

Disability Retirement Law Resource
Second Edition (Revised)
December 2018

**Focused on the California County Employees
Retirement Law of 1937**

Preface to the Second Edition (Revised)

This revision consists of an update of four sections pertaining to (1) the definition of “discontinuation of service” under Section 31722 (*Cameron v. Sacramento County Employees’ Retirement System* (2016) 4 Cal.App.5th 1266), (2) felony forfeiture, Government Code Sections 7522.72 and 7522.74, (3) accommodating an incapacity (*Meyers v. Board of Administration for the Federated City Employees Retirement Fund* (2014) 224 Cal.App.4th 250), and (4) the definition of the “last day of regular compensation” under Section 31724 (*Astorga v. Retirement Bd. of Santa Barbara County Employees Retirement System* (2016) 245 Cal.App.4th 386).

The revision was coordinated and directed by Frank Boyd, Senior Staff Counsel at LACERA, and by Vincent Lim, Chief Counsel, Disability Litigation; and the revisions were written by the following LACERA staff: Allison Barrett, Senior Staff Counsel; Fern Billingsy; Senior Staff Counsel; Frank Boyd, Senior Staff Counsel; Eugenia Der, Senior Staff Counsel; Vincent Lim, Chief Counsel, Disability Litigation; Elaine Salon, Staff Counsel; and Jason Waller; Senior Staff Counsel.

Any questions, comments, or concerns should be directed to Vincent Lim at vlim@lacera.com and to Frank Boyd at fboyd@lacera.com.

8 November 2018

Preface to the Second Edition

After the First Edition was rolled out in May 2000, several updates were issued that incorporated court opinions and statutory changes. The last such update was issued in October 2004. In June, 2010, a draft of the Second Edition was issued with a request for comments and critique to those interested in disability retirement and survivor benefits under the County Employees Retirement Law of 1937. A year later, and suggestions having been received and integrated in the Resource, the Second Edition is now finalized. However, we continue to invite comments and constructive critique that will improve the Resource on an ongoing basis.

While the subtitle of the original Resource included the name of the State Association of County Retirement Systems, the Second Edition does not include that subtitle because SACRS has not been consulted regarding the document and has not had an opportunity to consider it. It is our purpose not to throw words into SACRS' corporate mouth. The subtitle may be added later if it is appropriate to do so.

As indicated in the Preface to the First Edition, an objective of the Resource is to be a balanced source of information, without shift in favor of applicants or respondents. In this work, quotation of statutes and court opinions is the favored method of getting the point across, rather than an individual's interpretation of statutes and court opinions. The text departs from this favored method where the point does not appear to be controversial or it is not practical to explain a point by quoted material; but where there might be disagreement, there has been an attempt to flag the commentary as "Associations' comment" or "Applicants' comment." As is the case with any erroneous item in the Resource, where the judgment about a point being noncontroversial is in error, it is hoped that a reader noticing the error will alert the authors so that the offending part can be appropriately flagged or corrected, and opposing views can be better represented.

There are deviations from the norms of legal writing in some respects. These deviations have a downside in that the Resource is longer than it otherwise might be, but it is hoped that the deviations make the Resource more useful.

- In normal legal writing, after a court opinion has been cited, further citations to the same opinion are given with an abbreviated, or "short cite," citation with a reference to the fact that a full citation can be found above, e.g., "*supra*," "*id.*," or "*op. cit.*" (See *California Style Manual*, section 1:2.) A reader wanting to know the full citation must either put her finger on the page and refer to the Table of Authorities when the hard copy is used, or, when an electronic copy is being used, perform a word search or scroll up a few pages in hopes of landing on the original citation. In any case, this process can be an annoying interruption, particularly when using the Resource to cut and paste into a brief, memorandum, or letter. Also, it is anticipated that, at any one time, the Resource will most frequently be consulted with respect to a particular issue and only a small part of the Resource will be reviewed. Therefore, the full citations are repeated

unless the subsequent citation to a court opinion or other cited authority follows closely behind the first. If a citation to a court opinion was cited earlier in the Resource, the subsequent citation will be tagged with a “*supra*” so that the reader knows that the opinion was cited before.

- In normal legal writing, after material has been quoted, it is not quoted again, but a reference is made to the page number where the quotation can be found. In the Resource, some passages from opinions of the appellate courts and some statutes are authority for more than one point. As is the case for citations, rather than interrupting the reader, or one cutting and pasting, and sending her off on a hunt for the quoted material, the quote may be repeated in full in different sections of the Resource. The idea is that the user of the Resource is not sitting down to read the document from page one to the end, but is targeting a section that is pertinent to a particular question. Within reason, an attempt has been made to provide the user with all the information the user needs in each targeted section.

The authors would like to recognize, in addition to those contributors mentioned in the First Edition, Orange County Retirement System Staff Attorney David H. Lantzer and County of Ventura Assistant County Counsel Lori Nemiroff for their recent contributions. Also, LACERA staff attorneys James Castranova, Vincent Lim and Frank Boyd, and Chief Counsel, Disability Litigation J. Patrick Joyce who contributed to the Second Edition, and LACERA Senior Staff Counsel Fern Billings who reviewed and made recommendations for improvement of the new section dealing with the rights of survivors, beneficiaries, and estates following the death of a member.

Whether the Resource will be a useful educational and research tool for the CERL of 1937 community will depend on members of the community taking an active part in improving it.

July 21, 2011
Dan McCoy
Retired Chief Counsel, Disability Litigation
LACERA

Preface to the First Edition (Revised)

At the Fall 1996 conference of the State Association of County Retirement Systems (SACRS), it was determined that an ad hoc committee should be formed to discuss and make recommendations concerning whether the disability provisions of the County Employees Retirement Law of 1937 should be modified. The Ad Hoc Committee on Disability Retirement Reform was formed of representatives from various interest groups and, under the chairmanship of then President of SACRS, Ed O'Neill, III, of San Joaquin County, held meetings beginning in 1997. Among the recommendations made by the Committee was one proposed by Harry Hatch of San Bernardino County and Sylvia Miller, Division Manager, Disability Retirement Services for the Los Angeles County Employees Retirement Association. They proposed that SACRS develop an educational program for those involved in the disability retirement process. As originally conceived, the educational program would be designed for attorneys serving as referees appointed by boards of retirement to take evidence and recommend decisions. A written manual of the law, eventually called the "Disability Retirement Law Resource," was considered to be necessary as the core of such a program. Expressions of interest in such a manual were received from various county retirement associations, referees and applicants' attorneys. Some associations that do not use referees saw that a legal resource would be of assistance to association staff and members of the boards. A drafting committee of those interested was formed to work on the Resource. Deputy County Counsel Lance Kjeldgaard, counsel to the San Bernardino County Employees Retirement Association, took on the task of chairing the committee, prepared the initial outlines of the Resource and the initial drafts that were discussed in committee meetings and special meetings at SACRS conferences.

The drafting committee established several ground rules for the development of the Resource. First and foremost, the Resource must be a balanced presentation of the law. To guard against a "defense bias," input must be solicited from referees and applicant's attorneys. Interpretation must be kept to a minimum, except where identified as "Associations' comments" or "Applicants' comments." Statutes and court opinions must be quoted, as opposed to being interpreted. As a result of this approach, the Resource is lengthy, but its length is justified by the benefit derived from providing a balanced presentation.

In November 1998, a draft of the Resource was shared with a number of applicants' attorneys. Their comments were discussed at a meeting of the drafting committee held in March 1999. At that meeting, it was agreed that the purpose of the document should be broadened from being an aid to referees to a legal resource for anyone who might be involved in the disability retirement process.

In April 1999, a draft of the Resource was distributed to all of the retirement associations formed under CERL of 1937 for discussion at a meeting of those interested in the project that was held at the Spring 1999 SACRS conference. Further revisions to the Resource were made based on modifications proposed at that meeting. In August 1999, a draft of the Resource was distributed to the retirement associations with a request that it be shared with attorneys who act as referees and attorneys who

represent applicants. The draft was modified to reflect recommendations and comments from a number of sources.

The modified draft of the Resource was discussed at a meeting open to all interested persons that was held at the Fall 1999 SACRS Conference. The meeting was led by Mark Burstein of Los Angeles, an attorney whose specialty is acting as an arbitrator and hearing officer and who has extensive experience in acting as a referee in disability retirement cases. Additional modifications were made to the Resource as a result of suggestions made at that meeting.

Those serving on the drafting committee were its Chair, Deputy County Counsel Lance Kjeldgaard of San Bernardino; Los Angeles County Employees Retirement Association (LACERA) Chief Counsel David Muir; LACERA's Chief Counsel, Disability Litigation, Dan McCoy; Deputy County Counsel Denise Eaton May of the Office of the County Counsel, County of Alameda; Deputy County Counsel Deirdre McGrath of the Office of the County Counsel, San Diego County; and Annette Paladino of the Santa Barbara County Employees Retirement Association. A special "thank you" is extended to Dan McCoy for serving as the chief draftsman of the Resource.

Without implying that they all agree with the entire content of the Resource, the following are recognized for taking the time to review it and provide their comments: attorney and hearing officer James S. Armstrong, Jr., of the California and Colorado Bars; attorney and hearing officer Gregory J. Politiski of Orange; Judge Carlos M. Teran (Ret.) of Claremont; hearing officer George Liskow of Sierra Madre; hearing officer and referee James Alan Crary of Ojai; hearing officer Robert Neal of Solana Beach; John R. Descamp of the Sacramento County Employees Retirement Association; hearing officer Catherine Harris; Kathy Somsen, Retirement Benefits Manager, Contra Costa County Employees Retirement Association; Auditor-Controller/Treasurer-Tax Collector Gary W. Peterson of Fresno County; applicants' attorney Thomas J. Wicke of the law firm of Lewis, Marenstein, Wicke and Sherwin, Woodland Hills; applicants' attorneys Steven Pingel and Mark Ellis Singer of the law firm of Lemaire, Faunce, Pingel and Singer, Cerritos; Lori A. Nemiroff, Assistant County Counsel, Ventura County; Terry Rein of Modesto's Rein & Rein; JAMS Endispute's Judge William E. Sommer (Ret.); Deputy County Counsel Patricia J. Randolph of the Office of the County Counsel, County of Kern; Walter Cress, Assistant County Counsel, Office of the County Counsel, Imperial County; and Senior Staff Counsel Dixon M. Holston, Fern Billings and E. Steven Tallant, LACERA.

It is anticipated that the SACRS Disability Retirement Law Resource will be updated, revised and improved based on suggestions for improvement that will be made when it is used as a reference. We are especially interested in input from those who represent applicants for disability retirement benefits.

May 4, 2000
Lance Kjeldgaard,
Deputy County Counsel
County of San Bernardino

Chair, Disability Retirement Law Resource Drafting Committee

Disclaimer

This Disability Retirement Law Resource is intended to be an aid to those who are involved in the process of determining rights and obligations under the disability retirement provisions of the County Employees Retirement Law of 1937. Its purpose is to provide information as to what the law provides and, where the law is in dispute, what arguments may be made on how the law should be interpreted. However, the information provided in the Resource may not be sufficient in dealing with a particular legal problem. Neither LACERA nor any of the authors of and contributors to the Resource warrant or represent its suitability for such a purpose. The Resource should not be relied on as a substitute for independent legal research.

Likewise, referees and board members who might be aided in understanding the scope of the County Employees Retirement Law of 1937 should in any particular case consider first the points and authorities provided by applicants' and respondents' counsel.

The statutes quoted or cited in the Disability Retirement Law Resource and the authoritative status of court opinions cited may not be current. The user should independently verify the status of cited statutes and opinions of the courts.

There are 20 counties with retirement associations formed under the County Employees Retirement Law of 1937. There is no uniformity in the manner in which those associations process disability retirement applications. Each retirement association follows its own bylaws and regulations. These differences must be kept in mind by applicants and attorneys who appear before different boards, by those attorneys who act as referees for different boards, retirement association staff, and by the members of the various boards of retirement who might refer to this resource. An attempt has been made to keep this resource generic so that it will be of use to a greater number of persons involved in the disability retirement process throughout the state.

Members of boards and board staff who have questions about the applicability or validity of information contained in this resource should direct their questions to their board's attorney.

An applicant for a disability retirement pension who might refer to the Resource should understand that an applicant is best served in an administrative hearing if he or she engages the services of an attorney for representation and/or advice concerning the many and often complicated medical and legal questions that arise in disability retirement proceedings. An applicant should not presume that the issues discussed in the Resource are easily applied to his or her particular case, nor should an applicant presume that the law is too complicated to allow the applicant to represent him- or herself in a disability retirement proceeding. A decision to proceed without an attorney should be made in the light of sound advice from an attorney with expertise in disability retirement matters.

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DISABILITY RETIREMENT LAW RESOURCE

I. INTRODUCTION

A. Purpose of County Employees Retirement Law of 1937

Government Code section 31451 defines the purpose of the County Employees Retirement Law of 1937 as follows:

The purpose of this chapter is to recognize a public obligation to county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation for future services and to provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of the public service without prejudice and without inflicting a hardship upon the employees removed.

B. Statutory authority for disability retirement pension

The County Employees Retirement Law of 1937 is contained in the Government Code, Title 3, Division 4, Part 3, Articles 1 through 18. The disability retirement provisions of the County Employees Retirement Law of 1937 are contained in Article 10, Government Code sections 31720-31752. Section 31720 provides as follows:

Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

- (a) His incapacity is a result of injury or disease arising out of and in the course of his employment and such employment contributes substantially to such incapacity, or
- (b) The member has completed five years of service, and
- (c) The member has not waived retirement in respect to the particular incapacity or aggravation thereof as provided by Section 31009.

The amendments to this section enacted during the 1979-1980 Regular Session of the Legislature shall be applicable to all applicants for disability retirement on or after the effective date of such amendments.

Note: there are special statutory disability provisions for Contra Costa County: Government Code sections 31720.1 (statutory requirements) and 31727.01 (allowances).

C. Disability retirement allowances

1. Service-connected disability retirement and survivor allowances

Associations' comment

If the member is incapacitated for duty as a result of an injury or illness arising out of and in the course of employment, that is, a "service-connected disability," the member is entitled to an allowance equal to 50% of final compensation, or the amount of a years-of-service pension if it is greater than 50% of final compensation and the member is eligible to retire for years-of-service and age. (Gov. Code, § 31727.4). The Board of Supervisors may enact an ordinance that increases the percentage of final compensation from 60% to 90% where the member is totally disabled. (Gov. Code, § 31727.5.) Government Code section 31727.01 defines the disability retirement benefit for an employee of Contra Costa County.

Upon the death of a member while receiving a service-connected disability retirement allowance, 100% of the allowance continues to either a surviving spouse, who is designated as beneficiary and who was married to the member prior to retirement, or eligible children, unless the member elected an optional allowance. Note that the surviving spouse of a member retired for service-connected injury or disease need not have been married to the member for one year prior to retirement. (Gov. Code, § 31786. See Gov. Code, § 31760, et seq., regarding optional retirement allowances.) There are additional allowances for the children of certain members in active law enforcement and fire suppression and any other class fixed by the board of retirement, with exceptions, who are killed during performance of duty or as a result of an injury caused by external violence or physical force incurred in the performance of duty. (Gov. Code, § 31787.5) Where a safety member dies in the same circumstances covered by Section 31787.5, a surviving spouse is entitled to an additional one-time lump sum equal to one year of the member's compensation earnable. (Gov. Code, § 31787.6, discussed further below.)

If the member retires for disability from one county and also for years of service and age from another county or the Public Employees' Retirement System, the member's pension amount may be restricted. See the discussion, below, at Section I, C, 3.

End comment.

2. Allowances related to nonservice-connected injuries

Associations' comment

The general rule is that if the member is incapacitated for duty as a result of an injury or illness that is not service-connected and the member has five years of service credit (Gov. Code § 31720, subd. (b)), the allowance is the amount of the years-of-service retirement pension or, with certain exceptions, an allowance equal to 1/3 of final compensation. (Gov. Code, §§ 31726, 31726.5, 31727, and, for safety members, 31727.2.)

There are alternatives to the general rule. Government Code section 31727.01 defines the disability retirement benefit for a member of the Contra Costa County Employees

Retirement Association. Other rules that may be adopted by the board of supervisors of a county include Government Code sections 31727.1, 31727.3, and 31727.7.

Under Government Code section 31720.4, Section 31720, subdivision (b)'s requirement that the member have five years of service in order to qualify for a nonservice-connected disability retirement pension or for the member's survivors to qualify for a nonservice-connected survivor's allowance is waived when member is on military leave from the County of Los Angeles or a district of the county and the member becomes permanently incapacitated or dies as a direct consequence and result of injury or disease arising out of, and in the course of, active military service. The provisions of Section 31720.4 are not operative in the county or district until the Board of Supervisors or the governing body of the district adopts them by majority vote.

Upon the death of a member receiving a nonservice-connected disability retirement allowance, 60% of the allowance continues to either a surviving spouse, who is designated as beneficiary and was married to the member one year prior to retirement, or eligible children. (Gov. Code, § 31760.1 [any member retired for years of service and age or for nonservice-connected disability]; Gov. Code, § 31785 [safety member retired for years of service and age or for nonservice-connected disability]; Gov. Code, § 31785.1 [alternative provision applicable if adopted by a board of supervisors involving safety member retired for years of service and age or nonservice-connected disability where surviving spouse is at least 55 years of age].) For members of LACERA who retired on or after June 4, 2002, the survivors' continuance is 65% of the allowance the member received unless the member elected an optional allowance. (Gov. Code, §§ 31760.12 [general members] and 31785.4 [safety members]. See also Section 31486.6, Santa Barbara County, Plan 2 providing for a 50% continuance.) Other statutes apply to members who die before retirement, but who were entitled to retire for disability. See the discussion, below, at Section I, R, 2, b), (2), (a).

If the member dies as a result of a nonservice-connected injury, but does not have five years of service-credit, Government Code sections 31780, establishing liability for death benefit payments, 31781, defining the basic death benefit, and Sections 31591, , 31472 and 31472.1, providing for interest on contributions, provide for the payment of the basic death benefit, including interest, to the surviving spouse, designated beneficiary, or the member's estate. See further discussion at I., R., 1., c).

If the member retires for disability from one county and also for years of service and age from another county or the Public Employees' Retirement System, the member's pension amount may be restricted. See the discussion, below, at Section I, C, 3.

End comment.

a) "Level income option" (aka "Pension Advance Option")

Associations' comment

A member who retires on a years-of-service pension before age 62 and is fully vested in the social security system may select a retirement option that coordinates the retirement

allowance and the expected social security allowance. (Gov. Code, §§ 31810 and 31811.) Under this option, the association advances the retirement allowance, increasing the monthly amount to reflect the anticipated social security allowance the member will receive when he or she becomes eligible, at age 62. Once the applicant starts receiving social security payments, the association's payment is reduced by the equivalent actuarial values, allowing the association to recoup the advances. This option is only available to one who retires for service and is not available to a member who retires for disability. If a member retires using this so-called "level income option," also known as "the pension advance option," and is later successful in establishing entitlement to a nonservice-disability retirement pension, the disability retirement allowance may be less than the level income option allowance. In that case, it may be to the member's benefit not to retire for disability, but instead be satisfied with the level income option allowance.

A disability retirement awarded after a retirement for years of service and age using the level income option may create a debt to the association that the applicant must repay

End comment.

3. When a member retires for disability from one county and also receives a pension for years of service and age from the retirement association of another county or from the Public Employees Retirement System, the pensions may be restricted if the combined pensions exceed what the member would have received if all of the member's service had been with one entity.

Government Code section 31838.5 provides as follows:

No provision of this chapter shall be construed to authorize any member, credited with service in more than one entity and who is eligible for a disability allowance whether service connected or nonservice connected, to receive an amount from one county that, when combined with any amount from other counties or the Public Employees' Retirement System, results in a disability allowance greater than the amount the member would have received had all the member's service been with only one entity.

In cases of service-connected disability allowances only, the limitation on disability allowances provided for in this section shall apply to service-connected disability allowances payable to those who, after being employed with another county or an entity within the Public Employees' Retirement System, become employed by a second public entity on or after January 1, 1984.

Each entity shall calculate its respective obligations based upon the member's service with that entity and each shall adjust its payment on a pro rata basis.

In *Block v. Orange County Employees' Retirement System* (2008) 161 Cal.App.4th 1297 [75 Cal.Rptr.3d 137] a firefighter retired on a service-connected disability retirement from OCERS effective the same day he was granted a retirement pension for

years of service and age from the California Public Employees Retirement System. Block had been a firefighter with the Buena Park Fire Department and a member of CalPERS for just under 28 years when the city's fire department merged with the Orange County Fire Authority. During Block's last approximately seven and a half years as a firefighter, he was a member of OCERS.

Government Code sections 31830-31840.8 govern reciprocal retirement benefits granted to public employees who are entitled to retirement rights and benefits from two or more retirement systems that are subject to the reciprocity rules. "Reciprocity eliminates the adverse consequences a member might otherwise suffer when moving from one retirement system to another." (*Block*, p. 1308.) Under Government Code section 31835, a retiree is permitted to use his or her highest average salary with any entity to calculate the retirement allowances from all reciprocal retirement systems. Block's final average compensation with the Orange County Fire Authority was \$7,021.15 according to OCERS and \$6,793.42 according to CalPERS. Block's pension from CalPERS was calculated to be \$5,113. Block's service-connected disability pension from OCERS (50% of \$7021.5) would be \$3510 before consideration of the limitation mandated by Section 31838.5. Combined, the pensions would be \$8,623, which is 122.8% of Block's final average monthly compensation of \$7,021.15. OCERS determined that Block would be entitled to a pension of \$6,537.78 if he had spent his entire 35.54 years of fire service with one system and limited his pension on a pro rata basis with CalPERS to that amount.

Block filed a petition for writ of mandate challenging the reduction of his service-connected disability retirement pension. The trial court issued the writ, reasoning that the 50% disability retirement allowance itself was not greater than the pension Block would have been entitled to had his service been with one entity and, therefore, he was entitled to the full 50% disability pension as well as the pension for years of service and age from CalPERS. The trial court agreed with Block that the term "disability allowance" in Section 31838.5 did not include the pension from CalPERS. The Court of Appeal reversed the trial court, succinctly stating its ruling in the opinion's introductory paragraphs:

This case turns on our interpretation of the term "disability allowance" as used in Government Code section 31838.5, part of the County Employees Retirement Law of 1937, Government Code section 31450 et seq. (CERL). (All further statutory references are to the Government Code unless noted.) The disputed portion of section 31838.5 states: "No provision of this chapter shall be construed to authorize any member, credited with service in more than one entity and who is eligible for a *disability allowance*, whether service connected or nonservice connected to receive *an amount* from one county that, when combined with *any amount* from other counties or the Public Employees' Retirement System, results in a *disability allowance* greater than the amount the member would have received had all the member's service been with only one entity." (Italics added [by the court].)

Based on the language of section 31838.5, the statutory scheme, well-settled principles of statutory interpretation, and legislative history, we hold the term "disability allowance" means all benefits a member receives from reciprocal systems or from the California Public Employees' Retirement System (CalPERS) for retiring concurrently due to disability, regardless whether those benefits are labeled disability retirement or service retirement. Accordingly, the decision of the Orange County Employees' Retirement System (OCERS) Board of Retirement was correct, and we reverse the judgment of the trial court. (*Block*, p. 1302.)

After an exhaustive review of the statutory scheme and the legislative history, the Court of Appeal explained one of its reasons for siding with OCERS as follows:

Our interpretation of "disability allowance" in section 31838.5 fulfills the purpose of encouraging employee movement without impairment of retirement benefits. Although Block's interpretation of section 31838.5 is not inconsistent with this purpose, it goes too far by creating a greater benefit for employees, such as Block, who due to disability are eligible for service retirement from a reciprocal system or CalPERS. The CERL reciprocity provisions were intended to prevent *impairment* of retirement benefits of a member who changed employers, not to place such members in a better position than those who remained with the same employer throughout their service. Nothing in section 31838.5 or its legislative history supports the notion the Legislature intended to authorize greater retirement benefits to members who changed employers, such as Block, than to members who stayed with the same employer throughout their service. (*Block*, p. 1317.)

4. Forfeiture of Pension Benefit

In September of 2012, Governor Brown signed the Public Employees Pension Reform Act of 2013 into law to ensure the integrity of pension systems throughout California. The Act includes two statutes, codified at Government code sections 7522.72 and 7522.74, providing for the forfeiture of service credit during periods when the public employee uses his or her position to engage in criminal activity. All public employees and elective officers who commit job related felonies, including felonies against or involving minors, forfeit any benefits earned from the earliest date of commission of a felony to the date of conviction. Benefits earned prior to the felony commission date shall remain the property of the employee.

Section 7522.72 provides:

- (a) This section shall apply to a public employee first employed by a public employer or first elected or appointed to an office before January 1, 2013, and, on and after that date, Section 7522.70 shall not apply.
- (b) (1) If a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or

in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(2) If a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

(c) (1) A member shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section.

(2) Paragraph (1) shall apply to the extent permissible by law.

(3) For purposes of this subdivision, "forfeiture date" means the date of the conviction.

(d) (1) Any contributions to the public retirement system made by the public employee described in subdivision (b) on or after the earliest date of the commission of any felony described in subdivision (b) shall be returned, without interest, to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator.

(2) Any funds returned to the public employee pursuant to subdivision (d) shall be disbursed by electronic funds transfer to an account of the public employee, in a manner conforming with the requirements of the Internal Revenue Code, and the public retirement system shall notify the court and the district attorney at least three business days before that disbursement of funds.

(3) For the purposes of this subdivision, a "distribution event" means any of the following:

- (A) Separation from employment.
- (B) Death of the member.
- (C) Retirement of the member.

(e) (1) Upon conviction, a public employee as described in subdivision (b) and the prosecuting agency shall notify the public employer who employed the public employee at the time of the commission of the felony within 60 days of the felony conviction of all of the following information:

- (A) The date of conviction.
- (B) The date of the first known commission of the felony.

(2) The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(f) The public employer that employs or employed a public employee described in subdivision (b) and that public employee shall each notify the public retirement system in which the public employee is a member of that public employee's conviction within 90 days of the conviction. The operation of this section is not dependent upon the performance of the notification obligations specified in this subdivision.

(g) A public retirement system may assess a public employer a reasonable amount to reimburse the cost of audit, adjustment, or correction, if it determines that the public employer failed to comply with this section.

(h) If a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

(1) Recover the forfeited rights and benefits as adjusted for the contributions received pursuant to subdivision (d).

(2) Redeposit those contributions and interest that would have accrued during the forfeiture period, as determined by the system actuary, and then recover the full amount of the forfeited rights and benefits.

(i) The forfeiture of rights and benefits provided in this section, with respect to judges, are in addition to and supplement the forfeitures and other requirements provided in Section 75033.2, 75062, 75526, or 75563. If there is a conflict between this section and Section 75033.2, 75062, 75526, or 75563, the provisions that result in the greatest forfeiture or provide the most stringent procedural requirements to the claim of a judge shall apply.

(j) A public employee first employed by a public employer or first elected or appointed to an office on or after January 1, 2013, shall be subject to Section 7522.74.

Section 7522.74 is identical to section 7522.70 except it applies to employees first employed on or after January 1, 2013. Both sections require the forfeiture of "all accrued rights and benefits in any public retirement system" by any public employee convicted of any felony, as of the earliest date of the crime, "for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits."

Thus, if a disability occurred during the forfeited period of service, or the application was filed during the forfeited period of service, the public employee is no longer eligible for such benefits and may not continue or pursue a disability application.

D. Who may file an application for disability retirement?

Government Code section 31721 provides,

(a) A member may be retired for disability upon the application of the member, the head of the office or department in which he is or was last employed, the board or its agents, or any other person on his behalf, except that an employer may not separate because of disability a member otherwise eligible to retire for

disability but shall apply for disability retirement of any eligible member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Article 9 (commencing with Section 31700).

(b) When a member appeals from a separation for disability, disputing the employer's assertion or assumption that he is not eligible for disability retirement, the official, entity other than the board, or court to whom appealed shall transfer the proceedings to the board for determination of the eligibility and of disability if so eligible.

The appointing authority shall have the burden of proving disability. Thereafter, the appellant shall have the burden of proving job causation.

This subdivision shall not be operative in any county until such time as the board of supervisors shall, by resolution adopted by a majority vote, make the provisions applicable in that county.

1. The employer may be required to apply for a member's disability retirement.

Similar to CERL of 1937's Section 31721, Government Code section 21153, part of the Public Employees Retirement Law, provides,

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

In *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453 [44 Cal.Rptr.3d 394], a PERS case, a deputy sheriff filed an application for disability retirement. The county denied the application. The deputy appealed the denial, but then withdrew her appeal and requested the county to return her to duty. The county assigned her to a station, but she arrived with a statement of work limitations from her treating physician. A supervisor at the station concluded that the limitations could not be accommodated and sent her home. The county wrote a letter to the deputy stating that it was not refusing to return the deputy to duty and it considered her capable of performing the duties of a deputy sheriff. In the letter, the county offered to return the deputy to a temporary clerical assignment. The county also notified the deputy in writing that she was potentially entitled to vocational rehabilitation benefits. About six months later, the county notified the deputy that it considered the deputy to be entitled to rehabilitation benefits based on a determination that she was no longer capable of performing her usual duties and there was no assignment the county could offer the deputy that would be compatible with her restrictions. The deputy demanded that the county apply for a

disability retirement pursuant to Section 21153. The county refused on the basis that it did not believe that the deputy was disabled. The deputy filed a petition for a traditional writ of mandate to compel the county to perform what the deputy asserted was a nondiscretionary, ministerial act of filing an application for disability retirement pursuant to Section 21153. The superior court granted the petition and issued the writ. The county appealed. The Court of Appeal affirmed the trial court's decision, saying,

As a preliminary matter, we note that, although the County argues at great length that it did not separate Lazan from her position as deputy sheriff, under section 21153, separation is not required before the County must apply for disability retirement. "Eligibility for disability retirement benefits does not turn upon whether the employer has dismissed the employee for disability or whether the employee has voluntarily ceased work because of disability." (*Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, 1256, 277 Cal.Rptr. 531.) Also, it is not incumbent upon the employee to apply for retirement benefits. Under section 21153, the County must file the application on the employee's behalf. (See *Boyd v. City of Santa Ana* (1971) 6 Cal.3d 393, 398, 99 Cal.Rptr. 38, 491 P.2d 830.) (*Lazan v. County of Riverside, supra*, 40 Cal.App.4th, 459.)

. . . . It appears that the parties would agree that section 21153 imposes upon an employer a ministerial duty to apply for disability retirement despite being contingent upon a finding of disability, i.e., that the employee is "believed to be disabled." (*Lazan v. County of Riverside, supra*, 40 Cal.App.4th, 460.)

The dispositive question in this case is whether the contingency existed so as to have triggered the County's ministerial duty. The County argues that it had no duty to apply for disability retirement because it maintained that Lazan was capable of returning to work. Lazan argues that the County's statements made in the context of her workers' compensation case indicated that it believed that she was disabled. The trial court found that County's words and actions contradicted its claimed belief that Lazan was not disabled. Substantial evidence supports the court's finding. (*Lazan v. County of Riverside, supra*, 40 Cal.App.4th, 460-461.)

2. Termination, as in the case of a discharge for cause, severs the employment relationship and the right to a disability retirement.

In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 [79 Cal.Rptr.2d 749] a firefighter was terminated after a series of disciplinary actions. He claimed that he was permanently incapacitated for his duties because of a psychiatric reaction to the disciplinary proceedings that resulted in his termination. There was no evidence that Haywood had sustained an incapacitating injury before the disciplinary actions. The Superior Court granted Haywood's petition for writ of mandate to compel the District to grant him a disability retirement. The Court of Appeal reversed the Superior Court and remanded the case with instructions to deny Haywood's petition.

As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically unable to

perform his usual duties and one who has become unwilling to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. (*Haywood*, p. 1297.)

.....

As we have noted, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was properly terminated for cause. There is no claim, or evidence which would support a claim, that the termination for cause was due to behavior caused by a physical or mental condition. And there is no claim, or evidence which would support a claim, of eligibility for disability retirement that could have been presented before the disciplinary actions were taken. Instead, Haywood asserts he has become psychologically unable to return to employment with the District as the result of his reaction to the disciplinary proceeding which resulted in a complete severance of the employment relationship. (*Haywood*, p. 1306.)

.....

For all the reasons stated above, we conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed. (*Haywood*, p. 1307.)

Associations' comment

That termination of the employee and applying for the employee's disability retirement are mutually exclusive and inconsistent means of removing an employee from employment was a point made by the Court of Appeal, citing *Haywood*, in two County of Riverside cases in which each employee secured a court order requiring the county to hold a hearing pursuant to a Memorandum of Understanding. Disability retirement is only indirectly involved in the cases. In *Riverside Sheriffs' Association v. County of Riverside (Fauth)* (2009) 173 Cal.App.4th 1410 [93 Cal.Rptr.3d 832] and *Riverside Sheriffs' Association v. County of Riverside (Sanchez)* (2011) 193 Cal.App.4th 20 [122 Cal.Rptr.3d 197] the county discharged employees and in each case denied the employee's request for a hearing pursuant to the MOU on the basis that the discharge was not disciplinary or punitive. Fauth was discharged because she no longer met POST psychological fitness standards and could not carry a weapon. Initially, the county inconsistently claimed that there was no evidence that Fauth was disabled.

Sanchez was terminated because she had physician imposed work limitations due to lupus. In both cases, the county failed to comply with Government Code section 21153, applicable to PERS, which precludes an employer from separating a member because of disability and requires the employer to apply for the disability retirement of a member believed to be disabled, identical to one of the provisions in Government Code section 31721 of the CERL of 1937. In *Fauth*, the county filed an application for an involuntary disability retirement with PERS approximately seventeen months after removing Fauth from duty, approximately eleven months after terminating her paid administrative leave, ten months after terminating Fauth's use of her accumulated sick leave and eight months after terminating her employment. In *Sanchez*, the county filed an application for involuntary retirement approximately eight months after placing Sanchez on unpaid status, approximately two and a half months after terminating her employment, and a month and a half after rescinding the termination.

End comment.

E. Time to file application

1. Statutory provision

Government Code section 31722 provides,

The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

See *Piscioneri v. City of Ontario, et al.* (2002) 95 Cal.App.4th 1037 [116 Cal.Rptr.2d 38]. The case involved, among other things, the application of Government Code section 21154, a statute of limitations applicable to employees in the Public Employees Retirement System that is similar to Government Code section 31722. The Court of Appeal held that the city could not deny a hearing in reliance on the fact that the application was not filed while the applicant was in service or within four months of discontinuance of service and ignore the fact that the application would be timely if the applicant was, from the date of discontinuance of service, continuously physically or mentally incapacitated to perform his or her duties. An administrative hearing was required to develop the facts underlying the delay in filing the application.

a) The applicant must still be a member of the association when the application is filed.

In *Dodosh v. County of Orange* (1981) 127 Cal.App.3d 936 [179 Cal.Rptr. 804] an employee went off work after sustaining an injury in February 1999. (*Dodosh* was cited with approval by the Supreme Court in *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, 383 [216 Cal.Rptr. 733, 703 P.2d 73] for the proposition that a person must still be a member in order to file an application for

disability retirement and one cannot withdraw contributions and then apply for retirement.) After taking two months off work, he was released to return to work, but resigned effective July 19, 1999 to take a job that required that he leave the Orange County area. He withdrew his contributions from the retirement association. On July 10, 1980, he filed an application for disability retirement. The board of retirement determined that he was not eligible to apply since he was no longer a member. Dodosh filed a petition for writ of mandate that was denied and, on appeal, the Court of Appeal affirmed the trial court's decision.

Only a member of the retirement system may apply for a disability retirement. (Gov. Code, § 31720. [Footnote omitted.]) The Orange County Employees Retirement System operates pursuant to sections 31450-31898 and the statutory provisions relating to disability retirement are contained in sections 31720-31740. These sections refer to "members."

Section 31470 defines "member" as "... any person included in the membership of the retirement association ... or any person who has elected in writing to come within the provisions of Article 9." Article 9 (§§31700-31706) sets forth provisions wherein an employee who leaves county service and elects to leave accumulated contributions on deposit may receive a deferred retirement allowance and thereby remain a member of the retirement system. Dodosh's voluntary resignation and withdrawal of retirement contributions thus precluded him from being a "member" when he applied for a disability retirement allowance. (*Dodosh v. County of Orange, supra*, 127 Cal.App.3d, 938.)

Dodosh argued that he was continuously incapacitated from his "discontinuance of service," which occurred when he resigned and withdrew his contributions, and, therefore, his application was authorized by Section 31722. The Court of Appeal rejected Dodosh's argument.

Dodosh's position is untenable. Section 31722 contemplates only a "member" applying for a disability retirement subsequent to the date of discontinuance of service. Additionally, "service" means uninterrupted employment for that period of time for which deductions are made from an employee's earnable compensation (§ 31641). Therefore, discontinued service means an unpaid leave of absence, during which time the person remains an employee.

