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Workmen’s Compensation

by Jack E. Goshkin*

The most significant trend and development in workmen’s compensation law in the past year has been the activity of the appellate courts in annulling and reversing the decisions of the Workmen’s Compensation Appeals Board.¹ With the Labor Code’s severe limitations on the scope of judicial review of WCAB decisions,² particularly on the right of the courts to review factual determinations, and with most of the WCAB cases containing factual rather than legal questions, the majority of petitions for writ of review have been and still are being denied.³

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1. Hereinafter referred to as WCAB.


3. WCAB Chairman Morton Colvin has stated that of the 143 cases which were appealed from action of the WCAB between January and September 1, of 1968, the appeals board action was sustained in 121 cases. While Mr. Colvin did not state the number of...
The character of the questions presented to the WCAB has not changed; the questions remain primarily factual. However, the frequency with which the courts annulled WCAB decisions has increased noticeably in the past year. A review of the cases points up the changed attitude of the courts in interpretation of Labor Code section 5952 and its "substantial evidence rule." Future effect of the appellate courts' actions, in retreating from the long-standing interpretation of section 5952, is of vital concern to any attorney practicing in the field of workmen's compensation.

Another major trend of the past year has been the dramatic reduction in the amount of litigation of workmen's compensation claims. In attempting a prediction of whether the reduction in the number of claims will continue through future years, California lawyers may consider the two new programs introduced by the WCAB, which are discussed below.

Other developments in specific areas of workmen's compensation law are set forth in the latter portion of the article.

The Change of Judicial Attitude in Appellate Review of WCAB Decisions

A reading of the WCAB cases in which judicial review was granted between October 1, 1967 and October 15, 1968 reveals that the appellate courts are more and more reviewing factual determinations of the WCAB. While the factual re-

cases in which appeals board action was sustained by denial of review, reading the cases in the advance sheets would lead one to believe that in only 2 or 3 cases at most was the board action sustained in cases where review was granted.

A count of the WCAB cases reported in California Compensation Cases for the years 1965, 1966, 1967 and through October 1968 reveals that in 1965, the action of the WCAB was reviewed in a total of 28 cases and affirmed in 12 of those cases; in 1966, the WCAB action was affirmed in 12 of 28 cases and in 1967, the WCAB was affirmed in 12 of 29 cases. Through October of 1968, the WCAB was reversed or annulled in 42 of 52 cases granted review. In an address given before workmen's compensation referees and attorneys in San Diego on October 8, 1968, Supreme Court Justice Stanley Mosk said: "... A mere cursory reading of the advance sheets of both the Court of Appeal and the Supreme Court reveals that a greater number of Workmen's Compensation Appeals Board awards have been annulled in the years 1967 and 1968 than in any similar period in the state's recorded judicial history."
view was sometimes managed in a rather oblique manner, the increased interest of the courts in the factual determinations of the WCAB is bound to have an impact on California Workmen’s Compensation Law. In fact, there may well have been a tacit change in the “substantial evidence rule” as it applies to the determinations of the WCAB.

Before reviewing some of the cases in which the courts have disagreed with the factual determinations of the WCAB and accordingly annulled or reversed its decisions, a brief outline of the statutory restrictions on appellate review and court interpretations of those statutes\(^5\) will point up the changed attitude of the courts.

Labor Code section 5952\(^6\) sets forth the general scope of judicial review of WCAB decisions. It restates the “substantial evidence rule” as applied generally to administrative bodies exercising quasi-judicial functions and provides in part that nothing in the section shall permit the court to exercise its independent judgment on the evidence. Section 5953\(^7\) provides in part that the findings and conclusions of the appeals board on questions of fact are conclusive and final and not subject to review.

In interpreting those statutes, the courts have held that an

5. All sections referred to are from the Labor Code, unless otherwise indicated.

6. Cal. Lab. Code § 5952. The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:
   (a) The appeals board acted without or in excess of its powers.
   (b) The order, decision, or award was procured by fraud.
   (c) The order, decision, or award was unreasonable.
   (d) The order, decision, or award was not supported by substantial evidence.
   (e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

7. Cal. Lab. Code § 5953. The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board. The appeals board and each party to the action or proceeding before the appeals board shall have the right to appear in the review proceeding. Upon the hearing, the court shall enter judgment either affirming or annulling the order, decision, or award, or the court may remand the case for further proceedings before the appeals board.
award of the WCAB\textsuperscript{8} would not be disturbed unless there was an entire lack of evidence to support it and that the court could not be concerned with conflicts in the evidence.\textsuperscript{9} If the findings of the WCAB were supported by inferences which could be fairly drawn from evidence, even though the evidence was susceptible of opposing inferences, the reviewing court would not disturb the award.\textsuperscript{10} If a decision of the WCAB could be supported on any ground, it became immaterial that other grounds were improper.\textsuperscript{11} In reviewing an award rendered by the WCAB, the court was required to indulge in all reasonable inferences to support the board’s finding.\textsuperscript{12} Findings of the WCAB were to be interpreted liberally in favor of sustaining an award, even where reference to the record was required.\textsuperscript{13} The WCAB, and not the court, was authorized to draw inferences from the evidence and base conclusions thereon.\textsuperscript{14} The WCAB’s findings of fact were not subject to review where it could not be said that no reasonable man could reach the conclusion that the board reached.\textsuperscript{15}

The number of cases in which the courts declined to review or overturn the findings of the WCAB is legion. Succinctly stated, the “substantial evidence rule” has been applied to WCAB decisions. The courts have refused to weigh or to re-evaluate the evidence; they merely isolate that evidence which could support the decision, and if there was any such evidence, the WCAB’s action was affirmed.

One may wonder how an appellate court could possibly bridge the vast sea of precedent limiting and restricting its

\textsuperscript{8} The judicial functions of the old Industrial Accident Commission were transferred to the WCAB January 15, 1966.

\textsuperscript{9} Associated Indem. Corp. v. Industrial Accident Comm., 18 Cal.2d 40, 112 P.2d 615 (1941).

\textsuperscript{10} Riskin v. Industrial Accident Comm., 23 Cal.2d 248, 144 P.2d 16 (1943).


\textsuperscript{13} Mercer-Fraser Co. v. Industrial Accident Comm., 40 Cal.2d 102, 251 P.2d 955 (1953).

\textsuperscript{14} Los Angeles & S.L.R. Co. v. Industrial Accident Comm., 2 Cal.2d 685, 43 P.2d 282 (1935).

right to disagree with the WCAB’s view of the evidence. But in 1967, the courts apparently discovered section 5908.5 of the Labor Code\textsuperscript{16} which had been added in 1951 and amended to its present form in 1955. That section proved to be the span needed. It requires the WCAB to state the evidence upon which it relies and to specify in detail the reasons for its decision when it affirms, rescinds, alters, or amends an original finding of a referee.\textsuperscript{17}

The first application of section 5908.5 appeared in the case of \textit{Wilhelm v. WCAB},\textsuperscript{18} decided October 5, 1967. The applicant for workmen’s compensation benefits was a school nurse who alleged disability by reason of contracting herpes zoster from exposure to chickenpox in the course of her employment. The referee found industrial injury and defendant petitioned for reconsideration. The WCAB granted reconsideration, vacated the referee’s findings and award, and issued an order denying benefits. In her petition for a writ of review, the applicant contended that, in finding that she did not sustain industrial injury, the board disregarded the substantial evidence to the contrary. In its answer to applicant’s petition for a writ, the WCAB contended that there was “some evi-

\textsuperscript{16} Cal. Lab. Code § 5908.5. Any decision of the appeals board granting or denying a petition for reconsideration or affirming, rescinding, altering, or amending the original findings, order, decision, or award following reconsideration shall be made by the appeals board and not by a referee and shall be in writing, signed by a majority of the appeals board members assigned thereto, and shall state the evidence relied upon and specify in detail the reasons for the decision.

