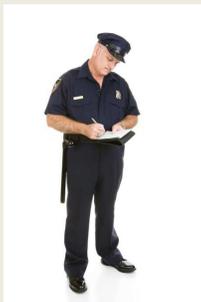


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Traffic officer struck by car while giving a ticket

Reason: common danger, officers even trained for



Jackson v. City of Los Angeles Department of Transportation (2010) 38 CWCR 306 [2010 Cal. Wrk. Comp. P.D. LEXIS 480] (panel decision)



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Other Defense Wins

IW's subjective expectations are not the test

Salas v. City of Bakersfield, 2011 Cal. Wrk. Comp. P.D. LEXIS 48

FACTS:

- ▶ IW fell from side gate when truck opened unexpectedly
- ▶ IW testified he didn't expect truck to open

HOLDING: not "sudden and extraordinary"

REASON:

"common and usual" for one who climbs up/down a truck to risk a fall



Other Defenses Wins

Facts: almost severed fingers with power saw

Holding: sudden? yes

extraordinary? no



REASON:

- ▶ severed fingers is a recognized hazard of this particular job

Alaniz v. WCAB (2011) 76 CCC 784 (writ denied)



Other Defense Wins

FACTS:

- ▶ dry cleaner burned by ironing press
- ▶ Ws testified never seen this type of injury



HOLDING: can ya guess?

REASONING:

not unusual in industry; not unexpected

Bonilla v. WCAB (2011) 76 CCC 788 (writ denied)



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SAME RESULT:

sewer's hand caught in sewing machine



Enriquez v. Nouveur Design, Inc., 2011 Cal. Wrk. Comp. P.D.
LEXIS 360



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SAME RESULT:



hand injury when hit by basketball thrown by child

- ▶ IW was supervising
- ▶ w/in 1.5 hours of supervising, had seen kids:
 - a. throw basketball to each other
 - b. throw tennis ball for dog
 - c. throw tennis ball at her



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Your results may vary

(but that's not the issue!)

Aresco v. WCAB (2014) 79 CCC 1188 (writ denied)

FACTS:

- ▶ company picnic
- ▶ infection from food or pick up trash
- ▶ turned to potential fatal disease
- ▶ 7 months in hospice
- ▶ recovered from infection, but psych con't'd
- ▶ less than 6 months of the job



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Aresco

HOLDING: defense win

REASON:

- ▶ consequences flowing from injury isn't the test for sudden/extraordinary
- ▶ the work condition, not resulting medical condition, must be "uncommon, unusual or totally unexpected"



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Defense Losses

CIGA v. WCAB (Tejera)
(2007) 72 CCC 482 (writ denied)

FACTS:

- ▶ truck driver lost control on wet pavement
- ▶ truck jackknifed
- ▶ truck struck cab "numerous times"
- ▶ steering wheel came off in IW's hands
- ▶ IW thrown out passenger-side door
- ▶ watched trailer nearly run over his feet

HOLDING:

MVAs usually don't qualify, but this one = "extraordinary"



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Docena v. Layne Christensen Co.,
2016 Cal. Wrk. Comp. P.D. LEXIS 393

FACTS:

- ▶ IW jumped to avoid wrecking ball falling at his head when cable snapped

HOLDING:

- ▶ that's pretty darn "sudden" AND "extraordinary"



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Camarena v. Inclusion Services, Inc.,
2015 Cal. Wrk. Comp. P.D. LEXIS 273

HOLDING:

- ▶ victimized via sexual molestation and rape by supervisor = sudden & extraordinary



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Don't forget

Nice to deny w/in 90 days

BUT

can raised 6 month defense at MSC
(sometimes can get away with rising at trial for the
first time...but don't hang your hat on it)

Martinez v. WCAB (2010) 75 CCC 381 (writ denied)



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Just remembered the defense while drafting your recon

TOUGH LUCK, PARTNER!

CIGA v. WCAB (Avila) (2004)
69 CCC 1323 (writ denied)



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POST-TERMINATION CLAIMS

Fired?

Just realized you "have a psych claim"

Tough luck (most of the time)

Most (non-psych) post-termination claims are decided per LC 3600(a)(10)

Psych has its own rule...LC 3208.3(e)



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The Law (doi o/a 7/16/93)

Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:

- 1) Sudden and extraordinary events of employment were the cause of the injury.
- 2) The employer has notice of the psychiatric injury prior to the notice of termination or layoff.
- 3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.



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The Law (doi o/a 7/16/93)

4. Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.
5. Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.



The Law (doi o/a 7/16/93)

- f) A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee.



HUH?

Got a post-term claim?