We concur with the trial court's conclusion of law number 5: "No one other than a member of the Orange County Employees Retirement System is eligible to apply for a disability retirement allowance from said Retirement System. Subsequent to this voluntary resignation from his County employment, and his withdrawal of contributions from the Retirement System, Petitioner ceased being a member of the Orange County Employees Retirement System." (*Dodosh v. County of Orange, supra*, 127 Cal.App.3d, 938-939.)

The *Dodosh* court's definition of the phrase "discontinuance of service" was held to be only dictum by the Court of Appeal in *Weissman v. Los Angeles County Employees Ret. Assoc.* (1989) 211 Cal.App.3d 40, 45 [259 Cal.Rptr. 124].

In *Weissman*, an employee retired for years of service and age on March 30, 1984. He suffered a heart attack on April 26, 1984, and filed an application for disability retirement on July 17, 1984, less than four months after his regular retirement. LACERA rejected his application on the basis that he had already retired and was not a "member." LACERA relied on the *Dodosh* court's construction of "discontinuance of service" as referring to an unpaid leave of absence during which time the person remains an employee. *Weissman*, having retired, was not in the status of having discontinued service, LACERA argued. The Court of Appeal rejected LACERA's argument, saying,

The ordinary meaning given to the word "discontinuance" is termination or cessation of activity. As explained above, the statute defines "service" in section 31641 as uninterrupted employment for a period of time for which deductions are made from the member's earnable compensation. It follows that "discontinuance of service" plainly and ordinarily means a member who has ceased to work for a salary from which deductions were made. In the instant case, *Weissman* stopped working because he retired. He then applied for a disability retirement within the four months "grace period" allowed by section 31722. The Board must accept and process *Weissman's* application. (*Weissman*, p. 45.)

In *Cameron v. Sacramento County Employees' Retirement System* (2016) 4 Cal.App.5th 1266, the Court affirmed the holding in *Weissman*, stating:

The Legislature has defined 'discontinuance of service' to refer to the period of time during which "a member who has ceased to work for a salary from which deductions were made." (*Weissman* at p. 46.) It is this legislative definition we must apply. *Cameron v. Sacramento County Employees' Retirement System*, *supra*, 4 Cal.App.5th, 1281.

In *Cameron*, the employee last received compensation on May 15, 2008. His incapacity began a month later on June 16, 2008. His application for service-connected disability retirement was not filed until May 22, 2009. *Cameron* contended that his application was timely as he was an employee of the County as of March 2009, thereby placing his application within the four-month window of section 31722. Relying on the dicta in *Dodosh*, *Cameron* argued that "service" for the purpose of section 31722 continued as long as he was an employee, and therefore, his application for disability retirement was timely.

However, the *Cameron* Court soundly rejected the *Dodosh* dicta. The Court stated:

If the Legislature wanted to define "service" as the period during which a person is a county employee, it could have easily done so. Instead, the Legislature defined "service" differently. As we have noted, section 31641, subdivision (a), defines "[s]ervice" as "*uninterrupted employment of any person appointed or elected for that*

period of time: (a) For which deductions are made from his earnable compensation from the county or district for such service while he is a member of the retirement association.” (Italics added.) As can be seen by the italicized text, *employment* is just one component of the definition of “service” as it applies here. When we look to the other language we have italicized, it is clear that the period of employment is not the focus of the statute. “Service” as defined in the CERL is the “period of time” “[f]or which deductions are made from [a member’s] earnable compensation.” Thus when this period discontinues, the relevant section 31722 alternative time limitations for submitting an application for disability retirement are triggered. These alternatives do not turn on whether the member remains an employee of the county. They turn on the point in time when the member stopped being compensated for his employment and consequently, stopped making contributions to the retirement system. *Cameron v. Sacramento County Employees’ Retirement System, supra*, 4 Cal.App.5th, 1282.

Based on the evidence presented, the Court concluded that Cameron ceased working for a “salary from which deductions were made” when he received his last check on May 15, 2008. As a result, May 15, 2008 was the date of Cameron’s “discontinuance of service.” Using this date, Cameron’s application for disability retirement filed on May 22, 2009 was clearly beyond the four-month timeframe set forth in section 31722, and thus untimely. Additionally, Cameron was unable to prove continuing incapacity from his discontinuance of service (May 15, 2008) as the evidence demonstrated his incapacity did not begin until one month later (June 16, 2008).

In *Gutierrez v. Board of Retirement* (1998) 62 Cal.App.4th 745 [72 Cal.Rptr.2d 837] a deputy marshal with ten years of service filed a January 1991 application for a nonservice-connected disability retirement on the basis of a "progressive systemic sclerosis with severe damage to the lungs" of unknown cause. In July 1991, LACERA granted "a nonservice-connected disability retirement" to Gutierrez, and monthly benefits were thereafter paid to him. Gutierrez died in January 1993 and his widow, Norma, began receiving monthly survivor's benefits equal to 60 percent of the allowance that Gutierrez had been receiving. In November 1994, the Workers' Compensation Appeals Board found that the decedent's illness arose out of and in the course of his employment. Norma then asked the retirement association to accept an application for service-connected survivor benefits. The association denied the request on the basis that "[s]urvivor benefits are based on the status of the member at the time of death" and that, since Gutierrez had never applied for service-connected disability benefits, LACERA was unable to grant Mrs. Gutierrez's claim for service-connected survivor benefits. On Norma's petition, the superior court issued a writ of mandate compelling the association to accept the application. LACERA appealed and the Court of Appeal reversed the trial court.

Section 31722 is not ambiguous or unclear. It permits an application for disability benefits to be made at three different times, none of which apply [*sic*] to the time at which Mrs. Gutierrez attempted to apply for revised death benefits. Section 31722 does not permit a late application for one kind of disability retirement after the other kind has been applied for and received (or at any time). It has no "delayed discovery" provision. It does not permit a new or renewed or changed

application for survivors *[sic]* benefits of one kind when the decedent was already receiving the other kind of disability benefits. Indeed, section 31725.8 expressly precludes the path that Mrs. Gutierrez attempted to take, by providing that "[i]f any member dies after electing to receive non-service-connected *[sic]* disability retirement and before the question of his entitlement to service-connected disability retirement is finally resolved [by a timely request during his lifetime for a determination that his disability is service-connected], *the rights of his beneficiary shall be those selected by the member at the time he elected to receive non-service-connected [sic] disability retirement.*"³ (Italics added [by the Court of Appeal].)

³Unless authorized by statute, an administrative agency acting in an adjudicatory capacity (as LACERA does when it decides whether to grant disability retirement benefits) may not in any event reconsider or reopen a decision. (*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407 [57 P.2d 1323]; *Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, 209 [109 P.2d 918].)

....

⁴We summarily reject Mrs. Gutierrez's contention that she should be permitted to apply for survivor's benefits under the authority of section 31787 (which provides an annual death allowance for the survivors of nonretired members). (See § 31780, subds. (a), (b) ["Upon the death before retirement of a member," certain death benefits are payable as provided in several sections, including section "31787"]; and see *Fatemi v. Los Angeles County Employees Retirement Assn.* (1994) 21 Cal.App.4th 1797, 1800-1801 [27 Cal.Rptr.2d 105].) Mrs. Gutierrez's petition for a writ of mandate claimed only that she should have been permitted to convert her husband's nonservice-related disability benefits to service-related benefits as requested in her letters to LACERA, and she alleged only that the "Board . . . breached its duty to accept [her] application for service-connected survivor benefits." She never applied for the "annual death allowance" provided by section 31787, and she never suggested in her petition that she ought to be permitted to do so. The issue has been waived. (*Cf. Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 882-883 [130 Cal.Rptr. 292].) (*Gutierrez v. Board of Retirement, supra*, 62 Cal.App.4th, 748-749.)

Associations' comment

Why the Court of Appeal ventured into a discussion of Section 31725.8 is not apparent. The decedent had not applied for a service-connected disability retirement pension, and he did not request a hearing. A request for a service-connected disability retirement was not unresolved when he died. Therefore, the prerequisites to Section 31725.8 are not present. It may be that the court was responding to an argument made by the applicant.

The Court of Appeal's decision implies that, where the application for the service-connected disability retirement pension increment is unresolved on the death of a member who applied for and received a nonservice-connected disability subsequent to the denial of the service-connected disability pension and pending a resolution of the service-connected piece of the disability claim, the beneficiary is limited to a nonservice-connected disability retirement allowance. However, the term "rights" in the second paragraph of Section 31725.8, selected by the member when the member elected to receive a nonservice-connected disability, is a reference to the right of the member to select among the unmodified and optional settlement choices. (See Gov. Code, § 31725.7, subd. (c), and §§ 31760-31768.) Under this interpretation, the survivor

would be limited to the selection of the unmodified or settlement option chosen by the member, but not limited to a nonservice-connected survivor's allowance as a result of the member's interim "election" of a nonservice-connected disability retirement allowance pending the outcome of the member's application for a service-connected disability pension. Since the basis for the court's reversal of the trial court's judgment is that the Government Code did not have a provision that permitted Mrs. Gutierrez to do what she was attempting to do, the court's comment may only be *dictum*, that is, commentary that is not essential to the decision, and may not amount to a interpretation of Section 31725.8 that would be precedent for other cases.

End comment.

- b) Where a person withdraws her contributions and terminates her membership in the association, there is no legally effective waiver of the right to apply for a disability retirement unless the retirement association can show by clear and convincing evidence that the person was fully informed of the existence of the right, its meaning, and the effect of the waiver presented, and that the person fully understood the explanation.**

In *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374 [216 Cal.Rptr. 733, 703 P.2d 73], a heavy truck operator hired in July 1977 sustained a back injury in September 1977 and was temporarily disabled. In June 1978, Hittle was released to return to work by his treating chiropractor. Within a week, a second chiropractor recommended that he continue on disability until the latter part of August. In mid-August, a physician reported to Hittle's attorney that Hittle was totally disabled. In September 1978, a physician employed by the county concluded that Hittle would never be able to return to his work as a truck driver. Hittle had not returned to work after being released to do so by the first chiropractor and the county sent Hittle a notice that his failure to return was grounds for termination. He failed to respond to the county's letter.

The retirement association sent Hittle two form letters, one in August and one in September, stating that the association understood that Hittle's employment had been terminated and warning Hittle that his contributions to the retirement association, amounting to \$187.49, would revert to the association if he did not provide for their disposition within five years. The letter stated that Hittle had two options: (1) withdraw his contributions; or, (2), if he had five years of service, which he did not, or he was hired by an entity with a retirement system with reciprocity with the Santa Barbara County Employees Association, which he was not, he could take a deferred retirement. A "Disposition of Retirement Contribution" form was enclosed with each letter. The options in the form did not include filing an application for a disability retirement. In the September letter, there was a handwritten notation that if Hittle had filed or intended to file an application for a disability retirement, he should not withdraw his contributions. Hittle executed the form, choosing to withdraw his contributions.

Two and a half years later, Hittle learned that he might have been eligible for a disability retirement. He requested that the association accept redeposit of his contributions, plus interest, and that it reinstate him as a member so that he could file an application for disability retirement. The board of retirement refused. The superior court denied Hittle's petition for a writ of mandate to compel the association to reinstate him. The Court of Appeal affirmed the trial court, but the Supreme Court reversed and remanded the case to the superior court with instructions to issue the writ.

The Supreme Court reasoned that (1) Government Code section 31727.4 provides that a member who is retired for a service-connected disability is entitled to a pension equal to one-half of the member's final compensation; (2) Government Code section 31721 provides that a member may be retired for disability upon a proper application unless the member waives the right to retire and elects to withdraw contributions; (3) A waiver of a statutory right is not legally effective unless it appears that the party executing the waiver is demonstrated to have been fully informed of the existence of that right, its meaning, the effect of the waiver and to have fully understood the explanation; (4) the burden of proof is carried by the person asserting the waiver to prove the elements of an effective waiver by clear and convincing evidence. (*Hittle*, pp. 389-390.)

The Supreme Court ruled that the two form letters erroneously gave Hittle only two options: withdrawal of contributions or a deferred retirement. Since Hittle did not have five years of service and was not transferring to a reciprocal system, he did not qualify for a deferred retirement. The handwritten note on the September 1978 letter did not explain that a disability retirement was different from a deferred retirement nor did it advise Hittle that he would qualify for a service-connected disability retirement even though he had less than five years of service. Hittle's choice of withdrawing \$187.49 instead of applying for a service-connected disability retirement pension was evidence that he was unaware of that option. The Supreme Court ruled that there was no substantial evidence to support a determination that Hittle was knowledgeable of his right to apply for disability retirement at the time he withdrew his contributions and the retirement association did not submit clear and convincing evidence to prove that Hittle effectively waived his right. (*Hittle*, p. 390.)

The Supreme Court went on to find that the retirement association breached its fiduciary obligation to adequately inform Hittle of his membership options.

An employee who serves under a pension plan acquires a vested contractual right to a pension. [Citation.] "A pension plan offered by the employer and impliedly accepted by the employee by remaining in employment constitutes a contract between them, whether the plan is a public or private one, and whether or not the employee is to contribute funds to the pension. [Citations.] The continued employment constitutes consideration for the promise to pay the pension, which is deemed deferred compensation. [Citation.]" [Citation.] As a result, "[pension] plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits . . . and the trustees must exercise their *fiduciary trust* in good faith and

must deal fairly with the pensioners-beneficiaries. [Citations omitted.]" (*Ibid.*, original italics.)

The SBCERA officers, by the acceptance of their appointment, are voluntary trustees, within the meaning of Civil Code sections 2216 [editor's note: repealed 1987] and 2222 [editor's note: repealed 1987], [footnote omitted] of the retirement plans available to the beneficiary-members of the Association. [Citation.] As such, the SBCERA officers are charged with the fiduciary relationship described in Civil Code section 2228 [editor's note: repealed 1987]: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

As this court has previously noted, "[in] the vast development of pensions in today's complex society, the numbers of pension funds and pensioners have multiplied, and most employees, upon retirement, now become entitled to pensions earned by years of service. We believe that courts must be vigilant in protecting the rights of the pensioner against powerful and distant administrators; the relationship should be one in which the administrator exercises toward the pensioner a fiduciary duty of good faith and fair dealing." [Citation omitted.]

This fiduciary relationship is judicially guarded by the application of Civil Code section 2235 [editor's note: repealed 1987], which provides that "[all] transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." (*Hittle*, p. 392-394.)

The Supreme Court concluded that the retirement association did not fulfill its fiduciary duty to deal fairly and in good faith with *Hittle*. The Court found that the means by which the association sought to inform *Hittle* of his options were "tantamount to the misrepresentation and concealment, however 'slight,' prohibited by Civil Code section 2228 [editor's note: repealed 1987]." (*Hittle*, p. 394.) The deficiencies in the information the association provided *Hittle* "support the presumption of Civil Code section 2235 [editor's note: repealed 1987], that the advantage to SBCERA resulting from *Hittle*'s choice to withdraw his retirement contributions, rather than seek a life-time allowance, was gained without sufficient consideration and under undue influence." (*Ibid.*)

The Civil Code sections cited by the Supreme Court in *Hittle* were repealed by the Statutes of 1986, chapter 820, effective July 1, 1987, and were replaced by various provisions of the "Trust Law," Probate Code section 15000, et seq., added by the same legislation. Probate Code section 16004, subdivision (c) [Stats 1990 ch. 79 § 14 (AB 759), operative July 1, 1991] provides,

A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains

and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

Further, Probate Code section 15003 provides,

(a) Nothing in this division affects the substantive law relating to constructive or resulting trusts.

(b) The repeal of Title 8 (commencing with Section 2215) of Part 4 of Division 3 of the Civil Code by Chapter 820 of the Statutes of 1986 was not intended to alter the rules applied by the courts to fiduciary and confidential relationships, except as to express trusts governed by this division.

(c) Nothing in this division or in Section 82 is intended to prevent the application of all or part of the principles or procedures of this division to an entity or relationship that is excluded from the definition of "trust" provided by Section 82 where these principles or procedures are applied pursuant to statutory or common law principles, by court order or rule, or by contract.

Probate Code section 15003 was added by the Statutes of 1986, chapter 820, section 40, operative July 1, 1987 as part of the reorganization of statutes related to trusts and the enactment of the Trust Law. It was amended by the Statutes of 1987 chapter 128, section 8, operative July 1, 1987, effective July 6, 1987, the date the legislation was signed by the governor, and was repealed by the Statutes of 1990, chapter 13, operative July 1, 1991. It was replaced by present section 15003 which was added by Statutes of 1990, chapter 79, section 14 (AB 759), operative July 1, 1991 and amended by Statutes of 1990, chapter 710, section 43 (SB 1775), operative July 1, 1991.

Though the provisions of the Civil Code on which the Supreme Court relied in *Hittle* were repealed, their provisions remain viable in various parts of the Trust Law to which they can be traced.

2. Laches

Associations' comment

An application that is timely filed within the limitations set forth in Government Code section 31722 may nonetheless be barred by laches if the applicant's delay was unreasonable and the delay resulted in prejudice to the respondent's ability to investigate the case. The facts supporting respondent's allegations of unreasonable delay that caused prejudice to the respondent are subject to being developed in an administrative hearing. The association cannot sit back and merely allege that it has been prejudiced by the delay. It must prove prejudice with evidence that demonstrates how the association has been placed at a disadvantage because of the applicant's delay in filing the application.

End comment.

We agree . . . that the factual basis for a laches determination must first be developed by the City at the administrative hearing. As this court has recently observed, "The question of whether a litigant is guilty of laches is a question of fact for the trial court." [Citation omitted.]

In an earlier case, we described laches as follows: "Generally, the existence of laches is a question of fact to be determined by the trial court in light of all the applicable circumstances, and in the absence of a palpable abuse of discretion, the trial court's finding of laches will not be disturbed on appeal. [Citation.] [P] The defense of laches is derived from the maxim that '[t]he law helps the vigilant, before those who sleep on their rights.' (Civ. Code, § 3527.) This has been restated as '[e]quity frowns upon stale demands [and] declines to aid those who have slept on their rights.' [Citation.] [P] In practice, laches is defined as an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party such as to render the granting of relief to the other party inequitable. [Citation.] Thus, if a trial court finds (1) unreasonable delay; and (2) prejudice, and if its findings are not palpable abuses of discretion, a finding of laches will be upheld on appeal." [Citation.] (*Piscioneri v. City of Ontario, et al.*, (2002) 95 Cal.App.4th 1037, 1046 [116 Cal.Rptr.2d 38].)

Compare *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 [99 Cal.Rptr.2d 316, 5 P.3d 874] in which laches was applied to bar a petition for writ of administrative mandate in an employment discrimination case. The Supreme Court discussed factors considered in determining whether there was prejudice to the city.

. . . . "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." [Citation.] (*Johnson*, p. 68.)

F. It is the nature of a CERL of 1937 Board of Retirement to have executive, administrative, investigative, legislative, and adjudicatory powers.

Preciado v. County of Ventura, et al. (1982) 143 Cal.App.3d 783 [192 Cal.Rptr. 253]:

In making this argument, claimant overlooks the nature of administrative agencies. An administrative agency may have executive, administrative, investigative, legislative or adjudicative powers. They normally have and exercise some combination or all of these powers. (2 Cal.Jur.3d, Administrative Law, § 41, p. 260.) [Now 2 Cal.Jur.3d (2007) Administrative Law, § 165. Types of power agency may exercise.]

The association's board of retirement is an excellent example of the hybrid character of administrative agencies. The board exercises executive, administrative, investigative, legislative and adjudicatory powers. It administers the retirement system, promulgates rules and regulations, determines member contributions, investigates claims and makes determinations concerning the

eligibility of members for retirement benefits. It is both the "forum" and a "party" in proceedings for disability retirement which it conducts. (*Preciado*, p. 789.)

G. Authority for Boards' determinations of disability and service-connection

California Constitution, article XVI, section 17, provides in part as follows:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for . . . administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

. . . .

1. Authority for Boards' determination on the issue of disability

Government Code section 31723 provides,

The board may require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability.

The Court of Appeal in *McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement* (2001) 91 Cal.App.4th 730, at 736-737 [110 Cal.Rptr.2d 565] rejected an applicant's argument that the Board of Retirement was limited to either requiring an applicant to submit records or requiring the applicant to submit to a medical examination.

Finally, we reject appellant's claim that the Board lacks authority to require an applicant both to submit medical records for review and submit to an examination by a Board-appointed doctor. There is no evidence appellant was required to do

both; rather, he was required to provide a medical history so the Board could obtain a meaningful medical examination. This practice is fully consistent with section 31723, which permits the Board to "require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability."

Government Code section 31724 provides,

If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him effective on the expiration date of any leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation. Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the member consents to his retirement at an earlier date.

When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

Government Code section 31725 provides,

Permanent incapacity for the performance of duty shall in all cases be determined by the board.

If the medical examination and other available information do not show to the satisfaction of the board that the member is incapacitated physically or mentally for the performance of his duties in the service and the member's application is denied on this ground the board shall give notice of such denial to the employer. The employer may obtain judicial review of such action of the board by filing a petition for writ of mandate in accordance with the Code of Civil Procedure or by joining or intervening in such action filed by the member within 30 days of the mailing of such notice. If such petition is not filed or the court enters judgment denying the writ, whether on the petition of the employer or the member, and the employer has dismissed the member for disability the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal.

2. Authority for Board's determination of service-connection

There is no provision in the CERL of 1937 that expressly grants authority to the Board to make a determination on the issue of service-connection. However, in *Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397 [18 Cal.Rptr. 256], the Court of Appeal determined that the manifest intent of the Legislature was that the Board had the duty, and, therefore, the concomitant power, to make a determination of fact when the existence of the fact was the basis for the Board taking action it is authorized by statute to take. Under Government Code section 31720, the fact that the Board shall grant a member a service-connected disability retirement when certain pre-requisite facts exist requires that the Board make findings on the existence of those pre-requisite facts. The court in *Flaherty* stated,

While the County Employees Retirement Law of 1937 does not embody elaborate provisions with respect to hearings by the board, it is manifest that it was the intention of the Legislature to place upon the board the duty of determining the fact upon which its action is to be based. Retirement because of disability is the subject of article 10 (Gov. Code, §§ 31720-31739.3) and included therein is the matter of permanent incapacity for the performance of duty as a result of injury or disease arising out of and in the course of employment. Section 31723 provides that the board may require such proof, including a medical examination at the claimant's expense, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability. Section 31724 is in part as follows: "If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall forthwith retire him for disability. ..." In section 31725, it is stated: "Permanent incapacity for the performance of duty shall in all cases be determined by the board." The determination of whether permanent incapacity has resulted from injury or disease arising out of and in the course of employment must often be based upon conflicting evidence of lay or medical witnesses and upon the inferences to be drawn from such evidence. It appears to have been the legislative intent that the board should receive such evidence and weigh it and, if the required causal relationship between the disability and an injury arising out of and in the course of duty is found, grant the proper retirement benefits. [Citation.] (*Flaherty v. Board of Retirement, supra*, 198 Cal.App.2d, 407.)

H. Authority for referral to a referee for an administrative hearing

Government Code section 31533 provides as follows:

Whenever, in order to make a determination, it is necessary to hold a hearing the board may appoint either one of its members or a member of the State Bar of California to serve as a referee. The referee shall hold such a hearing and shall transmit, in writing to the board his proposed findings of fact and recommended decision.

Associations' comment

The extent of the referee's jurisdiction will depend on the Board of Retirement's commission to the referee. If the referee or a party has doubts about whether hearing evidence and making a recommended decision on an issue is part of the commission, the Board of Retirement should be requested to give direction. Some boards are more restrictive than others.

For a discussion on a party's right to challenge a referee for cause and pre-hearing procedures for such a challenge, see California Administrative Hearing Practice (Cont.Ed.Bar. 2d ed. 2006), Chapter 6, Prehearing Motions and Procedures, Section III, Challenging Presiding Officer.

End comment.

I. Who may represent an applicant for disability retirement benefits?

Associations' comment

An applicant may represent himself or herself or the applicant may be represented by a member of the bar. An applicant may not be represented by one who is not a member of the State Bar. A judgment obtained against a person who was represented by a person who does not have a license to practice law may be invalid. (*People By and Through Dept. of Public Works v. Malone* (1965) 232 Cal.App.2d 531 [42 Cal.Rptr. 888].) The practice of law is restricted to active members of the State Bar. (**Business and Professions Code section 6125.**) There are exceptions to the rule. (E.g., State Bar Rules for Practical Training of Law Students, rules 4 - 5, and *People v. Clark* (1992) 3 Cal.4th 41 [10 Cal.Rptr.2d 554], regarding legal representation by law students; Lab. Code, §§ 5501 and 5700 regarding representation for an applicant before the Workers' Compensation Appeals Board.) No similar special legislation allows a non-lawyer to represent an applicant in a hearing conducted under the CERL of 1937.

End comment.

J. Board's subpoena power

Government Code section 31535 provides,

The board may issue subpoenas and subpoenas duces tecum, and compensate persons subpoenaed. This power shall be exercised and enforced in the same manner as the similar power granted the board of supervisors in the Article 9 (commencing with Section 25170) of Chapter 1, Part 2, Division 2; except that the power shall extend only to matters within the retirement board's jurisdiction, and committees of the board shall not have this power. Reasonable fees and expenses may be provided for by board regulation for any or all of such witnesses regardless of which party subpoenaed them.

Subpoenas shall be signed by the chairman or secretary of the retirement board, except that the board may by regulation provide for express written delegation of its subpoena power to any referee it appoints pursuant to this chapter or to any administrator appointed pursuant to Section 31522.2.

Any member of the board, the referee, or any person otherwise empowered to issue subpoenas may administer oaths to, or take depositions from, witnesses before the board or referee.

Government Code section 31535.1, specifically applicable to the County of Los Angeles, contains all the provisions of the first and third paragraphs of Section 31535. The third paragraph of Section 31535.1 provides,

Subpoenas shall be signed by the chairman or secretary of the retirement board, except that the board may by regulation provide for express written delegation of its subpoena power to the retirement administrator or to any referee it appoints pursuant to this chapter.

The last paragraph of Section 31535.1 provides,

This section shall apply only in a county of the first class, as defined by Section 28020, as amended by Chapter 1204 of the Statutes of 1971, and Section 28022, as amended by Chapter 43 of the Statutes of 1961.

K. Duties of the referee

In general, the referee's duties include,

- Conducting a hearing. (Gov. Code, § 31533.)
- Making written suggested findings of fact. (Gov. Code, § 31533.)

Associations' comment

Compare the Court of Appeal's discussion in *Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 924-925 [176 Cal.Rptr. 365]. The workers' compensation referee's findings of fact on medical issues must be supported by medical evidence. (A "workers' compensation referee" is also referred to as a "workers' compensation judge" or "workers' compensation administrative law judge." (Lab. Code, § 27.) Where the medical issues are in controversy, findings must be explained by specific statement or analysis of the evidence that leads the referee to his or her conclusions. The referee must comment on facts stated to be in support of contrary medical opinions.

End comment.

- Making a written recommended decision. (Gov. Code, § 31533.)

Associations' comment

Note this distinction between a workers' compensation referee and a referee appointed by the Board of Retirement: The decision of a workers' compensation referee is a final adjudication of the issues unless it is overturned by the Workers' Compensation Appeals Board. (Lab. Code, §§ 5307-5310; Cal. Code Regs., tit. 8, §§ 10348 and 10864.) A referee appointed by a Board of Retirement operating under the CERL of 1937 only "suggests" findings of fact and "recommends" a decision to the Board. The Board makes the decision. (Gov. Code, § 31534, discussed below.)

The Board may adopt the referee's recommended decision as its own. If it does adopt the recommended decision as its own, the recommended decision must meet standards set by the Legislature and the courts for decisions of administrative agencies. See discussion below in Section I, M.

L. Board's action on referee's recommended decision

Government Code section 31534 provides as follows:

The proposed findings of fact and recommendations of the referee shall be served on the parties who shall have 10 days to submit written objections thereto which shall be incorporated in the record to be considered by the board.

Upon receiving the proposed findings of fact and the recommendations of the referee, the board may:

(a) Approve and adopt the proposed findings and the recommendations of the referee, or

(b) Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon the receipt thereof the board shall take such action as in its opinion is indicated by such evidence, or

(c) Refer the matter back with or without instructions to the referee for further proceedings, or

(d) Set the matter for hearing before itself. At such hearing the board shall hear and decide the matter as if it had not been referred to the referee.

1. Further hearing for oral argument before the board is not a requirement of due process.

A board may have special rules on whether the successful party may respond to the objections referred to in the first paragraph of Government Code section 31534, whether the referee must respond to objections, and whether the parties will have an opportunity to present oral argument to the board. If the matter was referred to a referee and there was an opportunity to present arguments to the referee, oral or

written, an opportunity to present oral argument to the board is not a requirement of due process.

In 88 Ops.Cal.Atty.Gen. 16 (2006), the Attorney General addressed whether a board of retirement could meet in closed session to review medical records concerning a member's application and, if so, whether the board could permit the applicant and the applicant's attorney to be present. The author took as given that a meeting of the board was taking place after an administrative hearing had been conducted before a referee. The Attorney General concluded that the board was authorized to meet in closed session and could, but was not required to, allow the applicant and the applicant's attorney to attend the meeting. Addressing the requirements of due process, the Attorney General wrote,

. . . . We conclude that the applicant and his or her representative may attend the closed session if the retirement board so permits.

First, we note that, in the circumstances presented, the county retirement board would not be conducting an *evidentiary hearing* at which the medical records would be introduced or presented to support or oppose the claim of disability. We have assumed that such an administrative hearing has already been conducted, that rulings have been made on any evidentiary objections, that the applicant has been afforded an opportunity to respond to any opposing evidence or arguments, and that the hearing officer or referee has issued proposed findings and a recommended decision regarding the employee's retirement application. (See § 31533.) Hence, any due process rights that the employee may have at such an evidentiary hearing are not in question here. (See, e.g., *Keith v. San Bernardino County Retirement Bd.* (1990) 222 Cal.App.3d 411, 415 [271 Cal.Rptr. 649]; *Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362-363 [181 Cal.Rptr. 699]; see also *Bollinger v. San Diego Civil Service Com.*, *supra*, [(1999)] 71 Cal.App.4th [568] at pp. 575-578 [84 Cal.Rptr.2d 27].)

Instead, we are addressing a subsequent procedural step -- in which the retirement board considers the disability retirement application, including medical reports and other evidence submitted in connection therewith, and decides whether to grant or deny the application. (See § 35134.) In this situation, we find that the applicant and his or her representative, like members of the public, have no right to be heard, to observe, or to otherwise participate during the board's deliberations. (*Bollinger v. San Diego Civil Service Comm.*, *supra*, 71 Cal.App.4th at pp. 574-575; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876, 882-883 [80 Cal.Rptr.2d 589]; see also 80 Ops.Cal.Atty.Gen., [308] *supra*, at pp. 310-311 [1997].) (88 Ops.Cal.Atty.Gen. 16, *supra*, at 22-23.)

M. Legal standards that the board's decision must meet

The Board's decision may be reviewed by a court. A dissatisfied applicant or the county or district employer may petition the superior court for a "writ of mandate." A writ of mandate is an order issued by the court that directs an administrative agency to correct

an erroneous action. Code of Civil Procedure section 1094.5 sets forth certain requirements for a decision of an administrative board like a Board of Retirement. If a court finds that the board's decision fails to satisfy those requirements, the court will issue the writ ("order") commanding the board to take the action it failed to take. A referee's recommended decision should satisfy the requirements set forth in Section 1094.5 because, if the recommended decision is adopted, it will be the Board's own decision.

Rights to public employee retirement benefits are both fundamental and vested rights. (*Strumsky v. San Diego County Employees Retirement Assoc.* (1974) 11 Cal.3d 28, 45 [112 Cal.Rptr. 805; 520 P.2d 29].) Therefore, when a trial court reviews a board of retirement's decision in a writ of mandate proceedings under Section 1094.5, the court will exercise its independent judgment on the evidence developed before the board and will find an abuse of discretion on the part of the board if its decision is not supported by the weight (or preponderance) of the evidence. (*Strumsky*, pp. 44-45.)

In pertinent part, Code of Civil Procedure section 1094.5 provides as follows:

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

. . . .

(e) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836], the California Supreme Court explained the requirement that decisions of administrative agencies be supported by adequate findings and rationale as follows:

We further conclude that implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "*the findings*" (italics added) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.

Our ruling in this regard finds support in persuasive policy considerations. [Citations.] According to Professor Kenneth Culp Davis, the requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law [citations], and is "remarkably uniform in both federal and state courts." As stated by the United States Supreme Court, the "accepted ideal . . . is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'" [Citations.]

Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its

ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations and footnote omitted.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.]

Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. (Footnote omitted.) Moreover, properly constituted findings (footnote omitted) enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable. (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra*, 11 Cal.3d, 514-517.)

The rules announced in *Topanga* apply to boards of retirement. (See *Respers v. University of California Retirement System, et al.* (1985) 171 Cal.App.3d 864, 870-871 [217 Cal.Rptr. 594].)

N. Significance of referee's recommended decision if Board rejects it

The Board of Retirement is specifically authorized by Government Code section 31534, subdivision (b), to make a decision based on its own independent review of the testimony and the other evidence. (*Keith v. San Bernardino County Retirement Bd.* (1990) 222 Cal.App.3d 411 [271 Cal.Rptr. 649].) The court of appeal in *Keith* stated,

The first assignment of error which requires discussion is Keith's assertion that he was denied "due process" in the proceedings below. According to Keith, "due process" requires that "an adjudication" must be made by the hearing officer before whom the evidence was presented. Because one hearing officer heard the evidence and a different hearing officer issued the recommended decision, Keith contends he was denied "due process." Not so.

Procedural due process requires, at a minimum, notice and an opportunity to be heard in a proceeding which is "... adequate to safeguard the right for which the constitutional protection is invoked." (*Anderson Nat. Bank v. Lockett* (1944) 321 U.S. 233, 246 [88 L.Ed.2d 692, 705, 64 S.Ct. 599, 151 A.L.R. 824].) Keith was afforded an opportunity to be heard. More importantly, however, the decision of Retirement Board resulted from its own independent review of the testimony and other evidence presented at Keith's "due process" hearing, a procedure specifically authorized by section 31534, subdivision (b). Keith does not challenge this latter procedure, nor does he offer any relevant authority to support his contention that he was denied procedural due process. We conclude that Keith was afforded procedural due process under the statutory procedure

here utilized by Retirement Board. (*Keith v. San Bernardino County Retirement Bd.*, *supra*, 222 Cal.App.3d, 415.)

The court in *Compton v. Board of Trustees of Mt. San Antonio Community College* (1975) 49 Cal.App.3d 150 [122 Cal.Rptr. 493] construed Government Code section 11517, subdivision (c), applicable to administrative adjudication under the Administrative Procedure Act, Government Code sections 11400 - 11529. Subdivision (c) of Section 11517, similar to Government Code section 31534, subdivision (b), of the County Employees' Retirement Law of 1937, provides that an agency may reject the recommendation of an administrative law judge and decide the case itself on the record. With respect to the rejected proposed decision of a hearing officer (now referred to as an administrative law judge), the court in *Compton* said,

At most, it seems, they can claim that the proposed decision might have suggested an approach which did not occur to their attorney. (*Compton*, p. 157.)

. . . . Be that as it may, it is clear that from the moment of the agency's rejection thereof, it [the hearing officer's recommended decision] serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof. (*Compton*, p. 158.)

Associations' comment

California has not adopted the rule of *Universal Camera Corp v. NLRB* (1951) 340 U.S. 474 [71 S.Ct. 456, 95 L.Ed. 456], that a reviewing court may give reasonable weight to the findings of the hearing examiner who observed the witnesses even though the examiner's findings were rejected by the administrative board.

End comment.

The Board of Retirement may reject the credibility determinations of its referee and make its own credibility determinations. Compare *Mixon v. Fair Employment and Housing Commission* (1987) 192 Cal.App.3d 1306, 1310, footnote 2 [237 Cal.Rptr. 884] in which the court of appeal stated,

. . . . *Mixon* takes the position that the Commission must accept the factual findings of the administrative law judge who originally heard the matter. We find no merit in this argument. Under Government Code section 11517, subdivision (c) the Commission may refuse to adopt the administrative law judge's proposed decision and may then decide the case itself "upon the record, including the transcript, with or without taking additional evidence . . ." It follows that once the administrative law judge's proposed decision is rejected, "it serves no identifiable function in the administrative adjudication process" (*Compton v. Board of Trustees* (1975) 49 Cal.App.3d 150, 158 [122 Cal.Rptr. 493]), and is in no way binding on the Commission. *Mixon's* cases (for example, *Merrill Farms v. Agricultural Labor Relations Bd.* (1980) 113 Cal.App.3d 176 [169 Cal.Rptr. 774]) stand only for the general proposition that the credibility of a witness is a matter solely within the province of the finder of fact, and are inapposite here.