\textsuperscript{17} Workmen’s Compensation cases are initially heard by a trial referee who decides all issues of fact and law presented. Any person aggrieved by the referee’s final decision may petition the seven-man appeals board for reconsideration. Such petitions are usually considered and decided by rotating panels of three board members. If the questions presented are deemed of sufficient importance, all seven members of the board will consider and decide a petition for reconsideration en banc. The board may grant or deny reconsideration. If reconsideration is granted, the board may, with or without proceedings, affirm, rescind, alter or amend the referee’s order, award, or decision (§§ 5900–5911). Any person “affected” by the board’s order, decision or award (including an order denying reconsideration) may apply to the supreme court or the court of appeal for a writ of review for the purpose of inquiring into and determining the lawfulness of the board’s action (§§ 5950–5956).

\textsuperscript{18} 255 Cal. App.2d 30, 62 Cal. Rptr. 829 (1967).
ence” to support its finding. The court of appeal specifically stated that it was not considering the question of sufficiency of evidence, and that it was applying instead the provisions of section 5908.5. The court stated:

In its decision after reconsideration the appeals board, pursuant to Labor Code, section 5908.5, did not comment on the evidence but stated as the reason for its decision that it found merit in the contention of respondents [defendants below] “that there is no evidence of exposure of the applicant to an infectious or contagious disease.” Our review of the record shows that there is substantial evidence on this issue and no reason appears to justify its exclusion from consideration.19

The court went on to recite the evidence in the record that would support a finding of applicant’s exposure to chickenpox and stated that there was no evidence that she was not so exposed. One wonders why, if there was no evidence in the record to support the WCAB’s decision, the court of appeal did not annul on that basis. If there was any evidence at all in the record that, even though the applicant may have been exposed to chickenpox during the course of her employment, her own disease was not the result of such exposure, the court, if it intended to comply with the historic limitations on its right to review factual matters, had a duty to draw such inference in support of the WCAB’s denial of benefits.

Another application of section 5908.5 appeared in Evans v. WCAB,20 decided by the California Supreme Court in June of 1968. The referee had found the applicant not barred from reopening an old case by reason of incompetency. The board, after granting defendant reconsideration, annulled the referee’s finding, ruling instead that the applicant’s injury did not cause further disability and that his claim was barred by the limitations period. The court of appeal denied a writ of review and the supreme court then granted review. In its rather short decision, the court stated:

20. 68 Cal.2d 753, 68 Cal Rptr. 825, 441 P.2d 633 (1968).
The only reference by the board to the evidence and to the reasons for its decision was the statement that "We have carefully reviewed the record in this matter and are of the opinion that it is not established by the evidence therein that applicant was incompetent as he alleges. His petition to reopen which was filed on June 3, 1966 was therefore barred."¹

The court referred to section 5908.5, quoted a Public Utilities Commission decision² stating the purpose of the requirement that evidence be stated and reasons detailed, and found that the WCAB had not regularly pursued its authority. The court therefore annulled the decision.

In White v. WCAB,³ a widow received an award for death benefits including a penalty for serious and wilful misconduct. The WCAB granted defendant reconsideration, vacated the referee’s award, and found that the death was not caused by serious and wilful misconduct of the employer. The court of appeal granted review and, in a long decision, discussed the evidence and safety orders applicable. The court said that the WCAB had misinterpreted some of the applicable safety regulations and further stated:

Apart from the board’s evident misinterpretation of the safety regulations, its opinion is significantly devoid of any statement of the evidence relied upon and of any statement of the reasons for its ultimate decision. The decision thus fails to comply with section 5908.5 of the Labor Code.⁴

¹ 68 Cal.2d at 754, 68 Cal. Rptr. at 826, 441 P.2d at 634.
² "The purpose of the requirement that evidence be stated and reasons detailed appears analogous to that of the requirement of section 1705 of the Public Utilities Code that decisions of the Public Utilities Commission contain separately stated findings of the basic facts upon all material issues. It is to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." Greyhound Lines, Inc. v. Public Util. Comm., 65 Cal.2d 811, 56 Cal. Rptr. 484, 423 P.2d 556 (1967).
⁴ 265 Cal. App.2d at —, 71 Cal. Rptr. at 55.
The court annulled the WCAB decision and remanded it for further proceedings consistent with the views expressed in its opinion.

Why did the court feel it necessary to raise the question of section 5908.5? It stated: “As we read the record the evidence clearly sustains the findings of the referee that this element of serious and willful misconduct of the employer had been established.” (The court did not address itself to the question of whether there was any evidence in the record to sustain the WCAB’s decision.) The court could simply have found that by a misinterpretation of a safety order, the WCAB had made an error of law; it did not need to refer to section 5908.5 or to the evidence.

In the case of Brennfleck v. WCAB, the court of appeal annulled a decision after reconsiderations vacating a referee’s award of death benefits to an alleged widow. The stated reason for the annulment was the WCAB’s failure to state the evidence relied upon and to detail the reasons for its action as required by section 5908.5. The primary question in Brennfleck was whether the petitioner could qualify for death benefits as a widow or putative spouse of an employee killed in the course of his employment. The court outlined the evidence that would support a finding that the petitioner was a putative spouse and stated that “There is uncontradicted proof—all of it substantial—to indicate that petitioner in good faith believed she was legally married to Carl and that Carl joined in that belief.” Again, the court did not discuss the question of whether there was any evidence in the record, or any evidence from which inferences could be made, to support the WCAB’s decision. Why, if there were no substantial evidence in the record to support the WCAB’s decision, did the court have to rely on section 5908.5?

The case of Holcomb v. WCAB is unusual in the class of

6. 265 Cal. App.2d at —, 71 Cal. Rptr. at 530.
cases now under discussion. This is not a case in which the WCAB overturned an original decision of a referee. Rather, it is one in which a referee granted an award for permanent disability but denied further medical treatment. After applicant’s petition for reconsideration was denied, she petitioned for review. The review was granted and the court annulled the order denying reconsideration on the ground that it did not comply with section 5908.5. The court, after pointing out that the WCAB had stated it had carefully reviewed the record and had quoted from one medical report, nevertheless found that such a statement was not in compliance with the requirements of section 5908.5. The court noted that the extensive quotations from the record in the board’s answer to the petition for review did not meet the requirements of section 5908.5 because of that section’s provision that the WCAB shall state in its decision the evidence on which it relied.

If the WCAB could quote extensively from the record in support of its decision in its brief, there must have been some favorable evidence which the court could have used to uphold the decision had it wished to abide by its traditional refusal to reweigh and re-evaluate the evidence.

In the case of Granado v. WCAB the supreme court annulled a decision of the WCAB apportioning temporary disability and medical treatment between an industrial injury and a pre-existing non-industrial condition. The WCAB’s decision had been upheld by the district court of appeal, but the supreme court noted that the question before it had not been squarely decided and then discussed the statutes and the cases applicable. After deciding that apportionment was not in order as a matter of law, the court stated that the decision had to be annulled for another reason—the WCAB had not complied with section 5908.5 in setting forth its reasons for allowing apportionment. It would seem from this decision that, as a matter of law, the WCAB could not apportion medical treatment and temporary disability between an indus-

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trial injury and a non-industrial condition would be a sufficient basis on which to annul the WCAB’s decision.\(^{10}\)

*Lundberg v. WCAB\(^ {11}\)* is perhaps the most interesting of the cases in which the courts have relied at least in part on section 5908.5 to support annulment of WCAB decisions. More openly than the other cases, it reveals the supreme court’s discontent with the WCAB’s factual determinations. In *Lundberg* one of the two reporting doctors gave no opinion as to the cause of injury. The other doctor stated:

I do not know what caused the 4th lumbar intervertebral disc to rupture. It is possible that his work activity between 5–8–67 and the onset of symptoms on 6–27–67 was responsible for this rupture but it is equally possible that the rupture would have occurred had he not been working at all.\(^ {12}\)

The referee found that the petitioner suffered injury to his lower back arising out of and in the course of his employment. The defendant’s petition for reconsideration was granted and the WCAB discussed the reports of the doctors and concluded that the applicant had not met his burden of proof to establish that his injury was industrially caused. In annulling the decision of the WCAB, the court devoted most of its opinion to a discussion of the applicant’s burden of proof and to the Labor Code’s direction that provisions of the Workmen’s Compensation Act are to be liberally construed.\(^ {13}\)

The court engaged in a neat bit of semantic sleight of hand by severing that portion of the medical opinion quoted above which states that “it would be equally possible that the rupture would have occurred had he [the applicant] not been working at all,” and by characterizing that portion as “at most neutral.” The court then found the first part of the sentence which states “it is possible that his work activities . . . caused the rupture,” along with applicant’s testimony that he had

\(^{10}\) 69 Cal.2d at —, 71 Cal. Rptr. at 683, 445 P.2d at 299–300.

