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Workmen's Compensation

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I. In General

The reviewing Courts in 1969, enjoyed an open season in reviewing Workmen's Compensation Appeals Board[1] factual determinations, much in the manner reported in last year's article.[2] The comments made by the legislature (and some members of the State Supreme Court) on the courts' hunting without a license have been to no avail.

The legislature, for all practical purposes, was inactive in the field of workmen's compensation. There were important developments in case law, but some of the cases that may well work important changes in the field of workmen's compensation law are presently in various stages of appeal.

II. Appellate Review of WCAB Decisions

The 1969 article pointed out that in the 1967–1968 year, more WCAB awards had been annulled than in any similar period.[3] In that article we pointed out that in the years 1965, 1966 and 1967, appellate review was granted in only 28 or 29 cases per year, and that WCAB's action was overturned in about 16 of them. It was further pointed out that in the first ten months of 1968, the reviewing Courts had rendered decisions in 52 WCAB cases and reversed or annulled the decision of the WCAB in 42 of them.

A look at the scoreboard[4] for the period of November 1968 through September 1969 shows 54 reported appellate decisions concerning WCAB awards, 40 of which reversed or annulled the action of the WCAB.

1. Hereinafter referred to as WCAB.

2. Goshkin, WORKMEN'S COMPENSATION, *Cal Law—Trends and Developments* 1969, p. 99.

3. Goshkin, WORKMEN'S COMPENSATION, *Cal Law—Trends and Developments* 1969, pp. 99 et seq.

4. We use the cases reported in *California Compensation Cases* as a basis for our statistics.

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The courts continued to use Labor Code Section 5908.5,[5] as a key to unlock the statutory doors which have prohibited appellate review or reweighing of factual decisions of the WCAB for so many years. The legislature noted this propensity and one of the few legislative actions taken in workmen's compensation law in 1969, was to amend Labor Code Section 5908.5, by adding the following language to that section:

> "The requirements of this section shall in no way be construed so as to broaden the scope of judicial review as provided for in Article II (commencing with Section 5950) of this chapter."

In *Smith v. WCAB*,[6] Justice Burke's dissenting opinion, in which Justices McComb and Schauer joined, stated, in part:

> I dissent. On the factual issue, the record does not compel the finding that the employer required the deceased employee to furnish his own car. Instead, the majority opinion has reweighed the evidence, attempting to reconcile the testimony which conflicts with the 'conclusion' it announces, and has usurped the role of fact-finder contrary to the fundamental rules governing the functions of this Court.

The admonitions by the legislature and the dissenting opinion of the three members of the Supreme Court in the *Smith* case will probably have little real effect on the Court's continued activity in reviewing WCAB factual determinations. However, in considering the decisions of the reviewing Courts on WCAB matters for the eleven months between November

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

Lab. Code Section 5908.5 states: "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. The requirements of this section shall in no way be construed so as to broaden the scope of judicial review as provided for in Article 2 (commencing with Section 5950) of this chapter."

6. 69 Cal.2d 814, 826, 73 Cal. Rptr. 253, 261, 447 P.2d 365, 373, 33 C.C.C. 771, 780 (1968).

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1968 through September 1969, the time period used as the basis for this article, the author did note that in July, August, and September of 1969, only two appellate decisions on WCAB matters were reported, in contrast to a five-or-six-decision-per-month average for the prior 18 months. Incidentally, both of those appellate decisions annulled the WCAB decisions. It is doubtful that this lull in appellate activity in WCAB matters signals a trend.

III. Course and Scope of Employment

This section might well be entitled "Where Has the Going and Coming Rule Gone?" In a series of decisions that culminated with *Smith v. WCAB*,[7] a very large number of employees have been granted the protection under workmen's compensation insurance from the time they leave their homes in the morning until they return to their homes at night.

Under the well-established "going and coming rule," employees are not considered to be in the course and scope of their employment when they are traveling to and from work. Over the years, a number of exceptions have been made to this rule, the main exceptions being: (1) where the employer defrays the costs of the travel to and from work, (2) where the employee is on some special errand for the employer, and (3) the "commercial traveler" exception, applied to salesmen who do not report to a certain office at a specified time every morning to begin their employment, but leave their homes and travel directly to various customers' locations. Despite the many exceptions, the going and coming rule was still considered applicable to employees who reported to a specified location each morning at a certain time to begin their work. Such employees were not considered to enter the course and scope of their employment until they reported to their place of work.