If a petition for writ of mandate is filed, the superior court may ignore the credibility determinations made by the Board and/or the referee and make its own credibility determinations. The Court of Appeal in *Barber v. Long Beach Civil Service Commission* (1996) 45 Cal.App.4th 652, 658 [53 Cal.Rptr.2d 4] stated,

Contrary to the Commission's assertion and the trial court's ruling, an exercise of independent judgment does permit (indeed, it requires) the trial court to reweigh the evidence by examining the credibility of witnesses. As we explained 20 years ago, in exercising its independent judgment "the trial court has the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of witnesses." [Citation. Italics added by the Barber court.]

Similarly, the trial court may make its own findings after independently reviewing the evidence. (See *Strumsky v. San Diego County Employees Retirement Association* (1974), *supra*, 11 Cal.3d 28, 46 [112 Cal.Rptr. 805, 520 P.2d 29]; *Levingston v. Retirement Board* (1995) 38 Cal.App.4th 996, 1000 [45 Cal.Rptr.2d 386].) In *Fukuda v. City of Los Angeles* (1999) 20 Cal.4th 805, 808 [85 Cal.Rptr.2d 696; 977 P.2d 693] the Supreme Court held,

Under the independent judgment test, the trial court may weigh the credibility of witnesses in determining whether the findings of the agency are supported by the weight of the evidence.

O. Effect of the Board of Retirement's denial of a disability retirement

Associations' comment

The general rule is that a member is entitled to either his or her job (if not permanently incapacitated) or a disability retirement (if permanently incapacitated) and should not be placed in the position of receiving neither. The Legislature anticipated that the employer would not always agree with the determination of the Board of Retirement on the issue of the ability of the member to substantially perform his or her usual duties and in the first sentence of Government Code section 31725 gave the Board the final say. The general rule has been refined by a number of published appellate court opinions, discussed below, from the 1973 decision in *McGriff* to the 2006 decision of the California Supreme Court in *Stephens* in which the Court resolved the controversy over to what benefits an applicant is entitled while off work and waiting for a final determination on the application for disability retirement.

End comment.

1. Statutory provisions

a) Government Code section 31725

Government Code section 31725 provides,

Permanent incapacity for the performance of duty shall in all cases be determined by the board.

If the medical examination and other available information do not show to the satisfaction of the board that the member is incapacitated physically or mentally for the performance of his duties in the service and the member's application is denied on this ground the board shall give notice of such denial to the employer. The employer may obtain judicial review of such action of the board by filing a petition for writ of mandate in accordance with the Code of Civil Procedure or by joining or intervening in such action filed by the member within 30 days of the mailing of such notice. If such petition is not filed or the court enters judgment denying the writ, whether on the petition of the employer or the member, and the employer has dismissed the member for disability the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal. [Italics added.]

b) Government Code section 31725.7 (“Point seven retirement”)

Associations’ comment

Many applicants for a “service-connected disability retirement” or “a nonservice-connected disability retirement” are eligible for a “service retirement,” that is, a regular retirement for years of service and age. Government Code section 31725.7 permits the applicant for disability retirement to apply for, and gives the Board of Retirement discretion to grant, a service retirement pending the resolution of the application for disability retirement. This provision is referred to as “a point seven” retirement. However, if the employer “dismissed the member for disability,” the applicant/member who takes advantage of this provision, relinquishes the right to “return to his or her job as provided in Section 31725” if the final resolution is that the applicant is not permanently incapacitated.

Government Code section 31725.7 provides in pertinent part as follows:

(a) At any time after filing an application for disability retirement with the board, the member may, if eligible, apply for, and the board in its discretion may grant, a service retirement allowance pending the determination of his or her entitlement to disability retirement. If he or she is found to be eligible for disability retirement, appropriate adjustments shall be made in his or her retirement allowance retroactive to the effective date of his or her disability retirement as provided in Section 31724.

(b) In the event a member retired for service is found not to be entitled to disability retirement he or she shall not be entitled to return to his or her job as provided in Section 31725. . . . [Italics added.]

2. Court opinions:

a) *McGriff*: Where the Civil Service Commission terminated the employment of the applicant, she was released due to medical

incapacity, and the Board later denied the application for disability retirement, the applicant was entitled to reinstatement.

In *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394 [109 Cal.Rptr. 186], the county followed civil service procedures to release a business machine operator from her position on the basis of her medical inability to perform her duties. The Board of Retirement subsequently found her not to be incapacitated for duty. The county refused to reinstate her based on the determination made in the civil service proceedings. *McGriff* filed a petition for writ of mandate seeking reinstatement as of the day after she was released by the county. The trial court granted the petition. On appeal, the trial court's decision was affirmed. The appellate court stated,

[Government Code] Section 31725 was amended, effective November 23, 1970, to provide that if the Retirement Board determines a dismissed employee is not incapacitated and denies his application for benefits, the employer may obtain judicial review of the board's action. If the employer does not do so or if the court upholds the board, the section specifically provides that the employer shall reinstate the employee to his job. (*McGriff*, pp. 398-399.)

See *Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 806-807 [43 Cal.Rptr.3d 302], discussed below. The *Stephens* court distinguished *McGriff* on the basis that the *McGriff* court assumed that a medical release was the equivalent of a dismissal.

b) *Leili*: Where the employer took the applicant off duty due to work restrictions resulting from a work-related accident and the Board later denied the application for disability retirement, the applicant was entitled to reinstatement with credit for all wages and benefits paid while the applicant was off work.

In *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985 [196 Cal.Rptr. 427], a firefighter was taken off duty on the basis of work restrictions defined by a workers' compensation judge. The firefighter filed an application for a disability retirement that the Board denied on the basis that evidence did not support the firefighter's claim that he was incapacitated for duty. The firefighter returned to work. He demanded full salary between the time his workers' compensation benefits terminated and the time he returned to work. The department refused his demand and he filed a petition for writ of mandate that the trial court denied. The Court of Appeal reversed the trial court. Citing *McGriff*, the appellate court stated,

The Legislature recognized the unfairness of such a situation when it enacted section 31725 of the Government Code. That section, which is part of the disability retirement article of the county employees retirement act, provides that if an employee, who has been terminated from his employment because of physical incapacity, is later found not to be disabled by the retirement board, he must be reinstated to employment. The Report of the Assembly Committee on Public Employment and Retirement, contained in 1 Appendix to Journal of the Assembly (1970 Reg. Sess.) pages 11-13, explains that the purpose of enacting

this section was to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the retirement board concerning the employee's ability to perform his duties. Prior to the enactment of the statute, a local government employer could release an employee on the grounds of physical incapacity, and the retirement board could then deny the employee a pension on the ground that he was not disabled. The Assembly Committee found: "As a result of such disputes, approximately one percent of the applicants for a disability retirement pension have found themselves in the position of having neither a job, or a retirement income.' [para.] . . . 'Thus, to remedy this problem, which . . . is virtually a matter of life and death for the very few individuals involved each year, the Public Employees' Retirement System should be given authority . . . to mandate reinstatement of an individual— upon a finding of a lack of disability— but that the employing agency have the right of appeal to the courts."

. . . .

McGriff is legally indistinguishable from the instant case. Therefore, we have concluded that the trial court erred in denying appellant's petition for a writ of mandate. Appellant is entitled to be reinstated to his position with the Los Angeles County Fire Department effective August 11, 1976. Respondent is entitled to credit for all wages and benefits paid to appellant from August 1976 through August 1978. (*Leili v. County of Los Angeles, supra*, 148 Cal.App.3d, 988-989.)

Leili was distinguished by *Stephens v. County of Tulare, supra*, 38 Cal.4th, 807 (discussed further below) on the basis that the *Leili* court did not address the question of whether being "taken off active duty" was the equivalent of a dismissal.

- c) *Phillips*: Where the member requested and received a voluntary medical leave of absence, but the Board later denied the application for disability retirement, the member was entitled to be reinstated to paid status even though the employer's position was that the employee had a work-limitation that could not be accommodated.**

In *Phillips v. County of Fresno* (1990), *supra*, 225 Cal.App.3d 1240 [277 Cal.Rptr. 531] an employee requested and was granted a voluntary medical leave of absence. Two days after the Board of Retirement denied the employee's application for disability retirement, he asked the county to reinstate him. The county refused, explaining that it would not return the employee to work until he had been examined by a county-appointed medical examiner. The county asserted that the Board of Retirement's ruling and the county's position were not inconsistent since the employee, though not permanently incapacitated, was temporarily incapacitated. However, the county did not file a petition for writ of mandate under Section 31725 to challenge the Board's decision. Just under three years later, a new county sheriff returned the employee to duty. Two months later, the employee filed a petition for writ of mandate to compel the county to

provide him with back pay and benefits. The trial court issued the writ and the Court of Appeal affirmed, saying,

We recognize the sheriff has the ultimate authority and responsibility to determine whether a deputy is fit to engage in active duty. Clearly a person who suffers from a physical, emotional or mental disability should not be forced to perform the strenuous and dangerous duties of a deputy sheriff. Section 31725 does not mandate reinstatement to active duty status. The language and legislative intent reflect the purpose of the statute is to mandate reinstatement to paid status.

....

The employer cannot deny disability retirement on the basis of there being no disability and then claim disability in order to deny employment income. If the employer and Retirement Board do not agree that the employee is entitled to disability retirement, the employer's recourse is to seek judicial review of the Retirement Board's decision. If review is not pursued, the employee must be reinstated. Section 31725 recognizes no middle ground. (*Phillips v. County of Fresno, supra*, 225 Cal.App.3d, 1257-1258.)

Phillips was distinguished by *Stephens v. County of Tulare, supra*, 38 Cal.4th, 807-808, (discussed further below) on the basis that Phillips was awarded back pay from the date he asked to be reinstated, but not during the period of his voluntary medical leave of absence.

Associations' comment

The *Phillips* court construed Section 31725 as mandating reinstatement to paid status, not active duty status. In 1996, six years after the *Phillips* decision, the Legislature amended Government Code section 31725.7 to provide that if a disability retirement applicant takes a regular retirement for years of service and age pending the resolution of the disability retirement application and is found not to be entitled to a disability retirement, "he or she shall not be entitled to return to his or her job as provided in Section 31725." The language used by the Legislature in Section 31725.7 indicates its construction of Section 31725 to mandate reinstatement to the "job," not merely paid status. The ordinary meanings of word "job" include a piece of work, a task, duty, or chore, not the pay for the activity. The Legislature's language in Section 31725.7 sets forth an interpretation of Section 31725 that is at odds with the *Phillips* court's construction. The *Phillips* court's construction of Section 31725, however, was employed by the Court of Appeal in *Hanna*, discussed below, without discussion of the significance of the language used by the Legislature in Section 31725.7.

End comment.

- d) Raygoza: Where the employer's position was that the employee was incapacitated and the Board's finding was that the employee was not incapacitated, the Legislature gave preeminence to the Board's**

decision. The employee was entitled to work or be retired. The Legislature left the decision up to the Board.

In *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240 [21 Cal.Rptr.2d 896], after a deputy marshal had been found not to be incapacitated by the Board of Retirement, the county marshal refused to reinstate him because he had been found in his workers' compensation case to have a psychiatric condition requiring that he not carry a weapon. As explained by the California Supreme Court in *Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 807, "[t]he dispute [in *Raygoza*] centered not on whether Raygoza was in fact dismissed, but on whether the marshal was required to reinstate him when no position compatible with his work restrictions was available." The appellate court reversed the trial court's judgment denying *Raygoza's* petition for writ of mandate compelling his reinstatement, saying,

The 1989 petition [to compel the Board of Retirement to grant a disability retirement] having been denied, the retirement board's decision has been upheld. Therefore, all the requirements of section 31725 were met and Raygoza must be reinstated. (*Raygoza v. County of Los Angeles, supra*, 17 Cal.App.4th, 1245.)

. . . .

They cannot all be right. Raygoza is either fit or not. If he is, the marshal faces the uncomfortable prospect of putting an armed man on duty who once suffered a psychic injury connected to firearms. If Raygoza is unfit, he should be retired. But the retirement board has already eliminated that prospect. The result is that, whether Raygoza is truly fit or not, he is deemed fit, leaving the marshal the unpalatable chore of putting back on the payroll one he no doubt considers a liability and a danger.

"Section 31725 does not except from mandatory reinstatement those employees who are not permanently disabled according to a retirement board, but who are not presently ready to return to work according to the employer. Nor does it appear from the legislative history that the Legislature intended such an exception. To provide for such an exception, the Legislature could have included language to that effect. [Citation.]" (*Phillips v. County of Fresno, supra*, [(1990)] 225 Cal.App.3d [1240] at p. 1257.)

The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. Raygoza cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch. [Footnote omitted.] (*Raygoza v. County of Los Angeles, supra*, 17 Cal.App.4th, 1246-1247.)

- e) ***Tapia*: Section 31725 gives rise to a duty to reinstate after the Board denies the application for disability retirement. The claim of back salary is subject to the claims procedure of the Governmental Tort**

Claims Act.

In *Tapia v. County of San Bernardino* (1994) 29 Cal.App.4th 375 [4 Cal.Rptr.2d 431], the Court of Appeal rejected the county's argument that a deputy sheriff had not been "dismissed" for disability within the meaning of Government Code section 31725 because the Sheriff's Department brought her back to work after the Board of Retirement determined that she was not permanently incapacitated for duty.

The facts were as follows: Tapia was injured in 1987. In February 1989, the county's occupational health unit determined that Tapia was not able to return to full duty. It also determined that the Sheriff's Department had no light duty to offer her. Tapia filed an application for disability retirement in June 1989. The Board denied the application on its initial review and Tapia requested a hearing. In July 1990, the Board adopted a referee's suggested finding that Tapia was not incapacitated. The department brought Tapia back to work within two weeks. Tapia filed a petition for writ of mandate against the county demanding payment of salary between February 1989 and the date she returned to work. The county argued that an employee was "dismissed" within the meaning of Section 31725 only when the employer refused to bring the employee back to work after a final decision by the Board of Retirement that the employee was not permanently incapacitated. Tapia was brought back to work directly after the Board's decision. The trial court granted Tapia's petition and ordered the county to pay the salary and benefits for the period she was off work because of her work-related injuries. The county and sheriff appealed. The Court of Appeal reversed the trial court's judgment.

The Court of Appeal ruled that Tapia's claim was governed by *Leili* and, under Government Code section 31725, she was entitled to reinstatement effective the day following the day she was dismissed for disability by the county's occupational health unit. The Court of Appeal distinguished the right of reinstatement that is set forth in Section 31725 and the claim to salary that accrues between the employee's dismissal because of disability and the employee's return to work following the Board's decision that the employee is not permanently incapacitated. Tapia's claim for salary was subject to the claims requirements of the Tort Claims Act. Tapia had failed to follow the county's tort claims procedure that was a prerequisite to a suit for monetary damages.

When we apply *Phillips* to the case here, Tapia's dismissal occurred on February 2, 1989, when the county's occupational health service found that she was not medically qualified for regular duty coupled with the fact that the sheriff did not then approve her for light duty. Accordingly, Tapia was entitled to retroactive reinstatement as of February 3, 1989, the day following the effective date of the dismissal as defined by section 31725. (*Tapia*, p. 382.)

....

... Tapia's claim is not governed by section 31725, because section 31725 "does not prescribe the procedures for filing a claim for wages. Rather, this

section only gives rise to the duty to [reinstate]. " [Bracket in original.] (*Tapia*, p. 384.)

f) *Rodarte*: After the employer files an application for disability retirement, it has no obligation to continue paying salary to an employee who is not working.

In *Rodarte v. Orange County Fire Authority* (2002) 101 Cal.App.4th 19 [123 Cal.Rptr.2d 475], a firefighter sustained a back injury in 1994. Over the next approximately four years, Rodarte sought a release to return to work from fire authority-appointed physicians and was denied on a number of occasions. On one occasion, he was released to return to work in a training program and sustained further injury. He again returned to work, but shortly thereafter left work due to illness. The fire authority filed an application for disability retirement in 1998. The board of retirement granted the application and awarded Rodarte a disability retirement pension beginning in November 1998. Rodarte sued the county for a salary obligation that he asserted accrued while he was off work and before his pension commenced. The trial court sustained the county's demurrer and the Court of Appeal affirmed the trial court's decision.

Plaintiff contends the limitation of an employer's ability to separate a disabled employee who is "otherwise eligible to retire for disability" creates a duty on the part of the employer to continue paying the employee's salary while a retirement application is pending. But section 31721 is silent on this question. It does not explicitly provide for continued compensation. To the contrary, the language is more susceptible to an interpretation that once a disability retirement application has been filed, an employer is not obligated to continue paying an employee who is no longer working. For example, the statute states the application may be filed by the employer for whom the member "is *or was* last employed" (§ 31721, subd. (a), italics added [by the *Rodarte* court].) The use of the past tense indicates that a member need not be a current employee (one still drawing a salary) to apply for disability retirement. [Parenthetical is the court's.]

Moreover, the statutory context supports the court's conclusion. Section 31722 provides for the timing of a disability retirement application. "The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties." (§ 31722.) "[D]iscontinuance of service" has been interpreted to apply to "a member who has ceased to work for a salary from which deductions are made" within the meaning of section 31641, subdivision (a). (*Weissman [v. Los Angeles County Employees Ret. Assoc.]* (1989), *supra*, 211 Cal.App.3d [40], 46 [259 Cal.Rptr. 124].) As such, a disabled member no longer drawing a salary has four months from the date of "discontinuance of service" to apply for disability retirement. Interpreting section 31721 to require an employer to continue paying such a member's salary would make surplusage of

a portion of section 31722, a result we must avoid if possible. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987), *supra*, 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67].)

Furthermore, the legislative intent that a member not continue to receive a salary is clearly established by the provision for interim benefits while the application is pending. Upon application for disability retirement, a member may apply for “a service retirement allowance *pending the determination of his or her entitlement to disability retirement*,” with appropriate adjustments to the member's retirement benefits if the retirement application is granted. (§ 31725.7, subd. (a), italics added [by the court].) Plaintiff contends this section only applies to those instances when the employee voluntarily separates him or herself from employment and applies for disability retirement, and not to the current situation where the employer filed the application. Section 31725.7, subdivision (a) states “the *member* may, if eligible, apply for” a retirement allowance pending resolution of his or her application. (Italics added [by the court].)

But to read section 31725.7 in such a restrictive manner leads to an absurd result. (See *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055 [48 Cal.Rptr.2d 1, 906 P.2d 1057] [courts must read statutes to avoid absurdities].) Section 31721 expressly provides that an *employer* may file the retirement application. [Italics are the court's.] Plaintiff's reading of section 31725.7 would put the employee who voluntarily applies for retirement at an advantage over one who does not. Even if plaintiff were correct, he was eligible to apply for the interim benefits once he filed his own disability retirement application. He did so only one month after defendant's own retirement application was filed. The record does not indicate whether plaintiff applied for interim benefits, and if so, whether he received them.

Nor does the fact interim benefits are offset against the final disability award make a difference. Plaintiff's argument is that a full salary must be provided because without it the employee is left with no income pending action by the retirement board on the disability retirement application. Because the Legislature has explicitly provided a remedy in the section 31725.7 discretionary allowance, we are not free to read a different one into section 31721. (See *Gutierrez v. Board of Retirement* (1998) 62 Cal.App.4th 745, 749 [72 Cal.Rptr.2d 837] [“it is not the job of the courts to expand the scope of retirement benefits created by the Legislature and spelled out in a detailed statutory scheme”].) (*Rodarte v. Orange County Fire Authority, supra*, 101 Cal.App.4th, 23-25.)

g) *Hanna*: After the Board denies a disability retirement application and its decision becomes final, reinstatement is required, although the Sheriff need not return the applicant to full duty.

In *Hanna v. County of Los Angeles* (2002) 102 Cal.App.4th 887 [125 Cal.Rptr.2d 686], the Board of Retirement made an initial determination based on a unilateral staff recommendation to deny the application for disability retirement. Hanna appealed the

decision and requested an administrative hearing. During the pendency of her appeal, Hanna demanded that the Sheriff's Department return her to her usual and customary job. The Department refused on the basis that it could not accommodate the restrictions that were defined in her workers' compensation case. Hanna filed a petition to reopen her workers' compensation case with the intention of changing the work restrictions. She also requested that the Sheriff's Department "reinstate" her. The Sheriff's Department declined on the basis that the Board of Retirement's decision was not final. However, before the administrative hearing took place, Hanna withdrew her request and the Board dismissed the administrative appeal. Shortly before the Board dismissed Hanna's appeal, the Department filed its own application. Hanna petitioned for a writ of mandate against the county for reinstatement to paid status. The superior court granted the writ. The county appealed. The Court of Appeal ruled as follows:

In this case, the Retirement Board denied Hanna's application for disability retirement and the Department did not request a hearing by a board-appointed referee or seek judicial review of the decision. Based on these facts, section 31725 mandates the Department reinstate Hanna to paid status as a deputy sheriff regardless of the work restriction. The Department may refuse to allow Hanna to perform some of the duties of a deputy sheriff, but it must pay her as a deputy sheriff. [Italics added by Editor.] (Hanna, pp. 894-895.)

See the critique of the *Hanna* court's reliance on *Phillips* above at Section I, O, 2, c).

h) *Alvarez-Gasparin*: Where the member was off work, but the employer did not dismiss the member for disability, the member was not entitled to back pay and benefits under Section 31725.

In *Alvarez-Gasparin v. County of San Bernardino* (2003) 106 Cal.App.4th 183 [130 Cal.Rptr.2d 750], a Station Clerk for the Sheriff's Department began losing time from work in 1987. From 1991 to 2000, she worked only three weeks. In that time, she filed a workers' compensation case in which an agreed medical examiner concluded that she was a qualified injured worker and should be vocationally rehabilitated to another occupation. She also met with a staff member of the county occupational health unit and a rehabilitation counselor to discuss her options for accommodation, transfer, and rehabilitation services. She filed an application for disability retirement that was denied, both on initial determination in 1995 and after an administrative hearing in 1997. In 1999, Alvarez-Gasparin's petition for writ of mandate to overturn the Board of Retirement's decision was denied. She returned to work as a Station Clerk. She filed another writ petition and a complaint for damages, seeking salary and other benefits from April 1994 to September 2000 under Government Code section 31725. The court denied the petition because the county had not dismissed Alvarez-Gasparin for disability.

We first observe it appears questionable whether section 31725 applies in this case because plaintiff continues to be employed by the County. She has not been denied both retirement disability and employment as she persistently complains. Although plaintiff may have worked irregularly (or for only three

weeks) during the nine years between October 1991 and September 2000, the record shows she began working again as a station clerk in September 2000 and was still employed in June 2001. Because plaintiff returned to employment after denial of the retirement disability, section 31725's reinstatement requirement does not apply.

.....

Notwithstanding our foregoing preliminary comment, according to the County, section 31725 does not apply because it did not dismiss plaintiff. After the Retirement Board's finding of no disability was upheld, plaintiff simply returned in 2000 to her position. She was not entitled to reinstatement with back pay because she had never been dismissed. (*Alvarez-Gasparin*, p. 187.)

... The evidence does not prove what plaintiff would like it to prove. There is simply no showing that plaintiff was dismissed, expressly or impliedly. For that reason, this case differs from the cases relied upon by plaintiff in which the employee is fired,⁷ denied any comparable job opportunity with the public employer,⁸ or refused reinstatement.⁹ In October 1991, plaintiff effectively stopped working for the County and in the intervening nine years, her employment status was admittedly uncertain. But that does not mean she was dismissed for disability and entitled to a remedy under section 31725.

⁷ *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240 [21 Cal.Rptr.2d 896]; *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394 [109 Cal.Rptr. 186].

⁸ *Phillips v. County of Fresno*, *supra*, 225 Cal.App.3d 1240; *Tapia v. County of San Bernardino*, *supra*, 29 Cal.App.4th 375; *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985 [196 Cal.Rptr. 427].

⁹ *Hanna v. Los Angeles County Sheriff's Dept.*, *supra*, 102 Cal.App.4th at pages 891-895. (*Alvarez-Gasparin*, p. 188.)

- i) ***Stephens*: Where the county took the employee off work until the employee's medical condition permitted a return to full duty or to the light duties of an available modified assignment, the employee was not "dismissed for disability" and the employee was not entitled to the benefits of Section 31725.**

In *Stephens v. County of Tulare* (2006) 38 Cal.4th 793 [134 P.3d 288], a sheriff's detention services officer sustained a work-related injury to his right thumb that prevented him from performing the full range of duties of his position. In an effort to comply with work limitations recommended by Stephens' treating physician, the county provided Stephens with a temporary assignment to "modified light duty" consisting of pushing buttons that opened and closed gates in the detention facility. After performing the modified light duties for a time, Stephens complained to his superiors that the light duties were aggravating his thumb and one superior observed that Stephens' thumb was red and swollen at the end of a shift. Stephens declared that he would sue the county and his attorney would secure damages.

The county wrote a letter to Stephens instructing him not to return to work until he was either capable of the full range of duties of his position or the light duties of his modified assignment. Stephens was further instructed that while he was off duty, he was to use his personal sick leave and full salary under Labor Code section 4850 if he was found to be eligible for that benefit.

Stephens applied for a disability retirement that the Board of Retirement denied. After being given notice of the Board's action, the county notified Stephens that the county was ready to reinstate him to employment and invited him to participate in an interactive review of his work limitations. After six months had passed without Stephens returning to work, he filed a petition for a writ of mandate to compel the county to reinstate him and pay back wages and benefits under Section 31725. Nineteen days later, the county sent a letter to Stephens notifying him that he was reinstated to employment. On the first day of the following month, Stephens returned to the same modified light duties he was performing when he last worked. At trial on the petition for writ of mandate, the Stephens' superior testified that it was never intended that Stephens be terminated and Stephens testified that he never received a termination notice. Stephens also testified that his condition remained the same from the time he stopped working to the day he returned to his modified light duties.

The California Supreme Court held that Stephens was not entitled to back salary and benefits under Section 31725 from the time he stopped working in his modified light duty assignment to his return to those duties because he had not been dismissed for disability. The evidence established that the county did not intend to dismiss Stephens, its initial letter instructing the officer to use his sick leave benefits was a clear indication that the officer's employment continued, the officer admitted that he never received a termination notice, and his testimony established that he was as capable of performing his modified light duty assignment when he stopped working as he was when he returned to duty. Interpreting Section 31725, the Court listed the elements that must be present in order for accrued and unpaid benefits to be payable. The Court explained,

In other words, if (1) the county board of retirement rules an applicant/employee is not permanently disabled so as to be entitled to a disability retirement, (2) the board denies the employee's disability retirement application on that ground, and (3) no appeal is filed or all appeals are final, then the applicant/employee is entitled to reinstatement to his or her prior position if (4) the employing county has previously "dismissed" the employee "for disability." (§ 31725.) Section 31725, where applicable, has been interpreted to require not only reinstatement but also payment of wages and benefits that would have accrued during the period of dismissal. (Leili v. County of Los Angeles (1983) 148 Cal.App.3d 985, 196 Cal.Rptr. 427 (Leili); see generally Tapia v. County of San Bernardino (1994) 29 Cal.App.4th 375, 387, 34 Cal.Rptr.2d 431 (Tapia) [applicant must comply with statutory claim presentation requirements].) (Stephens, p. 801.)

.....

. . . . The only question remaining is whether the county dismissed Stephens for disability within the meaning of section 31725. . . . [¶] Applying these principles here requires us to discern the plain meaning of the word "dismissed" as used in section 31725. To "dismiss" means to "send or remove from employment." (Webster's 3d New Internat. Dict. (2002) p. 652.) As used in connection with section 31725, "dismissed," "terminated," and "released" all share a common meaning. Those terms describe a circumstance in which the employment relationship, at the employer's election, has ended. Because the relationship has ended, (1) the employer no longer has an obligation to pay salary or other forms of compensation, and (2) the employee has no basis for expectation that a position exists, will be kept open, or will be made available upon the employee's offer to return to work. Because section 31725 is concerned only with the consequences of "[p]ermanent incapacity for the performance of duty," we can reasonably assume the statute addresses permanent, not merely temporary, absence from employment. An employee who is temporarily absent from the workplace due to illness or vacation, where both employer and employee understand the employee will return to work when the reason for the leave ceases, would have no need to pursue a disability retirement before the board of retirement.

In addition, a dismissal as contemplated by section 31725 requires an employer action that results in severance of the employment relationship. An employee who is neither sent away nor removed, but voluntarily absents himself or herself from the job, without more, cannot validly claim he or she was "dismissed" by the employer. An employee who is uncertain of his or her status or the existence of an employment relationship is entitled to seek clarification. (Stephens, pp. 801-802.)

. . . . As we explain, although we agree a qualifying dismissal within the meaning of section 31725 need not be accompanied by any particular formality, some form of a termination is nevertheless required. To the extent Stephens and the Court of Appeal assert otherwise, they overstate the reach of prior judicial interpretations of section 31725. (Stephens, p. 806.)

The Supreme Court also distinguished the "early" cases on which Stephens relied most heavily, including *McGriff*, and *Leili*, on the basis that the Court of Appeal in those cases did not address whether being released for medical incapacity (*McGriff*) or being taken off active duty (*Leili*) constituted a dismissal within the meaning of Section 31725. (*Stephens*, p. 807.) The Supreme Court also distinguished *Raygoza*, on the basis that the focus of that case was whether the county had to return the employee to work when it had no position compatible with his work restrictions, not whether "being relieved of duty (fired)" constituted a dismissal within the meaning of Section 31725. (*Stephens*, p. 807. See the discussion of the opinions in *McGriff*, *Leili*, and *Raygoza* cases, above.) With regard to the Court of Appeal's decision in *Phillips*, the Court explained,

. . . . Whereas in *Phillips* the employee sought to return to his job after a period of voluntary medical leave and claimed he was "dismissed" as of the day his

employer refused to reinstate him, Stephens never sought to return to his job between 1997 and 2003, but claims he was "dismissed" as of the day following his receipt of Captain Perryman's September 12, 1997, letter. Because the county never refused to reinstate Stephens, but simply told him to take sick leave until his medical condition allowed him to perform the modified light duty recommended by his physician, *Phillips* is not inconsistent with our conclusion that the county never dismissed Stephens within the meaning of section 31725. (*Stephens*, p. 808.)

....

In sum, although the phrase "dismissed ... for disability," as used in section 31725, has been interpreted to encompass employer actions that are functionally equivalent to terminating an employee, Stephens cites no authority, and we have found none, holding that an employer functionally or effectively terminates an employee by telling the employee to go out on sick leave until his or her medical condition abates sufficiently to enable return to the job. (*Stephens*, p. 809.)

See also *Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910 [46 Cal.Rptr.3d 335] in which an LVN was removed from duty and regular payroll because temporary restrictions could not be accommodated. She was provided with vocational rehabilitation. Her application for a service-connected disability retirement was denied, and the Court of Appeal found that she was not entitled to back pay under Government Code section 31725 because she was not "dismissed" within the meaning of Section 31725. The *Kelly* court's opinion relied on the Supreme Court's decision in *Stephens v. County of Tulare*, *supra*.

P. If the Board of Retirement finds an applicant for a service-connected disability retirement to be permanently incapacitated, but for nonservice-connected reasons, the Board may grant a nonservice-connected disability retirement while the applicant pursues administrative or judicial remedies.

Government Code section 31725.8 provides as follows:

If any applicant for service-connected disability retirement is found by the board to be permanently physically or mentally incapacitated for the performance of his duties but not because of injury or disease arising out of and in the course of his employment, he may apply for, and the board in its discretion may grant, a non-service-connected disability retirement allowance while he is pursuing any rehearing before the board or judicial review concerning his right to service-connected disability retirement. If his disability is finally determined to have been service-connected, appropriate adjustments shall be made in his retirement allowance retroactive to the effective date of his disability retirement.

If any member dies after electing to receive non-service-connected disability retirement and before the question of his entitlement to service-connected disability retirement is finally resolved, the rights of his beneficiary shall be those

selected by the member at the time he elected to receive non-service-connected disability retirement.

Associations' comment

In order to be entitled to a nonservice-connected disability retirement under Section 31725.8, the member must be otherwise eligible to receive a nonservice-connected disability retirement and have five years of service. (Gov. Code, § 31720, subd. (b). See Section I, C, 2, above. Section 31725.8, second paragraph, is discussed, above, in Section I, E, 1, a), in connection with *Gutierrez v. Board of Retirement* (1998) 62 Cal.App.4th 745 [72 Cal.Rptr.2d 837].)

End comment.

Q. Effect of county following work limitations that are inconsistent with the Board of Retirement's denial of the application for disability retirement.

- 1. If neither the county nor the member successfully challenges the board's decision, the board's decision becomes final and preeminent over a contrary position taken by the county.**

Associations' comment

If it is convinced that member's application is not supported by the preponderance, or weight, of substantial, reliable evidence, the Board of Retirement has the authority to deny the application for disability retirement. (Gov. Code, § 31725.)

The Board is not bound by the recommendations of its staff or the opinions of its medical consultants to grant or deny an application.

The Board may reject the recommendations of its staff, medical consultants, and referees if the Board determines that there is a lack of substantial evidence in support of a suggested finding of fact that favors a party with the burden of proof – usually the applicant in a non-presumption case and usually the respondent in a presumption case. (See the discussion of the burden of proof, below in Section III.)

The Board may reject the recommendations of its staff, medical consultants, and referees that are adverse to the party with the burden of proof where the Board determines to the contrary that the preponderance of the evidence supports a finding favoring the party carrying the burden of proof.

Either the applicant or the employer or both may contest the Board's decision. But if neither contests the Board's decision, or, having contested the Board's decision, the applicant and/or the county are unsuccessful in overturning it, the Board's decision is preeminent and controls over the contrary position of the county. (*Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240, 1246-1247 [21 Cal.Rptr.2d 896].)

While the objective of all Boards is to reach the correct result, the Board's decision in a particular case, like the decision of any tribunal, may be incorrect. But, subject to limited exceptions (*viz.*, Gov. Code, 31729 and extrinsic fraud or mistake, or duress), the Board's decision, even an incorrect one, stands unless it is overturned in accordance with an administrative hearing process or by a reviewing court. Once the Board's decision is final, it has no jurisdiction to reconsider or reopen it. (*Gutierrez v. Board of Retirement* (1998), *supra*, 62 Cal.App.4th 745, 749 fn 3 [72 Cal.Rptr. 837] citing *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407 [57 P.2d 1323]; *Olive Proration Program Committee for Olive Proration Zone No. 1, et al. v. Agricultural Prorate Commission, et al.* (1941) 17 Cal.2d 204, 209 [109 P.2d 918].) See the further discussion at Section V, C, 1, below.

a) The member may challenge the Board of Retirement's denial of the application for a disability retirement allowance.

After exhausting his or her administrative remedies, the member may challenge the Board of Retirement's denial of the application for a disability retirement by filing a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. (*Mahoney v. San Francisco City, etc. Employees' Ret. Bd.* (1973) 30 Cal.App.3d 1, 3-4 [106 Cal.Rptr. 94]; *Strumsky v. San Diego County Employees Retirement Assn.* (1974), *supra*, 11 Cal.3d 28, 33 [520 P.2d 29].) References are made in Government Code section 31725 to a member's petition for writ of mandate and to the employer's option of joining in the member's petition as a way of challenging the Board of Retirement's denial of an application for disability retirement.

b) The County may challenge the Board of Retirement's denial of an application for disability retirement.

In *Raygoza v. County of Los Angeles, supra*, the court explained that the Legislature gave to the Board of Retirement the authority to determine whether a member is permanently incapacitated. If the county disagrees with the Board's decision, it has a remedy in court. It may file a petition for writ of mandate. (Gov. Code, § 31725.) If the county does not file a petition for writ of mandate, the Board's determination is preeminent.

The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. *Raygoza* cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch. (*Raygoza v. County of Los Angeles, supra*, 17 Cal.App.4th, 1247.)

In any one case, the possibility of inconsistency between the county's and the retirement association's positions concerning the same issues of incapacity and service-connection is a reality with which members, counties, and retirement associations must contend.

A county department may take the position that the employee is permanently incapacitated because it recognizes and gives effect to work restrictions that are developed in the workers' compensation case, recommended by the county's medical advisor or consultant, or imposed by the applicant's treating or consulting physician. The retirement association's staff, however, may reach a different conclusion, usually based on the analysis and conclusions of a medical consultant the association has appointed.

County departmental officials act on information obtained from a variety of sources, most notably the workers' compensation case, and they justifiably consider themselves obligated not to expose the applicant to further injury, the county to further liability, and other employees to the risks of working with someone who has been determined to be impaired.