\(^{11}\) 69 Cal.2d —, 71 Cal. Rptr. 684, 445 P.2d 300 (1968).

\(^{12}\) 69 Cal.2d at —, 71 Cal. Rptr. at 685, 445 P.2d at 301.

\(^{13}\) Cal. Lab. Code § 3202.
his onset of pains at work, to constitute undisputed evidence that "points toward" an industrial injury. The court went on to say that the WCAB had means by which it could have resolved its doubts as to causation (by taking additional evidence, having the applicant examined by a physician) but that the board had not followed these procedures and had, instead, determined "... in the absence of any supporting evidence to reject the inference of industrial causation, and this it may not do."14 (Emphasis added.) The court then brought up section 5908.5 and expressed grave doubt of the board's compliance with that requirement:

The board has failed to point in its decision to any valid basis for rejecting the inference of industrial causation arising from the undisputed facts and Dr. Haldeman's report ... The board has failed to set forth the undisputed evidence that the symptoms occurred when petitioner was engaged in the kind of work which could cause the injury, and has failed to furnish any reason to ignore it.15

Obviously a reasonable man could as easily infer from the medical report that the injury was not industrially caused as he could infer, as the court did, that it was industrially caused. Therefore, the court would be hard put to annul the decision in Lundberg on the ground that there was no evidence whatsoever in the record to sustain the decision of the WCAB. It is apparent that the court was in fact exercising its independent judgment on the evidence16 and was most certainly reviewing the findings and conclusions of the WCAB on questions of fact both of which activities are prohibited by statute.17

In all the above cases, the courts have relied, at least in part, on section 5908.5 to annul WCAB denials of workmen's compensation benefits where they thought there was substantial evidence in the record to support a decision granting those

14. 69 Cal.2d at —, 71 Cal. Rptr. at 686, 445 P.2d at 302.
15. 69 Cal.2d at —, 71 Cal. Rptr. at 687, 445 P.2d at 303.
benefits. If the records in the cases above had been entirely devoid of any evidence in support of the WCAB’s decisions denying benefits, the courts could, and probably would, forthrightly annul the awards on the ground that there was no substantial evidence to support the WCAB. In the past year, the courts have not been bashful about annulling WCAB awards on grounds other than section 5908.5 and have in several cases annulled the awards on the ground that there was no substantial evidence to support the WCAB’s decision.

In Clemmens v. WCAB the referee found that death did not arise out of and occur in the course of employment; the petition for reconsideration was denied. The court of appeal annulled the ruling on the ground that the referee’s opinion stated that the cause of death had not been determined and that it was required of the board to resolve the conflicting evidence on the cause of death. The decision, devoted largely to a discussion of the reasons for holding deaths from unknown causes occurring in the course of employment as compensable, admonished the WCAB that it was bound by the fundamental principle that all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee. However, the court overlooked the statutory prohibition on its power to review the evidence.

In Jones v. WCAB the supreme court annulled an order of the WCAB overturning a referee’s award of compensation benefits, addressing itself to the question of whether the claimant had suffered new and further disability resulting from a 1961 injury for which he had already been awarded a 42 percent permanent disability on November 10, 1965. In reversing the referee, the WCAB relied upon medical reports that had been filed during earlier proceedings. The court held that it was error for the WCAB to do so. While the court does not clearly so state, it appears that it annulled on the ground that there was no substantial evidence to support the WCAB’s decision and the evidence upon which the WCAB relied was no longer germane to the question. Sim-
Similarly, in *Berry v. WCAB*\(^2\), *Zemke v. WCAB*\(^1\), and *Zurich Insurance v. WCAB*\(^2\) the courts annulled WCAB decisions on the ground that there was no substantial evidence to support those decisions.

The court’s overturning of so many WCAB decisions in so short a period on the ground that the decisions were not supported by substantial evidence might, in itself, be indicative of a trend. However, the most significant development has been the courts’ use of section 5908.5 to annul decisions in which they believed, after reweighing and reinterpreting the evidence, that the evidence supporting an award for benefits had not been given sufficient weight by the WCAB. Section 5908.5 has been in effect in its present form since 1955, but research has failed to discover a single case prior to October, 1967 in which the courts have annulled decisions on the ground that the WCAB had not complied with the provisions of that section—in spite of prior presentations of that argument to the courts. Prior to 1967, cases presenting the 5908.5 argument to the courts had been denied review.\(^3\)

The present trend appears to be that the court will review the evidence and annul the award where it believes that there is no substantial evidence to support the WCAB award. Where there is some evidence to support the WCAB’s denial of benefits but, in the court’s view, a preponderance of evidence to support granting benefits, the trend is to annul the award on the ground that the WCAB had not complied with section 5908.5. No doubt this tactic has caught the WCAB by sur-

\(20\). 68 Cal.2d 786, 69 Cal. Rptr. 68, 441 P.2d 908 (1968).

\(1\). 68 Cal.2d 794, 69 Cal. Rptr. 88, 441 P.2d 928 (1968).

\(2\). 33 C.C.C. 569 (1968) (opinion not published in official reports).

in the cases above had been entire. In support of the WCAB’s decision, courts could, and probably would, fortify on the ground that there was support the WCAB. In the past year, courts have been bashful about annulling WCAB decisions rather than section 5908.5 and have upheld the awards on the ground that there was support the WCAB’s decision. The referee found that death did occur in the course of employment; the decision was denied. The court of appeal found the ground that the referee’s opinion as to whether an injury occurred in favor of the employee. The Supreme Court annulled an order of a referee’s award of compensation if to the question of whether the new and further disability resulting which he had already been awarded disability on November 10, 1965. The WCAB relied upon medical evidence during earlier proceedings. The court for the WCAB to do so. While so state, it appears that it annulled was no substantial evidence to support the evidence upon which the smaller germane to the question. Sim-

prise. Section 5908.5, in effect in its present form for some 12 years, had never before been used by the courts.

Although it has been generally understood that the WCAB need not make negative findings but only specify by its findings the evidence upon which it rested its decision, setting forth findings limited to affirmative ultimate facts, it now appears that, where the WCAB denies benefits, the courts want the board to set forth the evidence it has rejected and to explain its rejection.

From the many admonitions in the decisions that the workmen’s compensation law must be liberally construed in favor of granting benefits, it is doubtful that the courts will indulge in the use of section 5908.5 to overturn any decision that grants benefits. Further, it is doubtful that the courts will overturn any decision granting benefits where there is any evidence whatsoever in the record, either directly or by inference, to support an award granting compensation benefits. It does appear, however, that the courts, and particularly the supreme court, will no longer confine their search of the record to an attempt to determine whether there is any evidence or inference that could support the WCAB decision in those cases where the WCAB has denied compensation benefits, but will re-evaluate and reinterpret the evidence to determine whether the WCAB has resolved all doubts and engaged in all possible inferences in favor of granting benefits.

Reduction of Litigation

For the first time in some thirteen years, the number of original applications for hearing filed with the WCAB has decreased. Over the past ten years, the average annual increase in original filings has been 8.7 percent. For the first six months of 1968, there was a 4 percent decrease in original filings when compared to the corresponding period for the preceding year. The reasons for the rather dramatic decrease


5. Statistics taken from a speech delivered by Morton R. Colvin, Chairman, WCAB, September 16, 1968, to the International Association of Industrial Accident Boards and Commissions.
in the filing of original applications are not definitely ascertainable but may be due to recent programs developed by the WCAB to reduce litigation.