It was the WCAB, not the courts, who caused the first crack in the going and coming rule. In *Greyhound Bus Company*

7. 69 Cal.2d 814, 73 Cal. Rptr. 253, 447 P.2d 365, 33 C.C.C. 771.

v. WCAB,[8] the WCAB held that a bus driver, dressed in uniform and carrying a case of equipment, who was killed by a car as he walked along the edge of a freeway to catch a bus he had flagged down, was within the course and scope of his employment at the time of his death. The employer bus company provided its driver with a free pass and there is no doubt that the driver would have been considered in the course and scope of his employment under all of the old decisions, once he had boarded the bus. It was the contention of the appeals board in its answer to the bus company's petition for a writ (which was denied), that the bus driver was within the field of risk created by his employment once he reached a bus stop. Under that theory, even if the employer's bus had not reached the bus stop, as it in fact had in this case, any injury or accident occurring to a bus driver waiting at a bus stop would be compensable.

In *Le Febvre v. WCAB*,[9] the State Supreme Court annulled a decision of the WCAB which held that a volunteer fireman was not within the course and scope of his employment while he was driving to a predetermined location to attend an evening fire drill. The Supreme Court stated that the volunteer fireman did not fall within the going and coming rule because his employment could not be viewed as having a headquarters or office where he was required to report regularly in order to perform his duties or before setting out on his assigned tasks. The Court felt that from the moment he left his home, or any other point from which he might have been summoned, to engage in fire fighting or in training drills, he was within the scope of his employment. The *Le Febvre* case is not astonishing, as it merely represents a case of the Supreme Court viewing facts differently from the WCAB. From the view of the facts taken by the Supreme Court, the fireman would fall within the commercial traveler exception to the going and coming rule. The *Le Febvre* case is of interest since the Court did not seem concerned that, at the time of his death, the decedent was to report to a predetermined place.

8. 33 C.C.C. 611 (1968).

9. 69 Cal.2d 386, 71 Cal. Rptr. 703, 445 P.2d 319, 33 C.C.C. 653 (1968).

The Court of Appeal in *Joyner v. WCAB*[10] annulled a decision of the WCAB which denied benefits to an employee of a heating and air conditioning plant injured en route home from work, driving his own truck but carrying some of his employer's tools and equipment. It was the normal practice of the applicant to report to the shop of the employer each morning before going out on a job. He sometimes, however, went from his home directly to a job site and sometimes went directly from a job site to his home after his day's work was done. He would leave all of his equipment, supplied by his employer, on his truck and lock the truck in his garage at night. He sometimes used the truck as a camper for personal use. He had no business sign on his truck and it was not used to advertise his employer's business.

The referee denied the applicant compensation on the ground that he was not acting in the course and scope of his employment at the time of his accident. The applicant petitioned for reconsideration and the WCAB denied compensability as had the referee. The Court of Appeal granted a hearing, and, after reviewing and reweighing the evidence,[11] reversed the WCAB and granted compensation. The Court felt that the employer could not have contemplated that the applicant would leave his truck and its contents on the job site when it came time to quit, and, therefore, the only reasonable inference that could be drawn from the applicant's use and care of his truck and its contents was that the employer-employee relationship continued. The conclusion was that the employee was performing a service to his employer by the transportation of his employer's tools, even while traveling from the job site to his home after his day's work was completed.

10. 266 Cal. App.2d 470, 72 Cal. Rptr. 132, 33 C.C.C. 667 (1968).

11. The Court states: "The question is whether the evidence shows an agreement that the employment relationship continue during the journey." 266 Cal. App.2d 470, 474, 72 Cal. Rptr. 132, 135, 33 C.C.C. 667, 670. The Court clearly believed it was dealing with a factual question. The Court set forth evidence that would support WCAB's decision, but drew different inferences from it. If the Court were regularly pursuing its limited appellate authority in WCAB cases, the fact that it found *any* evidence in support of the WCAB decision would require the Court to affirm the award of the WCAB.

In *Whaley v. WCAB*,[12] the Court of Appeal annulled a decision of the WCAB which had denied compensation benefits to the widow of the supervisor of a newspaper delivery crew who was killed while driving his own automobile to work. The undisputed facts were that the decedent worked a 40-hour week, beginning each day at 2:30 a. m., when he went to the plant to pick up the day's papers, and ending when the morning deliveries were over, usually between 10:00 and 11:30 a. m. It was undisputed that the newspaper did not direct the decedent's travel nor was the decedent subject to the control of his employer in the use of his car, except as to a restriction against transporting unauthorized passengers during the time he was performing his duties. In overturning the WCAB, the Court reasoned that the availability and use of the decedent's car was a part of the service rendered to the employer. Therefore, the employment relationship was in effect while the employee was driving the car, used in performance of his duties, to his place of employment. The Court cited the *Joyner* and *Le Febvre* cases as its authority.