The members of the retirement association's staff also act on information they are provided. Their investigation into the disability retirement application may develop information not available to county officials -- information that leads the retirement association's staff and medical consultant to a conclusion contrary to the conclusion reached by the county on the relationship between work and the injury, on the nature and extent of disability, or both. The Board may adopt the staff's and medical consultant's recommendation to deny the application for disability retirement even though the county considers the member to be unable to perform his or her duties.

The county may challenge the Board's decision by filing a petition for writ of mandate. (Gov. Code, § 31725.) If it does not challenge the decision, or is unsuccessful in challenging the decision, the employer must reinstate the employee to paid status.

In *Hanna v. County of Los Angeles* (2002), *supra*, 102 Cal.App.4th 887 [125 Cal.Rptr.2d 686], the Board of Retirement made an initial determination based on a unilateral staff recommendation to deny the application for disability retirement. Hanna, a deputy sheriff, appealed the decision and requested an administrative hearing. During the pendency of her appeal, Hanna demanded that the Sheriff's Department return her to her usual and customary job. The Department refused on the basis that it could not accommodate the restrictions that were defined in Hanna's workers' compensation case. Hanna filed a petition to reopen her workers' compensation case with the intention of changing the work restrictions. She also requested that the Sheriff's Department "reinstate" her. The Sheriff's Department declined on the basis that the Board of Retirement's decision was not final. However, before the hearing took place, Hanna withdrew her request for an administrative hearing in her retirement case and the Board dismissed the appeal. Shortly before the Board dismissed Hanna's appeal, the Department filed its own application for disability retirement. Hanna petitioned for a writ of mandate that would compel the county to reinstate her to paid status. The superior court granted the writ. The county appealed. The Court of Appeal ruled as follows:

In this case, the Retirement Board denied Hanna's application for disability retirement and *the Department did not request a hearing by a board-appointed referee or seek judicial review of the decision*. Based on these facts, section

31725 mandates the Department reinstate Hanna to paid status as a deputy sheriff regardless of the work restriction. The Department may refuse to allow Hanna to perform some of the duties of a deputy sheriff, but it must pay her as a deputy sheriff. [Italics added.] (*Hanna v. County of Los Angeles, supra*, 102 Cal.App.4th, 894-895.)

c) The County may challenge the Board of Retirement's grant of an application for disability retirement.

In addition to the county having standing under Government Code section 31725 to challenge the Board of Retirement's *denial* of a disability retirement pension, it has standing to challenge the *grant* of a disability retirement under Code of Civil Procedure section 1094.5. (*County of Alameda v. Board of Retirement (Carnes)* (1988) 46 Cal.3d 902, 907-909 [251 Cal.Rptr. 267, 760 P.2d 464].)

End comment.

R. In the event of the death of the member or the deceased member's survivor

Associations' comment

In the case of the death of a member or a deceased member's survivor, rights may exist in a nominated beneficiary, one entitled to a survivor's allowance, and/or the deceased member's or deceased survivor's estate. When the member dies before a claim to service-connected disability retirement benefits is made or resolved, beneficiaries, survivors, and/or the member's estate may each have rights to greater allowances if the member is determined to have been incapacitated or died as a result of a service-connected injury. A person entitled to payment as a designated pension beneficiary may also be the beneficiary entitled to a survivor's allowance on the death of a member or the death of a survivor of the deceased member, and that person may also be the beneficiary of the deceased member's or deceased survivor's estate. But when they are not the same people, mapping out who is entitled to what, and who has standing to request an administrative hearing, is important. For example, the right of a person entitled to a survivor's allowance under Government Code sections 31781.1 and 31781.3 supersedes the right of a person nominated as a beneficiary. See the discussion, below, at Section I, R, 2, a), (1) and Section I, R, b), (2), (b), [7].

The CERL provisions governing the interests of parties are not uniform among the 20 retirement associations operating under the CERL of 1937. Certain provisions are not applicable to an association unless the county's Board of Supervisors has adopted them. Given the parochial nature of the law, this writer felt that it was best to simply point out that the issues arise and let the reader investigate the law applicable in an individual county. Determining which statutes have been adopted by which boards of supervisors is beyond the writer's resources, and a comprehensive statement of the law that would cover each association is beyond the scope of this document. However, expansion of the Resource's treatment of the topic has been requested and will be attempted.

This section of the Resource is intended to cover the general design of the law with respect to disability retirement pensions and survivors' allowances. The reader should bear in mind that the writer is an attorney for LACERA and has access to information about what statutes the Board of Supervisors of the County of Los Angeles has implemented. The coverage here has a bias toward the benefits available to LACERA's members, survivors and beneficiaries. We recommend that the reader use the discussion which follows as a guide, but refer to the resolutions and ordinances adopting specific statutes in his or her particular county for the precise definition of benefits available to survivors and beneficiaries. As indicated in the Prefaces, we request that the reader advise us of differences in another association's treatment of the issues so that they can be addressed in future editions of the Resource.

The comments in this section address some of the rights and duties with respect to disability retirement allowances and survivor allowances under Articles 7.5 through 12 of the CERL of 1937. While there are references to Articles 1.4, 15.5, 15.6, and 16, and statutes contained in those articles, there is no attempt here to discuss the ramifications of the provisions of those articles, or any other county-specific provisions in any detail.

End comment.

1. Summary of benefits available to a survivor.

A more detailed description of the benefits available following the death of a member under key Government Code sections is set forth below in Section I, R, 2, b). This summary is a brief overview. Note that not all code sections and not all provisions of each code section are included in the summary. For instance, provisions relating to the eligibility of the member's children (unmarried to age 18 and through age 21 if enrolled in an accredited school) are repeated throughout Articles 11 and 12 and are omitted from the summary simply to avoid repetition.

- a) Where the member's or survivor's death occurs after retirement and, at the time of retirement, the member had selected one of the optional settlements under Article 11 (Gov. Code §§ 31760, 31760.5-31765.2), the member's selection defines what benefits are payable following the member's death.**

If a member selects one of the optional settlements under Article 11, the member not only selects the pension allowance he or she will receive, but solidifies the kind of benefit that will be paid to eligible persons who survive the member or to his or her estate. Statutes that provide survivors with choices about how the survivors' benefit will be paid (lump sum, annuity, or a combination) following death of a member after retirement are applicable only where the member did not select an Article 11 optional settlement at the time of retirement. The optional settlements include,

Section 31760.5 [Unmodified+Plus Option; spouse must have been married to member at least one year prior to retirement; allows for increase of the allowance to be paid to the surviving spouse, with concomitant decrease in the allowance

paid to the member, based on the life expectancy of the member's spouse, so that there is no additional cost to the system resulting from the increased survivor's allowance.

Section 31761 [optional settlement 1; member elects to receive retirement allowance for life, but if member dies before receiving the amount of member's contributions, the balance is paid to member's estate or person member nominates who has an insurable interest in member's life]

Section 31762 [optional settlement 2; member elects to receive retirement allowance for life and thereafter 100% of the retirement allowance continues to be paid to a person member nominates who has an insurable interest in member's life]

Section 31763 [optional settlement 3; member elects to receive retirement allowance for life and then one-half of retirement allowance paid to person member nominates who has an insurable interest in member's life]

Section 31764 [optional settlement 4; member elects to receive retirement allowance for life and then other, customized benefits, approved by the board of retirement on advice of the actuary and which will not place an additional burden on the retirement system, to the persons nominated by the member who have an insurable interest in member's life]

Section 31782 [where member has elected optional settlements 2 through 4, member may not revoke the choice of beneficiary and rename another]

Section 31764.5 [(where adopted) where member has selected any one of optional settlements 2 through 4, member may have allowance reduced so that, in the event the named beneficiary predeceases the member, member's allowance returns to the amount member would have received if the allowance was unmodified; board of retirement and actuary must conclude there is no additional financial burden placed on the retirement system]

Section 31764.6 [optional settlement 5 (where adopted) retired member may elect to reduce his or her allowance and designate his or her spouse (who is not otherwise eligible to receive a survivor's allowance) to receive a survivor's allowance, where no additional burden will be placed on the retirement system]

Section 31764.7 [(where adopted) where member elects the terms of Section 31764.6, member may have allowance reduced so that, in the event the named beneficiary predeceases the member, member's allowance returns to the amount member would have received if the allowance was unmodified; board of retirement and actuary must conclude there is no additional financial burden placed on the retirement system]

Sections 31810 and 31811 ["Level Income Option" (aka "Pension Advance Option") although nominally an "option," it is not an optional settlement under Article 11; upon death of a member who selected the level income option, the

options available to those surviving the member are based on the unmodified allowance the member would have received if the member had not selected the level income option (see the discussion in the next section); member who retires on a years-of-service and age pension before age 62 and is fully vested in the social security system, may select a retirement option that coordinates the retirement allowance and the expected social security allowance. Under this option, the association advances the retirement allowance, increasing the monthly amount to reflect the anticipated social security allowance the member will receive when he or she becomes eligible at age 62. Once the applicant starts receiving social security payments, the association's payment is reduced by the equivalent actuarial values, allowing the association to recoup the advances. This option is only available to one who retires for service and is not available to a member who retires for disability. If a member retires using the level income option, and is later successful in establishing entitlement to a nonservice-disability retirement pension, the disability retirement allowance may be less than the level income option allowance. In that case, it may be to the member's benefit not to retire for disability, but be satisfied with the level income option allowance, because a disability retirement pension awarded after a retirement for years of service and age using the level income option may create a debt to the association that the applicant must repay.

- b) Where the member's death occurs before retirement but the member was eligible to retire, or where the member's death occurs after retirement and at the time of retirement the member did not select one of the optional settlements under Article 11, those surviving the member have a number of choices.**

Where the member dies before retirement, but the member was eligible to retire under various Government Code sections specified, or where the member dies after retirement and at the time of retirement the member did not select one of the optional settlements under Article 11, but took an unmodified pension allowance instead, a person qualifying for a survivor's allowance will have a choice of various settlements which we categorize here as (1) lump sum, (2) annuities, (3) combinations of lump sum and annuity payments and, certain cases, (4) special benefits. Note that a single code section may provide for methods of payment under more than one category:

(1) A lump sum

Section 31781 defines the "Death Benefit" as consisting of (a) the member's accumulated contributions, and (b) an amount from contributions by the county or district equal to one-twelfth of the annual compensation earnable by the member in the twelve months before death, multiplied by the number of completed years of service, not to exceed 50% of such annual compensation.

Section 31781.01 [defines the death benefit for Contra Costa County, Tier Two only; member's accumulated contributions, plus \$2000, offset by any lump sum death payment under federal Social Security Act].

Note: Sections 31781 and 31781.01 define the elements of the Death Benefit. They do not expressly state how it is to be paid, although these sections have been construed as providing authority to make a lump sum payment.

Section 31784 [installment payments; a person to whom the whole or part of the death benefit is payable may elect to receive all or part thereof paid over a period not exceed 10 years, plus interest on the unpaid portion; if person dies before all installment payments are made, to his or her estate or the person entitled to his or her property].

Section 31780 [death before retirement while in service or while continuously incapacitated for duty following discontinuance of service or within one month after discontinuance of service unless member's accumulated contributions have been withdrawn; survivor, nominated beneficiary, or the member's estate may be paid a lump sum if there is no election from a number of annuity options: [a] Section 31765 – optional settlement 3 pursuant to Section 31763; [b] Section 31765.1 – unmodified 60 to 65% allowance; [c] Section 31765.11 – Contra Costa County Tier Two only, 60% unmodified allowance; [d] Section 31781.1 – optional allowance after in-service death of one entitled to nonservice-connected disability retirement allowance; 60 to 65% allowance; [e] Section 31787 – optional allowance of 100% of retirement allowance after in-service death of one who would have been entitled to service-connected disability retirement allowance. If no election is made, and there is no survivor under Articles 15.5 or 16 then payment is made in a lump sum to the person the member nominated; if no election is made and a parent but no other is entitled to a survivor's allowance under Articles 15.5 or 16, and surviving spouse or child is designated as beneficiary (note spouse may be "deemed" to have been designated (Section 31458.2)), payment of a death benefit lump sum to the surviving spouse or child; if there is no surviving spouse or child, payment is made to such person as the member nominated by written designation filed with the board before the member's death; if there is no election and no person entitled to a survivor's allowance, the death benefit is paid to the member's estate]

(2) An annuity

In lieu of the death benefit, an annuity under one of the following sections:

(a) Death before retirement where the member was eligible to retire

Section 31765 [(LACERA calls this the "Fifth Optional Death Benefit") death of member eligible to retire in circumstances in which a death benefit under Article 12 is payable, member designated as beneficiary his or her spouse who survives member by not less than 30 days (note spouse may be "deemed" to have been designated (Section 31458.2)); spouse may elect to receive same allowance as member would have if member retired and selected an optional settlement 3 (Gov. Code, § 31763 [one-half of member's retirement allowance]); spouse may elect to receive in a lump sum payment all or part of the member's accumulated additional contributions, but the sum will not be included in the calculations of the annuity]

Section 31765.1 [(LACERA calls this the “Fourth Optional Death Benefit”) death of a member eligible to retire for service under Article 8, or safety service under Article 7.5 or 8.7; spouse must have been designated as beneficiary (note spouse may be “deemed” to have been designated (Section 31458.2)); spouse may elect to receive an allowance equal to 60% of the unmodified retirement allowance the deceased member would have received (65% in Los Angeles County (Gov. Code, § 31765.2)). Section 31765.1 also provides the surviving spouse with an option to receive all or any part of the member’s accumulated additional contributions in a lump sum, but that sum will not be included in the calculations of the annuity]

Section 31780 [where the member would have been entitled to retire under various code sections set forth in the section and death occurs before retirement while in service or while continuously incapacitated for duty following discontinuance of service or within one month after discontinuance of service unless member’s accumulated contributions have been withdrawn; surviving spouse or child may elect from a number of annuity options. See the more detail summary of Section 31780, above, under “Lump Sum.”]

Section 31781.1 [(LACERA calls this the “First Optional Death Benefit”) death before retirement where member would have been entitled to a nonservice-connected disability retirement (impliedly requires five years of service); surviving spouse may, instead of the death benefit under Sections 31780 and 31781, elect to receive a 60% continuance (65% in Los Angeles County (Gov. Code, § 31765.2)).

Section 31781.2 [(LACERA calls this the “Second Optional Death Benefit”) death before member reaches minimum retirement age, where member had more than 10 years of service, surviving spouse may, instead of receiving the death benefit in cash, elect to leave the death benefit on deposit until the earliest date member could have retired had he or she lived and then receive an unmodified 60% continuance (65% in Los Angeles County (Gov. Code, § 31765.2) under Section 31765.1 (or Section 31765.11 in Contra Costa County, Tier Two). Note: Section 31781.2 also contains an option of a combination lump sum and an annuity. See below.]

Section 31787 [death before retirement for service-connected disability; survivor’s allowance is equal to the allowance the member would have received if member retired for service-connected disability.]

(b) Death after retirement on an unmodified pension allowance

Section 31760.1 [death after retirement for years of service and age or nonservice-connected disability; 60% continuance; surviving spouse must have been married to member one year before retirement; in Los Angeles County, continuance is 65% (Gov. Code, § 31760.12); if no surviving spouse to eligible children; if member’s accumulated normal contributions exceed total pension allowance payments made, excess to designated beneficiary. For safety members, see Section 31785 and 31785.1, below.]

Section 31760.2 [where adopted; similar provisions to those in Section 31760.1, but surviving spouse must have been married to the member for two years prior to the date of death, not retirement, and must be 55 years of age on the date of death. For safety members, see Section 31785.1, below.]

Section 31760.11 [Contra Costa County Tier Two only; similar to Section 31760.1 but in addition, 20% continuance for each child up to 100% continuance for the family]

Section 31785 [death of safety member after retirement for years of service or nonservice-connected disability; 60% continuance (65% in Los Angeles County (Gov. Code, § 31785.4); surviving spouse must have been married to member for one year before retirement; no provision for distribution of excess member contributions]

Section 31785.1 [(where adopted) death of safety member after retirement for years of service and age or nonservice-connected disability; 60% continuance; surviving spouse must have been married to the member for two years before death, not retirement, and have attained 55 years of age.

Section 31786 [death of any member after retirement for service-connected disability; 100% of allowance continues to survivors; surviving spouse must have been married to member before retirement, but marriage need not have been for a year before retirement; no provision for distribution of excess member contributions]

31786.1 [where adopted; similar to Section 31786.1; death after retirement for service-connected disability; surviving spouse must have been married to decedent for two years before death and attained 55 years of age]

(3) A combination of a lump sum and an annuity

Section 31765, *supra*, [death before retirement of member eligible to retire in circumstances in which a death benefit under Article 12 is payable, member designated as beneficiary his or her spouse who survives member by not less than 30 days (note: spouse may be “deemed” to have been designated (Section 31458.2)); spouse may elect to receive same allowance as member would have if member retired and selected an optional settlement 3 (Gov. Code, § 31763 [one-half of member’s retirement allowance]); spouse may elect to receive in a lump sum payment all or part of the member’s accumulated additional contributions, but the sum will not be included in the calculations of the annuity]

Section 31765.1, *supra*, [death of a member eligible to retire for service under Article 8, safety service under Article 7.5 or 8.7; spouse must have been designated as beneficiary (note: spouse may be “deemed” to have been designated (Section 31458.2)); spouse may elect to receive an allowance equal to 60% of the unmodified retirement allowance the deceased member would have received. Section 31765.1 also provides the surviving spouse with an option to receive all or any part of the member’s accumulated additional contributions, but that sum will not be included in the calculations of the annuity]

Section 31781.2, *supra*, [death before member reaches minimum retirement age, where member had more than 10 years of service, surviving spouse may elect to leave the amount of the death benefit on deposit until earliest date member could have retired had he or she lived and at that time receive the allowance under Section 31765 (optional settlement 3, Gov. Code, § 31763 [50% continuance plus accumulated additional contributions in a lump sum] or an unmodified retirement allowance under Section 31765.1 or Section 31765.11 (Contra Costa County), plus all or some of the member's accumulated additional contributions in a lump sum, the lump sum not to be included in the calculation of the annuity to the surviving spouse (Gov. Code, § 31765.2) under Section 31765.1]

Section 31781.3 [(LACERA calls this the "Third Optional Death Benefit") death before retirement after five years of service or from a service-connected injury; surviving spouse may elect instead of the death benefit under Section 31781 or the life annuity under either Section 31781.1 (death before retirement where member would have been entitled to a nonservice-connected disability pension; 60-65% continuance) or Section 31787 (death before retirement where the member would have been entitled to a service-connected disability pension) a lump sum, as defined, but not to exceed 50% of member's annual compensation as defined, plus an annuity under either Section 31781.1 (nonservice-connected) or Section 31787 (service-connected), less, on a monthly basis, the actuarial equivalent of the lump sum based on the life of the spouse]

Section 31781.31 [Contra Costa County Tier Two only; similar to Section 31781.3, but member must have had 10 years of service or have died as a result of a service-connected injury]

(4) Special death benefits

See the additional discussion of this topic below at Section I., R., 2., (c), (2).

(a) Funeral expenses

Section 31783 [Where nominated beneficiary cannot be found or is the deceased's estate, the board may pay the undertaker all or a portion of the death benefit, but not more than is shown in a sworn itemized statement. Such payment is a full discharge of the association for the amount paid.

(b) Special benefits for children and surviving spouses of certain public safety employees who suffer a service-connected death in the performance of duty or who die as a result of an accident caused by external violence or physical force

Section 31787.5 [special death benefits for children; surviving spouse of member in active law enforcement or fire suppression or any other class as the retirement board shall fix, but not those described in Section 31469.2 (local prosecutor, public defenders and their deputies, or public defender investigator); where member is killed in the performance of duty or who dies as a result of an accident caused by external violence

or physical force, incurred in the performance of duty, who is entitled to receive a death allowance under Section 31787 (service-connected death; 100% of allowance member would have received); additional percentage of the allowance under Section 31787: 25% for one child; 40% for two children' 50% for three or more children, but no more than the maximum payable by a tax-qualified pension plan under the Internal Revenue Code (26 U.S.C.A. § 401, *et seq.*); if surviving spouse does not have custody of children, payment is made to person with custody.

Section 31787.6 [surviving spouse of a safety member who dies in circumstances covered by Section 31787.5 shall be paid an additional one-time lump sum equal to the annual compensation earnable by the decedent based on the monthly rate of compensation on the date of death. Those members described in Section 31469.2 (local prosecutor, public defenders and their deputies, public defender investigator) are expressly excluded from this section.

(c) Special lump sum payment for Santa Barbara Plan 2

Section 31486.7 [Santa Barbara Plan 2 only; death before retirement; one month of final compensation (three-year average compensation earnable) for each year of service up to six months paid to designated beneficiary]

(d) Survivor's entitlement to additional benefits on death of member while performing qualified military service

Section 31485.17 [In accordance with Section 401(a)(37) of Title 26 of the United States Code, if a member dies while performing "qualified military service," as defined in Section 414(u) of Title 26 of the United States Code (meaning any service in the uniformed services as defined in chapter 43 of Title 38, United States Code, sections 4301, *et seq.*) by any individual if he or she is entitled to reemployment rights under such chapter with respect to such service, the survivors of the member shall be entitled to any additional benefits that would have been provided under the retirement system had the member resumed his or her prior employment with an employer that participates in the system and then terminated employment on account of death; "additional benefits" do not include benefit accruals relating to the period of qualified military service (editor's note: consider that the member returned to county or district service the day before the date of death); the death of the member or former member while performing qualified military service shall not be treated as a service-connected death or disability; but service for vesting purposes shall be credited to a member who dies while performing qualified military service for the period of his or her qualified military service; section 31485.17, effective January 1, 2011, applies retroactively to deaths occurring on or after January 1, 2007]

(e) Los Angeles only – death resulting from military service while on military leave from county or district job, surviving spouse entitled to the combined benefit under Section 31781.3 regardless of length of service.

Section 31720.4 [Los Angeles county or districts only upon adoption by Board of Supervisors or governing body of district; surviving spouse of member who dies as a direct consequence and result of injury arising out of and in the course of military service while on military leave from county or district shall be entitled to the combined benefit under Section 31781.3 regardless of the member's years of county or district service at the time of death; as of this writing, the Board of Supervisors has not passed a resolution adopting the provisions of Section 31720.4]

- (f) Counties of the seventh class only – for purposes of Section 31787, in the case of a service-connected death of a safety member before retirement, compensation on which survivor's 100% allowance is calculated is increased when compensation for active members is increased.**

Section 31787.65 [In the case of a service-connected death of a safety member in a county of the seventh class, the compensation on which the surviving spouse's or eligible child's allowance under Section 31787 is calculated is increased when compensation for active members in the same job classification is increased; increases stop with the earlier of (1) the death of the surviving spouse or eligible children or (2) the deceased member's 50th birthday; not operative until the board of supervisors by resolution adopts the provisions of the section]

- c) Where the member dies as a result of a nonservice-connected injury or illness and the member would not have qualified for a nonservice-connected disability retirement for want of five years of service, the survivors, beneficiaries, or estate qualify only for the basic death benefit**

Section 31780 [establishes liability for the basic death benefit to a designated beneficiary (subdivisions (b) and (c)) or if there is no designated beneficiary, to the deceased member's estate (subdivision (d))]; Section 31781 [death benefit consists of the member's accumulated contributions, plus interest (Sections 31591, 31472 and 31472.1) and, from contributions from the county or district, one-twelfth of the annual compensation earnable by the member during the twelve months preceding his or her death, multiplied by the number of completed years of service; the additional limitation that the later piece of the benefit not exceed 50% of the member's annual compensation would not apply to one with less than five years of service since the beneficiary of a member with less than five years of service would receive less than 5/12ths of the member's annual compensation.]

2. Standing to assert disability and survivor allowance claims following the death of the member and/or the deceased member's survivor

This section describes benefits provided in Articles 11 and 12 only, except where otherwise indicated.

a) General description of standing

(1) Designated or nominated beneficiary

"Beneficiary" is defined in Government Code section 31458 as follows:

"Beneficiary" means any person in receipt of a pension, annuity, retirement allowance, death benefit, or any other benefit.

The term "beneficiary" is defined as anyone who receives any benefit under the CERL of 1937. The term technically includes a survivor as well as a person nominated or designated by the member to receive a benefit. It would also include a retiree receiving any sort of pension. In the vernacular of the CERL of 1937, the word "beneficiary" is used as a synonym for "person designated" or "nominated" by the member to receive a certain kind of benefit. When reference is made to the type of beneficiary who receives a survivor's allowance, that person is referred to as a "survivor." Use of the term "beneficiary" to describe a one who is entitled to a survivor's allowance, although precise, may cause confusion.

A nominated beneficiary is one designated or nominated, or "deemed nominated" (Gov. Code, § 31458.2) by the member or the recipient of a survivor's allowance to receive the following types of benefits in the event of the member or survivor's death:

(a) Undistributed member contributions are distributed to the deceased member's designated beneficiary or the deceased member's deceased survivor's designated beneficiary

The accumulated and undistributed contributions of a deceased member who retired for years of service and age, or for nonservice-connected disability, are paid to the person or persons nominated by the member in the event the member dies with no survivor who is entitled to receive a continuing allowance. (Gov. Code, § 31760.1, third paragraph; Gov. Code, § 31760.11, fifth paragraph: special statute for Contra Costa County; or, where adopted, Gov. Code, § 31760.2, subdivision (d). Also, Gov. Code, § 31780 [surviving spouse or guardian of a eligible child elects to receive the death benefit paid as provided in Gov. Code § 31765 [providing for payment of an optional settlement 3 allowance under Section 31763, plus a choice to receive in a lump sum the member's additional accumulated contributions]].) In Santa Barbara, following the death of a retired Plan 2 participant, whether for years of service or disability, accumulated and undistributed member contributions are paid to the person or persons designated by the deceased participant. (Gov. Code, § 31486.6, subdivisions (a) and (b).)

The Court of Appeal in *In re Marriage of Cramer* (1993) 20 Cal.App.4th 73, 76-77 [24 Cal.Rptr.2d 372] explained the workings of Section 31760.1 as follows:

As the designated beneficiary of decedent under decedent's retirement plan, appellant was entitled to receive any amounts paid into the retirement plan which

exceeded the benefits which had been paid out by the time of decedent's death. (See Gov. Code, § 31760.1, quoted *infra* at fn. 1 [fn. omitted].) That excess would have included appellant's community property contribution.

Here, however, appellant has acquiesced in the court's statement at trial that "[A]pparently the evidence is in this case there was no excess, and, therefore, although [appellant] was designated as beneficiary, there is nothing to be paid under the provisions of [Government Code section 31760.1]." There is therefore no claim by appellant that she is entitled to reimbursement of her community contribution other than in the form of survivor benefits." (*In re Marriage of Cramer*, *supra*, 20 Cal.App.4th, 76-77.)

The *Cramer* court also held that an ex-spouse does not qualify as a spouse who would be entitled to a survivor's allowance under Government Code section 31760.1, even in a case, such as *Cramer*, where the decedent did not remarry after the divorce. (*Cramer*, p. 78.)

(i) Where the member failed to designate a beneficiary, the surviving spouse may be deemed to have been nominated.

Government Code section 31458.2 provides that a surviving spouse is deemed to have been nominated as the deceased member's beneficiary if the member failed to actually designate one. The spouse must take steps to establish himself or herself as the member's spouse. Section 31458.2 provides,

If, after December 31, 1957, and either before or after retirement a member dies leaving a spouse and has not designated a beneficiary, and, prior to the payment of any portion of the death benefit, such spouse files with the board written evidence, satisfactory to the board, that she or he is the surviving spouse and the date of the marriage, such surviving spouse shall be deemed, for the purposes of this chapter, to have been nominated as the beneficiary by such member.

Associations' comment

Section 31458.2 was a legislative response to *Wicktor v. County of Los Angeles* (1956) 141 Cal.App.2d 592 [297 P.2d 115] in which the Court of Appeal held that nomination of a beneficiary required an affirmative act by the member and that the plaintiff widow's relationship with the decedent was not a substitute for the member's designation of a beneficiary.

In the case of a post-retirement death, with or without a survivor entitled to a continuing allowance, the deceased member's and the deceased member's deceased survivor's designated beneficiaries are also entitled to receive payment of any retirement allowance that was payable to the deceased member or the deceased member's survivor. This would include, not only any accrued or "earned" but unpaid pension allowance, but also, arguably, the disability retirement increment of the retirement pension allowance that was not paid to the decedent because the issue of disability and

service-connection was in dispute and unresolved when the member died. (Gov. Code, § 31452.7.) See discussion, below, with respect to an estate.

End comment.

- (b) Where member having taken a deferred retirement dies before the effective date of the retirement, member's accumulated contributions are paid to designated beneficiary or to member's estate.**

Government Code section 31702.

- (c) Additional and special death benefits are distributed to persons designated by the member.**

Additional lump sum statutory death benefits ranging from \$250 to \$5,000, payable to persons designated by the member, are authorized if a board of supervisors adopts the provisions of a particular statute. (Gov. Code, §§ 31789-31789.5.) Government Code sections 31790 and 31791, authorizing the Board of Supervisors of the County of Los Angeles to set amounts of special lump-sum payments and extend to age 23 the survivor allowance for students, have not been adopted.) The Board of Supervisors of the County of Los Angeles adopted Sections 31789.1 (1983; \$750) and Section 31789.3 (1997; \$5000), each section authorizing payment to the member's estate or the beneficiary nominated by written designation.

- (d) Payments may be made to an ex-spouse during the lives of the member and the member's surviving spouse**

Payments from the system, including a portion of a surviving spouse's allowance as defined in a court order, (i.e., a domestic relations order ("DRO") or qualified domestic relations order ("QDRO" [pronounced "quad-roe"])) may be paid to an ex-spouse or, after the ex-spouse's death, to a beneficiary or beneficiaries, nominated by the ex-spouse, to receive such payments until the death of the member or the deceased member's surviving spouse. (Gov. Code, § 31458.3 [County of Los Angeles, only]; Gov. Code, § 31458.4 [where adopted].) Effective January 1, 2009, "If there is no designated beneficiary, payment shall be made to the estate of the ex-spouse." (Gov. Code, § 31458.3, subd. (a), second sentence; Gov. Code, § 31458.4, subd. (a), second sentence [where adopted].)

(2) Survivor

The term "survivor" is not defined in the CERL of 1937. "Survivor" is used in the vernacular of the CERL of 1937 to refer to a beneficiary who is paid a survivor's allowance following the death of a member. A "survivor" is a beneficiary who has a right to receipt of an allowance in his or her own right, either as a result of having been nominated or designated by the member to receive a continuing allowance or as a result of being in a status that is favored by a statute, such as being a surviving spouse or eligible child, as opposed one who succeeds to a claim that was, or could have been,

asserted by the deceased member during his or her life. Survivors include the following:

1. A beneficiary, nominated by a member who at the time of retirement elected one of the optional settlements under Article 11, to receive a benefit after the death of the retired member.
2. A surviving spouse (Gov. Code, § 31780, subd. (a)) including, in counties adopting Article 15.5 of the CERL of 1937, a spouse who is caring for a member's minor children, and a divorced former spouse who received not less than half of his or her support from the decedent. (Gov. Code, § 31842.)
3. Surviving dependent children to age 18 or date of marriage, whichever occurs first, or until age 22 if enrolled full-time as a student in an accredited educational institution. (See Gov. Code, §§ 31760.1, 31760.11, 31760.2, 31760.5, 31765, 31765.1, 31765.1131781.1-31787.5.) A child eligible to receive a survivor benefit under Sections 31760.1, 31781.1, 31786 or 31787 shall be considered unmarried if the child is not married as of the date the member dies, even if the child was previously married. However, if the child subsequently marries, the survivor's benefit terminates. (Gov. Code, § 31780.1.)
4. A surviving domestic partner as defined in Government Code section 31780.2 (Section 31780.2 not applicable where death occurs on or after January 1, 2009. (Gov. Code, § 31780.2, subd. (d).) Where the death occurs on or after January 1, 2009, surviving domestic partner is accorded all the rights of a widow or widower under the provisions of California Domestic Partnership Act of 2003, enacted in Chapter 431 of the Statutes of 2003, Family Code section 297.5.)
5. Parent of the deceased member (Gov. Code, § 31844), in counties adopting Article 15.5 of the CERL of 1937. The parent must be 62 years of age or older; must have received half of his or her support from the member; and must not have remarried since the member's death.

The right of a survivor to select, instead of one of the annuity and/or lump sum optional death benefits under Government Code section 31780 or the lump sum death benefit under Government Code section 31781, an optional death allowance consisting of a straight annuity under Section 31781.1 (death before retirement for nonservice-connected reasons where decedent would have been entitled to a nonservice-connected disability retirement pension), or a combination of a lump sum and a reduced annuity under Section 31781.3, is superior to that of a designated beneficiary. (Gov. Code, § 31781.1, subdivision (f) provides expressly that survivor's rights supersede those of a beneficiary nominated by the deceased member; *Fatemi v. Los Angeles County Employees Retirement Assn.* (1994) 21 Cal.App.4th 1797, 1800 [27 Cal.Rptr.2d 105] [Legislature's intent in enacting Section 31781.3, providing for a survivor's election

of combination of a lump sum payment and reduced annuity was to provide a benefit in addition to options in Section 31781.1 and it was not necessary to repeat in Section 31781.3 the provision that the survivor's rights superseded those of a named beneficiary]. The *Fatemi* opinion is discussed in more detail below.)

Under Government Code section 31780.2, applicable in counties that have adopted the section, where the death occurs before January 1, 2009 (Gov. Code, § 31780.2, subd. (d)), in the case of a surviving domestic partner where the decedent left at least one child who is eligible for a survivor's allowance, the child or children are entitled to the entire survivor's allowance to the exclusion of the domestic partner. When there is no child eligible for a survivor's allowance or where surviving children attain the age at which they are no longer eligible for a survivor's allowance, the domestic partner then becomes eligible to receive the same survivor's allowance that a surviving spouse would have been entitled to receive. If the surviving child or children elect to receive a lump sum, the domestic partner shares equally with the children. Where the death occurs on or after January 1, 2009, the rights of the surviving domestic partner are the same as for a widow or widower. (Fam. Code, § 297.5.)

(3) Estate

(a) General rules

The general rule for deaths, before or after retirement, is that a deceased member's unresolved claims to retirement benefits, including the nonservice-connected or service-connected disability retirement increment of a retirement allowance, and a claim that the application should be deemed filed on the day following the member's last receipt of regular compensation (Gov. Code, § 31724), survive in the member's estate. (See Code Civ. Proc., § 377.10, *et seq.*)

Code of Civil Procedure section 377.20 provides,

(a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.

(b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage.

An estate may also have a right to receive payment under a CERL of 1937 statutory provision. (See Gov. Code, §§ 31761 [under optional settlement 1, member may direct payment to estate if member dies before receiving in annuity payments the amount of member's accumulated contributions]; 31780 [death benefit payable to deceased member's estate if there is no election of various annuity options, and there is no person entitled to a survivor's allowance under Articles 15.5 or 16, and the member has not nominated a beneficiary]; 31784 [where death benefit is paid in installments and person to whom payable dies before all installments are paid, to his or her estate or person entitled to receive his or her property].)

(b) Distinguishing rights of survivors, beneficiaries and an estate

(i) Pre-retirement death

The general rule is that, where the member dies before retirement with an unresolved disability retirement claim, the right to the disability retirement allowance increment that accrued while the member was alive is not held by the beneficiary designated to receive the member's undistributed accumulated contributions, even when there is no person entitled to a continuing allowance, because the beneficiary's right is to the member's accumulated and undistributed contributions, not to the annuity (Gov. Code, § 31457) or pension (Gov. Code, § 31471) that make up a retirement allowance (Gov. Code, § 31473). Note that Government Code section 31452.7, subdivision (a), applies only to post-retirement deaths.

(ii) Post-retirement death

In the case of a post-retirement death of a member who has an unresolved disability retirement claim, the claim to the unpaid disability increment of the retirement allowance is not held by one who is entitled to a survivor's allowance because the survivor's rights do not arise until the death of the member, or preceding survivor, and they are limited to the survivor's allowance that follows the member's death, or deceased member's survivor's death

One who is entitled to a survivor's allowance does not have a right defined by statute to "earned," that is accrued, but unpaid retirement allowances of a member who dies after retirement or to the earned but unpaid survivor allowances of a preceding survivor. The right to earned but unpaid retirement allowances is held by the retiree's designated beneficiary. (Gov. Code, § 31452.7, subd. (a).) In the event the member dies, either before or after retirement, leaving a spouse and has not designated a beneficiary, the surviving spouse shall be deemed to have been nominated as the beneficiary if, before payment of any portion of the death benefit, the surviving spouse submits proof of her status as the surviving spouse and the date of the marriage. (Gov. Code, § 31458.2.) Upon the death of the deceased member's survivor, "earned" but unpaid allowances that would have been paid to that survivor are to be paid to the survivor's designated beneficiary. (Gov. Code, § 31452.7, subd. (b).) This is the rule, notwithstanding that there is a succeeding survivor, as where the surviving spouse dies and she leaves at least one eligible child. See the further discussion of Section 31452.7, below.