EE must show:

1. Injury is caused by "sudden and extraordinary events of employment", and/or
2. The ER was aware of the claimed injury before the EE was notified of the termination or layoff, and/or
3. The EE's medical records existing before notice of termination or layoff contain evidence of treatment of the psychiatric injury, and/or
4. There is a finding of sexual or racial harassment by any trier of fact, and/or
5. The date of injury under either LC 5411 or LC 5412 is subsequent to the date of the notice of termination or layoff, but before the effective date of termination or layoff.



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HUH?

- ▶ A notice of termination or layoff not followed within 60 days by a termination or layoff doesn't count
- ▶ frequent notices of termination or layoff = bad-faith personnel action and render LC 3208.3(e)
 - post-term defense not applicable
 - lose lawful, nondiscriminatory good-faith defense, too

(How many such "bad faith" actions have YOU seen?)

EXACTLY



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We can use some of the same case law!

post-termination defense for psych (LC 3208.3(e)]

VERY SIMILAR

to that defense elsewhere in LC

"sudden and extraordinary events of employment"

similar to

"sudden and extraordinary employment condition"
(6-month rule)



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DCA says, "no difference"



Matea v. WCAB (2006) 71 CCC 1522, 1532



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FACTS:



- ▶ post-term claim
- ▶ medical records in existence prior to termination showed work-related psych problems

IW put ER on notice of "stress" from work pre-termination

HOLDING: compensable

Ontario-Montclair School District. v. WCAB (Ball) (1997)
63 CCC 94 (writ denied)



What if those pre-term psych records don't

diagnosis using terminology/criteria of the

APA's Diagnostic and Statistical Manual of
Mental Disorders?



NO PROBLEMS
(as long as reveals psych problems)
Country Villa West v. WCAB (Robinson) (1998)
63 CCC 435 (writ denied)

Question:

- ▶ How "bogus" can the diagnosis be?
- ▶ Didn't the legislature include the APA requirement for a reason?

Do Records Need to Make AOE/COE Connection?

NOPE!



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Alfama v. Smart & Final, LLC, 2016
Cal. Wrk. Comp. P.D. LEXIS 337

FACTS:

- ▶ prior to term, ER aware of "strained relationships" at work

HOLDING: barred by post-term defense

REASONING:

- ▶ ordinary stress doesn't confer "knowledge" of a psych injury



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Good Faith Personnel Action: Old School



Old school:

stress of termination = aoe/coe

stress of investigation = aoe/coe

How could an ER do business?

- ▶ Lay-offs/plants closures sometimes lead to hundreds of psych claims!



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Good Faith Personnel Action: Old School

CA Sup Ct re wrongful termination..."disabling injuries, whether physical or mental, arising from termination are generally within the coverage of workers' compensation and subject to the exclusive remedy provision"

"[B]oth the act of termination and the acts leading up to termination necessarily arise out of and occur during and in the course of employment."

Shoemaker v. Myers (1990) 55 CCC 494



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DCA seemed to disagree (brave indeed)

"The workers' compensation system, as well as employers and insurers, cannot absorb, and should not be required to absorb, the very substantial potential cost of awards for emotional distress caused solely by a lawful job termination."

To hold otherwise "would quickly convert workers' compensation into another form of unemployment insurance" which is "a result for which neither employers nor compensation insurers have bargained and for which employees could have no reasonable expectation."

Bray v. WCAB (1994) 59 CCC 475



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What were ERs to do with EEs who had to go?

(talk about your rock and hard place!)

Legislature creates a middle ground:

LC 3208.3.3(h): For injuries o/a 7/16/93 "[n]o compensation ... shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action."

Now ERs could safely conduct their business (layoffs, firings, discipline, etc.)

City of Oakland v. WCAB (Gullet) (2002) 67 CCC 705, 709



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LAWFUL, NONDISCRIMINATORY, GOOD FAITH PERSONNEL ACTIONS (G.F.P.A.)

Rolda v. Pitney Bowes, Inc. (2001), 66 CCC 241 (en banc) (WCAB en banc) compensability requires:
(What does “en banc” mean?)

- 1) Does alleged psych injury involve actual employment events?
- 2) If yes, does medical evidence prove required % of industrial causation (i.e., employment > 50% of all causes of injury)?
- 3) If alleged psych injury involved actual employment events that were > 50% of the cause of the injury, were any of those employment events personnel actions?



LAWFUL, NONDISCRIMINATORY, GOOD FAITH PERSONNEL ACTIONS

Rolda v. Pitney Bowes, Inc. (2001), 66 CCC 241
(WCAB en banc) compensability requires:

- 4) If any of the employment events were personnel actions, were they lawful, nondiscriminatory and made in good faith?