Finally, in *Smith v. WCAB*,[13] a majority of the State Supreme Court created a new exception to the going and coming rule. The *Smith* case is interesting not only because it changed a long-established rule of law, but also because, before a majority of the Court could get to the point of overruling the old controlling case, it had to review and reevaluate the facts, an activity from which it is precluded by statute.

Smith was a social worker who was killed while en route to work in his personal car. There was conflicting evidence as to whether social workers were required to furnish their own cars or could use state cars. The WCAB denied the widow's petition for death benefits on the ground that the decedent was within the going and coming rule and therefore not in the course and scope of his employment at the time of his death. The WCAB apparently did not go deeply into the question of whether the employer required Smith to use his own car in discharging his duties, as that would not have been a material

12. 267 Cal. App.2d 754, 73 Cal. Rptr. 348, 33 C.C.C. 743 (1968).

13. 69 Cal.2d 814, 73 Cal. Rptr. 253, 447 P.2d 365, 33 C.C.C. 771 (1968).

issue at the time the WCAB heard the case. It only became material after the Supreme Court, on review of *Smith,* changed the rule of law that had existed for 34 years.

The old rule was established in *Postal Telegraph v. Industrial Accident Commission.*[14] In that case, the Postal Telegraph Company had required its messengers to furnish their own motorcycles. A messenger driving to work on his motorcycle, which he would use to discharge his duties through the day, was injured and applied for workmen's compensation benefits. The then Industrial Accident Commission awarded compensation to the messenger and, following a hearing in the Supreme Court, the award was affirmed. However, rehearing was granted and the decision was reversed and recovery denied. From that time, the rule has been that even though the employer requires that an employee furnish his own car to discharge his duties, injuries suffered by the employee while en route to a fixed place of employment to which he must report before starting his day's work are not compensable. Therefore, in its decision, the WCAB did not devote too much of its attention to the question of whether Smith's employer required Smith to provide his own vehicle. On appeal, the WCAB did assert that there was substantial evidence to support its conclusion that Smith was not required to furnish his own car.

A four-justice majority of the Court, speaking through Justice Tobriner, was more impressed with the evidence that would support the conclusion that Smith was required to furnish his car than with the evidence that he could have used a state car if he had wished. The majority overlooked the statutory prohibitions forbidding their reevaluating the evidence, and concluded that Smith's employer did require him to furnish his own car. The Court then attacked the *Postal Telegraph* decision, and found that it had lost its "vitality," as its decisional foundations have been "eroded" over the years. The majority decision appears to offer a new rule of law, that is, that where the employee's use of his own car in perform-

14. 1 Cal.2d 730, 37 P.2d 441, 96 A.L.R. 460 (1934) overruled in 69 Cal. 2d 814, 73 Cal. Rptr. 253, 447 P.2d 365.

ing his duties is permitted by the employer, and such use can be said to be of some benefit to the employer, the employee is within the course and scope of his employment while he is driving from his home to his place of employment in the morning and when he is going from his place of employment to his home in the evening.

Smith's death occurred on one of his "office days," during which it was not contemplated that he would have to leave the office and make calls. Le Febvre's death occurred while he was en route to a fixed place where some fire drills were to be held, and it was not contemplated that he would have to respond to fire calls. Whaley's death occurred while he was en route to a fixed place, the newspaper plant, where he had to pick up his newspapers before distributing them to newsboys. Therefore, even though it has not been directly stated by the courts, it appears that where an employee uses his automobile to perform his duties, he is in the course of his employment driving to and from work even on those days where it is not contemplated that he will be using his automobile to perform his duties.

The minority opinion in *Smith* decried both the majority's reweighing and reevaluating the evidence and its overturning of the *Postal Telegraph* decision. It was a four-to-three decision.

IV. Penalties

Perhaps the decision which will have the most far-reaching effect on the administration of workmen's compensation claims is *Berry v. WCAB*.[15] While the question in the *Berry* case was whether the workmen's compensation carrier should be assessed a penalty for unreasonable delay in payment of benefits, the importance of the decision is in the Court's interpretation of section 4650.[16] In *Berry*, the applicant had been

15. 276 Cal. App.2d —, 81 Cal. Rptr. 65, 34 C.C.C. 507 (1969).