One entitled to a survivor's allowance may have the same interest that the member had in establishing that the member was permanently incapacitated and that the incapacity was due to a service-connected injury or illness because the survivor's allowance may be greater if either or both of those facts are established. A survivor may also be a designated pension beneficiary, and/or a beneficiary of the decedent's estate, and may have an interest in the disability pension increment by virtue of being in either or both types of status. But a person's interest in the disputed disability pension increment that accrued, but was not paid, while the member was alive derives, if at all, from the

person's status as one who is a beneficiary of the member's estate, not by virtue of the person's status as a survivor entitled to a continuing allowance. There is an argument that when the member dies after retirement but before a disability retirement claim is resolved, the member's designated beneficiary has a right to the disability increment of a retirement allowance (Gov. Code, § 31452.7 ["Upon the death of any member after retirement any retirement allowance earned but not yet paid to the member shall, notwithstanding any other provision of law, be paid to the member's designated beneficiary"]; Gov. Code, § 31458.2 [in a case of death before or after retirement, where the member did not designate a beneficiary, the surviving spouse may be deemed to be the nominated beneficiary]). The opposing view is that Section 31452.7 only authorizes payment to the beneficiary of those benefits in line for payment to the member as of the date of the member's death, not payments that may later become payable when the dispute is resolved.

- (c) Where ex-spouse failed to designate a beneficiary to receive a part of the member's allowance during the lives of the member and the member's spouse, upon the death of the ex-spouse, payment goes to the ex-spouse's estate. (Effective January 1, 2009 for Los Angeles and other counties, where adopted.)**

Effective January 1, 2009, in Los Angeles County (Gov. Code, § 31458.3) and in any other CERL of 1937 county where the Board of Supervisors has adopted the provisions of Government Code section 31458.4, where an ex-spouse is entitled to part of an allowance during the lives of the member and the current spouse pursuant to a court order, if the ex-spouse did not designate a beneficiary to receive the allowance after his or her death, the ex-spouse's allowance is to be paid to the ex-spouse's estate.

- (d) Government Code section 31452.7 – post-retirement death – payment of accrued but undistributed retirement allowances to designated beneficiary.**

In 2000, the Legislature enacted Government Code section 31452.7, (SB 2008) effective January 1, 2001, which provides as follows:

- (a) Upon the death of any member after retirement, any retirement allowance earned but not yet paid to the member shall, notwithstanding any other provision of law, be paid to the member's designated beneficiary.
- (b) Upon the death of any person receiving a survivor's allowance under this chapter, any allowance earned but not yet paid to the survivor shall, notwithstanding any other provision of law, be paid to the survivor's designated beneficiary.

The Legislative Counsel's Digest provided the following explanation for SB 2008:

The existing County Employees Retirement Law of 1937 provides for the payment of allowances to retired members and to survivors, as specified. Under

existing probate law, upon the death of a retired member or a person receiving a survivor's allowance, any allowance earned but unpaid as of the date of death becomes a part of the decedent's estate.

This bill would provide that, upon the death of a person receiving a retirement or survivor's allowance, any allowance earned but unpaid as of the date of death shall be paid to the decedent's designated beneficiary.

Associations' comment

Those requesting the Legislature to enact Section 31452.7 were attempting to solve a problem that arose when the final check that would have been paid to the member or survivor would have to be paid to the deceased member or survivor's estate. In many cases, however, there was no estate, and there were substantial delays while the decedent's family processed the forms necessary for the summary probate of the member or survivor's final check or probate of the member or survivor's entire estate. Section 31452.7 allowed the retirement association to make the check out to the member or survivor's designated beneficiary and avoid the delays associated with probate.

Notwithstanding the problem Section 31452.7 was written to address, the plain language of the section arguably appears to apply to the disability retirement allowance claims that were in dispute as of the retired member's death, but which are resolved after the member's death. If it is determined that the now deceased member or survivor was entitled to additional allowances related to nonservice-connected or service-connected disability, Section 31452.7 could be interpreted to require that payment of the pension allowance's disability increment, to which it is determined the member had a right, must be made to the member's or survivor's designated beneficiary or beneficiaries, rather than to the estate.

By its terms, Section 31452.7 does not apply in the case of the death of a member who was not retired as of the date of death. The unresolved claims to disability retirement allowances asserted by the deceased member who died before retirement would survive in his or her estate.

LACERA's position is that, in the case of a pre-retirement death, the designated beneficiary is entitled to payment of what is in the fund and ready to pay on the date of death. What becomes due and payable later as a result of a subsequent Board determination goes to the estate, not the designated beneficiary, because that money was not due and payable at the time of death. The language of Section 31452.7 does not change that result. The Section still begins with "Upon the death of any member *after* retirement . . ."

End comment.

3. Detail

a) Where death occurs after retirement and the member upon retiring

selected one of the optional settlements under Article 11, the retiree binds those who will receive benefits following the retiree's death.

- (1) Where the member selects Optional settlement 1, accumulated and undistributed contributions are paid to the member's estate or a nominated beneficiary having an insurable interest in the deceased member's life**

The member may elect Optional settlement 1 and receive a retirement allowance for life, but if the member dies before receiving the amount of his or her accumulated contributions in annuity payments, the balance is paid to the member's estate or a person having an insurable interest in the decedent's life whom the member nominates in a writing filed with the board. (Gov. Code, § 31761.) The nomination of the beneficiary may be revoked at the pleasure of the person who made it and a different beneficiary may be nominated. (Gov. Code, § 31782.)

- (2) Where the member selects Optional settlement 2, a person nominated by the member is paid a 100% continuance funded by a reduction in the member's pension allowance**

The member may elect Optional settlement 2 and receive a reduced annuity for life. After the member's death, a person nominated by the member receives a 100% continuance of the pension allowance the member was receiving. The member's pension is reduced by the value of the annuity based on the life expectancy of the beneficiary. (Gov. Code, § 31762.) Once the member has nominated the beneficiary under Optional settlement 2, the nomination cannot be revoked. (Gov. Code, § 31782.)

Associations' comment

Optional settlement 2 differs from the Unmodified+Plus option available to LACERA members under Government Code section 31760.5 in that the latter section provides for a continuance to unmarried children to age 18 and children in accredited schools through age 21. (Gov. Code, § 31760.5, subs. (a) and (b).) The significant differences between the options require that retirement administrators give clear advice so that the member can exercise an informed decision.

End comment.

- (3) Where the member selects Optional settlement 3, a person nominated by the member, and who has an insurable interest in the life of the member, is paid a 50% continuance funded by a reduction in the pension allowance**

The member may elect Optional settlement 3 and receive a reduced annuity for life. After the member's death, a person who has an insurable interest in the member's life and who is nominated by the member receives a 50% continuance of the pension allowance the member was receiving. The member's pension is reduced by the value of the annuity based on the life of the designated beneficiary. (Gov. Code, § 31763.)

Once the member has nominated the beneficiary under Optional settlement 3, the nomination cannot be revoked. ((Gov. Code, § 31782.)

- (4) Where the member selects the Optional settlement 4, other benefits approved by the board of retirement are paid to a person who is nominated by member and who has an insurable interest in life of member, but there must be no additional burden on the system.**

The member may elect Optional settlement 4 and receive a reduced pension for life. After the member's death, other benefits approved by the Board of Retirement are paid to, and throughout the life of, a person or persons who have insurable interests in the life of the member and are nominated by the member in a writing filed with the Board. No additional burden on the retirement system is permitted. (Gov. Code, § 31764.) Once the member has nominated the beneficiary under Optional settlement 4, the nomination cannot be revoked. (Gov. Code, § 31782.)

Associations' comment

Members of LACERA may qualify for what is called the "Unmodified+Plus" option under Government Code section 31760.5. In lieu of the retirement allowance and continuing survivor's allowance otherwise payable to the member's surviving spouse, the member may have the actuarial equivalent of the retirement and continuing survivor's allowances applied so that the member receives a lesser allowance throughout the member's life and, after the member's death, the survivor receives an increased allowance approved by the board throughout the surviving spouse's life that amounts to a pension allowance from 66% to 100% of the adjusted retirement allowance the member is otherwise entitled to receive. The adjustments made may not place any additional burden on the retirement system, i.e., the option is cost-neutral.

There is no provision in Section 31760.5 for the payment of accumulated and undistributed member contributions upon the death of the member or last remaining survivor of the deceased member.

What can be done under the Section 31760.5, Unmodified+Plus option, including coverage for minor and in-school children, could also be done under Section 31764 Optional Settlement 4 at the time of the member's retirement. Optional Settlement 4 is also cost-neutral. However, LACERA's experience before the Unmodified+Plus option was added to the CERL of 1937 was that the overwhelming use of Optional Settlement 4 was to make special provisions for both a current spouse and an ex-spouse.

End comment.

- b) Where death occurs before retirement or death occurs after retirement and the member retired on an unmodified retirement allowance (no optional settlement under Article 11 was selected),**

survivors have a number of choices

(1) The basic “Death Benefit”

Government Code section 31781 defines “death benefit” as follows:

The death benefit shall consist of:

- (a) The member's accumulated contributions.
- (b) An amount, provided from contributions by the county or district, equal to one-twelfth of the annual compensation earnable by the deceased during the 12 months immediately preceding his death, multiplied by the number of completed years of service under the system, but not to exceed 50 percent of such annual compensation.

Government Code section 31781.01 provides a different death benefit for members of the Contra Costa County Employees Retirement Association. In addition to the member’s accumulated contributions, subdivision (b) provides for a lump sum of \$2000 offset by any lump-sum death payment made under the federal Social Security Act.

Associations’ comment

The death benefit includes accumulated interest. (Gov. Code §§ 31591, 31472 and 31472.1.) While Sections 31781 and 31781.01 identify the elements of the death benefit, not how it is paid, the section is construed as providing authority for a lump sum payment. This construction is consistent with Section 31781.2 [providing that, where the deceased member had 10 or more years of service credit but died before reaching the minimum retirement age, the death benefit may be left on deposit until the earliest date on which the member could have retired] which begins, in part, “In lieu of accepting cash the death benefit payable under Section 31781 or 31781.01 . . . ,” implying that the payments made under those sections were intended to be paid out in a lump sum.

Note that the basic death benefit is the benefit payable when the member lacks five years of service credit and, therefore does not qualify for a nonservice-connected pension, and the death was not service-connected. But see the discussion of Government Code sections 31720.4 [Los Angeles only, when adopted; and 31485.17 [injury and death while a member is performing qualified military service]

End comment.

(2) Death before retirement

In addition to the lump sum “Death Benefit” under Government Code section 31781, the CERL of 1937 provides choices of annuities and mixes of smaller lump sums and smaller annuities.

(a) Section 31780: Death before retirement of member whether

or not entitled to either a service retirement or a disability retirement

Government Code section 31780 provides,

Upon the death before retirement of a member while in service or while physically or mentally incapacitated for the performance of his duty, if such incapacity has been continuous from discontinuance of service, or within one month after discontinuance of service unless the member's accumulated contributions have been paid to the member pursuant to Section 31628, the retirement system is liable for a death benefit which shall be paid:

- (a) As provided in Section 31765 or 31765.1 or 31765.11 or 31781.1 or 31787, if the surviving spouse or guardian of one or more of the surviving children of the member so elects, or
- (b) If no election is made pursuant to Section 31765, or 31765.1, or 31765.11, or 31781.1, or 31787 and no person is entitled to a survivor's allowance pursuant to Article 15.5 (commencing with Section 31841) or Article 16 (commencing with Section 31861) to such person as he nominates by written designation duly executed and filed with the board, before the death of the member, or
- (c) If no such election is made, and a parent as defined in Article 15.5 but no other person is entitled to a survivor's allowance pursuant to Article 15.5 or 16 and a surviving spouse or child is designated as beneficiary, to such surviving spouse or child, or
- (d) If no such election is made, no person is entitled to a survivor's allowance pursuant to Article 15.5 or 16, and a member has not nominated a beneficiary, to his estate.

The Court of Appeal in *Cox v. Board of Retirement* (1972) 27 Cal.App.3d 135 [103 Cal.Rptr. 445] explained,

Section 31780 is intended to take care of those situations in which a member, whether or not entitled either to a service retirement or disability retirement, had, because of physical or mental disability, not applied for either before death intervened.³

³In the case of disability retirement, the application need not be made by the member personally.

The system is designed primarily to provide a regular income for public employees in their less productive years. To that end there are provisions for disability retirement, which generally would not be sought by one already entitled to service retirement unless the disability were service-connected ([Gov. Code, §] 31720 et seq.).

It may be inferred from the language of section 31781.1 that section 31780 was not designed primarily with those in mind who are entitled to service retirement. (Cox, p. 140.)

- (b) Section 31765: LACERA's so-called "Fifth Optional Death Allowance." Death prior to retirement of one eligible to retire; surviving spouse is designated or there is no designated beneficiary and the surviving spouse is deemed nominated; spouse survives member by not less than 30 days; spouse may elect an Optional Settlement 3 (Gov. Code, § 31763): election of 50% of what would have been member's pension for years of service and age or disability retirement pension, plus a lump sum of all or part of the member's accumulated additional contributions**

Government Code section 31765:

Upon the death of a member who was eligible to retire, in circumstances in which a death benefit is payable under Article 12, if the deceased member has designated as beneficiary his spouse who survives him by not less than 30 days, such surviving spouse may elect, at any time before acceptance of any benefits from the retirement system, to receive, in lieu of the death benefit otherwise payable under Article 12, the same retirement allowance as that to which such spouse would have been entitled had such member retired on the date of his death and selected Optional Settlement 3. Such surviving spouse may elect in writing, before the first payment of any allowance is made, to receive in a lump sum payment all or any part of the member's accumulated additional contributions. The sum so paid shall not be included in the calculation of the annuity of the surviving spouse.

If, at the death of such spouse, she or he is survived by one or more unmarried children of such member, under the age of 18, such retirement allowance shall continue to such child or children, collectively, until every child dies, marries, or attains age 18. If such spouse dies, either before or after the death of such member without either making such election of receiving any portion of the death benefit, and no part of the death benefit has been paid to any person, prior to the payment of any benefits, the legally appointed guardian of such children shall make the election herein provided for on behalf of such surviving children as in his judgment may appear to be in their interest and advantage and the election so made shall be binding and conclusive upon all parties in interest.

Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to such children through the age of 21 if such children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.

Government Code section 31763 defines Optional Settlement 3 as follows:

Optional settlement 3 consists of the right to elect in writing to have a retirement allowance paid him or her until his or her death, and thereafter to have one-half of his or her retirement allowance paid to the person, having an insurable interest in his or her life, as he or she nominates by written designation duly executed and filed with the board at the time of his or her retirement.

Associations' comment

The key prerequisites for Section 31765 are:

- (1) The deceased member was eligible to retire for years of service and age or for disability.
- (2) The decedent had designated his spouse as beneficiary. (Note: if no beneficiary was nominated, the surviving spouse may be deemed to have been nominated. Gov. Code, § 31458.2.)
- (3) The surviving spouse survives the decedent by at least 30 days.

Note that there is no requirement that the surviving spouse had to have been married to the decedent for one year. The statute deals with in-service death. The requirements that the surviving spouse have been married to the member prior to retirement, without reference to the length of marriage, (Gov. Code, § 31786 [death after service-connected disability retirement]) and married to the member for one year prior to retirement (Gov. Code, §§ 31760.1 and 31785, general and safety members, respectively) apply to the death of a member who is already retired for years of service and age or nonservice-connected disability at the time of death.

The benefit the surviving spouse may elect under Section 31765 is a survivor's allowance that is 50% of the member's pension. The surviving spouse may elect to receive all or part of the deceased member's accumulated additional contributions. The sum so paid shall not be included in the calculation of the surviving spouse's annuity.

End comment

- (c) **Section 31765.1: LACERA's so-called "Fourth Optional Death Benefit." Death before retirement for years of service and age where the member is eligible to retire, surviving spouse is designated or there is no designated beneficiary and the spouse is deemed designated; election of unmodified survivor's allowance of 60% or 65% of what would have been member's retirement pension for years-of-service-and-age**

Government Code section 31765.1, applicable to certain counties, provides,

Upon the death of any member of a retirement system established in a county subject to the provisions of Section 31676.1 [editor's note: regarding retirement

for service] or Section 31695.1 [editor's note: regarding Article 8's extension of safety provisions to those in active law enforcement and fire suppression], eligible for retirement pursuant to Article 7.5 [editor's note: regarding service retirement for safety members] , 8 [editor's note: service retirement, generally], or 8.7 [editor's note: regarding extension of safety provisions to those in active law enforcement and fire suppression] who leaves a spouse designated as beneficiary, such surviving spouse may, in lieu of the death benefit provided for in Article 12, elect to receive a retirement allowance equal to 60 percent of the amount to which the member would have been entitled had the member retired on the date of his death with a retirement allowance not modified in accordance with one of the optional settlements specified in Article 11. Such surviving spouse may elect in writing, before the first payment of allowance is made, to receive in a lump sum payment all or any part of the member's accumulated additional contributions. The sum so paid shall not be included in the calculations of the annuity of the surviving spouse.

If, at the death of such spouse, she or he is survived by one or more unmarried children of such member, under the age of 18, such retirement allowance shall continue to such child or children, collectively, until every child dies, marries, or attains age 18. If such spouse dies, either before or after the death of such member without either making such election or receiving any portion of the death benefit, and no part of the death benefit has been paid to any person, prior to the payment of any benefits, the legally appointed guardian of such children shall make the election herein provided for on behalf of such surviving children as in his judgment may appear to be in their interest and advantage and the election so made shall be binding and conclusive upon all parties in interest.

Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to such children through the age of 21 if such children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.

Associations' comment

Under Government Code section 31765.2, applicable to members of the Los Angeles County Employees Retirement Association who die on or after June 4, 2002 while in service, but who were eligible to retire, the survivor's allowance pursuant to Section 31765.1 is 65% of the decedent's retirement pension. The Los Angeles Board of Supervisors adopted the provisions of Section 31765.2 on June 4, 2002. Section 31765.3, which would have extended the 65% allowance to the survivors of those who died prior to June 4, 2002, was not adopted by the Board of Supervisors.

Government Code section 31765.11 contains special provisions for survivors of members of the Contra Costa County Employees Retirement Association who die in service but were eligible for a service retirement or entitled to a disability retirement.

Government Code section 31458.2 provides that, where the member has failed to designate a beneficiary, a surviving spouse is deemed to have been nominated as the beneficiary by the member, assuming the spouse takes the steps necessary to establish herself as the surviving spouse.

End comment.

- (d) Section 31781.1: LACERA'S so-called "First Optional Death Allowance." Death due to injury or illness before retirement where the member was entitled to retire for nonservice-connected disability; designation of spouse as beneficiary not required; the "optional death allowance" for nonservice-connected disability; continuance of 60% to 65% of what would have been member's nonservice-connected disability retirement pension**

Government Code section 31781.1, provides,

(a) If a member of a retirement system established in a county subject to the provisions of Section 31676.1 [editor's note: Article 8, Retirement for Service] would have been entitled to retirement in the event of a non-service-connected disability, but dies as the result of an injury or illness prior to retirement, the surviving spouse of the member shall have the right to elect, by written notice filed with the board, to receive and be paid in lieu of the death benefit provided in Sections 31780 and 31781, an "optional death allowance."

(b) The allowance shall consist of a monthly payment equal to 60 percent of the monthly retirement allowance to which the deceased member would have been entitled if he or she had retired by reason of non-service-connected disability as of the date of his or her death.

(c) If the surviving spouse elects to receive the "optional death allowance" the payments due for this allowance shall be retroactive to the date of the deceased member's death, and shall continue throughout the life of the spouse.

(d) If the surviving spouse elects to receive the "optional death allowance," and thereafter dies leaving an unmarried surviving child or unmarried children of the deceased member under the age of 18 years, the "optional death allowance" shall thereafter be paid to those surviving children collectively until each child dies, marries, or reaches the age of 18 years. The right of any child to the allowance shall cease upon the child's death or marriage, or upon reaching the age of 18 years, and the entire amount of the allowance shall thereafter be paid collectively to each of the other qualified children.

(e) If the deceased member leaves no surviving spouse but leaves an unmarried child or children under the age of 18 years, the legally appointed guardian of the child or children shall make the election provided in this section on behalf of the surviving child or children that, in his or her judgment, is in the

best interests of the surviving child or children. The election made shall be binding and conclusive upon all parties in interest.

(f) The rights and privileges conferred by this section upon the surviving spouse and each child of the deceased member are not dependent upon whether any of these persons have been nominated by the deceased member as the beneficiary of any death benefits and shall supersede the rights and claims of any other beneficiary so nominated.

(g) Notwithstanding any other provisions of this section, the benefits otherwise payable to each child of the member shall be paid to each child through the age of 21 if the child remains unmarried and is regularly enrolled as a full-time student in an accredited school as determined by the board.

(h) For purposes of this section, "child" means a natural or adopted child of the deceased member, or a stepchild living or domiciled with the deceased member at the time of his or her death.

Associations' comment

California Statutes, 2003, Chapter 840, § 4, provides:

This act shall apply retroactively to the survivors of a deceased person who dies or is killed in the line of duty on or after January 1, 2001.

Under Government Code section 31781.12, applicable to members of the Los Angeles County Employees Retirement Association who die on or after June 4, 2002, but were eligible to retire for nonservice-connected disability, the survivor's allowance pursuant to Section 31781.1 is 65%. The Board of Supervisors of the County of Los Angeles adopted section 31781.12 on June 4, 2002. Section 31781.13, which would have increased the survivor's continuance under Section 31781.1 to 65% for survivors of those LACERA members who died before the operative date of Section 31781.13, was not adopted by the Board of Supervisors.

End comment.

- (e) Section 31781.2: LACERA's so-called "Second Optional Death Allowance." Death before retirement where the member had not reached the minimum age for retirement, but had more than ten years of service credit; survivor's option to leave death benefit on deposit until the earliest date on which the decedent could have retired.**

Government Code section 31781.2 provides as follows:

In lieu of accepting in cash the death benefit payable under Section 31781 or 31781.01, the surviving spouse of a member who dies prior to reaching the minimum retirement age and who at the date of his or her death has 10 or more

years of service to his or her credit, shall have the option to leave the amount of the death benefit on deposit in the retirement system until the earliest date when the deceased member could have retired had he or she lived, and at that time receive the retirement allowance provided for in Section 31765 [editor's note: 50%, Optional Settlement 3 allowance], 31765.1, [editor's note: 60% to 65% allowance, with option to take a lump sum with reduced allowance] or 31765.11 [editor's note: Contra Costa County provision], whichever is applicable.

If, at the death of the spouse, he or she is survived by one or more unmarried children of the member, under the age of 18 years, the retirement allowance shall continue to the child or children, collectively, until every child dies, marries, or attains the age of 18 years. If the spouse dies, either before or after the death of the member, without either making the election or receiving any portion of the death benefit, and no part of the death benefit had been paid to any person, prior to the payment of any benefits, the legally appointed guardian of the children shall make the election herein provided for on behalf of the surviving children as, in his or her judgment, may appear to be in their interest and advantage, and the election so made shall be binding and conclusive upon all parties in interest.

Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to those children through the age of 21 years if the children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.

- (f) Section 31787: Where member would have been entitled to a service-connected disability retirement, but dies prior to retirement as a result of the service-connected injury or disease; death caused by service-connected injury or disease before service-connected disability retirement; designation of spouse as beneficiary not required; the "optional death allowance" for service-connected disability; 100% of what would have been member's service-connected disability retirement pension**

Government Code section 31787 provides,

(a) If a member would have been entitled to retirement in the event of a service-connected disability, but dies prior to retirement as the result of injury or disease arising out of and in the course of the member's employment, the surviving spouse of the member shall have the right to elect, by written notice filed with the board, to receive and be paid in lieu of the death benefit provided for in Sections 31780 and 31781, an optional death allowance.

(b) The optional death allowance shall consist of a monthly payment equal to the monthly retirement allowance to which the deceased member would have been entitled if he or she had retired by reason of a service-connected disability as of the date of his or her death.

(c) If the surviving spouse elects to receive the optional death allowance, the payments due for this allowance shall be retroactive to the date of the deceased member's death, and shall continue throughout the life of the spouse.

(d) If the surviving spouse elects to receive the optional death allowance, and thereafter dies leaving an unmarried surviving child or unmarried children of the deceased member under the age of 18 years, the optional death allowance shall thereafter be paid to those surviving children collectively until each child dies, marries, or reaches the age of 18 years. The right of any child to the allowance shall cease upon the child's death or marriage, or upon reaching the age of 18 years, and the entire amount of the allowance shall thereafter be paid collectively to each of the other qualified children.

(e) If the deceased member leaves no surviving spouse but leaves an unmarried child or children under the age of 18 years, the legally appointed guardian of the child or children shall make the election provided in this section on behalf of the surviving child or children that, in his or her judgment, is in the best interests of the surviving child or children. The election made shall be binding and conclusive upon all parties in interest.

(f) The rights and privileges conferred by this section upon the surviving spouse and each child of the deceased member are not dependent upon whether any of those persons have been nominated by the deceased member as the beneficiary of any death benefits and shall supersede the rights and claims of any other beneficiary so nominated.

(g) Notwithstanding any other provision of this section, the benefits otherwise payable to each child of the member shall be paid to each child through the age of 21 years if the child remains unmarried and is regularly enrolled as a full-time student in an accredited school as determined by the board.

(h) For purposes of this section, "child" means a natural or adopted child of the deceased member, or a stepchild living or domiciled with the deceased member at the time of his or her death.

Associations' comment

History: The current Section 31787 was added by Statutes of 2000, chapter 497, section 3 (SB 2008) and amended by Statutes of 2003, chapter 840, section 3 (AB 933). The digest for SB 2008 explained,

The existing County Employees Retirement Law of 1937 prescribes disability retirement benefits for any member who has completed a specified number of years of service and is permanently incapacitated as a result of injury or disease arising out of and in the course of employment. Existing law also provides an optional death allowance, equal to 50% of the member's final compensation, that is payable to the spouse or minor children, or both, of a member who dies prior to retirement as the result of such an injury or disease.

This bill would delete those provisions relating to the optional death allowance and would instead provide that, if the member dies as the result of such an injury or disease and would have been eligible for disability retirement as of the date of death, the optional death allowance shall be equal to the monthly disability retirement allowance the member would have received. The bill would make a related technical change.

Associations' comment

What if the member would have been entitled to a service-connected disability retirement, but died because of something other than the service-connected injury or illness? While the continuance for one who retired on a service-connected disability is 100% even if death was not related to the service-connected injury or illness (Gov. Code, § 31786), the language of Section 31787 requires that, in the case of one entitled to, but not yet granted, a service-connected disability retirement, the death itself must be service-connected in order for the survivor's benefit to be equal to the disability allowance the member would have received. The survivors of a member who does not live to the date he or she is retired for service-connected disability may be denied a 100% survivor's continuance if the member dies because of some injury or illness other than the injury or illness that entitled the member to a service-connected disability retirement. This seems to be a hole in the statutory scheme.

End comment.

(g) Section 31781.3: Death before retirement after five years of service or as a result of service-connected injury or disease; optional death allowance for survivor to choose; combined lump sum and annuity.

Government Code section 31781.3 provides,

The surviving spouse of a member who dies in service after five years of service or as a result of service-connected injury or disease may elect, in lieu of the death benefit in Section 31781 [editor's note: death benefit lump sum] or the life annuity provided in Section 31781.1 [editor's note: optional death benefit for nonservice-connected disability where death occurs before retirement] or 31787 [editor's note: optional death benefit for service-connected disability where death occurs before retirement], the following combined benefit:

(a) An amount, provided from contributions by the county or district, equal to one-twelfth of the annual compensation earnable by the deceased during the 12 months immediately preceding his death, multiplied by the number of completed years of service under the system, but not to exceed 50 percent of such annual compensation, plus

(b) A monthly allowance as provided in Section 31781.1 or 31787 reduced by a monthly amount which is the actuarial equivalent of the amount in subdivision (a) as applied to the life of the surviving spouse.

In *Fatemi v. Los Angeles County Employees Retirement Assn.* (1994) 21 Cal.App.4th 1797 [27 Cal.Rptr.2d 105], a physician died from maladies not connected to his employment. He left a surviving spouse and an adult daughter from a prior marriage who was the decedent's only designated beneficiary. The widow's options were to take a lump sum death benefit under Government Code section 31781, an annuity under Government Code section 31781.1, or, "in lieu" of the annuity, a combination of a smaller lump sum and a lesser annuity under Government Code section 31781.3. She chose the latter. The adult daughter applied for a payment of the death benefit under Government Code sections 31780-31781. LACERA rejected the daughter's application on the ground that a surviving spouse's election of the combined benefit under section 31781.3 cut off all rights and claims of the decedent's designated beneficiary. The daughter sued and the superior court ruled that LACERA's action was correct. The Court of Appeal affirmed.

Section 31781.1, authorizing the spouse to elect to receive an annuity in lieu of the lump sum death benefit provided by Government Code section 31781, expressly provides that the rights of the surviving spouse and each child of the member "supersede" the rights of any nominated beneficiary. Section 31781.3 authorizes the spouse to elect a combination of a lesser lump sum and a lesser annuity, in lieu of Section 31780's death benefit, or the annuity authorized by Section 31781.1.

The Court of Appeal explained the purpose of Section 31781.3 as follows:

In 1969, the Legislature added section 31781.3 which allows the surviving spouse to choose the combination of a partial lump-sum payment and a reduced lifetime annuity. This option does not increase the overall amount of the death benefit but provides the surviving spouse with a cash payment up front to help meet unusual expenditures resulting from the other spouse's death. (*Fatemi*, pp. 1799-1800.)

Section 31781.3 does not contain language about the survivor's rights superseding the rights of designated beneficiaries. The daughter argued that the absence of a provision defining the primacy of survivors' rights raised a strong inference that the Legislature did not intend that the rights of the survivor superseded the beneficiaries' rights where the survivor's election was the combination of lump sum and annuity under Section 31781.3. The Court of Appeal rejected the daughter's argument.

In the present case, any such inference is overcome by the language of section 31781.3. That section provides the surviving spouse may elect the combined benefit "in lieu of" the lump sum or life annuity provided for in section 31781.1. Thus, section 31781.3 only affects how the pie is sliced, not entitlement to the pie itself. Therefore, the Legislature had no reason to repeat the superseding clause in section 31781.1 when it enacted section 31781.3. (*Fatemi*, p. 1801.)

Associations' comment

By referring to a member who dies in service after five years of service, the Legislature was referring to a member who had sufficient years of service to qualify for a nonservice-connected disability retirement, had the member lived, and whose surviving spouse and children would qualify for the optional survivor's allowance under Government Code section 31781.1. Section 31781.3, subdivision (b), provides for a nonservice-connected survivor's allowance under Section 31781.1 of 60% (for LACERA members the continuance is 65% under Government Code section 31781.12) of the decedent's allowance, or a service-connected allowance under Section 31787 of 100% of the decedent's allowance, but those continuing allowances are reduced by the annuity value of the lump sum payment of what amounts to up to a six months salary under Section 31781.3, subdivision (a).

End comment.

(3) Death after retirement

- (a) Section 31760.1: Where the deceased member at the time of retirement elected to receive an unmodified retirement allowance, that is, a retirement allowance not modified in accordance with one of the optional settlements under Article 11; death of general member after retirement for years of service and age or nonservice-connected disability; survivor's continuance is 60% to 65% of the deceased member's pension allowance; surviving spouse had to have been married to the member for one year prior to the member's retirement.**

Government Code section 31760.1 provides,

Upon the death of any member after retirement for service or non-service-connected disability from a retirement system established in a county subject to the provisions of Section 31676.1 [editor's note: regarding retirement for service], 60 percent of his or her retirement allowance, if not modified in accordance with one of the optional settlements specified in this article, shall be continued throughout life to his or her surviving spouse. If there is no surviving spouse entitled to an allowance hereunder or if she or he dies before every natural or adopted child of the deceased member attains the age of 18 years, then the allowance which the surviving spouse would have received had she or he lived, shall be paid to his or her natural or adopted child or children under that age collectively, to continue until every child dies or attains that age; provided, that no child shall receive any allowance after marrying or attaining the age of 18 years. No allowance, however, shall be paid under this section to a surviving spouse unless she or he was married to the member at least one year prior to the date of his or her retirement. The right of a child or children of a deceased member to receive an allowance under this section, in the absence of an eligible surviving spouse, shall not be dependent on whether the child or children were nominated by the deceased member as the beneficiary of any benefits payable upon or by

reason of the member's death, and shall be superior to and shall supersede the rights and claims of any other beneficiary so nominated. [Editor's note: last sentence added Stats 1995.]

Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to those children through the age of 21 if the children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board. [Editor's note: added Stats 1967.]

If at the death of any retired member there is no surviving spouse or minor children eligible for the 60-percent continuance provided in this section, and the total retirement allowance income received by him or her during his or her lifetime did not equal or exceed his or her accumulated normal contributions, his or her designated beneficiary shall be paid an amount equal to the excess of his or her accumulated normal contributions over his or her total retirement allowance income. [Editor's note: added Stats 1970.]

The superseding rights pursuant to this section shall not affect benefits payable to a named beneficiary as provided under Section 31789, 31789.01, 31789.1, 31789.12, 31789.13, 31789.2, 31789.3, 31789.5, or 31790. [Editor's note: added Stats 1998.]

[Editor's note: Added 1953; amended 1959, 1967, 1970, 1995 and 1998 as indicated in the brackets above.]

Associations' comment

The survivors' allowance pursuant to Section 31760.1 is 65% under Government Code section 31760.12, applicable to members of the Los Angeles County Employees Retirement Association who retired on or after June 4, 2002, the date the County of Los Angeles Board of Supervisors adopted Section 31760.12 and made it operative in the county. The Board of Supervisors did not adopt Section 31760.13 that would have extended the 65% continuance to those who retired before June 4, 2002.

End comment.

- (b) Section 31785: Death of safety member. Death occurs after retirement for years of service and age or nonservice-connected disability; continuance of 60% to 65% of the pension; spouse must have been married to member for one year prior to retirement.**

Government Code section 31785 provides as follows:

Upon the death of any safety member, after retirement for service or non-service-connected disability from a retirement system established in a county subject to the provisions of Section 31676.1 [editor's note: regarding retirement for service]

or 31695.1 [editor's note: regarding Article 8's extension of safety provisions to those in active law enforcement and fire suppression], 60 percent of his or her retirement allowance if not modified in accordance with one of the optional settlements specified in Article 11 (commencing with Section 31760), shall be continued throughout life to his or her surviving spouse. If there is no surviving spouse entitled to an allowance hereunder or if she or he dies before every child of the deceased safety member attains the age of 18 years, then the allowance which the surviving spouse would have received had she or he lived, shall be paid to his or her child or children under that age, collectively, to continue until every child dies or attains that age; provided, that no child shall receive any allowance after marrying or attaining the age of 18 years. No allowance, however, shall be paid under this section to a surviving spouse unless she or he was married to the safety member at least one year prior to the date of his or her retirement.

Any qualified surviving spouse or children of a member of a pension system established pursuant to either Chapter 4 (commencing with Section 31900) or Chapter 5 (commencing with Section 32200), who shall have been retired on or before December 31, 1951, shall be paid a retirement allowance pursuant to the provisions of this section. In cases where the death of a member occurred prior to January 1, 1952, the payment of the retirement allowance to the qualified surviving spouse or children shall be made effective on January 1, 1952.

Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to those children through the age of 21 if the children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.

The superseding rights pursuant to this section shall not affect benefits payable to a named beneficiary as provided under Section 31789, 31789.01, 31789.1, 31789.12, 31789.13, 31789.2, 31789.3, 31789.5, or 31790. [Editorial note: special \$750 to \$5000 death payments.]

Associations' comment

The survivor's allowance pursuant to Section 31785 is 65% under Government Code section 31785.4, applicable to members of the Los Angeles County Employees Retirement Association who retire on or after June 4, 2002, the date the County of Los Angeles Board of Supervisors adopted Section 31785.4 and made it operative. The Board of Supervisors of the County of Los Angeles did not adopt Section 31785.5 that would have extended the 65% continuance to those who retired before June 4, 2002.

End comment.

- (c) Section 31785.1: Not a LACERA benefit. Death of safety member. Death after retirement for years of service and age or nonservice-connected disability; 60% survivor's**

continuance.