"Good faith personnel action" must be

- ▶ objectively reasonable
- ▶ taken honestly after an appropriate investigation
- ▶ for reasons that are not arbitrary or pretextual

Ex subjective good faith = ER didn't act with intent to deceive or defraud.

City of Oakland v. WCAB (Gullet)
(2002) 67 CCC 705



Vayser

TEST for whether substantially caused by lawful, nondiscriminatory, good faith personnel actions?

Distinguish between...

general stressful working conditions

VS

"personnel action" specifically directed at IW involving his/her employment status



Medical report fails to apply this test?

WCJ doesn't use this formula?

Toss 'em out!

Stevenson v. Bloomingdale's/Macy's Corporate Services,
2012 Cal. Wrk. Comp. P.D. LEXIS 603

Felix v. Carl Karcher Enterprises/Carl's Junior 2010 Cal.
Wrk. Comp. P.D. LEXIS 623



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FACTS:

AME:

IW's "feelings that he was unsupported by his supervisors" did
NOT =
personnel action

WCAB adopted AME's determination

DCA says, "Nope"

REASON:

- ▶ PTP/QME/AME doesn't decide what is (or isn't) a good faith personnel action
- ▶ Remand to WCAB to decide that issue on its own

County of Sacramento v. WCAB (Brooks) (2013) 78 CCC 379



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What's a "personnel action"?

(and who decides whether there is one)

EASY ANSWER: WCJ decides



Rolda v. Pitney Bowes, Inc. (2001) 66 CCC 241, 246 (appeals board en banc)



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Short cuts!

WCJ says a threshold issue for psych (predominant cause)...

actual events of employment) hasn't been met...

...no need to do "good faith personnel action" analysis

Murphy v. County of San Bernardino, 2010 Cal. Wrk. Comp. P.D. LEXIS 635



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What is a "personnel action"?

What is a personnel action?

WCAB says "a personnel action is conduct either by or attributable to management and includes such things as done by one who has the authority to review, criticize, demote, or discipline an employee."

"Personnel actions may include but are not necessarily limited to transfers, demotions, layoffs, performance evaluations and disciplinary actions such as warnings, suspensions and terminations of employment."

Larch (Fleming) v. Contra Costa County (1998) 63 CCC 831
(significant panel decision)

Stockman v. State of California/Department of Corrections (1998)
63 CCC 1042 (significant panel decision)



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No need to be polite!



"An employer's disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline."

Larch (Fleming) v. Contra Costa County (1998)
63 CCC 831, 833 (significant panel decision)

Result of "personnel action" important?



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NO!

"It is unnecessary, moreover, that a personnel action have a direct or immediate effect on the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected."

Larch (Fleming) v. Contra Costa County (1998) 63 CCC 831, 834 (significant panel decision)



What's a "personnel action"?

Consider:

- a. subject matter
- b. factual setting

Example:

FACTS:

- › IW confronted by co-ee re IW's management style
- › co-ee did not have authority to supervise/discipline IW

HOLDING: good faith personnel action

REASON: EE was acting on behalf of ER

Larch (Fleming) v. Contra Costa County (1998) 63 CCC 831, 834 (significant panel decision)



What's a "personnel action"?

Consider:

- a. subject matter
- b. factual setting

FACTS: IW injured by transfer to new location

HOLDING: good faith personnel action

Stockman v. State of California/Department of Corrections (1998) 63 CCC 1042 (significant panel decision)



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FACTS:

- ▶ internal investigation of IW
- ▶ IW felt "unsupported by his supervisors"

HOLDING:
good faith personnel action



County of Sacramento v. WCAB (Brooks)
(2013) 78 CCC 379



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What is (and isn't) a personnel action?

IS:

- ▶ oral discipline
- ▶ write-ups
- ▶ misconduct investigations
- ▶ failure to turn temp into perm
- ▶ counseling for poor performance
- ▶ requiring fitness-for-duty test
- ▶ being placed on performance improvement program
- ▶ denial of tenure
- ▶ tracking project status
- ▶ managing the business
- ▶ accommodating work restrictions



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ISN'T

- ▶ co-ee ridicule
- ▶ 3rd party harassment
- ▶ dispute between IW and ER re money owed



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MUST be "individual" management actions impacting "individual employees"

NOT G.F.P.A.:

- ▶ increasing sales quotes
- ▶ commission structure change
- ▶ implementing new computer system
- ▶ cutting out a dept. b/c of budget issues
- ▶ transferring EEs to new dept.
- ▶ assigning work beyond IW's abilities
- ▶ shift change adding more hours
- ▶ increased workload
- ▶ stressful work conditions
- ▶ change of work duties w/in needed training



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Not necessarily only a "management thing"!