16. Lab. Code § 4650 states: "If an injury causes temporary disability, a disability payment shall be made for one week in advance as wages on the eighth day after the injured employee leaves work as a result of the injury; provided, that in case the injury causes disability of more than 49 days

awarded continuing temporary disability. On September 30, 1968, the employer petitioned to terminate temporary disability on the ground that the applicant's condition had become stationary and ratable as of August 21, 1968. In support of its petition to terminate temporary disability, the carrier filed a medical report in which the doctor offered his opinion that the employee's condition was permanent and stationary and that he had a residual disability which was due, at least in part, to the industrial injury. The carrier stopped payments of temporary disability with its filing of the petition to terminate its liability. The applicant objected to the termination of his temporary disability and asserted that his condition was still temporary. He also requested an assessment of a penalty for unreasonable delay if the carrier failed to make advances against his permanent disability. The carrier did not make such advances. After a hearing, the referee determined that the applicant's condition was permanent and stationary; that he suffered a 63% permanent disability, and that the employer had not unreasonably delayed payment. Reconsideration was denied and the applicant petitioned for a writ solely on the issue of the WCAB's refusal to assess a penalty against the carrier for unreasonable delay because of its refusal to advance payments against his permanent disability award. The Court granted the writ, annulled the order of the WCAB, and directed it to enter a new award allowing a penalty for late payment.

The WCAB had adopted the referee's opinion that it was not unreasonable for the carrier to stop temporary disability payments and to await determination of its liability before beginning permanent disability payments. In its answer to the employee's petition for a writ, the WCAB argued that it would be unreasonable to require an employer or insurance carrier to make advances of permanent disability prior to a

or necessitates hospitalization the disability payment shall be made from the first day the injured employee leaves work or is hospitalized as a result of the injury. If the injury causes permanent disability, a disability payment shall be made for one week in advance as wages on the eighth day after the injury becomes permanent or the date of the last payment for temporary disability whichever date first occurs."

hearing and rating by the WCAB. The Court noted that the WCAB was arguing, in effect, that permanent disability need not be paid, under any circumstances, until after the issuance of an award. The WCAB cited no authority for that rule and the Court did not believe that section 4650, suggested such a rule. The Court further pointed out that such an interpretation would be contrary to the provisions of section 5814,[17] which states, in pertinent part, "when payment of compensation has been unreasonably delayed or refused, either *prior to* or subsequent to the issuance of an award, the full amount of the order, decision or award shall be increased 10%" (emphasis added). The Court thought that section 5814, indicated that the carrier was not entitled to await a formal determination of its liability through the issuance of a permanent disability award unless the carrier could show reasonable cause for delay. The Court stated that the employer should be required to give a satisfactory excuse for delaying payments of permanent disability for more than 7 days after the time temporary disability payments stop. If, however, the injured employee's condition becomes permanent and stationary, and there is a genuine doubt, from a medical or legal standpoint, as to liability for benefits, delay is excused. In the Court's opinion, an employee's failure to make a specific request for advances or payments of his yet undetermined permanent disability, or failure to demonstrate urgent need for such payments, would not be sufficient reason to excuse prompt payment by the carrier.

As a matter of practice, no workmen's compensation insurance carrier has regularly begun payments of permanent disability within 7 days of terminating temporary payments or within 7 days of the date that the employee's condition is per-

17. Lab. Code § 5814 states:
"When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision or award shall be increased by 10 percent. The question of delay and the reasonableness of the cause therefor shall be determined by the appeals board in accordance with the facts. Such delay or refusal shall constitute good cause under Section 5803 to rescind, alter or amend the order, decision or award for the purpose of making the increase provided for herein."

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manent and stationary. Many carriers, as a regular practice, have made "advances" against the future liability for permanent disability when a request for such advances has been made. The Court's interpretation of the requirements of section 4650, has created a burdensome administrative problem for workmen's compensation insurance carriers. The Court apparently believes that the wording of section 4650, should be rigidly interpreted, and any time that temporary disability is stopped, for any reason, the carrier must begin payment of permanent disability benefits on the 8th day or be required to show a medical or legal doubt as to its liability for such payments. The most frequent basis for terminating temporary disability is when an employee returns to work. In the vast majority of industrial injuries the employee is returned to work before his condition has reached a permanent and stationary stage. Frequently, the treating doctors want to give the injured employee a trial at work before determining what, if any, permanent residuals he will suffer from his industrial injury. Therefore, while a carrier may believe that it will have some liability for permanent disability at the time the employee returns to work and his temporary disability is terminated, it may be weeks or even months before the *extent* of the disability resulting from the industrial injury is known. In such a case, there would be no doubt that some liability for permanent disability would attach. The *Berry* decision requires that payment of permanent disability begins when temporary disability stops. The question facing the insurance carriers is "how much?" If payment of permanent disability is started, when can it reasonably be stopped? Would payment of a very minimal amount satisfy the *Berry* court's interpretation of the statute?