Under authority granted by Labor Code section 138.4, effective January 15, 1966, the Division of Industrial Accidents enacted regulations requiring that employees receive notice of payment and non-payment of benefits, termination of benefits, and an accounting of benefits paid, and that insurance companies provide copies of such notices to the division. In compiling reports, copies of notices of payment as received by the division are fed into computers; every six months a report is prepared covering the previous twelve-month period. These published reports set forth a statistically developed listing of insurance companies and self-insureds in a descending order of promptness of first payments to injured employees. Those companies who find themselves at the bottom of the list generally strive to improve their position before the next list is published.

The effectiveness of this program in improving the promptness with which first payments are issued is shown by a contrast of studies made in 1963 and in 1968. The 1963 study indicated that benefit payments were made by the fourteenth day after injury in only 19 percent of all cases. In 1968, some two years after the reporting procedure was instituted, first payments were made by the fourteenth day after beginning of disability in over 68 percent of the cases.6

Another possible reason for reduction of litigation is the “Procedure to Reduce Workmen’s Compensation Litigation,” issued by the WCAB in October of 1967. Basically, the procedures are an attempt to avoid the filing of applications before the case is ready for decision. It had been found that, in many cases, applications were filed when injured employees first visited an attorney even though they were receiving all benefits to which they were entitled and were not yet ready for permanent disability rating. The basic tool

of the procedure to reduce litigation is a form which injured employees’ attorneys send to insurance companies or self-insured employers requesting information and stipulations.

Whether the reduction in litigation is due to the procedures to reduce litigation or to the more prompt payment of first disability benefits is still questionable. When an injured employee is promptly put on temporary disability and receives his first temporary disability check within two weeks, he is far less likely to consult an attorney. When the employer or carrier is dilatory in instituting temporary disability benefits, the injured employee wants his status determined and seeks legal counsel or files an application for a hearing on his own behalf. Therefore, it is probable that the reduction of filings is more closely related to the great increase in prompt payment of first benefits than it is to the procedures to reduce litigation.

Regardless of the reason, the filing of original applications for hearing is markedly reduced for the first time in many years. Whether that reduction will mean an actual reduction of litigated cases remains to be seen. Perhaps the effect of the procedures instituted by the WCAB will be merely to delay the filing of applications. It will probably take a year or two to determine whether workmen’s compensation litigation in California has actually been reduced.

Apportionment of Liability

Basically, there are only two types of apportionment in workmen’s compensation law: (1) the apportioning of liability for a single disability between multiple employers or insurance carriers where the employee’s disability is due to a continuous injury or occupational disease; and (2) the apportioning of liability for an employee’s disability between multiple causes. Significant developments have appeared in both areas of the law of apportionment during the past year.

Apportionment for Multiple Causes

The question whether an employer’s liability for temporary disability and medical treatment could be apportioned between
an industrial injury and a pre-existing non-industrial condition had not been squarely decided by the courts before this year. The WCAB had simply taken the position that such apportionment was not required by section 4663. Those cases which had attacked the WCAB interpretation were decided on other grounds. In Granado v. WCAB the supreme court announced that there may be no apportionment of the liability for temporary disability payments or medical treatment between industrial injuries and non-industrial injuries. While the court discussed only apportionment between industrial injuries and non-industrial injuries, its reasoning suggests that apportionment will not be permitted between industrial injuries and any pre-existing non-industrial condition, regardless of the cause of the pre-existing medical problem.

Granado did not work any change in the law as understood by most practitioners in the field. Prior to Granado the WCAB had consistently taken the position that, while it could apportion temporary disability and medical treatment, it was not required to do so by the statute and that it did not make such apportionment as a matter of policy. Attacks on the WCAB's refusal to apportion temporary disability and medical treatment had always failed. Therefore, there was a general acceptance of the rule that temporary disability and medical treatment would not be apportioned. What Granado did was to remove a nagging doubt and to change an administrative policy into a rule of law.

The rules for apportioning permanent disability between the effects of an industrial injury and a pre-existing condition were reviewed and redefined twice by the supreme court during the past year. In both decisions the court disagreed

7. Cal. Lab. Code § 4663. In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.


with the WCAB’s interpretation of the medical evidence and held that the board’s awards were not supported by substantial evidence. The two cases did not state any new principles of law, but they are interesting only as an indication of the court’s resolve to deny apportionment unless the medical evidence supporting it is stated in a set formula.

Subsequent to these decisions, the court of appeal faced the same question\(^\text{11}\) and concluded:

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\ldots \text{[W]hile the employer is liable for that portion of the total disability caused by the industrial injury, he is not liable for the part of the disability which “. . . would have resulted, in the absence of the industrial injury, from the ‘normal progress’ of the pre-existing disease.”}\text{12}
\]

It would seem that unless the medical opinions use the terminology “x percent of the employee’s present disability would have resulted in the absence of the industrial injury from the normal progress of the pre-existing disease,” the courts do not find apportionment permissible.\(^\text{13}\)

**Apportionment for Continuous Trauma Injuries**

In the nine years since *Beveridge v. Industrial Accident Commission*,\(^\text{14}\) continuous trauma cases have burgeoned to a point where they deserve a classification of their own.

Probably the major development in continuous trauma cases in the past year was the complete confusion caused by three

\[^{11}\text{Peterson v. WCAB, 266 Cal. App. 2d —, 72 Cal. Rptr. 545 (1968).}\]

\[^{12}\text{266 Cal. App.2d at —, 72 Cal. Rptr. at 548.}\]

\[^{13}\text{In Fine v. WCAB, 32 C.C.C. 492 (1967), (opinion not published in official reports) which was decided by the court of appeal prior to the two supreme court cases mentioned, the court was content with medical testimony that “The bulk of his (employee’s) problem predated the injury,” and that the industrial injury contributed to the disability only to a “minimal extent.” However, it annulled the appeals board’s decision denying the applicant benefits and returned the matter, ordering the board to determine how much is “minimal,” though it is a well established and well-known rule that minimal disabilities are not ratable.}\]

\[^{14}\text{175 Cal. App.2d 592, 246 P.2d 545 (1959).}\]
appellate decisions: *Dow Chemical Company v. WCAB*,\(^{15}\) *De Luna v. WCAB*,\(^{16}\) and *Miller v. WCAB*.\(^{17}\) In these cases the courts apparently attempted to restructure the law of continuous trauma, and in doing so, set forth decisions with effects so troublesome that eventual amendments and additions to the Labor Code were enacted to offset them.\(^{18}\)

The *Dow* case concerned itself with whether the WCAB was bound by its final decisions granting permanent disability ratings for two specific injuries when considering the same employee’s claim for disability for a period of continuous trauma which encompassed the dates of specific injuries. The same workmen’s compensation insurance carriers were defendants in the continuous trauma case as had been held liable for the specific incidents. The WCAB found that the employee’s total permanent disability at the end of the period of continuous trauma was 75 percent and that he was due a life pension. The WCAB granted credit to the carriers who had been held liable for the specific injuries in the amount of their liability for those injuries. But the supreme court held that the action of the WCAB was improper since “. . . any injury which produced by itself a definable disability should not be submerged in a series of injuries with indemnity being awarded for repetitive trauma.”\(^{19}\) The court pointed out that the constructive date of the continuous trauma injury was the time when it finally resulted in disability (at the end of the period) and, as the two specific injuries had occurred prior to that date, section 4750 of the Labor Code would preclude the board from lumping the disabilities awarded in the specific incidents with the total disability.

The employee in *Dow* had also petitioned for subsequent injuries fund benefits but that claim had been denied by the board. The supreme court reversed the board and adopted the rule, for the purpose of the subsequent injuries statutes,

19. 67 Cal.2d at 492, 62 Cal. Rptr. at 763, 432 P.2d at 371.
that a cumulative injury will be deemed to have been incurred on "... the last day of the period in which the WCAB finds that cumulative injury was received by repetitive exposure to stress or other cause; or, if disability does not appear until yet a later date, the time when the employee becomes disabled."\textsuperscript{20} The court pointed out that adopting that date would make the two specific injuries prior in time and provide a basis for holding the subsequent injuries fund liable for benefits.