(aka 3rd parties can do it, too!)

EXAMPLE:

- ▶ grand jury investigation into IW's alleged criminal action
- ▶ investigation re involvement in school funding raising and misappropriation of those funds

HOLDING 1: investigation not G.F.P.A.

REASON: not attributable to management

HOLDING 2:

actual event of employment (could support aoe/coe finding)

Merced City School District v. WCAB (Delgado)
(2008) 73 CCC 1115 (writ denied)



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What about criticism alone

(w/in no disciplinary action, threats or warnings)

County of Butte v. WCAB (Purcell) (2000) 65 CCC 1053 (writ denied)



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DCA says

"A personnel action has been defined as conduct attributable to management in managing its business, including such things as reviewing, criticizing, demoting, transferring, or disciplining an employee... Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected."

County of Sacramento v. WCAB (Brooks)
(2013) 78 CCC 379



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EXAMPLE

FACTS:

- ▶ WCJ says "oral criticism" during "counseling sessions"

by supervisor did...

NOT =

G.F.P.A.



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WCAB says, "WRONG"

"Verbal criticism by a direct supervisor comes squarely within conduct defined as a personnel action...The discussion of the personnel action defense...does not allow for the distinction drawn by the WCJ between educational counseling and disciplinary action."

Porter v. Tarzana Treatment Centers, 2013 Cal. Wrk. Comp. P.D. LEXIS 328



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"Counseling", yes; "attacking", no!

FACTS:

- › IW asked to change work stations by supervisor
- › didn't do so
- › Reprimanded

"Applicant saw [direct supervisor] talking to [general manager], after which [general manager] approached Applicant, raising his finger at her and speaking very loudly. He asked Applicant if she understood that [her supervisor] was a lead clinician and told Applicant that she must do whatever [her supervisor] told her to do. Applicant attempted to explain about the scheduling mistake, but [general manager] told her to stop talking or he would 'kick her out.' Applicant stated that she felt threatened with the loss of her job, and that she was very upset about being reprimanded so harshly, especially in front of her co-workers. [general manager] instructed Applicant to move to [a different work station]".



"Counseling", yes; "attacking", no!

HOLDING: not a G.F.P.A.

REASON:

"unreasonable and unwarranted verbal attack that was out of proportion to what had taken place"

*Quest Diagnostics, Inc. v. WCAB (Mahmoudi) (2015) 80
CCC 1495 (writ denied)*



"All's Well That Ends Well", right!?!?

NO!?!?
Take your choice

FACTS:

- ▶ IW received promotion

"WCJ determined that Applicant reacted emotionally to Defendant's good faith personnel action of offering her a promotion"

"Applicant testified at trial that the promotion came with greater responsibilities, with which she could not cope. Although the WCJ found that Applicant's reaction to the promotion may have been reasonable, she opined that Defendant's offer of a promotion to Applicant, given its financial circumstances and its need to cut back on expenses, could not be viewed as anything but a good faith personnel action. The WCJ concluded that Applicant's claim was barred by Labor Code § 3208.3(h)"

HOLDING: G.F.P.A

Avery v. WCAB (1998) 63 CCC 597 (writ denied)



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Not everyone agrees good = good!

Sav Max Foods v. WCAB (Thayer) (2003) 68 CCC
1517 (writ denied)

"personnel actions are those actions of the employer that are adverse in nature or perceived as negative by the employee" (emphasis added)

Who has the final word?

Nobody!

Stay tuned!



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Personnel Action Must Cause Psychiatric Injury

Sounds strange...sounds obvious...BUT:
G.F.P.A. must cause the psych injury!
(ER must show causal relationship)

EXAMPLE:

- ▶ 18 yr EE
- ▶ first 13 = prepped payroll, etc manually
- ▶ last five years: problems adapting to computer
- ▶ stressed by inability to do the work as req'd (via computer)
- ▶ no discipline

HOLDING: not a G.F.P.A.

REASON:

injury caused by inability to do job
=
"actual events of employment"
(not "personal action")



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Personnel Action Must Cause Psychiatric Injury

"Were we to adopt [ER's argument that the G.F.P.A. defense applies], it would lead to an overly broad view of causation of psychiatric injuries. For example, using this reasoning, if an employee were hired who later could not perform his or her job duties without suffering anxiety, then the anxiety could be said to be caused by the hiring itself, a lawful, nondiscriminatory, good faith personnel action. This over expansive attribution of causation to the initial events of the employment would bar almost every claim made under section 3208.3(h)."