As the *Berry* decision recognizes a carrier's right to withhold payment of permanent disability where there is a legal or medical doubt as to its liability for such payment, there seems to be no question that a conflict in the medical opinion as to the existence of *any* disability would be a reasonable cause for withholding payment. However, where there is only a conflict in the medical opinion as to the extent of permanent disability resulting from the injury, the carrier has a duty to

start and continue payments until it has paid off at least the minimum amount supported by the medical record.

The *Berry* decision is going to create a problem for applicants' attorneys as well as for insurance carriers. Applicants' attorneys fees are payable from the applicant's awarded compensation, and generally are paid from accrued but unpaid disability benefits. Where a carrier has been paying permanent disability from the time that temporary disability has ceased and the matter does not go to hearing for some months, it may well be that the carrier will have paid out its entire liability to the injured employee and there will be no monies available for the applicant's attorney's fee. When injured employees seek representation, they may have a difficult time obtaining the services of an attorney where they have enjoyed payments of permanent disability for some time.

V. Costs

In *Caldwell v WCAB*,[18] the Court of Appeal overturned an en banc decision of the WCAB that denied an injured employee reimbursement for travel expenses and one day's temporary disability reimbursement for loss of wages incident to the employee's traveling to see a doctor of his own choice to obtain a medical report on his own behalf. Due to its apparent misunderstanding of the record, the Court may well have effected a greater change in the law than it had intended.

The question in *Caldwell* is the interpretation of section 4600.[19] As may be noted in the footnotes where it is set forth

18. 268 Cal. App.2d 912, 74 Cal. Rptr. 517, 34 C.C.C. 37 (1969).

19. Lab. Code § 4600 states:
"Medical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for expenses reasonably, actually, and necessarily incurred for X-rays, laboratory fees, medical reports, and medical testimony to prove a contested claim. The reasonableness of and necessity for incurring such expenses to prove a contested claim shall be de-

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in full, section 4600, consists of three paragraphs. The third and final paragraph was enacted in 1959, and reads as follows:

> "Where at the request of the employer, the employer's insurance carrier, the administrative director, the appeals board or a referee, the employee submits to examination by a physician, he shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for such examination, together with one day of temporary disability indemnity for each day of wages lost in submitting to such an examination."

Prior to 1959, there was no express provision in section 4600, granting an employee reimbursement for travel expenses and payment of one day's temporary disability for each day of wages lost in submitting to examinations and treatment requested by the employer or its compensation carrier. However, the WCAB (then Industrial Accident Commission) had read into the section the right of the employee to such expenses, relying upon section 3202,[20] which requires that the Labor Code be liberally construed in favor of an injured workman.

In *Caldwell,* the WCAB took the position that, prior to the 1959 amendment that added the third paragraph to section 4600, in the spirit of section 3202, it might well have been able to interpret section 4600, to permit reimbursement of travel

termined with respect to the time when such expenses were actually incurred. Expenses of medical testimony shall be presumed reasonable if in conformity with the fee schedule charges provided for impartial medical experts appointed by the administrative director.

Where at the request of the employer, the employer's insurance carrier, the administrative director, the appeals board or a referee, the employee submits to examination by a physician, he shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for such examination, together with one day of temporary disability indemnity for each day of wages lost in submitting to such an examination."

20. Lab. Code § 3202 states:
"The provisions of Division 4 and Division 5 of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

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expenses incurred by an injured employee visiting a doctor on his own behalf or by his own choice. However, the WCAB did not feel that even under a liberal construction could it have granted the employee one day's temporary disability for each day's wage loss. The WCAB further felt that when the legislature specifically addressed itself to that question by the addition of the third paragraph in 1959, it had expressed its intention to grant the employee reimbursement for travel expenses and one day's temporary disability for each day's loss of wages only where such expenses were incurred at the direction of the employer or its insurance carrier. The WCAB pointed out that the third paragraph started with the specific phrase "where at the request of the employer, . . ." and expressed its opinion that, as the words of the statute were clear, it was not free to alter or add to them to accomplish a purpose that did not appear on the face of the statute or in its legislative history.

On appeal, the Court disagreed with the WCAB's interpretation of the statute, and its self-restraint in not finding a way to construe section 4600, so as to grant the employee reimbursement. The Court apparently misunderstood what reimbursement had been granted Caldwell by the referee. The referee had actually reimbursed Caldwell for his travel expenses and granted him one day's temporary disability to compensate him for one day's loss of wages. The Court apparently believed that the referee had granted reimbursement for travel expenses and reimbursement for the actual wages lost. As the maximum temporary disability at the time of the *Caldwell* decision was $10 per day, it would be considerably less than the loss of a day's wages for most employees.