Government Code section 31785.1 provides as follows:

- (a) Notwithstanding Sections 31481 or 31785, upon the death of any safety member, after retirement for service or non-service-connected disability from a retirement system established in a county pursuant to this chapter, 60 percent of his or her retirement allowance if not modified in accordance with one of the optional settlements specified in Article 11 (commencing with Section 31760), shall be continued to his or her surviving spouse for life. If there is no surviving spouse entitled to an allowance under this section or if she or he dies before every child of the deceased safety member attains the age of 18 years, then the allowance that the surviving spouse would have received had he or she lived, shall be paid to his or her child or children under that age, collectively, to continue until each child dies or attains that age. However, no child may receive any allowance after marrying or attaining the age of 18 years.
- (b) No allowance may be paid under this section to a surviving spouse unless he or she was married to the safety member at least two years prior to the date of death and has attained the age of 55 years on or prior to the date of death.
- (c) Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to the children through the age of 21 years if the children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.
- (d) No allowance may be paid pursuant to this section to any person who is entitled to an allowance pursuant to Section 31785.
- (e) The superseding rights pursuant to this section do not affect benefits payable to a named beneficiary as provided under Section 31789, 31789.01, 31789.1, 31789.12, 31789.13, 31789.2, 31789.3, 31789.5, or 31790.
- (f) This section is not applicable in any county until the board of retirement, by resolution adopted by a majority vote, makes this section applicable in the county. The board's resolution may designate a date, which may be prior or subsequent to the date of the resolution, as of which the resolution and this section shall be operative in the county.

Associations' comment

Section 31785.1 has not been adopted by the LACERA Board of Retirement. Note that the marriage requirement is two years before death, not retirement, and to be eligible, the surviving spouse must have attained 55 years of age by the date of death.

End comment.

(d) Section 31786: Death after retirement for service-connected

disability; the survivors' continuance is 100% of the service-connected disability retirement pension; spouse need only have been married to the decedent before retirement; full year of marriage not required.

Government Code section 31786 provides,

Upon the death of any member after retirement for service-connected disability, his or her retirement allowance as it was at his or her death if not modified in accordance with one of the optional settlements specified in Article 11 (commencing with Section 31760), shall be continued throughout life to his or her surviving spouse. If there is no surviving spouse entitled to an allowance hereunder or if she or he dies before every child of such deceased member attains the age of 18 years, then the allowance which the surviving spouse would have received had she or he lived, shall be paid to his or her child or children under said age, collectively, to continue until every such child dies or attains said age; provided, that no child shall receive any allowance after marrying or attaining the age of 18 years. No allowance, however, shall be paid under this section to a surviving spouse unless she or he was married to the member prior to the date of his or her retirement.

Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to those children through the age of 21 if the children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.

Associations' comment

Note that, unlike the provisions for death that occurs after a retirement for years of service and age or nonservice-connected disability for general members (Gov. Code, § 31760.1) and safety members (Gov. Code, § 31785), Government Code section 31786 only requires that the spouse have been married to the member prior to retirement. A year of marriage is not required.

End comment.

- (e) Section 31760.5: "Unmodified+Plus Option" – County of Los Angeles only. Retiring member provides for a continuing allowance for his or her surviving spouse that is greater than the 65% continuance otherwise applicable, funded by a reduction in the allowance to which the member would otherwise be entitled. Spouse must have been married to member for one year before retirement. If there is no surviving spouse when member dies or spouse dies before children reach 18 or 22 if enrolled in an accredited school, the allowance is paid to children. A child's share terminates on child's death, marriage or**

reaching the applicable age limit. The board and actuary must find that there is no additional financial burden placed on the retirement system.

Association's comment

Government Code section 31760.5, adopted by the Board of Supervisors of the County of Los Angeles effective June 4, 2002, allows a member to provide for a continuing survivor's allowance for his or her eligible surviving spouse that amounts to between 66% and 100% of the retiring member's pension allowance. The member's pension is reduced by the actuarial cost of providing the continuing allowance for the life of the surviving spouse. The surviving spouse must have been married to the member for at least one year before the date of retirement. If there is no surviving spouse entitled to the benefit on the member's death or the spouse dies before every child reaches age 18, the allowance is paid to the surviving children equally. A child's share in the allowance terminates with the child's death, marriage or his or her reaching age 18, or through age 21 while unmarried and enrolled full-time in an accredited school. The benefit is cost neutral. No additional financial burden to the retirement system is permitted.

Government Code section 31780.2 provides that, where the Board of Supervisors has adopted its provisions, benefits accorded to a spouse may be accorded to a domestic partner where the member and domestic partner were registered for one year before the member retired. A member may provide for a continuing Unmodified+Plus option allowance for a domestic partner under this section. The Board of Supervisors for the County of Los Angeles adopted the provisions of Section 31780.2 on August 3, 2003, effective August 26, 2003, although the Board's resolution did not adopt a provision that is optional under Section 31780.2 that would require the member and the member's partner to have a current Affidavit of Domestic Partnership, in a form adopted by the Board of Supervisors, on file for at least one year prior to the member's retirement or death prior to retirement.. Section 31780.2 is not applicable where the death occurs on or after January 1, 2009 (Gov. Code, § 31780.2, subd. (d)), but the surviving domestic partner's rights are the same as those of a surviving spouse. (Fam. Code § 297.5.)

End comment.

4. Additional death benefit provisions

a) Funeral expenses in absence of beneficiary or where beneficiary is the member's estate

Government Code section 31783 provides,

If the nominated beneficiary cannot be found by the board, or if the nominated beneficiary is the estate of the deceased person, the board in its discretion may pay to the undertaker who conducted the funeral all or a portion of the amount payable as a death benefit, but not more than the funeral expenses of the deceased person as evidenced by the sworn itemized statement of the

undertaker and by such other documents as the board may require. Payment so made is a full discharge of the board and system for the amount so paid.

b) Special payment provisions

(1) Special benefits for children of active law enforcement and fire suppression personnel who are killed in the performance of duty or who die as a result of accident or injury caused by external violence or physical force

Government Code sections 31787.5-31792 contain various provisions for special and additional death benefits, including increased benefits for family members when death is in the performance of duty or results from an on-the-job accident or injury due to violence or physical force, and lump sum payments ranging from \$250 to \$5,000, payable to the member's estate or to the beneficiary who was nominated by the member. Several of these code sections are applicable only when adopted by the county's Board of Supervisors. Where the member failed to nominate a beneficiary and leaves a surviving spouse, the surviving spouse may be deemed to be the nominated beneficiary. (Gov. Code, § 31458.2.)

Government Code section 31787.5, provides in part,

(a) A surviving spouse of a member who is killed in the performance of duty or who dies as the result of an accident or an injury caused by external violence or physical force, incurred in the performance of the member's duty, now or hereafter entitled to receive a death allowance under Section 31787, shall be paid an additional amount for each of the member's children during the lifetime of the child, or until the child marries or reaches the age of 18 years, as follows, subject to the limitation in subdivision (b):

(1) For one child, twenty-five percent (25%) of the allowance provided in Section 31787.

(2) For two children, forty percent (40%) of the allowance provided in Section 31787.

(3) For three or more children, fifty percent (50%) of the allowance provided in Section 31787.

(b) If a benefit payable under this section, when added to a benefit payable under Section 31787, exceeds the maximum benefit payable by a tax-qualified pension plan under the Internal Revenue Code (26 U.S.C.A. Sec. 401 et. seq.), the benefit payable under this section shall be reduced to the amount required to meet that benefit limit.

(c) If the surviving spouse does not have legal custody of the member's children, the allowance provided by this section shall be payable to the person to whom custody of the children has been awarded by a court of competent jurisdiction for

each child during the lifetime of the child, or until the child marries or reaches the age of 18 years.

(d) The allowance provided by this section shall be payable to the surviving spouses of members whose duties consist of active law enforcement or active fire suppression or any other class or group of members as the retirement board shall fix. The allowance provided by this section is not payable to the surviving spouses of members described in Section 31469.2 [editor's note: local prosecutors, public defenders and their deputies, public defender investigators].

(e) Any child whose eligibility for an allowance pursuant to this section commenced on or after October 1, 1965, shall lose that eligibility effective on the date of his or her adoption.

. . . .

(g) Notwithstanding any other provisions of this section, the benefits otherwise payable to the children of the member shall be paid to those children through the age of 21 years if the children remain unmarried and are regularly enrolled as full-time students in an accredited school as determined by the board.

(2) Special additional benefits for surviving spouse of a safety member who is killed in the performance of duty or who dies as a result of accident or injury caused by external violence or physical force

Government Code section 31787.6 provides,

A surviving spouse of a safety member who is killed in the performance of duty or who dies as the result of an accident or injury caused by external violence or physical force, incurred in the performance of his or her duty, shall be paid the following amount in addition to all other benefits provided by this chapter:

A one-time lump-sum benefit equal to an amount, provided from contributions by the county or district, equal to the annual compensation earnable by the deceased at his or her monthly rate of compensation at the time of his or her death.

This section is not applicable to members described in Section 31469.2 [editor's note: Section 31469.2 refers to local prosecutors, public defenders and their deputies, public defender investigators].

(3) Special lump sum payment for Santa Barbara Plan 2

Section 31486.7, applicable to Santa Barbara Plan 2 only, provides that, in the case of the member's death before retirement the member's designated beneficiary shall receive one month of final compensation (three-year average compensation earnable) for each year of service up to a maximum of six months.

(4) Survivor entitlement to additional nonservice-connected death benefits on death of member while performing qualified military service

Government Code section 31485.17 provides as follows:

(a) In accordance with Section 401(a)(37) of Title 26 of the United States Code, if a member dies while performing qualified military service, as defined in Section 414(u) of Title 26 of the United States Code, the survivors of the member shall be entitled to any additional benefits that would have been provided under the retirement system had the member resumed his or her prior employment with an employer that participates in the system and then terminated employment on account of death.

(b) For purposes of this section, "additional benefits" shall not include benefit accruals relating to the period of qualified military service.

(c) The death of a member or former member while performing qualified military service shall not be treated as a service-connected death or disability.

(d) Service for vesting purposes shall be credited to a member who dies while performing qualified military service for the period of his or her qualified military service.

(e) This section shall apply to deaths occurring on or after January 1, 2007. (Added Stats 2010 ch. 188 § 1 (AB 1354), effective January 1, 2011.)

Title 26, United States Code, section 401, defining pension, profit-sharing, and stock bonus plans that are qualified for beneficial tax treatment, provides at subdivision (a)(37) as follows:

Death benefits under USERRA [Uniformed Services Employment and Reemployment Rights Act] -qualified active military service. A trust shall not constitute a qualified trust unless the plan provides that, in the case of a participant who dies while performing qualified military service (as defined in section 414(u) [26 USCS § 414(u)]), the survivors of the participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the plan had the participant resumed and then terminated employment on account of death.

Title 26, United States Code, section 414(u) (5) defines "qualified military service" as follows:

Qualified military service. For purposes of this subsection, the term "qualified military service" means any service in the uniformed services (as defined in chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.]) by any individual if such individual is entitled to reemployment rights under such chapter with respect to such service.

- (5) Applicable to County of Los Angeles only, where the member dies as a direct consequence of active military service while on military leave from county or district employment, surviving spouse is entitled to the combined benefit under Section 31781.3 even if the member did not have five years of service credit.**

Government Code section 31720.4 provides as follows:

(a) Notwithstanding subdivision (b) of Section 31720, a member who becomes permanently incapacitated for the performance of duty with his or her employing county or district as a direct consequence and result of injury or disease arising out of, and in the course of, active military service while on military leave from the county or district, shall be retired for nonservice-connected disability regardless of age or years of service.

(b) Notwithstanding any provision to the contrary in Section 31781.3, the surviving spouse of a member who dies as a direct consequence and result of injury or disease arising out of, and in the course of, active military service while on military leave from his or her employing county or district, shall be entitled to the combined benefit under Section 31781.3 regardless of the member's years of service at the time of death.

(c) For the purposes of this section:

(1) "Active military service" means full-time duty within a branch of the Armed Forces of the United States.

(2) "Military leave" means an authorized leave of absence taken from a member's employing county or district as a result of a member being called to active military service because of his or her position as a reservist or member of the National Guard.

(d) This section shall apply only to the County of Los Angeles and shall not be operative with regard to the county, or a district within the county, until the board of supervisors of the county, or the governing body of the district, elects, by resolution adopted by a majority vote, to make this section operative. The adoption of a resolution making this section operative shall not create a vested right with respect to any member prior to the member's retirement or death. The board of supervisors or the governing body of the district may repeal or amend the resolution at any time, except to the extent that it would affect a member who is retired or is deceased at the time of the repeal or amendment. (Added Stats 2010 ch. 83 § 1 (AB 1739), effective January 1, 2011.)

- (6) Applicable to counties of the seventh class only, final compensation for purposes of the service-connected death benefit for death of a safety member before retirement under Section 31787 is increased when compensation for active**

members is increased until the earlier of death of the surviving spouse or eligible children or the date the deceased member would have turned 50 years of age.

Government Code section 31787.65 provides as follows:

(a) For purposes of Section 31787, the final compensation upon which the special death benefit is calculated for the eligible surviving spouse or eligible children of a safety member killed in the performance of his or her duty shall be increased at any time the increase is effective and to the extent the compensation is increased for then-active members employed in the job classification and membership category that was applicable to the deceased member at the time of the injury, or the onset of the disease, causing death. The deceased member's final compensation shall be deemed to be subject to further increases hereunder only until the earlier of (1) the death of the surviving spouse or eligible children or (2) the date that the deceased member would have attained the age of 50 years.

(b) This section applies only to a county of the seventh class, as defined by Sections 28020 and 28028, as amended by Chapter 1204 of the Statutes of 1971, and shall not be operative until the board of supervisors, by resolution, makes this section applicable in the county. A resolution to make this section operative in the county shall specify whether these provisions apply retroactively or prospectively only. (Added Stats 2009 ch. 583 § 1 (SB 345), effective January 1, 2010.)

c) Where the member dies as a result of a nonservice-connected injury or illness and the member would not have qualified for a nonservice-connected disability retirement because the member lacked five years of service, the survivors, beneficiaries, or estate are to receive the basic death benefit, plus interest on contributions

Government Code section 31780 provides in part as follows:

Upon the death before retirement of a member while in service or while physically or mentally incapacitated for the performance of his duty, if such incapacity has been continuous from discontinuance of service, or within one month after discontinuance of service unless the member's accumulated contributions have been paid to the member pursuant to Section 31628, the retirement system is liable for a death benefit which shall be paid:

....

(b) If no election is made pursuant to Section 31765 [deceased member eligible to retire, surviving spouse may elect Optional settlement # 3, and receive all or part of member's additional contributions and annuity will not include the sums paid in a lump sum] 31765.1, [in certain counties, death of member eligible to retire, spouse may elect to receive 60% of an unmodified retirement allowance,

plus a lump sum member's accumulated contributions] 31765.11 [Contra Costa County; generally, where member eligible to retire for years of service or disability dies before retirement, spouse may elect to receive 60% of an unmodified retirement, plus 20% for each child up to a family maximum of 100%; if there is no spouse or spouse dies before making an election and there is at least one eligible child, guardian of child or children make elect to receive 60% of the allowance the member would have received; plus other provisions], or 31781.1 [death before retirement resulting from nonservice-connected cause where member would have been entitled to retirement, surviving spouse, or eligible children where there is no surviving spouse, may elect to receive 60% of member's allowance; plus other provisions], or 31787 [death prior to retirement for service-connected reasons, surviving spouse, or the guardian of the member's child or children, if member left no surviving spouse but leaves an unmarried child or children under 18, may elect to receive an allowance equal to the retirement allowance the member would have received; plus other provisions] and no person is entitled to a survivor's allowance pursuant to Article 15.5 (commencing with Section 31841) or Article 16 (commencing with Section 31861) to such person as he nominates by written designation duly executed and filed with the board, before the death of the member, or

(c) If no such election is made, and a parent as defined in Article 15.5 but no other person is entitled to a survivor's allowance pursuant to Article 15.5 or 16 and a surviving spouse or child is designated as beneficiary, to such surviving spouse or child, or

(d) If no such election is made, no person is entitled to a survivor's allowance pursuant to Article 15.5 or 16, and a member has not nominated a beneficiary, to his estate.

Associations' comment

Section 31780 establishes liability for the basic death benefit to a designated beneficiary (subdivisions (b) and (c)) or if there is no designated beneficiary, to the deceased member's estate (subdivision (d)). Note that where there is a surviving spouse and the member had failed to designate the spouse as beneficiary, the spouse may be deemed to have been nominated. (Gov. Code § 31458.2) Section 31781 defines of what the death benefit consists: the member's accumulated contributions (subdivision (a)), and, from contributions from the county or district, one-twelfth of the annual compensation earnable by the member during the twelve months preceding his or her death, multiplied by the number of completed years of service; the additional limitation that the later piece of the benefit not exceed 50% of the member's annual compensation would not apply to one with less than five years of service since the beneficiary of a member with less than five years of service would receive less than 5/12ths of the member's annual compensation.] Other Government Code provisions provide that interest on the member's accumulated contributions is also payable. (Gov. Code §§ 31591, 31472 and 31472.1]

d) Effect of death on retired member's selection of unmodified or optional settlements where the application for disability retirement is pending.

Government Code section 31725.7 provides in pertinent part as follows:

(a) At any time after filing an application for disability retirement with the board, the member may, if eligible, apply for, and the board in its discretion may grant, a service retirement allowance pending the determination of his or her entitlement to disability retirement. If he or she is found to be eligible for disability retirement, appropriate adjustments shall be made in his or her retirement allowance retroactive to the effective date of his or her disability retirement as provided in Section 31724.

(b) This section shall not be construed to authorize a member to receive more than one type of retirement allowance for the same period of time nor to entitle any beneficiary to receive benefits which the beneficiary would not otherwise have been entitled to receive under the type of retirement which the member is finally determined to have been entitled. In the event a member retired for service is found not to be entitled to disability retirement he or she shall not be entitled to return to his or her job as provided in Section 31725.

(c) If the retired member should die before a final determination is made concerning entitlement to disability retirement, the rights of the beneficiary shall be as selected by the member at the time of retirement for service. The optional or unmodified type of allowance selected by the member at the time of retirement for service shall also be binding as to the type of allowance the member receives if the member is awarded a disability retirement.

(d) Notwithstanding subdivision (c), if the retired member should die before a final determination is made concerning entitlement to disability retirement, the rights of the beneficiary may be as selected by the member at the time of retirement for service, or as if the member had selected an unmodified allowance. The optional or unmodified type of allowance selected by the member at the time of retirement for service shall not be binding as to the type of allowance the member receives if the member is awarded a disability retirement. A change to the optional or unmodified type of allowance shall be made only at the time a member is awarded a disability retirement and the change shall be retroactive to the service retirement date and benefits previously paid shall be adjusted. If a change to the optional or unmodified type of allowance is not made, the benefit shall be adjusted to reflect the differences in retirement benefits previously received. This paragraph shall only apply to members who retire on or after January 1, 1999.

II. THE FOUR PRIMARY ISSUES IN DISABILITY RETIREMENT HEARINGS

- A. Is the member permanently incapacitated?
- B. If the member is incapacitated, is the incapacity service-connected?
- C. Should the application be deemed to have been filed on the day following the day for which the applicant last received regular compensation?
- D. Is the applicant entitled to a Supplemental Disability Allowance (some counties)?

A. Is the member permanently incapacitated?

Government Code section 31720 provides in part as follows:

Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

(a) His incapacity is a result of injury or disease arising out of and in the course of his employment and such employment contributes substantially to such incapacity, or

(b) The member has completed five years of service, . . .

Government Code section 31724 provides in part as follows:

If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him effective on the expiration date of any leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. . . .

Associations' comment

Finding permanent incapacity involves a two-step determination:

1. Is the member physically or mentally substantially incapacitated from performing the usual duties of the job; and, if so,
2. Is the incapacity permanent?

End comment.

1. **The Court of Appeal in *Mansperger* defined "incapacity" as the inability of the applicant to substantially perform his or her usual duties.**

The court in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450] defined the term "incapacitated for the performance of duty" in the Public Employees Retirement Law, Government Code section 21022. Mansperger was a state fish and game warden who sustained injury to his right arm while arresting a suspect. He claimed that the residual disability incapacitated him for his duties. As a warden, Mansperger was a peace officer and was required to be able to shoot a gun, arrest suspects, move animals, and perform other duties typically associated with public safety occupations. An examining orthopedic surgeon opined that Mansperger was not incapacitated for his usual and customary duties; Mansperger could not engage in heavy lifting or carrying, but it did not appear that he normally performed this sort of work. In addition, Mansperger had returned to work and had demonstrated his ability to perform his duties. The Court of Appeal ruled:

. . . . We hold that to be "incapacitated for the performance of duty" within section 21022 means the substantial inability of the applicant to perform his usual duties.

While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do [*sic*] occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens. Petitioner testified that, since his accident, he was able to perform all his required duties except lifting a deer or lifting a lobster trap out of kelp. (Footnote omitted.) (*Mansperger*, pp. 876-877.)

2. The *Mansperger* definition of "incapacity" under the Public Employees Retirement Law has been applied in cases arising under the County Employees Retirement Law of 1937.

Harmon v. Board of Retirement of San Mateo County (1976) 62 Cal.App.3d 689, 694-696 [133 Cal.Rptr. 154]:

Before examining the foregoing evidence it is necessary to determine what is meant by the requirement that the employee be "permanently incapacitated physically or mentally for the performance of his duties in the service." (Gov. Code, § 31724, fn. 1 above.) In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450], the court was concerned with the phrase "incapacitated for the performance of duty" as used in section 21022 of the Government Code covering the retirement of highway patrol or local safety members of the state public employees' retirement system. There the employee, a fish and game warden, was not disabled, except for activities requiring heavy lifting and carrying. The court decided, "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the *substantial* inability of the applicant to perform his usual duties." ([*Italics are the Mansperger court's.*] 6 Cal.App.3d at p. 876. See also *Cansdale v. Board of*

Administration (1976) 59 Cal.App.3d 656, 664 [130 Cal.Rptr. 880]. In *Barber v. Retirement Board* (1971) 18 Cal.App.3d 273 [95 Cal.Rptr. 657], the shoe was on the other foot. A fireman was fighting compulsory retirement. In reviewing the matter the court rejected the fire chief's contention that "incapacitated for the performance of his duty" as found in the provisions for compulsory retirement in a city charter meant "*any and all duties that are performed by firemen.*" ([*Barber*] 18 Cal.App.3d at p. 278, italics the [*Barber*] court's.) It concluded, "We think that in view of the well recognized public policy favoring the employment and utilization of physically handicapped persons (Welf. & Inst. Code, § 10650), the Chief's interpretation here was too broad. Under the circumstances, where there were permanent light duty assignments, a narrower construction declaring 'his duty' in section 171.1.3 to refer to duties required *to be performed in a given permanent assignment within the department* would be more reasonable." (*Id.* See also *Craver v. City of Los Angeles* (1974), *supra*, 42 Cal.App.3d 76, 79-80 [117 Cal.Rptr. 534].) [Italics are the *Harmon* court's.]

In *Mansperger v. Public Employees' Retirement System*, the court upheld the findings of the governing board of the retirement system and the trial court that the employee was not entitled to a retirement pension. It stated, "While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do [*sic*] occur in petitioner's job, they are not a common occurrence for a fish and game warden." (6 Cal.App.3d at pp. 876-877.) Here even accepting in full the facts and opinions in the doctor's reports, and disregarding the testimony of the investigator and the supporting motion pictures, the record supports the implied finding that the deputy was not incapacitated for the performance of the duties of bailiff or other duties set forth in the civil service classification which did not involve heavy lifting or frequent necessity, as on patrol, for the use of considerable physical effort to subdue arrestees or prisoners.

Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957, 961-962 [191 Cal.Rptr. 421]:

Appellant urges a "full range of duties" construction of section 31729 to impose the requirement that unless he is fully fit for vehicular pursuit, he be found incapacitated. Existing authority does not support this position. While no cases specifically construing sections 31729 and 31730 can be located, similar language has been defined. *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450] held that "'incapacity for the performance of duty' within section 21022 means the *substantial* inability of the applicant to perform his usual duties." (*Id.*, at p. 876, italics in [*Mansperger*] original.) In *Barber v. Retirement Board* (1971) 18 Cal.App.3d 273 [95 Cal.Rptr. 657] the phrase "incapacitated for the performance of his duty" in the San Francisco Charter section relating to firemen was construed to refer to "duties

required to be performed in a given permanent assignment within the department" (*Id.*, at pp. 277-278, italics in original.) *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76 [117 Cal.Rptr. 534], dealt with the similar issue of physically disabled police officers. Citing *Barber, supra.*, *Craver* held that, "... where there are permanent light duty assignments and a person who becomes 'incapacitated for the performance of his duty ... shall be retired,' that person should not be retired if he can perform duties in a given permanent assignment within the department. He need not be able to perform any and all duties performed by firemen or, in the instant case, policemen. Public policy supports employment and utilization of the handicapped. (*Barber, supra.*) If a person can be employed in such an assignment, he should not be retired with payment of a disability retirement pension." (*Craver, supra.*, 42 Cal.App.3d at pp. 79-80.) Recently, in *O'Toole v. Retirement Board* (1983) 139 Cal.App.3d 600 [188 Cal.Rptr. 853], another division of this court construed the phrase "incapacitated for the performance of his duty" in the San Francisco Charter section relating to policemen, and held that if the injured police officer "was able to perform the duties of his permanent assignment within the department, under the *Barber-Craver* standard, he should not be retired with a disability pension." (*Id.*, at p. 603.) Most persuasive, however, is *Harmon v. Board of Retirement, supra.*, 62 Cal.App.3d at pp. 694-695, in which the court, defining the phrase "permanently incapacitated physically or mentally for the performance of his duties in the service" as contained in section 31724, adopted the construction of *Mansperger and Barber, supra.* Sections 31724, 31729 and 31730 are all in article 10, entitled "Disability Retirement," of the County Employees' Retirement Law. (Gov. Code, § 31450 et seq.) They were enacted simultaneously, deal with the same subject matter and are in pari materia. As such, they should be harmonized and similarly construed. (*People v. Navarro* (1972) 7 Cal.3d 248, 273-274 [102 Cal.Rptr. 137, 497 P.2d 481]; *Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 687 [91 Cal.Rptr. 585, 478 P.2d 17]; *Hamilton v. State Bd. of Education* (1981) 117 Cal.App.3d 132, 141 [172 Cal.Rptr. 748]; *In re Marriage of Pinto* (1972) 28 Cal.App.3d 86, 89 [104 Cal.Rptr. 371].)

With established rules of statutory construction in mind (see *Palos Verdes Faculty Assn. v. Palos Verdes Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658-659 [147 Cal.Rptr. 359, 580 P.2d 1155]) and the persuasive rationale of *Mansperger, Barber, Craver, O'Toole and Harmon, supra.*, as precedent, we reject appellant's suggested construction of sections 31729 and 31730.

Curtis v. Board of Retirement (1986) 177 Cal.App.3d 293, 297-298 [223 Cal.Rptr. 123]:

By the terms of Government Code section 31720, the appellant need be incapacitated only for performance of duty and it is not enough to disqualify appellant to show that she is able to do some other kind of job than she has been working in the county.

The court in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877 [86 Cal.Rptr. 450], in a case involving injuries to a

game warden's arm that he contended made him physically incapacitated from performing his duties, stated as follows: "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the *substantial* inability of the applicant to perform his usual duties. [¶] While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do [*sic*] occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens." (Italics in original.)

Appellant argues that pension laws are to be liberally construed, resolved all ambiguities in favor of the appellant. [*Sic*] (*Gorman v. Cranston* (1966) 64 Cal.2d 441 [50 Cal.Rptr. 533, 413 P.2d 133]); *Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815 [111 Cal.Rptr. 841].)

The object of the disability allowance is not solely to compensate a member with a pension. The disability retirement allowance has as its objective the effecting of efficiency and economy in public service by replacement of employees, without hardship or prejudice, who have become superannuated or otherwise incapacitated. Therefore, the primary test before us is whether petitioner is substantially incapacitated from the performance of duty, and the rule of liberality of construction does not change that test. (*Mansperger v. Public Employees' Retirement System, supra.*, 6 Cal.App.3d 873.)

It is the Board which must determine whether an applicant is permanently incapacitated for the performance of duty. (Gov. Code, § 31725; *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394 [109 Cal.Rptr. 186].)

It is a question of fact to be determined from the evidence presented. (*Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155 [236 P.2d 651].) The record reflects the hearing officer, in his review of the evidence, especially the medical testimony, stated that appellant is not substantially unable to perform her usual duties which do not include the activities which doctors warn she cannot do; heavy lifting, repeated bending and stooping. The testimony of Doctors Hirabayashi and Phillips was particularly impressive since it was submitted by appellant.

3. "Full range of duties test" rejected in CERL of '37 cases.

Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 695-697 [133 Cal.Rptr. 154]:

.... Here even accepting in full the facts and opinions in the doctor's reports, and disregarding the testimony of the investigator and the supporting motion pictures, the record supports the implied finding that the deputy was not incapacitated for the performance of the duties of bailiff or other duties set forth in the civil service

classification which did not involve heavy lifting or frequent necessity, as on patrol, for the use of considerable physical effort to subdue arrestees or prisoners.

The deputy seeks to avoid the foregoing conclusion by reference to testimony of the assistant sheriff that since July 1, 1973, it was the policy of the sheriff's office not to restore officers to duty unless they were 100 percent fit for any duty to which they might be assigned, and that at the time of the hearing before the referee in April 1974, some eight months after the deputy, not the sheriff, had terminated the employment relationship, there was no position available in the sheriff's office which would not involve a significant risk of violence. He relies upon *Barber v. Retirement Board, supra*, where the board, the trial court, and the Court of Appeal upheld the compulsory retirement of the fire lieutenant sought by the fire chief because there was no light duty available for one of the lieutenant's rank with his disability. (18 Cal.App.3d at pp. 279-280. See also *Dobbins v. City of Los Angeles* (1970) 11 Cal.App.3d 302, 305-306 [89 Cal.Rptr. 758]; and *O'Neal v. City of San Francisco* (1969) 272 Cal.App.2d 869, 874-875 [77 Cal.Rptr. 855].) In this case the sheriff is not a party seeking to force the deputy to retire.

Under the provisions of the County Employees Retirement Law of 1937, the employer is entitled to secure judicial review of a decision denying an employee retirement because the retirement board, as here, is not satisfied from the medical examination and other evidence that the member is incapacitated for the performance of his duties. If no such action is taken by the employer and the denial becomes final the employer must reinstate the employee. (Footnote omitted (See *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, 398-400 [109 Cal.Rptr. 186].))

Moreover, the assistant sheriff's testimony when taken as a whole does not foreclose the possibility that there were positions in the sheriff's office which could be performed by one subject to the disabilities which the doctors reported that the deputy suffered.

Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957 [191 Cal.Rptr. 421]:

The standard applicable to appellant is set forth in section 31729 as "incapacitated for service in the office or department of the county or district where he was employed and in the position held by him when retired for disability." When retired for disability, appellant was in the position of deputy sheriff. The only current limitation which affects his incapacity is the possible inability to drive a pursuit vehicle. However, there are many permanent full-time positions in the sheriff's office which do not require vehicular pursuit.' (*Schrier*, p. 961.)

.....

Appellant's claim that the trial court failed to make findings concerning a "full range of duties" standard is irrelevant. The proper standard is that contained in sections 31729 and 31730, as defined in *Harmon, supra.*, 62 Cal.App.3d 689, and again herein, and the trial court properly applied that standard. (*Schrier*, p. 963.)

Associations' comment

An employer may accommodate the employee's medical conditions within the employee's existing permanent position. An employee is not disabled if she can perform modified duties in her permanent assignment. In other words, a claimant is not necessarily incapacitated even though the claimant is unable to perform the "full range" of duties of a given job assignment. (*Schrier v. San Mateo County Employees' Retirement Assn., supra.*, 142 Cal.App.3d, 959.)

End comment.

4. Distinctions in the Meaning of "Disability"

Associations' comment

The terms "disability" and "incapacity" are used interchangeably in the CERL of 1937 (e.g., Gov. Code, § 31720) and clearly refer to the member's inability to substantially perform the member's usual duties. "Disability" in workers' compensation law is not synonymous with "incapacity," but refers to a full range of impairment, from the miniscule to totally incapacitating. Distinctions in the meaning and use of the word "disability" among the systems that use the term must be kept in mind when one looks at how issues were analyzed and resolved in one of those other systems.

End comment.

a) ADA

Title 42 U.S.C. § 12102, subdivision (2):

"Disability" is

- (1) A physical or mental impairment that substantially (by comparison to an "average person") limits (considering nature, severity, duration and impact) a major life activity (e.g., caring for oneself, seeing, hearing, walking, speaking, breathing, learning, working, sitting, standing, lifting, reaching, concentrating, interacting with others, sleeping.) or
- (2) A record of such impairment, or
- (3) Being regarded as having such an impairment.

Associations' comment

Under the expansive ADA definition of "disability," the impairment does not have to be permanent or even presently incapacitating.

End comment.

b) Workers' Compensation

Before the 2004 workers' compensation reform legislation, "permanent disability" was defined as a permanent injury that impaired a worker's earning capacity or a worker's bodily function, or that created a competitive handicap for the worker in the open labor market. (*Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 237 [145 Cal.Rptr. 22].)

The 2004 workers' compensation reform legislation changed the definition of "disability" for workers' compensation purposes. Labor Code section 4660 was amended to provide, in part, as follows:

(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

(b)

(1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

In its April 2004 *Summary of SB 899 by Labor Code Section*, the Commission on Health and Safety and Workers' Compensation explained how SB 899 changed the meaning of "disability":

One of the basic principles of PD [ed. "permanent disability"] rating, "diminished ability to compete," is now replaced by "diminished future earning capacity." Other basic principles remain the nature of the physical injury or disfigurement, age, and occupation. . . . [¶] The 'nature of the physical injury or disfigurement' shall incorporate the AMA Guides for both descriptions and percentage impairments.'

Bruce A. Barron, M.D., in a medical journal article for physicians who become involved in disability issues, explained the term "disability," writing,

. . . . For the most part, "disability" is an administrative term that refers to an individual's inability to perform certain activities of daily living, such as work. Disability should not be confused with "impairment," which is a medical term.

According to the American Medical Association's "Guides to the Evaluation of Permanent Impairment," [footnote omitted] impairment can be defined as a loss of physiologic function or anatomic structure. Permanent impairment implies that the condition has persisted to a sufficient degree that further medical, psychologic, surgical and rehabilitative interventions are unlikely to produce any substantial improvement in the condition, level of function or quality of life over the course of the next year. By contrast, disability can be defined as a reduced ability to meet occupational demands as a result of impairment and other associated factors. Therefore, disability is a broad term that encompasses not only impairment but also a multitude of other factors, as listed in Table 1.5, [Table and Footnote omitted] Disability is frequently stratified in terms of extent and permanency [Figure 1, omitted]. (Barron, *Disability Certifications in Adult Workers: A Practical Approach*, American Family Physician, [a journal of the American Academy of Family Physicians], November 1, 2001, Vol. 64, No. 9.)

c) CERL of 1937

"Permanent incapacity" for the performance of duty is the substantial inability of a member to perform his or her usual duties. (*Harmon v. Board of Retirement, supra*, (1976) 62 Cal.App.3d 689, 694-696 [133 Cal.Rptr. 154].)

Associations' comment

The Board of Retirement has no authority to enforce the ADA or to force the employer to provide reasonable accommodations to a member. However, in determining whether a member is permanently incapacitated for the performance of the usual duties of his or her job, the Board should consider those accommodations that have been or should be offered by the employer so that the member can continue to work.

End comment.

(1) What is a "usual duty."

Associations' comment

The Court of Appeal in *Mansperger* did not define "substantial inability" or "usual duty." The closest the Court came to providing a definition was stating what was not a usual duty. The court held that a duty that is a "remote occurrence" or "not a common occurrence" is not a "usual duty." It follows that an inability to perform a duty that is a remote or uncommon occurrence is not a substantial inability to perform the usual duties of the job. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d, 877.)

- (a) Duties listed in a job classification are not the measure of a member's usual duties if the duties listed are not actually performed.**

In *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327 [263 Cal.Rptr. 224] a supervising cook at a county jail asserted that he was entitled to the presumption that his heart trouble was service connected. He pointed to a class specification that stated that a supervising cook was responsible for handling emergencies in the kitchen and argued that this translated into a requirement that he handle prisoners and engage in active law enforcement. The Court of Appeal found the class specification reference to "emergencies" to be vague, and, perhaps, only a reference to administrative emergencies, such as not having enough cooks on a shift. On the significance of the class specification, the court concluded,

However, Glover's ultimate status should be based on the duties he actually performed and not the duties listed in a job analysis or other documents. (*Neeley v. Board of Retirement* [(1974)], *supra*, 36 Cal.App.3d 815, 818, fn. 2 [111 Cal.Rptr. 841] and cases cited therein.)

See subsection II, A, 12, below, for a discussion of the effect of the employer providing a lighter duty assignment of indefinite duration to a disabled member.

Associations' comment

A member need not be physically or mentally incapable of performing each and every duty that may arise within the job classification in order to qualify for a disability retirement.