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Personnel action? check!

Next?

determine whether:

- ▶ Lawful
- ▶ Nondiscriminatory
- ▶ In good faith

This is a job for....NOT Superman
WCJ

Rolda v. Pitney Bowes, Inc. (2001) 66 CCC 241, 246
(appeals board en banc)



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What is "lawful", "nondiscriminatory", "good faith"?

Don't bother reading LC 3208.3!

City of Oakland v. WCAB (Gullet) (2002) 67 CCC 705

Not sure a "precise" rule/definition is an option

"good faith personnel action" may be found "[i]f a regular and routine personnel decision is made and carried out with subjective good faith and the employer's conduct meets the objective reasonableness standard."



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ER must:

- a. believe acting in good faith (subjective)
- b. be acting in good faith (objective):
 - 1) "coupling 'good faith' with 'objectivity' is intended to place the trier of fact in the position of the 'reasonable employer' in deciding whether the defendant ... acted responsibly and in conformity with prevailing social norms ..."



City of Oakland v. WCAB (Gullet) (2002) 67 CCC 705

FACTS:

- ▶ ER made honest mistake with demotion process
- ▶ mistakenly mislead EE to believe accepting a different job would protect him from demotion
- ▶ caused "false hope"
- ▶ demotion justified by fiscal concerns (not illegal animus)



Gullet

HOLDING: G.F.P.A.

REASONING:

"To be in good faith, the personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design."

- ▶ Although mistake re demotion created "false hope", demotion was a G.F.P.A. given that it was "a regular and routine employment event [that] was carried out in a reasonable manner with no hint of improper motive."



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FACTS:

- ▶ claims IW engaged in racial discrimination against co-ee
- ▶ ER conducted investigation confirmed IW treated co-ee differently
- ▶ couldn't confirm it was based on race
- ▶ WCAB awarded benes b/c racist charge was "baseless"



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DCA says, "WRONG!"

"[T]his investigation was mandated by law.

Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work...The award in this case rests on the workers' compensation judge's factually unsupported conclusion Northrop's personnel action was not undertaken in good faith"



No evidence:

- ▶ ER had arbitrary motive
- ▶ ER had unlawful motive
- ▶ an intent to mislead, deceive, defraud
- ▶ collusion
- ▶ unlawful decision

=

G.F.P.A.

Northrop Grumman Corp. v. WCAB
(Graves) (2002) 67 CCC 1415



FACTS:

- ▶ ER received anonymous letters re
- ▶ IW putting cameras in girls' locker room

ER:

- ▶ employed admin leave
- ▶ had outside law firm investigate
- ▶ returned to U&C post investigation

ISSUE: G.F.P.A.?

HOLDING: yes

"The defendant has met the preponderance of the evidence burden of proof under Labor Code section 3202.5, as review of the record, and the credible testimony of the defendant's witness, establishes that the above-mentioned personnel actions taken by the employer between 3/00 and 6/00 are lawful, non-discriminatory good faith personnel actions. Contrary to applicant's contentions, review of the record, including the credible testimony of Dr. Palmer shows that the employer's personnel actions were done in a manner lacking outrageous conduct, were honest and with a sincere purpose, were done without intent to mislead, deceive, or defraud, and were without collusion or unlawful design."

McKinney v. WCAB (2014) 79 CCC 1456 (writ denied)



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Harassment = G.F.P.A.?

FACTS:

- ▶ supervisor's criticism = harassment
- ▶ can lack "outrageous conduct" despite harshness

HOLDING: G.F.P.A. – "Angry criticism and occasional shouting addressed at work product, standing alone, is not conduct so outrageous, irresponsible or outside prevailing social norms as to be called bad faith where there is no hint of an improper motive or discrimination"



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REASONING: criticism was

- a. justified
- b. "honest with a sincere purpose"
- c. "without an intent to mislead, deceive, or defraud", and
- d. "without collusion or unlawful design"

Metropolitan Water District v. WCAB (Woo) (2004)
69 CCC 1242, 1255-56



OK to get "hot under the collar"

"While certainly one in authority should strive to maintain calm and reflective communications when dealing with employees, where emotions do rise or an exchange does become heated, that does not alter the fact that the action is being done with an honest and sincere purpose and with an intention based upon valid and good cause."