\textit{De Luna} was decided by the court of appeal some three months after \textit{Dow}. De Luna filed a claim on November 2, 1966, alleging a specific incident of injury occurring on July 16, 1962. He also filed a separate claim alleging continuous trauma from July, 1960 and thereafter. The WCAB found the claim of specific injury barred by the statute of limitations but granted benefits for the continuous trauma injury. The court of appeal ruled that the board had erred in holding the claim for specific injury barred by the statute of limitations, reasoning that the incident of specific injury "... should have been considered as an integral part of the applicant's claim for cumulative injuries."\textsuperscript{1} In arriving at its decision the court stated, without citation of authority:

"While the applicant may file both a claim of specific injury and a claim of cumulative injury covering the same period of time, he may not have an award on both nor is disability, either temporary or permanent, to be apportioned between the two claims."\textsuperscript{2}

The \textit{De Luna} decision would seem to be specifically contrary to \textit{Dow}, yet the supreme court refused hearing.

In \textit{Miller} the WCAB again found an incident of specific injury barred by the statute of limitations, but allowed recovery on a claim for continuous trauma. Again the court disagreed with the board's finding and annulled the decision on the

\textsuperscript{20} 67 Cal.2d at 493, 62 Cal. Rptr. at 764, 432 P.2d at 372.  
\textsuperscript{1} 258 Cal. App.2d at 204, 65 Cal. Rptr. at 425.  
\textsuperscript{2} 258 Cal. App.2d at 202, 65 Cal. Rptr. at 423.
ground that the board should have considered the specific incident alleged "... as the first of many exacerbations causing the cumulative injury, and should have taken that injury into consideration in determining whether the applicant sustained a cumulative injury which had its inception on that date." Again, though Miller is seemingly contrary to Dow, the supreme court denied hearing.

The WCAB, as well as most practitioners in the field of workmen's compensation, were completely confused by the Dow, De Luna, and Miller cases. In an attempt to set forth its understanding of those cases, the board wrote a twenty-page en banc opinion in Burris v. Southern California Rapid Transit District, wherein it reviewed and set forth the many procedural problems raised by the three troublesome cases and made a statement of its understanding of the procedures now required of the WCAB in the light of the holdings of these cases. Even though legislation subsequent to the cases may have solved some of the problems, the author strongly recommends that anyone interested in continuous trauma cases read and reread the Burris decision. What action, if any, the appellate courts will take on Burris is not known at the time of this writing.

In an attempt to offset the problems raised by the Dow, De Luna, and Miller decisions, the legislature, in the First Extraordinary session, enacted Assembly Bill 1 which became effective January 1, 1969. This bill added section 3208.1 to the Labor Code to provide that an injury, for the purposes of workmen's compensation law, may be "specific" or "cumulative" as defined therein and that the date of cumulative injury "shall be the date of disability caused thereby." The bill also added section 3208.2 to the Labor Code to provide that when disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific or cumulative or both, all questions of fact and law shall be separately determined with respect to each injury. This section of the code specifically provides for

3. 258 Cal. App.2d at 496–497, 65 Cal. Rptr. at 838.
4. 33 C.C.C. 419 (1968).
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Apportionment between such injuries. An amendment to section 5305 added the provision that no one injury, whether specific or cumulative, shall for any purpose merge into or form a part of another injury.

Whether these amendments and additions will clarify cumulative injury proceedings and awards, or add to the confusion, remains to be seen. The WCAB is adopting the policy that the additions and amendments to the Labor Code just discussed are substantive in nature and therefore will not have any effect in causes of action arising before the January 1, 1969 effective date.

Does a specific incident of injury occurring before January 1, 1969, merge with a continuous trauma resulting in disability after that date? The question remains unanswered pending judicial interpretation of the new sections and amendment.

In Fruehauf Corp. v. WCAB the supreme court decided that the date of injury in continuous trauma cases should be that set forth in section 5412, which had previously been held to apply only to occupational disease cases rather than the date set forth in section 5411, which states that it is to be applicable “except in cases of occupational disease.” The importance of this determination is that it affects the running of the statute of limitations, which does not begin to run until the “date of injury.”

Section 5411, which had been held applicable to all injuries other than occupational disease injuries and which had previously been the section used to determine the date of injury in cumulative trauma cases, in effect holds that the date of injury is the date of last exposure. Section 5412, which previously had been applicable only to occupational disease cases, provides that the date of injury is the date upon which the employee first suffered disability from the disease, “and either knew, or in the exercise of reasonable diligence should

5. Memorandum to all referees and attorneys, dated September 30, 1968, from Morton R. Colvin, Chairman, WCAB and its attached statement of policy.

have known, that said disability was caused by his present or prior employment.” Many occupational disease cases have been brought years after last exposure and disability under the theory that the injured employee did not know, and with the exercise of reasonable diligence could not have known, that his disability was work-connected.

The WCAB has frequently applied the “occupational disease” rule to what would appear to be continuous trauma injuries by the simple expedient of finding that the injured employee suffered from an “occupational disease.”

The court’s change in date of injury in continuous trauma cases, as affected by Fruehauf, may apply only to causes of action accruing prior to January 1, 1969. The new section 3208.1, which was effective on that date, specifically provides that the date of injury in continuous trauma cases “shall be the date of disability caused thereby.” (Caveat—the courts have yet to interpret that provision.)

**Earnings**

In recent years, the question of whether fringe benefits should be included in calculating an employee’s average earnings has been litigated more and more often. In *Norton v. North American Aviation, Inc.* the WCAB decided that those fringe benefits which are continued during an injured employee’s period of disability should not be included in determining average weekly earnings for the purpose of calculating an injured employee’s weekly temporary disability rate. AB 1, effective January 1, 1969, which amended section 4454, further clarified the question of what is to be included in “earnings” by adding the following phrase:

. . . [N]or shall there be included either the cost or the market value of any savings, wage continuation, wage replacement, or stock acquisition program or of any employee benefit programs for which the employer pays

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7. See, for example, Aerojet-General Corp. v. WCAB, 32 C.C.C. 398 (1967).
8. 32 C.C.C. 498 (1967).
Injury Arising out of and in the Course of Employment

Death by Suicide

Prior to 1960, death benefits were not allowed to widows of employees who died by their own hands. While the Labor Code made no mention of suicide as such, section 3600(e) provided (and still provides) that an injury is compensable "where the injury is not intentionally self-inflicted." (Emphasis added.) Before 1960, the WCAB and courts held that the quoted section precluded the granting of death benefits where the injured employee died by his own hand, even if the suicide was the proximate result of an industrial injury.
The WCAB did recognize, however, the possibility that a suicide might be compensable. *Alexander v. California Department of Insurance*,\(^9\) decided in 1948, denied death benefits, but stated that such benefits could be allowed where the industrial injury resulted in an insanity “. . . such as to cause the employee to take his own life through an unaccountable impulse or in a delirium or frenzy, without conscious volition. . . .”\(^{10}\) However, the writer found no recorded California case prior to 1960 in which the board actually found that the industrial injury caused such an insanity.

In 1960, the court of appeal changed the test for compensability in *Burnight v. Industrial Accident Commission*.\(^{11}\) The WCAB had found that the employee’s nervous breakdown and manic-depressive psychosis arose out of and occurred in the course of his employment but denied death benefits because of the testimony of a psychiatrist that the deceased’s act was voluntary and that he had the mental capacity to, and did, realize the consequences of his act. The court of appeal, in considering the case and the state of the law at that time, stated: “We think that the test is and should be, not did the employee know what he was doing, but was the compulsion or the impulse to commit suicide one which he could not resist.”\(^{12}\) The court added, by way of dicta, that if the industrial injury results in pain that the employee believes to be unbearable, or if the employee becomes so depressed as a result of his injury that he thinks suicide is the only way out, or if the industrial injury results in any condition that causes the employee to feel that death will afford him his only relief, his act of suicide directly results from the industrial injury, and unless it appears that the employee could have resisted the impulse to commit suicide, his death should be compensable. The court also added that if it could be shown by competent expert testimony that

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10. 14 C.C.C. at 123.
12. 181 Cal. App.2d at 822, 5 Cal. Rptr. at 790.
absent the injury there would have been no suicide, the injury is the proximate cause of death.