The Court's reasoning in *Caldwell* is not as important as its conclusions. That reasoning seems to be that as the words of section 4600, are not clear, the admonition of section 3202, should control and the second paragraph of section 4600, could still be construed to grant the employee reimbursement for travel expenses and loss of wages when he seeks an examination by a doctor of his own choosing to help him prove a contested claim. All of this, of course, is subject to

the referee's right to find that such expenses were reasonably incurred.

If your author properly understands the implications of the *Caldwell* decision, it means that where the employer or the carrier requests that the injured employee report to a doctor for examination or treatment, the employee must be reimbursed for his travel expenses and given one day's temporary disability for each day's wages he loses. However, where the employee decides to visit a doctor, on his own, for examination, the employer or carrier must reimburse him for his travel expenses and his actual loss of wages. This would truly seem to be an anomalous rule.

VI. Payment of Benefits

A. *Waiting Period*

In *Coolman v. Continental Can Co.*,[1] the WCAB, in an en banc opinion, settled some uncertainties as to the proper construction of the first sentence of section 4650.[2] Simply summarized, that portion of section 4650, states that an injured employee gets no temporary disability for the first 7 days of his loss of time from work by reason of his injury unless the total period of lost time exceeds 49 days or unless the injury requires hospitalization. Some confusion has grown up in those cases where the injury causes hospitalization; not on the first day of the injury, but at some time during the 7-day waiting period. If, for example, the injured employee goes to the hospital on the third day after leaving work, there is a question as to whether his temporary disability should start with that day, omitting only the first two, or if the compensation carrier should go back and pick up the first two days of lost time as well. The WCAB, in its en banc opinion, in *Coolman*, interpreted the section to require that temporary disability start on the day of hospitalization, not on the first day of lost time.[2.5]

1. 34 C.C.C. 61 (1969).

2. Lab. Code § 4650 is set forth in full *supra*.

2.5. Since this article was written, the Court of Appeal has overturned the decision in *Coolman*. The Court of

B. *Interest*

In *Klein v. City of Los Angeles*,[3] the WCAB, in another en banc opinion, decided the date on which interest would start running on awards where reconsideration has been granted. This question has been raised by several petitions for reconsideration.

An injured employee's right to interest on an award of compensation benefits is set forth in section 5800.[4] The WCAB pointed out that where reconsideration is denied, the injured employee's rights flow from the referee's decision and interest should run from the date of that decision. Problems arise, however, where reconsideration is granted and the WCAB alters, amends, or annuls the decision of the referee. In a highly technical opinion, the WCAB decided, 6 to 1, that when reconsideration is granted, a referee's decision loses its vitality and interest on the award runs from the date of the opinion after reconsideration, and not from the date of the award by the referee.

C. *Temporary Disability*

In *Herrera v. WCAB*,[5] the State Supreme Court issued a rare decision, in that it affirmed an order of the WCAB. It probably merits consideration for that reason alone. Actually the case cannot be considered a landmark case, although it does quiet some nagging doubts.

Appeal decision now holds that when an employee is hospitalized any time during the first 7 days, the carrier must go back and pay the temporary disability from the first day of lost work. Donald G. Burns v. WCAB (1969), 2 Cal. App.3d 542, 82 Cal. Rptr. 678, 34 Cal. Comp. Cases 635 (hearing denied).

3. 34 C.C.C. 247 (1969).

4. Lab. Code § 5800 states:
"All awards of the appeals board either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award. Such interest shall run from the date of making and filing of an award, as to amounts which by the terms of the award are payable forthwith. As to amounts which under the terms of the award subsequently become due in installments or otherwise, such interest shall run from the date when each such amount becomes due and payable."

5. 71 Cal.2d 254, 78 Cal. Rptr. 497, 455 P.2d 425, 34 C.C.C. 382 (1969).

Herrera suffered an industrial injury which caused him to lose two months' work, but his employer continued his salary. After hearing, a referee granted Herrera reimbursement for some self-procured medical treatment and temporary disability in the amount of $567.92, covering his loss of work. The employer and its insurance carrier petitioned for reconsideration, which was granted. The WCAB, after reconsideration, found that the employee did sustain injury but that the injury had caused no compensable wage loss. In its order after reconsideration, the WCAB granted the employee recovery only of his self-incurred medical treatment. Herrera appealed, contending his continued wage was "a gratuity." A Court of Appeal annulled the WCAB decision and the Supreme Court granted a hearing. In its decision, the Supreme Court pointed out that, under section 4909, the allowance of credit for wage payments voluntarily made by an employer with no agreement as to the purpose is within the WCAB's discretion. Also, the WCAB was following its established policy to allow credit to the employer when wage payments are made to an employee during a period of total disability where there has been no agreement as to their purpose. Therefore, the WCAB's action in denying Herrera temporary disability benefits was proper.