Larch (Fleming) v. Contra Costa County (1998) 63
CCC 831, 838



"lawful and nondiscriminatory"

If you have one, you have the other (so far)

"lawful" = WCAB uses Black's Law Dictionary

"warranted or authorized by law having the qualifications prescribed by law not contrary to nor forbidden by the law not illegal." "To say of an act that it is 'lawful' implies that it is authorized, sanctioned, or at any rate not forbidden, by law"

Larch (Fleming) v. Contra Costa County (1998) 63 CCC 831, 838



What's discrimination?

"[a] failure to treat all persons equally where no distinction can be found between those favored and those not favored."

Were "similarly situated employees" treated differently "without justification"?

Larch (Fleming) v. Contra Costa County (1998) 63 CCC 831



Substantial Cause

1. industrial causes must be "predominant"
2. if yes, has a G.F.P.A. defense been raised
3. if yes, are those personal actions a "substantial cause" of the psych problem?

"substantial cause" = "at least 35 to 40 percent of the causation from all sources combined" (LC 3208.3(b)(3))



FACTS:

- ▶ 15% apportioned to non-aoe/coe
- ▶ 85% aoe/coe:
 - ▶ 60% caused by teaching
 - ▶ 40% caused by G.F.P.A. (performance eval, reprimands, etc.)

The important numbers...

- ▶ 15% non-aoe/coe
- ▶ 51% caused by teaching (60% of 85%)
- ▶ 34% caused by G.F.P.A (40% of 85%)



HOLDING:
claim not barred by G.F.P.A.

REASON:

- ▶ G.F.P.A. < 35–40% of LC 3208.3 requirement



Who proves what?

(shifting burden of proof)

1. IW proves injury [3208.3(b)]
2. ER then proves G.F.P.A. = "substantial cause"



Hernandez v. Cartwright, 2011 Cal. Wrk. Comp. P.D. LEXIS 433

FACTS:

- ▶ Injured assisting pt into vehicles
- ▶ RTW
- ▶ Fired
- ▶ AME = psych apportionment:
 - 15% – physical injury
 - 10% – non-aoe/coe
 - 75% – firing
- ▶ IW testified others were also fired
- ▶ Told she wasn't needed



HERNANDEZ

HOLDING: ER loses

REASON:

- ▶ failed to prove G.F.P.A.
- ▶ failed to provide:
 - evidence proving firing was G.F.P.A.
 - evidence re circumstances surrounding firing

not enough evidence to carry ER's burden



FACTS:

- › written up/demoted for rudeness to customer
- › no evidence as to what happened except history EE gave to QME
- › EE claimed supervisor wasn't good with women;
- › didn't like IW (woman)
- › EE claimed innocence
- › ER gave no evidence re what happened

HOLDING: aoe/coe

REASON: no evidence to support G.F.P.A.

Crockett v. Verizon Communication Services, 2013 Cal. Wrk. Comp. P.D. LEXIS 482



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What should ER provide?

Anything they can produce!

- › employment records, AND
- › testimony, AND
- › corroborative evidence

Credibility will be a big issue
(need your own good witnesses to undercut EE's
testimony)



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What happens when stress claim includes

stress related symptoms (headache, heart problems)?

How does G.F.P.A. apply?



County of San Bernardino v. WCAB (McCoy) (2012) 77 CCC 219

FACTS:

- ▶ ct to psyche
- ▶ amended to include headaches (caused by arguments with supervisor)

ISSUE:

Does LC 3208.3(h)'s G.F.P.A. provision apply to headaches?



DCA says "yes"

"we must conclude that section 3208.3, subdivision (h), precludes recovery for physical manifestations that are directly and *solely* resulting from the psychological injury suffered as a result of good faith personnel actions. Any other result would undermine the purpose of the law to limit such claims because of their potential for fraud and abuse. It would be relatively easy for a claimant to avoid this bar by asserting internal problems and symptoms, such as upset stomach, headache and sleeplessness, but not injury to the psyche per se. There is no better example of this than the present case where McCoy added the claim for migraine headaches—a preexisting condition—on the first day of trial. We conclude that the good faith personnel action defense precludes recovery for psychiatric injuries with resulting physiological manifestations solely caused by stress from such actions."



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EXAMPLE

Facts:

- ▶ sheriff claims heart, psych
- ▶ 2 specifics: reaction to double homicide, suicide)
- ▶ 3rd specific: stress over change in shift
- ▶ AME (psych):
 - 30%– homicide/suicide
 - 70%– shift change

AME (internal): heart aoe/coe



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HOLDING:

- a. psych barred b/c shift change = G.F.P.A.

Reason: subjective good faith and objectively reasonable

- b. heart not barred

Reason:

- ▶ heart not solely caused by G.F.P.A. (McCoy)



Goodbye sleep, sex and psych problems (SSP) (kinda!)