The legislature acted speedily after *Burnight* to add another sub-section to section 3600 aimed directly at death by suicide. This sub-section provided that where an employee wilfully and deliberately caused his own death, it was not compensable.\(^\text{13}\) The legislature's action seemed to be an attempt to limit or overrule *Burnight* and to reinstate the old narrower rule applied by the WCAB for so many years. Perhaps because most attorneys believed this was the legislative intent, the new provision did not come before the courts for construction until 1968.

In 1968, in the case of *Beauchamp v. WCAB*,\(^\text{14}\) the court considered for the first time the compatibility of section 3600 with the *Burnight* decision. In *Beauchamp* the WCAB denied death benefits for suicide apparently believing that the addition of the new section again reinstated the old rule, precluding compensability where the deceased knew what he was doing. Not so, said the district court, holding that the legislative amendment was entirely consistent with *Burnight* and that the rule stated therein must be followed.

As the supreme court denied hearing in *Beauchamp*, it appears that where it can be shown by competent evidence that but for the industrial injury there would have been no suicide, the suicide is compensable.

**Injury in Altercation with Employer**

In *Litzmann v. WCAB*,\(^\text{15}\) the court of appeal appears to have attempted judicial repeal of the sub-section of Labor Code section 3600, which provides that as a condition to the right to compensation benefits the injury must not arise out of an altercation in which the injured employee is the initial physical aggressor.\(^\text{16}\) The court, while specifically stating that it was not considering the constitutional question, seemed to be declaring the provision, section 3600(g), invalid on the

\(^{13}\) Cal. Lab. Code § 3600(f).
\(^{14}\) 259 Cal. App.2d 147, 66 Cal. Rptr. 352 (1968).
\(^{15}\) 266 Cal. App.2d —, 71 Cal. Rptr. 731 (1968).
\(^{16}\) Cal. Lab. Code § 3600(g).
ground that it is unconstitutional. The Litzmann court also substitutes its judgment of the inference to be drawn from the evidence for the inference drawn by the referee, and does so without so much as the courtesy of a nod to sections 5952 and 5953 of the Code.\textsuperscript{17}

In Litzmann a truck driver, waiting in a dispatch room with other truck drivers, went to a coffee urn to draw some hot water. He was apparently bumped by another truck driver and turned and threw the cup of hot water at the other man. The other driver became irate and picked up a coffee pot and emptied its contents on Litzmann. Litzmann was burned and applied for workmen's compensation benefits. The referee found that he was injured in the course and scope of his employment, but that his injury arose out of an altercation in which he was the initial aggressor and that benefits must therefore be denied under section 3600(g). Litzmann's petition for reconsideration was denied and the court granted his petition for review.

After devoting most of its discussion to a case\textsuperscript{18} decided before the enactment of section 3600(g) the court mentioned that in 1961 the legislature enacted a sub-section which prohibits compensation benefits to the initial physical aggressor and in a footnote stated that, in view of the earlier case, the enactment might be unconstitutional but, as the question was not before it, there was no need for the court to decide its constitutionality. The court went on to discuss the only case in which that amendment has been considered,\textsuperscript{19} a case which distinguished "altercation" from "horseplay" by characterizing "horseplay" as an absence of animosity and "altercation" as a willingness to inflict, or the actual infliction of, bodily harm. The Litzmann court then concluded, "... We are satisfied

\textsuperscript{17} Labor Code §§ 5952 and 5953 are reproduced herein under the heading The Change of Judicial Attitude in Appellate Review of WCAB Decisions, footnotes 6 and 7.

\textsuperscript{18} State Compensation Ins. Fund v. Industrial Accident Comm., 38 Cal.2d 659, 242 P.2d 311 (1952). In this case, the supreme court decided that an applicant was entitled to workmen's compensation benefits irrespective of fault and even though he was the aggressor.

\textsuperscript{19} Tate v. Industrial Accident Comm., 120 Cal. App.2d 657, 261 P.2d 759 (1953).
that the evidence does not sustain the finding that the applicant was the aggressor, and that, \textit{even if it did, compensation could not be denied on that ground.}^{20} \text{(Emphasis added.)}

The court supported its re-evaluation of the facts with the statement:

There is no evidence here that there was any willingness or intent to inflict bodily harm on Dean, or that he [Litzmann] actually did inflict any bodily harm on him. It also seems clear that applicant’s act was characterized by an absence of animosity.\textsuperscript{1}

What made it clear to the court that the act of throwing hot water, freshly drawn from a coffee urn, at another man was characterized by an “absence of animosity” was left unstated and, absent clairvoyance, would appear to require the drawing of an inference from the evidence.

In another district of the court of appeal, the claimant in \textit{Ochsner v. WCAB}\textsuperscript{2} attempted to raise the issue of unconstitutionality of section 3600(g). Review of the constitutional question was denied by the court of appeal and by the supreme court. At the time of this writing, it is not known if the supreme court will grant a hearing in \textit{Litzmann}. If a hearing is not granted, there is a strong possibility that section 3600 (g) may be deemed unconstitutional in some judicial districts and constitutional in others.

\textbf{Insurance Coverage}

In a case of first impression, \textit{Pacific Indemnity Co. v. WCAB},\textsuperscript{3} the district court decided that an employer’s workmen’s compensation insurance policy provides insurance coverage for the employer’s intentional assault upon an employee, but that the employee is confined to his workmen’s compensation benefits and may not sue his employer for civil damages. In an earlier appeal in the same matter, the court disapproved

\begin{itemize}
  \item \textsuperscript{20} 266 Cal. App.2d at --, 71 Cal. Rptr. at 736.
  \item \textsuperscript{2} 33 C.C.C. 387 (1968).
  \item \textsuperscript{3} 264 Cal. App.2d --, 70 Cal. Rptr. 710 (1968).
  \item \textsuperscript{1} 266 Cal. App.2d at --, 71 Cal. Rptr. at 736.
\end{itemize}
a WCAB decision that the workmen's compensation law does not cover injuries caused by an assault by the employer, and the court granted the injured employee the right to proceed before the WCAB (then the Industrial Accident Commission) for workmen's compensation benefits. Following that earlier decision, the superior court granted a defense motion for dismissal of the civil damage action which the employee had filed against her employer. The employee had been granted compensation benefits and the WCAB had held that the employer's workmen's compensation carrier was liable for those benefits. The compensation carrier appealed the WCAB decision holding it liable under the compensation policy, and the employee appealed dismissal of her civil action; the appeals were consolidated.

While not questioning the employee's substantive right to compensation benefits, the carrier disclaimed insurance coverage on the theory that statutory declarations of public policy apart from the compensation law preclude insurance covering wilful injury by a policy holder. Specifically, the carrier relied on Insurance Code section 533, which states in part, "An insurer is not liable for a loss caused by the wilful act of the insured," and on Civil Code section 1668, which states in part, "All contracts which have for their objective, directly or indirectly, to exempt anyone from responsibility for his own . . . wilful injury to the person or property of another . . . are against the policy of the law."

In considering these contentions, the court pointed out that Insurance Code section 11661 specifically prohibits an employer's insuring against the penalty for serious and wilful misconduct and that Labor Code sections 3700 and 3710.2 make it mandatory upon the employer to "secure the payment of compensation" either by liability insurance or by a certificate of consent to self insure. The court stated that if Insurance Code section 533 and Civil Code section 1668 were to apply to workmen's compensation liability, this would de-

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prive Insurance Code section 11661 of a useful function. The latter section is a specialized expression of public policy expressed by the other two statutes, "but evolved for the particular purpose of workmen's compensation coverage."^5

Therefore, in the workmen's compensation system, Insurance Code section 11661, prohibiting an employer's insuring himself against his liability for the penalty for serious and wilful misconduct, serves as a sole spokesman of public policy. Section 533 of the Insurance Code and section 1668 of the Civil Code are not applicable to compensation insurance coverage and do not prohibit insurance against the employer's ordinary liability for disability compensation and medical expense even when such liability is caused by the employer's wilful wrong.