Other laws in respect to disability create controversial issues as to what standard is to be used to judge a "disability." If an employee was disabled for her usual and customary duties, the employee may have been "a qualified injured worker" and entitled to rehabilitation under the Workers' Compensation Act if her injury occurred before the effective date of the repeal of the rehabilitation feature of the workers' compensation law. (April 19, 2004 versus January 1, 2004. See the discussion of issues arising under the rehabilitation provisions of the workers' compensation law, including the elimination of those provisions under the April 2004 reforms, beginning at Section II, A, 16.) However, that the employee was entitled to rehabilitation benefits did not mean that the employee was entitled to a disability retirement. For example, a clerk may have been disabled for his usual and customary duties and may have been entitled to rehabilitation services in the form of assistance with placement. The rehabilitation services may have entailed only switching the clerk from one desk to another. In such circumstances, the facts that entitled the clerk to rehabilitation benefits may not have entitled him to retirement benefits.

The employer may find that the member is unable to perform an "essential job function," a standard under the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.), and conclude that the employee is unable to continue working. The Board of Retirement may determine that the member is able to substantially perform her usual duties, even if the member is unable to perform a duty that the employer considers to be an essential job function. In such a case, unless the employee or the employer is successful in overturning the Board's decision, the Board's decision is preeminent and the employer

must reinstate the member. (*Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240 [21 Cal.Rptr.2d 896].)

In *Raygoza*, the court stated,

Government Code section 31725 (footnote omitted) provides that when a county employee is fired for disability, and disability retirement is denied because the evidence does not satisfy the retirement board "that the member is incapacitated physically or mentally for the performance of his duties," the employer may file a petition for a writ of mandate, or join in such a writ filed by the employee, seeking to compel a disability retirement. "If the employer does not do so or if the court upholds the [retirement] board, the section specifically provides that the employer shall reinstate the employee to his job." (*McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, 399 [109 Cal.Rptr. 186].) (*Raygoza v. County of Los Angeles, supra*, 17 Cal.App.4th, 1244.)

....

The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. *Raygoza* cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch. (*Raygoza*, p. 1247.)

End comment.

5. "Permanent" defined

Associations' comment

There is no reported appellate court opinion that defines "permanent" for purposes of the CERL of 1937, and it is not defined in the CERL of 1937 itself. The following authorities provide some guidance.

End comment.

Sweeney v. Industrial Acc. Comm. (1951) 107 Cal.App.2d 155, 159 [236 P.2d 651]:

It is a fact that on four different occasions since February, 1949, when exposed to cinnamon, he developed dermatitis and all the doctors agree that he is now sensitive to cinnamon and exposure to it at present will result in dermatitis. Those facts alone, however, do not establish that such condition will continue for the balance of his life or meet the test of permanent disability. "... a disability is generally regarded as 'permanent' where further change-for better or worse-is not reasonably to be anticipated under usual medical standards. It may be that no further treatment is possible, or that the only treatment suggested is so problematical of success as to warrant the employee's refusal to undergo it. In such an event, it is permanent within the meaning of the Act. In practical legal

results, the healing period is over and a permanent aftermath of disability exists. ... Ordinarily the term permanent, when applied to a personal injury means 'lasting during the future life of the injured party.' " (Campbell, Workmen's Compensation, vol. I, § 813, p. 719.) The evidence upon which petitioner relies is the statement of Dr. Epstein that the "sensitivity to cinnamon will probably remain for an indefinite period of time but it is impossible to know how long such a sensitivity will remain." This is not a prognosis that it will remain all his life or will be permanent. The most that can be said of the statement is that it is susceptible of two reasonable inferences, one that it might continue for his lifetime, the other that it may not so continue. The commission adopted the second inference and we are bound by their selection. Dr. Epstein's statement in nowise compels the adoption of the first inference.

In *Subsequent Injuries Fund v. Industrial Acc. Comm. (Rogers)* (1964) 226 Cal.App.2d 136 [37 Cal.Rptr. 844], the Court of Appeal affirmed the commission's finding that an amputee's recurrent swelling and drainage of the leg stump over the course of two and a half years, during which time correction of the problem with surgery was attempted, was permanent and stationary notwithstanding that the amputee testified that he intended to undergo another attempt at remedial surgery.

The applicable statutes provide no definition of permanent disability. However it is now settled that a disability is permanent within the meaning of the Workmen's Compensation Law when further change for better or for worse is not reasonably to be anticipated under usual medical standards. Either no further medical treatment is possible or the success of that which is suggested is so problematical as to warrant refusal to undergo it. Generally speaking a permanent disability is one which will remain substantially the same during the remainder of the injured party's life. (*Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155, 159 [236 P.2d 651] quoting from 1 Campbell, Workmen's Compensation, § 813, p. 719.) According to Hanna (2 Hanna, *The Law of Employee Injuries and Workmen's Compensation* (1954 ed.) p. 255) "Permanent disability may be defined as any impairment of bodily or mental function which remains after maximum recovery has been attained from the effects of injury, and which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market." Whether an injury is permanent is purely a question of fact for the determination of the commission which is final and conclusive on said issue if supported by any substantial evidence. [Citations.]

The Public Employees Retirement Law, in Government Code section 20026, provides,

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

Until it was amended effective January 1, 2005, Title 8, California Code of Regulations section 10152 [Division of Workers' Compensation, Administrative Director - Administrative Rules] provided,

A disability is considered permanent after the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time.

As part of the implementation of the 2004 workers' compensation reforms, Section 10152 was amended to provide,

A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment.

This amendment conformed the Administrative Rules of the Administrative Director to the definition of "maximal medical improvement" contained in the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, pages 2 and 601.

Maximal medical improvement (MMI) A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated. (Guides, Glossary, p. 601.)

The AMA definition is also incorporated in the Schedule for Rating Permanent Disabilities (January 2005), pages 1-2:

The extent of permanent disability that results from an industrial injury can be assessed once an employee's condition becomes permanent and stationary. Permanent and stationary is defined as the point in time when the employee has reached maximal medical improvement (MMI), meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment. (AMA Guides, p. 2.)

Associations' comments

The Schedule departs from the distinction made by the California Supreme Court in *Industrial Indem. Exch. v. Industrial Acc. Comm. (Riccardi)* (1949) 90 Cal.App.2d 99, at 102 [202 P.2d 585] between the "condition," which might change over time, and the "disability," which may be permanent notwithstanding the changes that may be going on with the "medical" or "physical" condition.

Riccardi sustained a traumatic injury to his heart, the repair of which was too risky to perform. At issue was whether he was temporarily or permanently disabled.

Respondents also argue that because Riccardi may become progressively worse and because digitalis and restricted activity may improve his general condition

his physical condition is not stable and is therefore temporary. This confuses physical condition with disability. His disability is now permanent though his physical condition may be subject to change for the worse or to slight periodic improvement. The need for medical treatment is not incompatible with a status of permanent disability and may be allowed in connection with an award for permanent total disability where necessary. [Citation.] (*Ibid.*)

Given the AMA's definition of MMI and the Schedule's definition of "permanent and stationary," perhaps Riccardi today would be found not to be permanent and stationary because further medical improvement was anticipated.

The Board of Retirement of the Los Angeles County Employees Retirement Association, based on legal advice, adopted the Division of Workers' Compensation's definition of "permanent and stationary" and has instructed its consulting physicians to use that definition when reporting on the disability status of LACERA applicants for disability retirement.

Note that while the AMA's Guides provides that an assessment of permanent impairment rating may be performed once the impairment has reached maximal medical improvement (Guides, ch. 2, sec. 2.4, p. 19), the Court of Appeal has held that the existence of permanent disability may be determined even though the injured worker's condition is not permanent and stationary. (*Genlyte Group, LLC v. Workers' Comp. Appeals Bd.* (2008) 158 Cal.App.4th 705, 719 [69 Cal.Rptr.3d 903]; *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483, 496-499 [71 Cal.Rptr.3d 724]; *Lewis v. Workers' Comp. Appeals Bd. (Beutler Heating and Air Conditioning)* (2008) 168 Cal.App.4th 696 [85 Cal.Rptr.3d 661].)

Since the physicians who render opinions in disability retirement cases often use the terminology of the workers' compensation system, it is important to consider the difference between the nature of permanent disability for workers' compensation purposes and the nature of permanent disability, or incapacity, for disability retirement purposes.

Conceivably, one can be temporarily disabled for workers' compensation purposes, but permanently incapacitated for purposes of disability retirement.

For example, a county road laborer may lose an arm in an accident that also causes orthopedic injuries to the back and other parts of the body. Assume that the orthopedic injuries may be expected to heal over the course of a year. For workers' compensation purposes, the road laborer will be temporarily disabled and not permanent and stationary for workers' compensation purposes until the orthopedic injuries have reached maximal medical improvement. However, due to the loss of the arm, the road worker is permanently incapacitated from the substantial performance of his or her usual duties immediately (a court may use the term "permanent *ab initio*") and, perhaps, long before the temporary disability period ends. There may be reasons why the commencement date of the pension might be delayed, such as the member's receipt of sick leave with compensation or vacation pay as regular compensation (Gov. Code, §

31724), but there is no need to delay the member's disability retirement merely because his or her condition is not expected to be permanent and stationary for an extensive period of time.

We assume that there is no indefinite assignment available to duties to which other road workers are assigned that would be compatible with the limitations faced by a person who has lost an arm. If there is such an assignment, the "permanent disability" in the workers' compensation sense would not be considered "permanently incapacitating" in the disability retirement sense. See discussions below at Section II, A, 12.

On the other hand, an employee may have a very high permanent disability rating for workers' compensation purposes, yet still be capable of substantially performing the usual duties of the job. A discussion of these concepts is contained in 1 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) §§ 8.01 (What Permanent Disability Means) and 8.02 (Permanent Disability Rating).

End comment.

6. Effect of a need for continuing medical treatment on the question of the permanence of incapacity

That the applicant continues to need medical treatment is not inconsistent with the fact that the applicant's incapacity is permanent.

Industrial Indem. Exch. v. Industrial Acc. Comm. (Riccardi), supra, (1949) 90 Cal.App.2d 99, 102 [202 P.2d 850]:

Any disability must have been temporary during the healing period but that cannot prevent its later becoming permanent. ¶ Respondents also argue that because Riccardi may become progressively worse and because digitalis and restricted activity may improve his general condition his physical condition is not stable and is therefore temporary. This confuses physical condition with disability. His disability is now permanent though his physical condition may be subject to change for the worse or to slight periodic improvement. The need for medical treatment is not incompatible with a status of permanent disability and may be allowed in connection with an award for permanent total disability where necessary.

The Court of Appeal in *Subsequent Injuries Fund v. Industrial Acc. Comm.* (1964) 226 Cal.App.2d 136, 144,[37 Cal.Rptr. 844] citing *Riccardi*, held, ". . . the need for further medical treatment is not incompatible with the status of permanent disability."

7. Preexisting conditions waivers

Government Code section 31009, provides,

Prior to January 1, 1981, an applicant for employment who does not meet the physical standards established for his employment because of a physical impairment existing on the date of his employment may be required by the county as a condition to such employment to execute a waiver of any and all rights to a disability retirement under the County Employees Retirement Law of 1937 arising as a result of such impairment or any aggravation thereof while in county service.

The Court of Appeal in *Burdick v. Board of Retirement* (1988) 200 Cal.App.3d 1248, at 1255, [246 Cal.Rptr. 555] held that a waiver was unenforceable:

In determining the validity of the waiver executed by Burdick, the crucial issue is whether her diabetic condition when she applied for County employment constituted a job-related impairment. The record contains no evidence Burdick's diabetic condition at that time made her unable to perform her duties as an intermediate clerk typist or unable to perform such duties in a manner not dangerous to the health and safety of herself or others. The waiver was not based upon a job-related impairment or any other bona fide occupational qualification. Thus, the waiver is unenforceable against Burdick. (*Burdick v. Board of Retirement, supra*, 200 Cal.App.3d, 1254.)

. . . .

At the time Burdick was required to execute the waiver, her controlled diabetes did not interfere with her ability to perform [her duties] or pose a risk to the health and safety of herself or others. It was not reasonably foreseeable her job duties would likely aggravate her diabetic condition or enhance the probability of disability. The County's discrimination was impermissible because her controlled diabetes did not constitute a job-related impairment. (*Burdick v. Board of Retirement, supra*, 200 Cal.App.3d, 1256.)

Association's comment

Government Code section 31009, enacted in 1965, permitted an applicant for employment to waive a right to a disability retirement if he or she did not meet the physical standards established for the position because of a physical impairment. Section 31009 was amended in 1980 to limit its application to persons employed prior to January 1, 1981.

End comment.

The California Attorney General concluded that Section 31009 is constitutional. See 64 Ops.Cal.Atty.Gen. 837 (1981), at 846:

Section 31009, as amended, does not present any significant constitutional question, nor is it, for the reasons hereinabove set forth, in conflict with any state or federal law. In order for a pre-existing conditions waiver to be enforceable, the

waiver must be based on a job-related impairment or other bona fide occupational qualification.

8. Pain as the basis of a claim of incapacity

When is pain a factor of disability? Issues arise when the applicant's complaint of pain cannot be verified by the presence of objective findings consistent with the pain.

a) Pain as not disabling

Universal City Studios, Inc. v. Workers' Comp. Appeals Bd. (1979) 99 Cal.App.3d 647 [160 Cal.Rptr. 597]:

At bench the evidence (as opposed to the statutory presumption) of actual physical inability to compete (the disability) is based entirely upon subjective complaints of slight or minimal pain. There is no testimony or other evidence of objective findings that the condition in any way, physiologically or functionally, prevents or disables the employee from performing whatever work she could have or would have performed in the future. There is only evidence that when she stands for a protracted period of time, dances, squats, or walks a certain number of blocks, she then complains of some aching or pain. While there is no evidence of any reason to doubt the truthfulness of the employee, the presence of pain is not a compensable limitation. It is but one of the subjective factors that the doctor considers in determining the actual existence of new limits upon motion or actual use of the particular part of the body. (*Universal City Studios, Inc. v. Workers' Comp. Appeals Bd.*, *supra*, 99 Cal.App.3d, 656-657. Parentheticals in the text are the court's.)

.....

Examining the evidence closely, it is clear that the only evidence which supports the theory that the employee should be confined to semisedentary work as classified by the rater, is the evidence of the employee's own subjective complaints and the doctor's acceptance of that subjective complaint. There is no objective evidence that the doctors concluded that Lewis is permanently restricted by reason of this injury to semisedentary work. None of the objective findings of any doctor disclose any physical abnormality or any functional disability of Lewis' left foot.

There is no evidence that Lewis tried to return to her work although the independent medical examiner and another doctor stated that she was able to perform work which would permit her to stand equally, alternately and intermittently throughout the day. On the other hand, there is evidence that after her injury, she danced, and took a three week trip to Detroit, during which she chose to do without the medical therapy then being provided for her by her employer.

The worker is not to be penalized for trying to lead a normal life. The foregoing matters, however, are matters of evidence and part of the entire record which should be assessed on a side by side basis with other evidence in determining her physical condition and ability. (*Universal City Studios, Inc. v. Workers' Comp. Appeals Bd.*, *supra*, 99 Cal.App.3d, 657-658.)

....

We do not say that the rating procedures or the purposes thereof are unconstitutional. We simply observe that under *Hale v. Morgan, supra.*, (1968) 22 Cal.3d 388 [149 Cal.Rptr. 375, 584 P.2d 512] upon a case by case [*sic*] examination (*Id.*, at p. 404), when we discern an inequitable result, it is our duty to require reexamination. These principles, when applied, require reconsideration by the Board. Guided by the teaching of *Hale v. Morgan*, simply and basically stated, we conclude here that the award is so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair. [Footnote omitted.] On the evidence available in this record, the award demonstrates a windfall not just and fair compensation. (*Universal City Studios, Inc. v. Workers' Comp. Appeals Bd.*, *supra*, 99 Cal.App.3d, 659.)

b) Acceptance of subjective complaints in the absence of evidence to the contrary

Baker v. Workmen's Comp. Appeals Bd. (1971) 18 Cal.App.3d 852, 859-860 [96 Cal.Rptr. 279]:

In the absence of evidence to the contrary, the referee and the board must assume the truth of petitioner's uncontradicted and unimpeached testimony respecting the genuineness of his complaints. (See *Place v. Workmen's Comp. App. Bd.*, (1970) 3 Cal.3d 372, 379 [90 Cal.Rptr. 424, 475 P.2d 656].) Given the truth of petitioner's testimony, the board's finding that petitioner did not sustain an industrial injury cannot be reached by simply ruling out heart disease. The only reasonable inference which can be drawn from the evidence is that petitioner suffers from a form of psychoneurotic injury which doctors termed "cardiac neurosis."

Association's comment

Baker was a firefighter who developed chest pains after he was exposed to smoke at a fire. Medical evidence established that he did not have heart disease. The Appeals Board denied his claim on the basis that he did not have heart disease and the presumption that heart trouble is work-related, therefore, did not arise. The Court of Appeal reversed on the basis that there was no substantial evidence supporting a finding that the applicant did not have a work-related injury nonetheless, perhaps on the basis of a cardiac neurosis. The court's opinion addresses the question of whether

Baker had sustained a work-related injury, not whether he was permanently incapacitated.

End comment.

In *Gillette v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312 [97 Cal.Rptr. 542], a firefighter claimed to have a disability caused by injury to his heart. He suffered a heart attack while on vacation in 1969. He pointed to the onset of chest pain in the fall of 1968 while fighting a fire. Attorneys for the defendant city argued that the applicant's uncorroborated statements about the chest pains during the 1968 fire were self-serving and, therefore, unreliable. The court defined the issue as follows:

The only real question presented to us here is: Where a trier of fact accepts the opinion of a doctor who has used as a part of that opinion a history given by the patient, has it relied upon inadmissible evidence? (*Gillette v. Workmen's Comp. Appeals Bd.*, *supra*, 20 Cal.App.3d, 315.)

....

As stated above, the carrier has argued that petitioner's description of the September 1968 incident was unbelievable as being "self-serving." We find no merit to this argument. Every time an applicant testifies to facts which favor his claim of disability he testifies to further that cause. If the carrier denounces such testimony as unbelievable because it is "self-serving," it effectually argues that an applicant may neither testify nor state a subjective history to his doctor. That, of course, is to argue an absurdity. It also disputes well settled law to the contrary. (See Witkin, Cal. Evidence, *supra*, , s 555, pp. 529, 530, discussing Evid. Code § 1251.) The referee properly considered all of the evidence relating to the September 1968 incident. (*Gillette v. Workmen's Comp. Appeals Bd.*, *supra*, 20 Cal.App.3d, 321.)

Associations' comment

Evidence Code section 1251, cited by the *Gillette* court, provides that expressions of pain are not made inadmissible by the hearsay rule where the declarant is unavailable to testify.

End comment.

Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312 [90 Cal.Rptr. 355] involved a decision by the Workers' Compensation Appeals Board that, because the applicant delayed in reporting his injury, his claim that he sustained injury to his back could not be believed. The Supreme Court rejected the Appeals Board's rationale, stating at 3 Cal.3d, 317-318,

As a general rule, the board "must accept as true the intended meaning of [evidence] both uncontradicted and unimpeached." *LeVesque v. Workmen's Comp. App. Bd.*, *supra.*, (1970) 1 Cal.3d 627, 639 [83 Cal.Rptr. 208]; *McAllister*

v. Workmen's Comp. Appeals Bd., supra., (1968) 69 Cal.2d 408, 413 [71 Cal.Rptr. 697]; see *Wilhelm v. Workmen's Comp. App. Bd., supra.*, (1967) 255 Cal.App.2d 30, 33 [62 Cal.Rptr. 829].) At the hearing, respondents made no effort to impeach petitioner's testimony by showing, through medical opinion, that he suffered no injury on January 5, or by proving that such an injury could not have occurred in the manner testified to by him. Indeed, with one possible exception, [footnote omitted] the evidence relied upon by the appeals board sustains petitioner's assertion that he suffered an industrial accident on that date.

There is no question that petitioner did in fact have a back condition which ultimately required surgery to correct, and petitioner adequately explained his reasons for not reporting his injury to his employer or doctors.

Associations' comment

The courts' statements in *Baker* and *Garza* that the WCAB and its referee must assume the truth of the applicant's testimony is qualified. The testimony must be assumed to be true "in the absence of evidence to the contrary" and the testimony must be "uncontradicted and unimpeached." But even if there is no testimony or documentary evidence that directly contradicts the applicant's testimony, that testimony may be found not to be credible for a variety of reasons.

Evidence Code section 780 authorizes a court or jury in assessing the credibility of a witness to consider facts that have any tendency in reason to prove or disprove the truthfulness of testimony. While administrative proceedings are ordinarily not controlled by the provisions of the Evidence Code, many of the Evidence Code's provisions codify the wisdom of the common law developed over centuries, and those provisions are instructive. Evidence Code section 780 provides,

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

End comment.

Davis v. Judson (1910) 159 Cal. 121, 128 [113 P. 147]:

While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.

La Jolla Casa De Mañana v. Hopkins (1950) 98 Cal.App.2d 339, 345-346 [219 P.2d 871]:

In support of her contention defendant cites cases [citations] which are to the effect that uncontradicted and unimpeached testimony of a witness which is not inherently improbable, cannot be arbitrarily disregarded and should be accepted as true by the trier of facts where it is not found that the testimony was false, in which case the appellate courts must presume it was true. There is no argument about this general rule. However, this general rule is subject to many exceptions and limitations. An appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness.

All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. [Citations.] . . .

Associations' comment

Whether the applicant's expressions of pain can support a finding of incapacity for duty is an issue of fact. Does the Board believe the applicant's expressions of pain or not? Complaints of pain that are verified in the circumstances may persuade the Board that the complaints of pain are true and do in fact incapacitate the applicant. On the other hand, the Board may not believe complaints of pain because they are not consistent with the disability claimed or are not corroborated in the circumstances. Such complaints of pain may not, in the Board's collective opinion, be sufficient to support a finding of disability. If this is the case after the applicant has had a due process hearing, the Board and/or the Board's referee should articulate in the decision each fact that supports the Board's decision that the applicant's complaints of pain are not believed or, if believed, are not sufficient to support a conclusion that the applicant is incapacitated. [Cf., *Osenbrock v. Apfel* (2000) 240 F.3d 1157, 1165-1166: The decision of an administrative law judge articulating seven reasons why he rejected the excess complaints voiced by an applicant for social security disability benefits was upheld by a panel of the Ninth Circuit Court of Appeals.] If the Board or referee fails to articulate reasons for the rejection of the applicant's claims of pain, a reviewing court may reject the Board or referee's findings because they appear to be arbitrary.

The approach to assessing the credibility of pain in the Social Security system, exemplified in *Osenbrock*, is not binding in a CERL of 1937 case, but it is instructive:

The ALJ conducts a two-step analysis to assess subjective testimony where, under step one, the claimant "must produce objective medical evidence of an underlying impairment" or impairments that could reasonably be expected to produce some degree of symptom. *Smolen [v. Chater]* (1996, 9th Cir.), 80 F.3d [1273] at 1281-82. If the claimant meets this threshold and there is no affirmative evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Id.* at 1281, 1283-84. The ALJ may consider many factors in weighing a claimant's credibility, including "(1) ordinary techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the claimant's daily activities." [Citation.] (*Tommasetti v. Astrue* (2008, 9th Cir.) 533 F.3d 1035, 1039.)

In *Tommasetti*, the Ninth Circuit Court of Appeals affirmed the District Court's affirmation of an Administrative Law Judge's decision which was, in part, based on a finding that the claimant's complaints of pain were not credible. After finding that there was objective medical evidence of an underlying impairment, the ALJ recited specific reasons for rejecting the claimant's testimony about the severity of his symptoms: (1) the claimant did not seek an aggressive treatment program or an alternative program of medication after experiencing mild side effects (dizziness) from medication which he stopped taking and a claimant's following a conservative treatment program supports discounting complaints of severe pain; (2) the claimant's testimony about his capacity for work was vague; (3) the claimant testified that his diabetes was not disabling, inconsistent with his prior claims that it was; (4) the claimant may not have been motivated to return to work because he had \$97,000 in savings; (5) the ALJ doubted that the claimant's pain was as severe as he claimed because he was able to travel to Venezuela for an extensive period to care for an ailing sister. (*Tommasetti*, pp. 1039-1040.)

In *Universal City Studios, supra*, the described level of pain - minimal to slight - was inconsistent with the high level activity restriction imposed by the physician on whose opinion the Workers' Compensation Appeals Board relied, specifically, a restriction to semi-sedentary work. A restriction to semi-sedentary work contemplates that the individual is limited to work with the minimum demands of physical effort performed roughly half the time in a standing position or while walking, and half the time in a seated position. There were no objective findings that would support the claimant's complaints. Therefore, the Court of Appeal held that the finding of disability based on the semi-sedentary work restriction was unsupported by substantial evidence.

Appreciation of the differences in the relative severity of disability between minimal to slight subjective complaints and a restriction to semi-sedentary work may be gained by knowing that the standard rating for a constant minimal to slight pain in the back was 5% at the time of the *Universal City Studios* decision, whereas a semi-sedentary restriction called for a 60% standard rating. (Schedule for Rating Permanent Disabilities (July 1978) page 1-A, Guidelines for Work Capacity, and notes for disability of the spine, 18.1, *et seq.*)

On the other hand, in the cases of *Baker* and *Gillette*, pain without an organic cause was found to be genuine based on expert opinions that the pain stemmed from psychiatric reactions.

In *Garza*, the applicant claimed that he sustained an injury at work, but he did not report it for a number of days. Later, he needed surgery. His complaint of pain was consistent with the injury he described and the treatment he subsequently obtained. The Court of Appeal held that the Appeals Board's suspicion, based on the applicant's delay in reporting the injury, was not substantial evidence on which to base a rejection of the claim when the rest of the circumstances were consistent with the applicant's claim.

End comment.

c) Is the applicant's mere expression of pain enough?

Associations' comment

We find no authority for the bare proposition that the description by the applicant of pain alone, that is, expressions of pain that are unsupported by any corroborating findings, must be accepted as true evidence of incapacity even in the absence of evidence that contradicts or impeaches the testimony. The decision in *Universal City, supra*, is authority to the contrary.

End comment.

(1) A board may accept the applicant's uncorroborated description of pain as being true.

There is authority for the proposition that an applicant's uncorroborated description of pain may be accepted by the fact finder as true and, in that event, the applicant's uncorroborated complaint of pain will constitute substantial evidence on which to base a finding that the applicant actually suffers from the pain.

Sweeney v. Workmen's Comp. Appeals Bd. (1968) 264 Cal.App.2d 296, 303 [70 Cal.Rptr. 462]:

Usually a scientific or medical question is one "where the truth is occult and can be found only by resorting to the sciences," and where the issue is exclusively a matter of scientific or medical knowledge. (See *Peter Kiewit Sons v. Industrial Acc. Com.*, (1965) 234 Cal.App.2d 831, 838 [44 Cal.Rptr. 813].) The question as to whether a person has pain, to the extent that he cannot work, is not one which can be determined only by resorting to sciences. That question may be determined upon the testimony of the person alone. (*Employers' etc. Corp. v. Industrial Acc. Com.*, [(1941)] 42 Cal.App.2d 669, 671 [109 P.2d 716].) While such an issue is of a medical nature, it is not a scientific or medical question within the usual acceptance or understanding of that expression. In *Employers' etc. Corp. v. Industrial Acc. Com.*, *supra*, it was said: "[T]he injured person naturally was in the best position to tell whether he was suffering pain." It is reasonable, of course, to conclude that an investigation or inquiry as to the extent of disability suffered by a certain individual would include physical examination and questioning of the injured person. In this connection it is to be noted, from Dr. Krepela's testimony, that also it has been his experience in his medical practice, while examining patients, that he had acquired insight regarding the validity or invalidity of their complaints from their responses during the examination.

Employers' Liability Assurance Corp. Ltd. of London England v. Industrial Acc. Comm. (1941) 42 Cal.App. 699 [cited by the Court of Appeal in *Sweeney*], 671-672 [109 P.2d 716]:

It appears from the reports of the physicians that the employee did in fact receive an injury to his back. The testimony of the employee presented substantial evidence to support the finding of the commission that the disability had not ceased on January 8, 1940. We are not unmindful of the rule that the commission may not disregard the opinion of medical experts in cases where the question is "one within the knowledge of experts only and not within the common knowledge of laymen." (*William Simpson C. Co. v. Industrial Acc. Com.*, (1925) 74 Cal.App. 239 [240 P. 58].) The present case however, is not one in which experts only could supply information, for the injured person naturally was in the best position to tell whether he was suffering pain. The experts could give opinions as to the probable duration of the pain but their opinions would not be conclusive in a particular case. Expert testimony must be relied upon "in cases where the truth is occult and can be found only by resorting to the sciences". (*State Comp. Ins. Fund v. Industrial Acc. Com.*, [(Willson) (1924)] 195 Cal. 174 [231 P. 996].) The question whether Mr. Christian was suffering such pain as would prevent his working at the time of the hearing by the commission was not one which could be determined only by resorting to the sciences. In *County of Los Angeles v. Industrial Acc. Comm.*, (1936) 14 Cal.App. (2d) 134 [57 P.2d 1341], the employee suffered a severe pain in the lower part of his back while lifting a heavy tire wheel. The commission made an award for permanent injury based upon the testimony of the employee without the evidence of experts. This court refused to annul the award.

Associations' comment

The reference by the court in *Employers' Liability Assurance Corp. Ltd. of London England v. Industrial Acc. Comm.*, supra, to the opinion in *County of Los Angeles v. Industrial Acc. Comm.*, is somewhat misleading. While, as the Court of Appeal stated, the Industrial Accident Commission in the County of Los Angeles case awarded the applicant permanent disability indemnity, the finding that was made without medical opinion was that the employee's disability was permanent. The finding on disability was based on medical opinion. Medical experts had evaluated the employee's disability and the Industrial Accident Commission's finding on the level of disability was based on expert opinion. The Court of Appeal's opinion shows that the applicant's disability remained the same for two years. The Court of Appeal in the County of Los Angeles case upheld the Commission's finding that the disability was permanent based on lay testimony about the consistency of the employee's complaints over those years. Whether the holding in this 1936 opinion would be repeated over seventy years later is debatable. Over the years, opinions of the appellate courts have developed an insistence that findings on medical issues be supported by expert opinion.

Since it is rare that the applicant's expressions of pain are not evaluated by a consulting physician who is equipped to find contradiction in the applicant's story and potentially impeach the applicant's credibility, this issue may be academic.

Note that of the cases cited in this section, only *Universal City Studios* deals with pain as a factor of permanent disability. The other opinions deal with pain as an item of evidence that an injury was sustained, not as a factor of permanent disability.

In *Employer's Liability*, the issue was whether the employee's subjective complaints of pain could support a finding of continuing *temporary* disability even though those complaints were contrary to the opinions of examining physicians.

In *Sweeney v. Workmen's Comp. Appeals Bd.*, *supra*, the issue was whether the report and testimony of a non-examining physician, who apparently either did not accept or ignored the applicant's complaints of pain on ambulation, could establish that the level of the applicant's disability was light work only versus a limitation to sedentary work, a higher level of disability that was endorsed by other physicians who had actually examined the applicant. The Court of Appeal ruled that the non-examining physician was neither a special investigator nor an examining physician as required by Labor Code section 5703, his written opinion was not evidence on which the Board could rely.

Pain has been recognized as a factor of permanent disability in the workers' compensation system, though it has usually been rated as an add-on to the primary disabling factor, e.g., a loss of range of motion. (Regarding the method of rating pain under the 1997 Schedule for Rating Permanent Disabilities, with exceptions, generally applicable to injuries sustained before January 1, 2005, see 1 Herlick, California Workers' Compensation Law, 6th Ed. (December 2010, Release No. 10) § 7.6, Pain and Other Subjective Symptoms, and § 7.32; Guidelines; Judgment Ratings; Title 8, California Code of Regulations section 9727 [defining the adjectives used to describe pain.]. See the further discussion regarding permanent disability evaluations under the Workers' Compensation Act, below at Section V, J.)

Under reform legislation enacted during the 2003-2004 Regular and Extraordinary Sessions, for ratings based upon the schedule adopted on January 1, 2005, pain alone is not ratable, except when combined with an objective factor of disability under the AMA Guides. (Schedule for Rating Permanent Disabilities (January 2005), p. 1-12, Rating Impairment Based on Pain; 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 8.02 [4][b], Pain and Other Subjective Disabilities.)

End comment.

9. Effect of an unreasonable failure to secure medical care and application of the doctrine of avoidable consequences

a) Reynolds: Incapacity was found not to be permanent where the member's refusal of knee surgery was not reasonable.

Reynolds v. City of San Carlos (1981) 126 Cal.App.3d 208, 216-217 [178 Cal.Rptr. 636]:

The [City of San Carlos Civil Service] Commission found that appellant's disability was not permanent because the "probabilities are great that [he] will be restored to normal functioning if he submits to surgery In making this finding, the Commission relied on Labor Code section 4056 (see part A above), which denies workers' compensation benefits if an injured employee unreasonably refuses recommended medical treatment. Section 4056 merely codifies the common law rule requiring mitigation of damages (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 870, p. 3158), which is properly applied in determining eligibility for disability retirement. The Commission has inherent power under Government Code section 21025 to determine whether a claimant has undergone the medical treatment that reasonably could be expected to effect a cure.

As previously discussed, the Commission also has the authority to apply workers' compensation law by analogy. (See *Heaton v. Marin County Employees Retirement Bd.*, *supra*, (1976) 63 Cal.App.3d 421, at pp. 427-428 [133 Cal.Rptr. 809].)

Appellant argues that any doubt about application of the condition contained in Labor Code section 4850 must be resolved in his favor, since pension laws are to be liberally construed. We do not agree that the doctrine of liberal construction precludes the Commission from applying the common sense rule that appellant is not permanently disabled when he unreasonably refuses remedial surgery. As stated in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450], "The object of the disability allowance is not solely to compensate a member with a pension. The disability retirement allowance has as its objective the effecting of efficiency and economy in public service by replacement of employees, without hardship or prejudice, who have become superannuated or otherwise incapacitated. (Gov. Code, § 20001.) Therefore, the primary test . . . is whether petitioner is substantially incapacitated from the performance of duty, and the rule on liberality of construction does not change that test." (*Id.*, at p. 877.)

Applicants' comments

(1) *Reynolds* does not correctly state the law. We question whether *Reynolds* is even good law under the CalPERS statute, given some amendments to the Labor Code that the court in *Reynolds* cited.

We assert, also, that *Reynolds* was overruled, *sub silentio*, by the California Supreme Court in *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044]. In *Pearl*, the Supreme Court ruled that workers' compensation reform legislation, which made the employee's burden to prove the existence of a compensable work-related injury in psychiatric injury cases more difficult, was not applicable to disability retirement claims under the Public Employees Retirement Law because the Legislature had not clearly indicated its intent that the workers' compensation reforms were applicable to disability retirement law. While the Supreme

Court was not dealing with an applicant's refusal of treatment in *Pearl* and did not address the validity of the decision in *Reynolds*, the *Reynolds'* court's statement that the city commission deciding the applicant's disability retirement claim could apply Labor Code § 4056 "by analogy" was erroneous and contrary to the Supreme Court's ruling in *Pearl*.

(2) *Reynolds* is also erroneous because case law establishes that there are certain requirements that must be met before Labor Code section 4056 may be applied: (a) there must be an admitted work-related injury; (b) there must be an unequivocal tender of medical treatment by the employer; (c) the applicant must unreasonably refuse the offered treatment, with unreasonableness being established by proof that the risks of the treatment are inconsiderable in comparison with the seriousness of the injury.

As explained by the Court of Appeal in *Flores v. Workmen's Comp. Appeals Bd.* (1973) 36 Cal.App.3d 388 [111 Cal.Rptr. 424], the employer in a workers' compensation case is charged with the duty to provide medical care. The employer meeting its duty enables the employee to avoid the consequences of not obtaining treatment, i.e., prolonged or a higher level of disability. The employer cannot fail to meet its duty and then claim that it is not responsible for an increased level of disability that results from the applicant's failure to obtain treatment.