DOI o/a 1/1/13

- ▶ LC 4660.1(c)(1) "there shall be no increases in impairment rating for sleep dysfunction, sexual dysfunction, and compensable psychiatric disorder, or any combination thereof, arising out of a compensable physical injury."



Covers PD only

Does not cover

- a. TD
- b. treatment

Exceptions:

- a. violent acts
- b. catastrophic injuries

- ▶ Add-on PD prohibition applies to SSP claims only if arise from compensable physical injury
- ▶ Stand alones not barred (psych injury caused by stress; sex injury caused by kick to groin)
- ▶ Physical PD resulting as consequence of SSP injury not barred (ex. harassment causing HBP)



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Still pay for non-PD benefits...

LC 4660.1(c)(1) "Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury."

Other benefits (TD) not expressly prohibited



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FACTS:

- ▶ 2 injuries in 2014
- ▶ both amended (2015) to include psych
- ▶ saw ortho AME; petitioned for psych panel
- ▶ def said 4660.1(c)(1) made psych panel inappropriate

HELD: defense loss

REASON:

IW still has right to discovery to argue for treatment/td from psych

Hernandez v. Fremont Bank, 2015 Cal. Wrk. Comp. P.D. LEXIS 470



EXCEPTIONS

- 1) LC 4660.1(c) psych disorder may increase the impairment rating if it "resulted from being a victim of a violent act or from direct exposure to a significant violent act within the meaning of Section 3208.3."
 - just like LC 3208.3(b)(2) language providing that "predominant cause" standard lowers to "substantial cause" if violence is involved
- 2) (LC 4660.1(c)(2)(B): psych disorder may increase rating where there is a "catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury."

"catastrophic injury" = not defined

Note: these exceptions apply to psych only (not sex/sleep)



EXCEPTIONS

WCAB/Courts have said little

Possible insight... 2 year TD restriction exceptions:

- A. Acute and chronic hepatitis B.
- B. Acute and chronic hepatitis C.
- C. Amputations.
- D. Severe burns.
- E. Human immunodeficiency virus (HIV).



Exceptions?

WCAB/Courts have said little

Possible insight

- F. High-velocity eye injuries.
- G. Chemical burns to the eyes.
- H. Pulmonary fibrosis.
- I. Chronic lung disease.



What we do know...

- ▶ "violent act" need not be criminal
- ▶ or quasicriminal
- ▶ acts characterized by either strong physical force, extreme or
- ▶ intense force or are vehemently or passionately threatening

EX.

- ▶ being hit by a car from behind with enough force to fall and lose consciousness = "violent act"

Larsen v. Securitas Security Services (2016)
81 CCC 770 (panel decision)



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Here's a crazy thought...



LC 4660.1(c)(1) bars PD increases from sleep, sex and psych injuries

- ▶ "arising out of a compensable **physical** injury"
- ▶ LC is silent as to sleep, sex and psychiatric injuries arising out of a compensable **psychiatric** injury
- ▶ IF sleep and/or sex. dysfunction are a result of the compensable **psychiatric** injury (and NOT a compensable consequence of any **physical** injury)...does this mean sexual and sleep dysfunction PD arising from **psychiatric** injury is compensable?



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RATING PSYCH

Do not use AMA Guides (5th)

You couldn't if you wanted to!

See PDRS GAF scores



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Psych?

▸ Bad news



◦ No objectives at all!

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- ▶ Psychiatrists are not comfortable working together...what would Freud think?



Recipe

- (1) Take a handful of psychiatrists.
- (2) Lock them in a room.
- (3) Call them a “committee”
- (4) What would you get?

DISASTER...AKA...



AMA Guides Chapter 14

“Mental & Behavioral Disorders”

- ▶ WORTHLESS



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Rating Psychiatric Impairment

- ▶ Pages 1-12 thru 1-16
- ▶ GAF = Global Assessment Function

“Kicking the tires to check the engine”



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Eleven GAF Categories

- ▶ 10 of the 11 have a GAF range of 10
- ▶ Compare I/W to each category (1-14, 1-15)
- ▶ If “symptom severity” or “level of functioning” is worse than is described, go to next category



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Eleven GAF Categories (continued)

- ▶ Keep looking for category that best matches “symptom severity” or “level of functioning” (whichever is worse).
- ▶ While selecting a category, “[c]onsider psychological, social and occupational functioning on a hypothetical continuum of mental health-illness.”



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- ▶ Do not consider impairment in functioning due to physical (or environmental) limitations
- ▶ Evaluates symptoms at MMI



Code 91-100

- ▶ Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities.
- ▶ No symptoms



Code 91–100

- Mary Poppins?