The established policy of the WCAB, to deny temporary disability benefits to an injured employee who is paid his salary during his period of disability, now has Supreme Court sanction.

VII. Subrogation

In the 1969 article, we reported on the case of *Pearce v. Liberty Mutual Insurance Co.*,[6] and noted that in its en banc decision, the WCAB speculated that it might not have to deny an employer or carrier credit as to future liability in the amount of an injured workman's net recovery from a third-party suit, even though the employer had been found to be

6. Pearce v. Liberty Mutual Insurance Co. 33 C.C.C. 243 (1968).

contributorily negligent. In that case, the WCAB also speculated that an employer's obligation to furnish medical treatment might not be subject to a right to credit for third-party recovery.[7] As expected, the WCAB's speculations bore fruit and in 1969 it was faced with the question in *Nelsen v. Capitol Roof Structures*.[8]

In *Nelsen*, a jury in a third-party suit found Nelsen's employed contributorily negligent and reduced Nelsen's recovery by the amount of workmen's compensation benefits expended. Under the jury's determination, the workmen's compensation carrier's lien was denied. Nelsen applied for further workmen's compensation benefits and the carrier claimed a credit in the amount of Nelsen's net civil recovery. After a hearing before a referee, the carrier was refused credit on the ground that the employer had been found contributorily negligent. Nelsen was awarded permanent disability and further medical treatment. The carrier petitioned for reconsideration, contending that the referee erred in disallowing the credit in the amount of Nelsen's net third-party recovery, and that if its credit was not allowed, Nelsen would receive a double recovery.

The WCAB granted reconsideration and pointed out that it had dealt with some similar problems in *Pearce*, and that while its decision in *Pearce* had been appealed, the appellate proceedings had been dismissed at the request of the petitioner.[9] The WCAB decided that the carrier or employer is due credit against his future liability for workmen's compensation benefits, including medical treatment, in the net amount of the injured employee's third-party recovery, regardless of a finding of employer negligence. The rationale of the decision is that to hold otherwise would permit double recovery on the part of an injured employee.

The impact of *Nelsen* on subrogation practices of insurance carriers is bound to be wide-spread. Prior to *Pearce* and *Nel-*

7. WORKMEN'S COMPENSATION, *Cal Law—Trends and Developments 1969*, at p. 133.

8. 34 C.C.C. 238 (1969).

9. Petitioner requested dismissal because settlement had been effected.

sen, where an employer had been found to be contributorily negligent, not only was the workmen's compensation carrier denied recovery of monies expended to the date of trial, but it was also denied credit against future liability. Particularly after *Pearce*, carriers would frequently waive their right to a lien and recovery of monies expended to the date of trial, to help effect settlement so that no determination would be made as to the negligence of the employer. Where there had been no determination of the employer's contributory negligence, under *Pearce*, the carrier or employer would be granted credit. Therefore, it was to the benefit of carriers, where it appeared that the employer might well be held for contributory negligence, to waive their lien for monies spent to help effect settlement and avoid a determination of negligence, in hopes of offsetting further liability by way of credit.

If the courts uphold the WCAB's decision in *Nelsen*, carriers will probably be less willing to waive or cut their liens to help effect settlement, since they can be assured of a credit in the amount of the employee's net third-party recovery as an offset against liability for future compensation benefits.

The plaintiff's (injured employee's) negotiating position would also be changed should the court uphold the WCAB's decision in *Nelsen*. However, the considerations facing the employee under the rules of *Nelsen* are a bit more complex. Prior to *Nelsen* and *Pearce*, it was, in some cases, to the plaintiff's advantage to try a case and receive a determination of his employer's contributory negligence. This, under the prior law, would have assured him of future compensation benefits regardless of his third-party recovery. In cases where the damages were high, and the amount of compensation benefits paid to the time of civil trial low, and where the chances of a jury holding the employer contributorily negligent high, the plaintiff would be in a particularly good position to effect a double recovery. If the law in *Nelsen* prevails, it would be completely immaterial to the plaintiff whether the employer were found contributorily negligent. In either case, the employer or its carrier would be granted credit against future compensation liability in the amount of the employee's net

third-party recovery. In either case, the employee's civil recovery would be reduced by the amount of the compensation benefits previously paid. Only the third-party defendant and the employer would be concerned about whether the employer was contributorily negligent. The finding on that issue would determine whether the employer and its carrier would be reimbursed for the amount of compensation benefits previously paid, or whether the third-party defendant would have the judgment against it reduced in that amount.