The court pointed out that most of the decisions concerning an employee's right to proceed against his employer in the superior court or before the WCAB have been decisions on procedural matters, not on substantive rights. The court found that Labor Code sections 3600 and 3601 are substantive declarations confining an employee's claim to workmen's compensation benefits and precluding an employee from the right to civil damages.

On September 15, 1967, the Insurance Commissioner issued Ruling No. 157 which deleted Rule IV, paragraph 5 of the Manual of Rules, Classifications and Basic Rates for Workmen's Compensation Insurance. This rule had been in effect for many years, permitting workmen's compensation insurance carriers to exclude corporate executive officers from workmen's compensation coverage by special endorsement. The effect of this ruling is that workmen's compensation policies with an effective date on or after April 1, 1968 may no longer exclude corporate executive officers from workmen's compensation coverage.

Right to Control Medical Treatment

In Zeeb v. WCAB,^6 the supreme court changed what was


6. 67 Cal.2d 496, 62 Cal. Rptr. 753, 432 P.2d 361 (1967).

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generally considered well-established law for the past 40 years. Prior to 1928, the Industrial Accident Commission had adopted a policy that once an employer or carrier lost control of the medical treatment to be provided for an industrial injury, it could not be regained without consent of the employee. In 1928, the court of appeal handed down a decision which the then Industrial Accident Commission (and most authorities) felt required adoption of a policy that "lost medical control" could be regained by adequate tender.

In *Zeeb*, the employee had received treatment from a doctor selected by the carrier apparently until his condition became quiescent. Several months later, when his condition again required treatment, the doctor chosen by the carrier refused to render further treatment on the ground that the employee's condition at that time was not due to the industrial injury. The employee went to a doctor of his choice and later sought, and was granted, reimbursement by the WCAB for self-procured medical treatment. Later the carrier notified the employee that it was authorizing further treatment by the doctor it had originally selected, and would not authorize further treatment by the doctor chosen by the employee. The employee refused to accept the services of the carrier's doctor and petitioned the WCAB for a determination that he was entitled to continue treatment with the doctor he had selected, at the expense of the carrier. The WCAB denied the employee's claim and he appealed. The supreme court stated that, because of the "... vacillating position of the Commission, there does not appear to be any basis in this case for the application of the principle that long-standing administrative interpretation of a statute is entitled to great weight." The court, finding that the 1928 case on which the Industrial


9. The court did not specify in what particular it felt the "Commission" was guilty of "vacillation", but as the WCAB and its predecessor, the Industrial Accident Commission have both maintained the same interpretation of section 4600, as regards right of medical control, for 40 years, the court's standard of constancy might just be a little high.

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Accident Commission had based its change of interpretation of section 4600 had been interpreted too broadly, held that where the employer or carrier has refused medical treatment necessitating an employee to procure his own treatment, the treatment should continue with the doctor chosen by the employee, in the absence of a change of condition or evidence that the treatment given by the employee’s doctor is defective, or unless additional treatment is necessary.

The Zeeb case has not only changed a long-standing and well-established rule on workmen's compensation law, but has also sown the seeds for much litigation. What change of condition is necessary to permit the employer or carrier to regain control? What treatment is “defective”? How long must the employer or carrier continue paying for treatment by a doctor of the injured employee’s choice when the employee’s condition doesn’t improve? When “additional treatment is necessary,” must the employer continue to provide the employee with treatment by the doctor of his choice, as well as obtaining additional specialists of the employer-carrier’s choice? What is “additional treatment”? These questions will provide some interesting cases.

Payment and Amount of Benefits

In Grillo v. Commercial Union Insurance Co. the WCAB, in an en banc decision, laid down rules for the type of instrument that must be used in paying workmen’s compensation benefits. The carrier in Grillo used a draft on an out-of-state bank to satisfy its liability for benefits awarded an injured employee. Local banks to which the employee took the draft would not cash it, but accepted it for collection at the cost of $1.00. Collection took 11 days. The employee filed a petition requesting a penalty for the carrier’s delay in payment as well as for its failure to pay interest. The referee found that the payment of compensation had been unreasonably delayed and penalized the carrier for failing to comply with the provisions of section 4651, which requires that payment of disability benefits shall not be made by a written instru-
ment “... unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state.” The referee also found that the carrier had not complied with section 5800, which requires the payment of interest on all due and unpaid payments from the date of making and filing of awards. The WCAB granted reconsideration on its own motion and upheld the referee’s decision. The WCAB noted that it was aware of section 212, which covers the type of instrument required to be used by employers in payment of employees’ wages, and which requires that such an instrument must be “negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument. ...” While recognizing that section 4651 does not specifically require that an instrument used in payment of workmen’s compensation benefits show on its face the name and address of some established place of business in the state in which it could be cashed, the board thought that the requirement of section 4651, that instruments used to pay workmen’s compensation benefits be payable at some established place in the state, would be rendered meaningless unless such place was plainly shown on the face of the instrument.

The board also noted that while the receipt of a properly drawn instrument in payment of compensation would toll the running of interest, the instrument used in the case before it was not properly drawn, and therefore interest should be awarded.

For the first time since 1959, the legislature increased the amount of some compensation benefits. Sections 4453 and 4460 were amended by AB 1, effective January 1, 1969, to increase the maximum average weekly earnings to be used in computing temporary disability from $107.69 to $134.62. The effect of this amendment is to increase maximum temporary disability from $70.00 per week to $87.50 per week. The statutory amendments have no effect on the minimum temporary disability rate nor on the permanent disability rate.

Section 4702 was amended to increase the death benefits
of a surviving widow from $17,500 to $20,000 and to increase the death benefit of a surviving widow with one or more dependent minor children from $20,500 to $23,000. No increase was made in the maximum amount payable to partial dependents.

Section 4701(a) was amended to increase the maximum allowable for burial expense from $600 to $1,000.

Subrogation

*Harrison v. Englebrick*\(^\text{11}\) laid to rest the troublesome problem of the applicable statute of limitations for intervention in negligence suits against third parties. This problem had not existed until 1964 when the court in *Liberty Mutual Insurance Co. v. Fabian*\(^\text{12}\) mentioned, by way of dicta, that the employer had only one year to file a lien or to intervene. It was generally thought that the court’s dicta would not cause a serious problem because of section 3853's clear statement providing for the employee’s or the employer’s right to intervene in the other’s suit. “If the action is brought by either the employer or the employee, the other may, at any time before trial on the facts, join as a party plaintiff or shall consolidate his action, if brought independently.” (Emphasis added.) Section 3856 (b), on which the employer’s right to a lien against a recovery by an employee is based, does not specifically indicate the time an application for a lien against a judgment must be filed, but similar language in earlier forms of that section has been held to grant the employer the right to file the lien at any time before satisfaction of judgment.\(^\text{13}\)

In *Harrison*, the injured employee filed a timely suit for damages against a third party on April 3, 1962, and the employer’s workmen’s compensation carrier intervened on October 13, 1964. The defendants in the civil suit demurred to the complaint in intervention on the ground that the cause of action therein contained was barred by the statute of limi-
tations. The superior court sustained the demurrer of the defendants without leave to amend and entered a judgment dismissing the employer's complaint in intervention. The employer appealed and the court of appeal discussed old cases permitting the employee to intervene in an employer's suit well after the one-year period had run and decided the employer should have the same right. Nowhere in its decision does the court refer to the plain language of section 3853 which grants either the employer or the employee the right to intervene in the other's suit “at any time before trial on the facts.”