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Code 81–90

- Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (e.g., an occasional argument with family members).



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Code 81–90 (continued)

- ▶ Ozzie & Harriet?



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Code 71–80

- ▶ If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational or school functioning (e.g., temporarily falling behind in schoolwork).



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Code 71–80 (continued)

- Pa, Ma, Mary & Laura?
(Little House on the Prairie)



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First Three Healthiest Codes Receive NO WPI

- ▶ GAF 70–100 = 0
(page 1–16)

PROBLEM



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Code 61–70

= 0–14% WPI = 0–20% PD

- ▶ Some mild symptoms (e.g., depressed mood and mild insomnia)

OR

- ▶ Some difficulty in social, occupational or school functioning (e.g., occasional truancy or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.



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Code 51–60

= 15–29% WPI = 21–41% PD

- ▶ Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks)

OR

- ▶ Moderate difficulty in social, occupational or school functioning (e.g., few friends, conflicts with peers or co-workers).



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Code 51–60 (continued)

- ▶ Doesn't this describe most claimants with psych claims?
 - “Moderate difficulty in... occupational... functioning”?
 - “Conflicts with...co-workers”?



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Code 41–50 = 30–48% WPI = 42–67% PD

- ▶ Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting)
- OR
- ▶ Any serious impairment in social, occupational or school functioning (e.g., no friends, unable to keep a job).



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Code 41–50 (cont'd)

“suicidal ideation”?
 “preoccupation” required?

“unable to keep a job”?
 sounds like many psych claimants
 we've seen!



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Code 31–40

= 51–65% WPI = 71–97% PD

- ▶ Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure or irrelevant)

OR

- ▶ major impairment in several areas, such as work or school, family relations, judgment thinking or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home and is failing at school).



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Code 31–40 (continued)

- ▶ “Speech is at times illogical, obscure or irrelevant”?

Me? (you’re my witnesses!)

(I’m retiring!)



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Code 21–30

= 70–76% WPI = 98–100% PD

- ▶ Behavior is considerably influenced by delusions or hallucinations
- OR
- ▶ serious impairment in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home or friends).



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Code 11-20

= 77-83% WPI = 100% PD

- ▶ Some danger of hurting self or others (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement)

OR

- ▶ occasionally fails to maintain minimal personal hygiene (e.g., smears feces)

OR

- ▶ gross impairment in communication (e.g., largely incoherent or mute).



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Code 1-10

= 84-90% WPI = 100% PD

- ▶ Persistent danger of severely hurting self or others (e.g., recurrent violence)

OR

- ▶ Persistent inability to maintain minimal personal hygiene

OR

- ▶ Serious suicidal act with clear expectation of death.



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Code 0

- ▶ Inadequate information



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When Do You Owe LC 5710 Fees In A Post-Term Psych Case

NOT as soon as you think!

- ▶ LC 3600(a)(10) Where the claim for compensation is filed after notice of termination or lay off **no compensation shall be paid** unless the employee demonstrates by preponderance of the evidence that:
 - a. The employer had notice of the injury prior to the notice of termination or layoff.
 - b. The employees medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
 - c. The date of injury is subsequent to the notice of termination or layoff.



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LC 5710 Fees = "Compensation"?

You bet!

Labor Code §3207

"Compensation" means compensation under this division and includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.

But this says "employee", not AA

5710 fees = employee "compensation"

5710(b) If the employer or insurance carrier requests a deposition to be taken of an injured employee...**the deponent is entitled to receive in addition to all other benefits...**(emphasis added)



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But aren't 5710 fees automatic?

NOPE!

LC 5710: A reasonable allowance for attorney's fees for the deponent, if represented by an attorney licensed by the State Bar of this state. ***The fee shall be discretionary*** with, and, if allowed, shall be set by, the appeals board...



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Flores v. Chualar Canyon Ranch Supply 2017 Cal. Wrk. Comp. P.D. LEXIS 110

FACTS:

- ▶ VR expert opined 100% based on psych
- ▶ psych barred by LC 3208.3 six month rule

ISSUE: what happens to expert's costs?

HOLDING: payment issues!

REASONING:

- ▶ VR expert's evaluation, report or testimony is analogous to medical-legal costs under section 4621, and must be reasonable and necessary at the time the costs are incurred
- ▶ "The VR expert's evaluation, report or testimony must have the potential to affect the injured employee's permanent disability rating in order for the costs to be recoverable."
- ▶ "VR report and testimony had the potential to affect applicant's permanent disability rating should the WCJ find that applicant's psychiatric injury was caused by a sudden and extraordinary employment condition"



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