The subrogation rights of an employer or its compensation carrier against the injured employee's third-party recovery received another setback this year. The same Court that decided *LaBorde v. McKesson Robbins*[10] in 1968, decided *Bennett v. Unger*[11] 1969. In the 1969 article, we pointed out that the Court, in *LaBorde*, felt that the prohibitions in sections 3859[12] and 3860,[13] against settlement between the plaintiff-employee and third-party defendant, without participation by the employer or its compensation carrier, were not intended to block settlement where the concurrent negligence of the employer had been made an issue in the litigation, and where settlement was carefully drawn to leave intact all the

10. 264 Cal. App.2d 363, 70 Cal. Rptr. 726 (1968).

11. 272 Cal. App.2d 202, 77 Cal. Rptr. 326, 34 C.C.C. 295 (1969) modified in 272 Cal. App.2d —.

12. Lab. Code § 3859 states:
"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. The consent of both the employer and employee filed in court in writing together with the approval of the court, is sufficient in any action or proceeding where such approval is required by law."

13. Lab. Code § 3860 states in pertinent part:
"(a) No release or settlement under this chapter, with or without suit, is valid or binding as to any party thereto without notice to both the employer and the employee, with opportunity to the employer to recover the amount of compensation he has paid or become obligated to pay and any special damages to which he may be entitled under Section 3852, and opportunity to the employee to recover all damages he has suffered and with provision for determination of expenses and attorney's fees as herein provided.
"(b) The entire amount of such settlement, with or without suit, is subject to the employer's full claim for reimbursement for compensation he has paid or become obligated to pay and any special damages to which he may be entitled under Section 3852, together with expenses and attorney fees, if any, subject to the limitations in this section set forth."

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rights of the employer.[14] In *Bennett*, the same Court felt that a "contingent settlement" is beyond the purview of sections 3859 and 3860. The contingency on which the settlement in *Bennett* hinged was a determination of the employer's concurrent negligence. There, a widow was suing a third party for the wrongful death of her husband who apparently was killed in the course and scope of his employment. The widow had received some $11,749.95 in workmen's compensation death benefits, and the workmen's compensation carrier intervened in her suit to recover such benefits. One of the third-party defendants cross-complained against the employer, and, therefore, the employer was both a cross-defendant and plaintiff in intervention. Settlement negotiations took place. The widow and third-party defendants reached an agreement as to the value of her claim apart from the compensation lien. The compensation carrier had agreed to cut its $11,749.95 claim to $7,249.95. However, the third-party defendants would pay no more on the compensation lien than $5,750. As agreement could not be reached, the plaintiff and defendants then arrived at a sum satisfactory to the widow and agreed to settle, contingent on adjudication of the validity of the compensation lien. The compensation carrier's attorneys refused this offer and took the position that settlement had been reached between defendant and plaintiff, and, therefore, it had a right to impress its lien upon those monies. Since agreement as to the status of the case could not be reached by the parties, trial was resumed, and the attorney for the employer was advised to be ready to proceed. He chose to dismiss his complaint in intervention and leave the courtroom. Apparently, the attorney for the compensation carrier, beset on all sides, overlooked the fact that his client was not only a party as a plaintiff in intervention, but also as a defendant via cross-complaint. Therefore, his dismissal of the complaint in intervention and departure did not remove his client from the case. Trial proceeded and it was found that the compensation carrier was contributorily negligent and its lien denied. On appeal by

14. WORKMEN'S COMPENSATION, *Cal Law—Trends and Developments 1969*, at p. 136.

the compensation carrier, the Court upheld the action of the trial court and, further, fined the attorneys for the compensation carrier for bringing what the Court termed a frivolous appeal.

Apparently, in at least one District of the Courts of Appeal, the prohibitions against third-party defendants and plaintiff-employees settling without participation by the employer or its compensation carrier are no longer recognized, where the concurrent negligence of the employer has been made an issue and the settlement between the third-party defendant and employee is carefully drawn to leave intact all the rights of the employer. The same is true where the settlement is made contingent on the trial of the employer's contributory negligence.

VIII. Enterprise

The caption "Enterprise" is not a proper subhead for an article on workmen's compensation, but one of the 1969 cases was so intriguing that it should be included in this article and fits in no other category.

In *Wiley v. WCAB*,[15] the wife of an injured employee filed for workmen's compensation death benefits although her husband had not died and, apparently, had suffered only minor injury. The WCAB's order dismissing the application for death benefits was appealed, the potential widow contending that the statutes did not make the death of the employee a condition precedent to commencement of an action for death benefits. She claimed that the statutory requirement that a death benefit claim must be filed within 240 weeks from the date of injury did not require that death itself occur within that period, but only that the claim be filed in that period. The Court of Appeal denied the widow's writ. The author feels that this potential widow's foresight and preparation merits our admiration, if not our support.

15. 34 C.C.C. 486 (1969).

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