The WCAB, sitting en banc, decided *Pearce v. Liberty Mutual Insurance Co.*,\(^\text{14}\) concerning an employer's right to credit against future compensation liability for an employee's third-party recovery. The full impact of *Pearce* has not yet been felt. In the *Pearce* case, heirs of an employee killed in the course of his employment filed suit against a third party. That suit was settled. After settlement of the third-party suit, the workmen's compensation carrier ceased payment of the workmen's compensation death benefits awarded certain of the heirs on the theory that its credit for the third-party recovery offset its liability. The heirs petitioned the WCAB to enforce payment under the award alleging, among other contentions, that the employer's negligence contributed to the employee's fatal injury and that credit for third-party recovery should be denied. The issue of whether the WCAB has jurisdiction to find negligence on the part of the employer, and to disallow credit based on such finding, was submitted to the trial referee by brief without a hearing respecting the employer's negligence. The referee issued a supplemental award finding that, if the employer's negligence was a proximate cause of the employee's fatal injury, the carrier would be barred from claiming credit for the third-party recovery. The referee further decided that the WCAB had jurisdiction to decide the issue of credit and that the decision of that issue necessarily included a decision of whether the employer was concurrently negligent. Reconsideration was granted. Some

\(^{14}\) 33 C.C.C. 243 (1968).
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of the statements made by the board in its discussion of its reasoning are as significant as the actual holding of the case. That portion of the holding in which we are here concerned is:

Accordingly we hold that absent an express waiver of credit, the carrier's right to credit under Labor Code Section 3862 in the amount of the employee's net recovery from the settlement of a third-party suit is absolute and unaffected by the employer's alleged negligence.15

The board's holding may not be startling, but its discussion and reasoning contain several interesting comments. In discussing section 3861, the section that provides for an employer's right to credit, the board states: "On its face the section does not condition the employer's right to credit upon his being free from negligence or fault contributing to the employee's injuries,"16 and at another place in the decision:

. . . [I]t may be true that when faced with a Superior Court finding of an employer's negligence, and a specific indication of the extent of the reduction of the third-party's judgment, this Board has the power and the duty to adjust the employer's or carrier's credit accordingly.17 (Emphasis added.)

It seems that the board is not all convinced that it must deny credit to an employer or carrier where there has been a superior court finding of the employer's contributory negligence, and it would also appear that the board is at least considering that section 3861 may give the employer or carrier an absolute right to credit against future liability for workmen's compensation even though the employer's lien for benefits already paid may have been denied in the superior court on the ground that the employer was contributorily negligent.

15. 33 C.C.C. at 249. (The reference to section 3862 must be a typographical error as that section has nothing to do with credit rights. Section 3861, previously referred to in the opinion, provides for an employer's right to credit, and thus it must be the section the board intended to cite.)
16. 33 C.C.C. at 246.
17. 33 C.C.C. at 248.
The board makes another intriguing observation:
An employer's obligation to furnish medical treatment may require different considerations respecting a claim of credit for a third-party recovery . . . Without deciding the issue, it should be noted that the employer’s obligation to provide medical treatment under Labor Code section 4600 may not be relieved by applicant’s net third-party's recovery, since under the subrogation statutes such a recovery may relieve only the obligation to pay indemnity.18

To date, where credit has been granted, it has been granted against all future liability including the liability to furnish medical treatment.

Very probably, the board's speculations will soon bring before it the question of whether a superior court’s finding of employer contributory negligence bars credit in the amount of the employee’s net third-party recovery against future compensation liability and also whether credit, when granted, includes the liability for further medical treatment.

The board also decided in Pearce that it did not have jurisdiction to determine whether or not the employer was contributorily negligent in causing the employee’s injury.

The old adage “last but not least” applies to the final case to be discussed in this article. In LaBorde v. McKesson & Robbins19 a compensation carrier who had intervened in an injured employee’s third-party action was appealing from the trial court’s denial of its lien against the settlement reached between the plaintiff-employee and the defendant-third party, which purported to cover only the plaintiff’s general damages and to leave the defendant’s liability for special damages open. The defendant had raised the issue of the employer’s contributory negligence in its answer and, after more than two days of trial, the attorneys for the plaintiff-employee and third-party defendant informed the court that they had reached an agreement to settle the plaintiff’s claim for general dam-

ages but had given no consideration to the compensation carrier’s expenditures. The carrier refused to consent to the settlement on that basis but made various motions aimed at recovering its expenditures from the settlement of the plaintiff’s “general damages.” The trial court denied the motions and directed the carrier to proceed to trial on the sole remaining issue, the employer’s concurrent negligence. The carrier refused, moved instead for dismissal of its complaint in intervention, and made further motions in attempting to impose a lien on defendant’s recovery, seeking an order allocating expenses and fees, attempting to force production of the settlement agreement, restraining the defendant from transferring funds to the plaintiff, and restraining the plaintiff from dissipating funds. Appeal followed denial of the carrier’s motions.

The court of appeal was faced with three problems in supporting the trial court’s actions: Section 3859, section 3860, and the case of Smith v. Trapp.20

The year before the LaBorde decision, another court of appeal, in Smith v. Trapp, facing a very similar set of facts, held that a plaintiff and defendant in a third-party suit may not compromise absent the employer’s consent, though the compromise purports to preserve the employer’s or carrier’s rights against the defendant. The court in LaBorde handled the Smith case by in part distinguishing it and in part disagreeing with it. The LaBorde court distinguished the Smith case by pointing out that there was substantial evidence of concurrent negligence on the part of the employer during the more than two days of trial on LaBorde where there had been no presentation of evidence in the Smith case. The LaBorde court further distinguished Smith by pointing out that Smith was a wrongful death action in which damages would generally be gauged by dependency as were the compensation benefits in that case, so that the settlement portions to which the plaintiffs and intervening employer were entitled were

interwoven and overlapping. The LaBorde court also said that there were statements in the Smith decision with which it could not agree (without specifying them) and, in any event, it was not bound by Smith.

The court was also faced with sections 3859 and 3860 of the Labor Code which are quite specific in their terms. Section 3859 states in part, "... No release or settlement of any claim under this chapter as to either the employee or the employer is valid without the written consent of both." Section 3860(a) states in part, that no "settlement . . . with or without suit, is valid or binding as to any party thereto without notice to . . . the employer . . . with opportunity to the employer to recover the amount of compensation he has paid." Section 3860(b) states in part, "The entire amount of such settlement, with or without suit, is subject to the employer’s full claim for reimbursement. . . ."

The LaBorde court admits that sections 3859 and 3860 would justify the conclusion that a settlement by an employee without the consent of the employer or without reimbursing the employer in full could not be made. However, the court points out that those sections were enacted before decision in Witt v. Jackson\(^1\) and holds that those sections were not designed to cover the Witt v. Jackson situation. The court states that those sections

\[\ldots\text{[W]ere not intended to block a settlement between an injured employee and a third party tortfeasor where the concurrent negligence of the employer has been made an issue in the litigation and where the settlement is carefully drawn to leave intact all the rights of the employer (and his compensation carrier).}\]^2

The propriety of plaintiff and defendant settling without the employer’s consent under sections 3859 and 3860 came under consideration by Judge Gerald S. Levin of the Superior Court of the City and County of San Francisco when he granted a preliminary injunction prohibiting such a settlement

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2. 264 Cal. App.2d at —, 70 Cal. Rptr. at 728.
in May of 1965. Judge Levin’s reasoning and conclusions were surprisingly similar to those of the court in Smith. Both the Smith court and Judge Levin were presented with the arguments that Witt v. Jackson made the provisions of sections 3859 and 3860 inapplicable and both rejected those arguments. The court in Smith and Judge Levin were both presented with the argument that permitting a settlement leaving the intervening carrier’s right to proceed with the case open in no way prejudiced the employer or carrier. Both rejected this argument, pointing out that an intervenor’s status in the preparation and trial of a case is one of subordination to and in recognition of the propriety of the plaintiff’s case and that the plaintiff must be permitted to dominate and control such a suit to its conclusion, unfettered by the views of the intervenors. The court in Smith recognized as well the possibility of collusion between the parties to the settlement when judicial sanction is afforded compromises without the consent of the employer.

The courts that have considered the question of the effect of Witt v. Jackson on sections 3859 and 3860 have presented us with a mixed bag of views. The only certainty as to the question of whether a plaintiff-employee and third-party defendant can settle their differences without consideration of the intervening employer’s lien is that it is uncertain, as are many other areas of workmen’s compensation law at the present time.