In *Flores*, the employer denied liability for a hernia the employee maintained was work-related and, consistent with that denial, the employer did not provide medical care. The injured worker was not able to afford surgical correction of the hernia. Surgical treatment was offered by a county welfare agency, but the injured worker refused. Later, in connection with an adjudication that the employee's injury was work-related, the WCAB found that the employee unreasonably refused surgery that had been offered to him by the welfare agency during the period his employer denied liability and ruled that the employee was not entitled to temporary disability indemnity after his refusal. The Court of Appeal held that the injured worker was not required by the provisions of Labor Code section 4056 to undergo the surgical treatment offered by the welfare agency and his award was not to be reduced as a result of his failure to undergo surgery. In the context of a worker's compensation claim, Section 4056 contemplates an admitted or adjudicated work-related injury, and a tender of treatment by the employer. The *Flores* court reasoned,

Section 4056 obviously was adopted by the Legislature to protect employers who tender medical or surgical treatment to their injured employees by making certain that workmen will be returned to the labor market as quickly as possible; its plain purpose is to prevent employees with treatable injuries from resorting to unfounded beliefs, ungrounded fears or personal idiosyncrasies or convictions to reject proffered treatment. (See 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1966) § 16.05[3][e].) Furthermore, the section does not state that every refusal of medical or surgical treatment shall result in a forfeiture; it provides that a forfeiture occurs only if the risk of treatment is "inconsiderable in view of the seriousness of the injury," and then delegates to the board the duty of resolving any dispute which might arise in this respect. If

the forfeiture provisions of section 4056 apply to a case where an employer has denied liability for the injury, how can an employee who in good faith believes that the risk of medical or surgical treatment is considerable have that issue resolved promptly? Finally, section 4056 is a part of a separate chapter which deals exclusively with medical examinations requested by the employer of the injured employee. In fact, all of the sections in that chapter which precede sections [sic] 4056 pertain to the duty of the employee to cooperate with his employer regarding such medical examinations. Suddenly to construe this section to apply to medical and surgical treatment offered by someone other than the employer is not consonant with ordinary doctrines of statutory construction.

In our view, section 4056 contemplates an admitted or adjudicated industrial injury, and a tender of medical or surgical treatment by the employer himself is an essential prerequisite to any possible forfeiture under that section. As the California Supreme Court stated in *Fruehauf Corp. v. Workmen's Comp. App. Bd.*, (1968) 68 Cal.2d 569, 577 [68 Cal.Rptr. 164, 440 P.2d 236]: "Limitations provisions in the workmen's compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a right being lost before it accrues." (*Flores v. Workmen's Comp. Appeals Bd.*, *supra*, 36 Cal.App.3d, 392-393.)

Since a retirement association does not offer medical treatment, the retirement association cannot meet one of Section 4056's prerequisites. In the absence of an unequivocal tender of treatment by the employer, the retirement association cannot meet the prerequisites for the application of Section 4056.

End comment.

Associations' comment

(1) Response to Applicants' Comment asserting that *Pearl* overturned *Reynolds*:

The *Reynolds* court's decision was not singularly dependent on its statement that the city commission could apply Labor Code section 4056 by analogy. As the court in *Reynolds* explained, Section 4056 is merely a codification of the common law rule that persons injured as a result of tortious conduct of another must act reasonably to mitigate their damages. While the court did rule that the Civil Service Commission "also" had the authority to apply workers' compensation law by analogy, the primary ruling was that the city commission had inherent powers under the retirement law to determine whether the claimant had undergone the medical treatment that reasonably could be expected to effect a cure and to apply the common sense rule that the applicant is not permanently disabled when he or she unreasonably refuses remedial medical care. The *Reynolds* court stated,

The Commission found that appellant's disability was not permanent because the "probabilities are great that [he] will be restored to normal functioning if he

submits to surgery” In making this finding, the Commission relied on Labor Code section 4056 (see part A above), which denies workers' compensation benefits if an injured employee unreasonably refuses recommended medical treatment. Section 4056 merely codifies the common law rule requiring mitigation of damages (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 870, p. 3158), which is properly applied in determining eligibility for disability retirement. The Commission has inherent power under Government Code section 21025 to determine whether a claimant has undergone the medical treatment that reasonably could be expected to effect a cure.

As previously discussed, the Commission *also* has the authority to apply workers' compensation law by analogy. (See *Heaton v. Marin County Employees Retirement Bd.*, *supra.*, 63 Cal.App.3d at pp. 427-428.) [Italics added.] (*Reynolds v. City of San Carlos*, *supra.*, 126 Cal.App.3d, 216.)

Even assuming that, under *Pearl*, the *Reynolds* court's ruling that the city commission could apply Labor Code section 4056 by analogy is no longer good law, the *Reynolds* opinion remains valid to the extent that the Court of Appeal relied on the common law rule requiring mitigation of damages, also known as the doctrine of avoidable consequences. (See further discussion of the doctrine of avoidable consequences, below.)

(2) Response to Applicants' Comment that a retirement association lacks standing to assert that the applicant's incapacity is not permanent because of the applicant's unreasonable refusal of treatment:

Applicants claim that a tender of medical treatment by the employer is a prerequisite to an association's standing to assert that, because the applicant has unreasonably refused medical care that would relieve the incapacity, the applicant's incapacity is not permanent, citing *Flores v. Workers' Comp. Appeals Bd.*, *supra.* We submit that the Applicants misconstrue the rule of *Flores*. While in the context of a workers' compensation case, the employer may not avoid liability for compensation on the basis that the insured worker unreasonably failed to obtain medical care unless the employer met its duty to offer the medical treatment in the first place, a retirement association under the CERL of 1937, a legal entity separate from the employing county or district (*Flaherty v. Board of Retirement* (1961), *supra.*, 198 Cal.App.2d 397, 404 [18 Cal.Rptr. 256]), does not have a duty to offer medical care. Having not acted in derogation of any duty to offer medical care, the retirement association is not estopped or precluded from asserting that the applicant's incapacity is not a permanent one because the applicant has unreasonably failed to obtain remedial medical care.

The *Reynolds* opinion does not address whether the city or its workers' compensation carrier offered the applicant the surgery the defense consultant and the applicant's treating physician recommended. The omission, however, is not crucial to the opinion's vitality. A retirement association operating under the CERL of 1937 cannot logically be deprived of its inherent authority to insist that an applicant for a disability retirement act reasonably in pursuit of remedial medical care, an authority that is corollary to its power

to make a determination on the existence of a *permanent* incapacity (Gov. Code, § 31725, first sentence), because some other entity, be it the employer, a workers' compensation insurer, a private health insurance provider, or anyone else, failed to meet a duty it has to the applicant.

The rule might be otherwise for a public retirement system that is an integrated part of the public entity itself. An integrated pension system may be bound by employing public entity's failure to tender medical treatment in the workers' compensation case. See the discussion of the distinction between integrated and nonintegrated retirement systems below at Section V, I.

Rather, the fact that the employer, a workers' compensation insurance carrier, or private health insurance carrier, did or did not offer medical treatment is one factor that must be considered in determining whether the applicant's failure to obtain treatment is reasonable. The determination of the "reasonableness" of the applicant's failure to obtain medical treatment must include consideration of whether the applicant has a source of medical care that is reasonably available. If the applicant is shown not to have a source of medical treatment or is otherwise not able to afford the treatment, the applicant's failure undergo medical treatment is not unreasonable. (*Cf. Marshall v. Ransome Concrete Co.* (1917) 33 Cal.App. 782, 786-787 [166 P. 846], discussed in more detail subsection c), below.) So, for example, in the factual situation of *Flores* in which the applicant had a source of remedial medical care, i.e., the offer of medical care from a welfare agency, the retirement association, having no duty to offer medical care, would not be precluded from denying an application for a disability retirement if the applicant unreasonably refused that medical care. The retirement association is simply not in the same boat as the employer in *Flores*.

Further, unlike the workers' compensation system, the disability retirement provisions of the CERL of 1937 provide compensation in the form of a disability retirement pension for injuries and illnesses that are not work-related. Where the injury is not work-related, the employer, as well as the retirement association, has no duty to tender treatment under Labor Code section 4056. But still applicable is the common sense requirement that a member act reasonably with regard to availing himself or herself of treatment that will provide a cure, or reduction in the level of disability, sufficient to allow the member to return to work.

End comment.

b) While the doctrine of avoidable consequences may not be applicable to a workers' compensation case due to statutory proscription, there is no statutory proscription to its application in a disability retirement case under the CERL of 1937.

The court in *Thompson v. Workers' Comp. Appeals Bd.* (1994) 25 Cal.App.4th 1781 [31 Cal.Rptr.2d 242], added another reason for not applying the doctrine of avoidable consequences in a workers' compensation case. The doctrine of avoidable consequences is an aspect of the common law defense of contributory negligence. The

Thompson court pointed out that the defense of contributory negligence on the part of the employee was abolished in the workers' compensation law. (Lab. Code, § 3708.)

The Court of Appeal in *Thompson* annulled the WCAB's finding that, both under and apart from Labor Code § 4056, workers' compensation benefits were forfeit by an employee's unreasonable failure to comply with medical advice. After being diagnosed with hypertension and being noncompliant with medical advice about treatment, the employee died of a stroke. The Court of Appeal held that Labor Code § 4056 was not applicable since, at the time of injury, there was no workers' compensation claim and no offer of medical care by the employer. The court also rejected the WCAB's finding that, aside from the provisions of Labor Code § 4056, the employer was protected from liability by the doctrine of avoidable consequences. The *Thompson* court stated,

The *Flores* court, however, went on to enunciate the theory on which the Board in the instant case decided that benefits were forfeited. "The remaining question is whether the board's decision is sustainable under the mitigation doctrine applicable in tort actions. According to this doctrine, sometimes referred to as the doctrine of avoidable consequences, a person injured by the wrong of another must mitigate the damages if reasonably possible, and he is bound, at least to the extent of his financial ability, to exercise reasonable diligence in procuring medical or surgical treatment to effect a speedy and complete recovery." (*Flores v. Workmen's Comp. Appeals Bd.*, *supra*, [(1973) 36 Cal.App.3d [388], at p. 393 [111 Cal.Rptr. 424]].) After explaining why the doctrine did not apply to require an employee to resort to public welfare or risk the loss of benefits, the court stated that it did not declare, "unequivocally, that we believe that the mitigation doctrine is never applicable to a workmen's compensation claim; it is conceivable that circumstances could arise where justice and equity would dictate some duty on the part of the employee 'to mitigate the trouble and promote recovery.'" (*Id.* at p. 396, quoting *Marshall v. Ransome Concrete Co.* (1917) 33 Cal.App. 782, 786 [166 P. 846].) (*Thompson*, p. 1787.)

The employee in *Marshall*, discussed in more detail in the next subsection, as in *Flores*, was not precluded from compensation since the employee in *Marshall* could not afford to pay for the operation and there was considerable dispute as to whether the operation would be beneficial. The Court of Appeal in *Thompson continued*,

No case has been cited in which the doctrine of "avoidable consequence[s]" has actually been applied to deny workers' compensation benefits to an employee. Despite the dictum of *Flores* and *Marshall*, it is extremely doubtful that it could ever be applied. Prosser and Keeton suggest "that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not." (Prosser & Keeton on Torts (5th ed. 1984) § 65, p. 459.) Labor Code section 3708 expressly abolishes the common law defenses of contributory negligence, assumption of risk and the negligence of a fellow servant. If the stroke was

caused by the stress of Mr. Thompson's work and thus arose out of and occurred in the course of his employment, benefits cannot be forfeited because of the negligence of Thompson which contributed to the fatal event. (*Ibid.*)

Associations' comment

There are a number of reasons why the *Flores* and *Thompson* opinions on the applicability of the doctrine of avoidable consequences would not apply to a disability retirement claim under the CERL of 1937.

First, unlike the Workers' Compensation Act, there is no provision in the County Employees Retirement Law of 1937 that precludes application of the doctrine of avoidable consequences. It is a rule of reason the application of which is inherent in the board's power under Government Code section 31725 to determine the existence of permanent disability. (See *Reynolds v. City of San Carlos Civil Service Comm.*, *supra*, 126 Cal.App.3d, at 216 [city commission had inherent power under the Public Employees Retirement Law's "Government Code section 21025 to determine whether a claimant has undergone the medical treatment that reasonably could be expected to effect a cure."].)

Second, an association operating under the CERL of 1937 is not part of the employer but a separate legal entity (*Flaherty v. Board of Retirement* (1961), *supra*, 198 Cal.App.2d 397, 404 [18 Cal.Rptr. 256]) with legal relationships to its members that are defined by the CERL of 1937, not the laws that define the employer's relationships to its employees, such as the workers' compensation law. The association has neither the duty nor the authority to provide medical treatment for disabling injuries or illnesses whether they be service-connected or nonservice-connected.

Third as pointed out, above, unlike the workers' compensation law, the County Employees Retirement Law of 1937 provides a disability retirement allowance for incapacities that are not work-related. In the case of a nonservice-connected illness or injury, there will be no employer acceptance of an injury and tender of treatment under Labor Code section 4056. With respect to the retirement association's standing to assert that an incapacity is not permanent where the injured or ill member has unreasonably failed to obtain remedial medical treatment, whether the employer has or has not met a duty to tender medical care is only one factor among many to be considered in determining whether the member's failure to obtain treatment is unreasonable.

We submit that with respect to a claim for disability retirement, under the doctrine of avoidable consequences, whether the injury is work-related or not work-related, whether the employer has accepted liability or made a tender of treatment, the member must nonetheless act reasonably in making decisions about medical care. Incapacity, work-related or not, that results from unreasonable failure to obtain medical care, may not be a "permanent" incapacity.

On the other hand, whether a refusal is unreasonable must be determined given the member's circumstances. If medical treatment is not reasonably available, as where there is no offer of treatment from the employer, the member has no medical insurance on which the member can rely, and/or the member is unable to pay for the treatment, the failure of the member to obtain the treatment would not be "unreasonable." (See the further discussion of "reasonableness," next.)

End comment.

c) Whether a failure to obtain medical care is reasonable is a question of fact that will involve consideration of various factors depending on the circumstances.

In *Bethlehem Steel Corp. v. Industrial Acc. Commission (McClure)* (1945) 70 Cal.App.2d 369 [161 P.2d 18], an applicant refused to undergo surgery on his back to correct a herniated disc. At the time, the surgical procedure was relatively new. Physicians initially gave the applicant advice that conflicted with the advice of other physicians on the question of whether the applicant should have the surgery and some physicians over time contradicted their own advice. The employee's refusal to undergo the procedure was held to be reasonable.

[Labor Code section 4056] is simply a codification of the general rule that aggravation or extension of an injury is not compensable—one may not recover for an aggravation of an injury caused by his own act. An employee is under a duty to submit to reasonable medical or surgical treatment, and, if he refuses and his injury is thereby aggravated, he may not recover compensation. [Citations.] However, it is also well settled that an employee is not compelled to undergo an operation or treatment when the outcome is problematical, uncertain or attended with real danger. [Citations.] It is equally well settled that the question as to whether the employee has acted reasonably or not in refusing treatment is a question of fact upon which the opinion of the commission, based upon expert medical or surgical advice, is final. [Citation.] The commission's power is, of course, not arbitrary, and its determination must be based upon competent expert evidence, unless the issue pertains to a problem properly falling within the scope of judicial knowledge. [Citation.] (*Bethlehem Steel Corp. v. Industrial Acc. Commission, supra*, 70 Cal.App.2d, 377-378.)

In *Gallegos v. Workmen's Comp. Appeals Bd.* (1969) 273 Cal.App.2d 569 [78 Cal.Rptr. 157], the Court of Appeal annulled a decision of the WCAB that the injured worker unreasonably refused surgery and his permanent disability should be fixed at the level to be expected if surgery had been performed. The court explained that the employee did not reject surgery, but only responded that he would rather it be done in Mexico if the risks associated with the surgery were not greater there. While the fact that the employer had made a tender of surgery was conceded by the employee, when the tender had been made was not established. Therefore, it could not be determined if the employee's delay in accepting surgery was tantamount to a refusal.

It follows from the foregoing that in seeking to terminate or reduce compensation under Labor Code section 4056, the respondent insurer had the burden of showing: (1) that it had made an unequivocal tender of surgery [citations] and that petitioner refused to submit to surgery without good cause (see *Bethlehem Steel Corp. v. Industrial Acc. Com.*, [(1945)] 70 Cal.App.2d 369 [161 P.2d 18]); that the risk of the surgery was inconsiderable in view of the seriousness of the injury; and that surgery would reduce disability to a particular extent. The statute expressly calls for medical opinion to support the issue of risk and it is obvious that the extent of disability with or without surgery is an issue which requires medical evidence. (*Gallegos v. Workmen's Comp. Appeals Bd.*, *supra*, 273 Cal.App.2d, 574.)

Reasonableness of a refusal of surgery was demonstrated in *Marshall v. Ransome Concrete Co.* (1917), *supra*, 33 Cal.App. 782 [166 P. 846]. *Marshall* was an industrial injury case under the Roseberry Act. That early workers' compensation law did not have the equivalent of Labor Code section 4056 and the Act limited an employer's liability for medical care to \$100. The employer in the case, whose liability for medical care had reached its limit, defended against liability for that portion of permanent disability that was due to the employee's failure to undergo surgery that, the employer contended, would have reduced the employee's disability. The employer made payments of permanent disability indemnity up to the level at which the employee's permanent disability was expected to be after surgery. The Court of Appeal, rejecting the employer's arguments, reasoned,

But suppose we consider the case as though the applicant had refused or declined to submit to the surgical operation, and what would be the consequence? Upon this theory, should the award be annulled? In this consideration is involved, of course, the general rule as to the care required of the injured person to mitigate the trouble and promote recovery. Probably the rule is as well stated as anywhere in 8 R. C. L. 447, as follows: "It has been pointed out that one who has suffered personal injuries through the negligence or wrongful acts of another is bound to exercise reasonable care and diligence to avoid loss or to minimize the consequences of such injury, and that he cannot recover for so much of his damage as results from his failure to do so. Thus he is bound to exercise reasonable diligence in securing medical or surgical aid, take all reasonable care of the injury and to make use of reasonable means to prevent aggravation of it or to effect its speedy and complete cure. He is not required to take the best care of his injuries, however, nor to employ the means best adapted to heal them. It is sufficient that he act in good faith and with due diligence and that he exercise only ordinary care and reasonable or ordinary prudence of judgment."

Necessarily, said rule implies that the sufferer is able to employ the means that are needed to alleviate his situation. It would be a strange law that would require him to act with ordinary care and prudence and yet penalize him because of his inability, through indigence or otherwise, to avail himself of the remedy. An impossible or unavailable remedy is, of course, no remedy at all. If the injured

person cannot appropriate the means, the effect as to him is the same as though they did not exist. His inability, unless shown to be the result of his own negligence, must be a complete answer to the charge of culpability. And, in considering the finding, we must assume that the applicant was in no position to avail himself of the operation; in other words, that it was practically impossible for him to adopt the course contended for by appellant. If we look to the evidence, we find that such was actually the situation. He said he had thought of the recommendation of the physicians to get a specially fitted shoe, "but I didn't do it, because it would cost too much, and I haven't had more than a dollar at a time since they cut me down." Furthermore, he declared he had no money "to pay for special plates or hospital fees or an operation." It also appears that he was in debt to the extent of five hundred dollars for medical treatment which he had already received. It is fair to infer from the testimony of one of the physicians that the suggested operation with the necessary subsequent treatment would cost four or five hundred dollars, and there is nothing in the record to show that the applicant had the means or credit required for the purpose.

The foregoing ought to be sufficient to excuse and justify the applicant for his failure to take any affirmative action in the matter, but another reason also appears in the record that might properly cause a prudent person to hesitate before submitting to the recommended ordeal. It appears that he had submitted to an operation on two different occasions with but little, if any, benefit, and that he had consulted with Drs. Stephenson and Shaw, who told him that his leg "was as good as it ever would be, that it couldn't be improved on," and that nothing else could be done to improve it. He also consulted Dr. Garrett, who said he "didn't see where an operation would benefit, and that there was probably one chance out of a hundred of it doing any good, and that I couldn't have any more motion in the ankle than I had now, and I wouldn't have, no matter how straight the leg was, and it would hinder me walking stairs and that kind of thing, and that he considered me, as far as my trade was concerned, to be totally disabled." Assuredly the foregoing furnished the basis for a rational belief on the part of Marshall that the supposed benefit from an additional operation was problematical, and it justified his disinclination or refusal to take the chances. (*Marshall*, pp. 786-787.)

d) An incapacity will be found to be permanent even if a refusal of surgery is otherwise unreasonable when the ground for refusal is a sincerely held religious belief.

In *Montgomery v. Board of Retirement* (1973) 33 Cal.App.3d 447 [109 Cal.Rptr. 181], it was held that an applicant could refuse surgery based upon her religious beliefs and still be granted a permanent disability retirement pension.

It is undisputed that so long as appellant does not have an operation her condition, which incapacitates her from work, is permanent. The Board in effect found that because her condition was correctable by surgery appellant was not permanently incapacitated within the meaning of Government Code section

31720 and, therefore, denied her benefits. Since it is appellant's religious beliefs which do not permit her to undergo surgery, we therefore squarely face the question of whether she is entitled to the retirement benefits though the condition from which she suffers is correctable by an operation presenting no unusual hazards but which procedure is violative of her sincerely held religious beliefs. (*Montgomery v. Board of Retirement, supra*, 33 Cal.App.3d, 450.)

. . .

. . . The denial of disability retirement forces appellant to choose between following the precepts of her religion and forfeiting the disability retirement benefits on the one hand and abandoning one of the precepts of her religion in order to cease to be permanently disabled and return to work on the other hand. In effect, appellant may not practice her religion and receive benefits.

Measured against this stringent standard, we perceive no compelling state or county interest enforced in the eligibility provisions of the disability retirement statute justifying the substantial infringement of appellant's First Amendment right to the free exercise of her religion. (*Montgomery v. Board of Retirement, supra*, 33 Cal.App.3d, 451.)

10. Risk of further injury as a basis for a disability

a) Work limitations versus prophylactic work restrictions: A frank inability to perform activities may be subsumed in more severe physician-imposed prophylactic work restrictions.

The concept of a *prophylactic* work restriction is a subset of an umbrella concept of work limitations in general. A work limitation may be an actual inability to perform a particular activity because of injury or illness or, even if the injured person retains the ability to perform a particular activity, a physician may recommend that the individual avoid the activity as a prophylactic measure in order to protect the individual from further injury. In other words, the person *can* perform, but *should not* perform the activity.

Activity limitations may describe both actual inability to perform at a particular level along with an increment of more severe restrictions designed to protect the injured person from further injury. For example, a member may be unable to lift heavy weights or bend due to a back injury. A physician may recommend that the member observe a greater limitation, such as a limitation to light work, semi-sedentary work, or sedentary work, in order to avoid further damage to the back. If the member's occupation requires routine heavy lifting and bending, the member may be actually unable to perform his duties, irrespective of the greater prophylactic restrictions. If the member's duties actually do not require performance of heavy lifting or bending, the member may be capable of actually performing the duties, but prophylactically restricted from their performance in order to avoid further injury. (See generally, 1 Hanna, California Law of

Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 8.06[5](c) Work Restrictions, subsections [i]-[ii].)

b) A prophylactic work restriction, by its definition, does not actually limit an applicant's capacity to work unless it is recommended by a physician and the applicant knows about it.

Under workers' compensation law prior to the 2004 reform legislation (SB 899), where an employee had a pre-existing disability, an employer's liability for an employee's permanent disability was limited to the extent that the employee's permanent disability exceeded the pre-existing disability. (Lab. Code, § 4750 (repealed, Stats. 2004, ch. 34 § 37 (SB 899).) [The rules of apportionment under current Labor Code sections 4663 (added Stats. 2004, ch. 34 § 34; amended, Stats. 2006, ch. 836 § 1 (AB 1368) and 4664 (added Stats. 2004, ch. 34 § 35 (SB 899)), perpetuate the purpose of limiting employer liability, but ease the defendant's burden by permitting apportionment on the basis of medical opinion on the extent of industrial versus nonindustrial causation.]

In an effort to articulate the existence of such a pre-existing disability under former Labor Code section 4750, some physicians expressed opinions that were framed in terms of work limitations. For example, under rules applicable to injuries sustained before January 1, 2005, if an employee was restricted to semi-sedentary work for a back injury, the employee's disability is based on a 60% standard rating, that is, before adjustment up or down for age and occupation. (Schedule for Rating Permanent Disabilities (April 1997), p. 2-14.) A physician might offer the opinion that, if the physician had the opportunity to examine the applicant before the injury, the applicant's pre-existing, underlying, asymptomatic pathology would have led the physician to impose a prophylactic restriction limiting the applicant to light work only, a 50% standard rating. In this type of circumstance, an employer or its insurance carrier might have attempted to argue that the employer was responsible for only the 10% work-related increase in the permanent disability rating, before adjustment for age and occupation.

The appellate courts found that such "retroactive prophylactic work restrictions" were not valid bases for findings of pre-existing disability. The courts held that, in order for a work restriction to be considered a pre-existing disability under the law, it must have limited the employee's activities. A prophylactic work restriction does not limit the employee's activities if the employee does not know about it – it has to be actually recommended by a physician and communicated to the employee. The court in *Amico v. Workmen's Comp. Appeals Bd.* (1974) 43 Cal.App.3d 592, 606 [117 Cal.Rptr. 831], overturning a Workmen's Compensation Appeals Board decision that recognized the existence of a disability based on a retroactive prophylactic work restriction, stated,

In support of the appeals board's decision it is urged, as recited therein [footnote omitted], that there *should have been* a prophylactic work restriction on the petitioner's activities after his first operation, and that such restriction constituted a preexisting disability supporting the apportionment. There is nothing in the history or the reports to show that such a restriction was in fact imposed. The suggestion by Drs. Cappeller and Miller that they *would have imposed* such a

restriction, falls within the criteria of that medical opinion which is denigrated in *Place v. Workmen's Comp. App. Bd.* [(1970) 3 Cal.3d 372, 378 [90 Cal.Rptr. 424]], and related cases. Insofar as the appeals board attempts to draw on its own experience to establish as a fact that which can be but surmise or conjecture, there is no substantiality to the evidence. [Italics added.]

Later, in *Gross v. Workmen's Comp. Appeals Bd.* (1975) 44 Cal.App.3d 397, 404-405 [118 Cal.Rptr. 609], the Court of Appeal overturned the Workmen's Compensation Appeals Board's assignment of a portion of the employee's permanent disability to a pre-existing condition. The Appeals Board's reasoning was that, had the condition been medically evaluated, it would have required the imposition of prophylactic work restrictions. The Court of Appeal stated,

It is of course true, as held in *Luchini v. Workmen's Comp. App. Bd.*, (1970) 87 Cal.App.3d 141 [6 Cal.Rptr. 453], that a prophylactic restriction, i.e., a work restriction reasonably necessary to prevent further harm, is a ratable factor of one's permanent disability. But that is not to say that such a prophylactic restriction is to be applied retroactively, thus creating a sort of factual or legal fiction of an otherwise nonexistent previous disability or physical impairment. Application of such a rule would not only be unreasonable, but flatly contrary to the principle reiterated in *Ballard v. Workmen's Comp. App. Bd.* (1971) 3 Cal.3d 832, 837 [92 Cal.Rptr. 1]. We reached a similar conclusion in *Amico v. Workmen's Comp. Appeals Bd.*, 43 Cal.App.3d 592, 606.

c) A physician-imposed work restriction, recommended as a prophylactic measure to protect an employee from further injury, was a "disability" under the pre-2004-reform workers' compensation law and remains a valid factor of disability under the 2004 reforms.

Levesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627 [83 Cal.Rptr. 208, 463 P.2d 432]:

The referee's only support for his conclusion [that a prophylactic limitation was not a valid factor of disability] appears in his report and recommendation on the petition for reconsideration. After reviewing Dr. Dedinsky's reports and Dr. Messinger's report, the referee observed, "The general tenor of the medical reports, especially when considered in the-light of other factors, suggests that the doctor's cautions were more in the nature of prophylactic advice rather than rigid restrictions. [Footnote omitted.]" (*Levesque v. Workmen's Comp. App. Bd.*, *supra*, 1 Cal.3d, at 638.)

. . . [T]he only two physicians who have seen or treated petitioner since his temporary disability payments ceased, have concluded that petitioner cannot perform work requiring lifting. Neither doctor has released petitioner from the lifting limitation. In essence, the referee's report confronts petitioner with the grisly choice of obeying the medical advice of his treating physician or risking

further injury by following the medical views of the referee.) (*Levesque*, pp. 639-640.)

Title 8, California Code of Regulations, section 10606, which set forth the required content of medical reports prepared for use as evidence in workers' compensation trials, continues to require the physician's opinion on ". . . the nature, extent, and duration of disability and work limitations, if any." (*Id.*, subd. (h)).

d) A prophylactic work restriction may be the basis for a finding of incapacity under the CERL of 1937.

The Workers' Compensation Act and the County Employees Retirement Law of 1937 are related in subject matter, harmonious in purpose and courts look to workers' compensation precedent for guidance when contending with similar issues in pension law. (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 576, fn. 4 [229 Cal.Rptr. 814, 724 P.2d 500].)

Without relying on *Levesque*, the Court of Appeal in a public employee disability retirement case recognized that a prophylactic restriction supported a finding that an employee was incapacitated for the performance of her duties. (*Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d 787 [196 Cal.Rptr. 395].) *Wolfman* is a State Teachers Retirement System case. *Wolfman* was a teacher who was found to be impaired by a prophylactic restriction from working in a classroom. The restriction was medically imposed because, if *Wolfman* returned to the classroom, a return of severe and disabling bronchial asthma would be certain to occur. The *Levesque* court had relied on the primacy of medical opinion over the lay opinion of the referee on whether the employee should observe medically imposed work limitations. The *Wolfman* court, on the other hand, focused on the retirement law's purpose to achieve economy and efficiency in public service by replacing aged and disabled employees without hardship to the employees replaced. (Gov. Code, § 20001. That purpose is shared with the County Employees Retirement Law of 1937. Gov. Code, § 31451.) Therefore, even though *Wolfman* retained the ability to perform, she was considered disabled because hardship in the form of further injury would certainly occur if she returned to her duties. The *Wolfman* court stated,

. . . [Wolfman's] treating doctor testified she was continually reinfected and severely so on seven occasions during her last year of teaching. Use of antibiotics increased as did the dosage of steroids with their resultant dangerous side effects of tiredness, weakness, susceptibility to diabetes, bleeding and hypertension. He stated she was particularly sensitive to dust, a hazard of her occupation, and the constant exposure to a pool of infections carried by young children. Although physically capable at the time of hearing to perform her duties, it would be medically unwise. Her improved state was due to the discontinuance of her classroom contacts and a resultant decrease in the steroids she required. Reinstatement would initiate the vicious circle of infection leading to severe pulmonary attack and increased necessity for dangerous

steroid therapy.

[¶] [¶]

Her attempt to continue teaching last year, despite increased illness and exhaustion, does not mandate her returning to the classroom this year. Wolfman suffers from a chronic disease, preventing her from effectively performing her duties as a teacher. "[T]he provisions for disability retirement are also designed to prevent the hardship which might result when an employee who, for reasons of survival, is forced to attempt performance of his duties when physically unable to do so." (*Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021 [127 Cal.Rptr. 11].) (*Wolfman*, p. 791.)

e) Where further injury is probable if the prophylactic work restriction is not observed, the work restriction may be incapacitating.

That Wolfman's pulmonary illness would be certain to recur with her return to her duties did not establish a rule that future injury must be *certain* to occur in order for a prophylactic work restriction to be the basis of a finding of incapacity. That a further, incapacitating injury would be *probable* is sufficient. Medical opinion based on what probably is true is substantial evidence on which a board may rely in making a finding of fact. The applicant is not required to prove a fact to a certainty in order to establish its existence. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416-417 [71 Cal.Rptr. 697]; *Paneno v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 136, 153 [5 Cal.Rptr.2d 461]. These cases and others dealing with the burden of proof are discussed in more depth, below, in Section III.)

Applicants' comment

Substantial evidence must support the Board's findings of fact. (*Glover v. Board of Retirement* (1989), *supra*, 214 Cal.App.3d 1327, 1337 [263 Cal.Rptr. 224].) Where the opinions of medical experts recommending a prophylactic activity restriction are not themselves unreliable, the Board's rejection of the restriction must be supported by substantial evidence. (*Levesque v. Workmen's Comp. Appeals Bd.*, *supra*, 1 Cal.3d, at 638.)

End comment.

f) Under the pre-2004 reform law, where there was merely an increased chance, or risk, of further injury if the work restrictions were not observed, a work restriction designed to avoid that increased risk was not a factor of disability unless the increased risk amounted to a probability.

An opinion that further injury is probable if work restrictions are not observed is to be distinguished from an activity restriction based on an opinion that chances of further injury are increased if the restriction is exceeded. A finding of present disability cannot be supported by an opinion from a physician who speculates about future injury. A prophylactic work restriction imposed to avoid an increased *chance* that the applicant

will sustain a further injury will not support a finding of incapacity. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, at 863 [143 Cal.Rptr. 760], the Court of Appeal wrote,

Throughout the hearing, and again in his briefs, Hosford relied and relies heavily on the fact that his condition increases his chances for further injury. As the Board correctly points out, however, this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently in existence.

Raven v. Oakland Unified School Dist. (1989) 213 Cal.App.3d 1347 [262 Cal.Rptr. 354], dealt with a teacher's request for a court order compelling the school district to reinstate her after she had been on sick leave for a work-related mental illness. Explaining its opinion that the teacher was entitled to back pay and reinstatement, subject to potential proceedings that could be brought by the school district to prove that the teacher was mentally incompetent to teach, the Court of Appeal stated,

Moreover, the district has repeatedly denied Raven's request for reinstatement because its staff psychiatrist has concluded or speculated that Raven may reexperience stress-related symptoms. It also has denied her request because Raven's psychiatrist states that he was not "certain" that Raven could "weather the stress" in the future, although he felt that her condition had progressed to the point that she deserved the opportunity to return to work. It is interesting to note that in analogous administrative contexts, the risk or fear of prospective disability is not considered a permanent incapacitation compensable by disability retirement. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863-865 [143 Cal.Rptr. 760].) (*Raven*, pp. 1359-1360.)

Associations' comment

The integration of the Court of Appeal's opinions in *Hosford*, *Levesque*, *Wolfman*, and *McAllister* produces the rule that an increased chance that the applicant will sustain a further injury is insufficient to support a finding of incapacity unless the "chance" or risk of future injury amounts to at least a probability—a likelihood—that injury will occur. That further disabling injury is probable if a work restriction is exceeded is substantial evidence that the physical condition supports the work restriction and is disabling.

End comment.

Applicants' comment

The likelihood of further injury should not be the only factor to be considered in the determination of whether a physician-recommended prophylactic restriction amounts to an incapacity. The severity of the anticipated injury should also be considered in the mix. If there is only a 10% chance that further injury will occur if the restriction is not followed, but in the event that it does occur, the result may be death, or severe injury and a high level of disability, is it not reasonable for the applicant to avoid the risk? Where the consequences are so severe, we submit that it would be unreasonable for

someone to run such a risk. Therefore, even though the chances of further injury are not certain or probable, a restriction imposed to protect an applicant from a severe further injury should be considered permanently incapacitating.

End comment.

- g) Under the pre-2004 workers' compensation reform law, where a work restriction was imposed in order to avoid subjective complaints that were not themselves incapacitating, as opposed to the restriction being imposed to avoid further injury, the work restriction was not a basis for a finding of disability.**

In *Universal City Studios, Inc. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal.App.3d 647 [160 Cal.Rptr. 597] the Court of Appeal annulled a WCAB decision in which a bookkeeper-cashier was found to be limited to semi-sedentary work as a result of a sprained ankle. The only positive objective finding was minimal limitation of motion of the ankle. (*Id.*, 99 Cal.App.3d, 652.) Subjective complaints were described by an independent medical examiner who was appointed by the workers' compensation judge as being minimal to slight, becoming more than moderate with prolonged walking or standing. (*Ibid.*) Based on the subjective complaints, the independent medical examiner recommended a semi-sedentary work restriction, but explained that if the applicant exceeded the restriction, she would not suffer further injury, but would experience increased subjective complaints. (*Id.*, 99 Cal.App.3d, 653.) The Court of Appeal stated,

At bench the evidence (as opposed to the statutory presumption) of actual physical inability to compete (the disability) is based entirely upon subjective complaints of slight or minimal pain. There is no testimony or other evidence of objective findings that the condition in any way, physiologically or functionally, prevents or disables the employee from performing whatever work she could have or would have performed in the future. There is only evidence that when she stands for a protracted period of time, dances, squats, or walks a certain number of blocks, she then complains of some aching or pain. While there is no evidence of any reason to doubt the truthfulness of the employee, the presence of pain is not a compensable limitation. It is but one of the subjective factors that the doctor considers in determining the actual existence of new limits upon motion or actual use of the particular part of the body. (*Universal City Studios, Inc.*, p. 656.)

...

Examining the evidence closely, it is clear that the only evidence which supports the theory that the employee should be confined to semisedentary work as classified by the rater, is the evidence of the employee's own subjective complaints and the doctor's acceptance of that subjective complaint. There is no objective evidence that the doctors concluded that Lewis is permanently restricted by reason of this injury to semisedentary work. None of the objective

findings of any doctor disclose any physical abnormality or any functional disability of Lewis' left foot. (*Universal City Studios, Inc*, p. 657.)

. . .

That there is "some minimal pain" or "slight tenderness localized to the posterior portion of the longitudinal ligament of the foot on the medical [*sic: medial*] side" does not mean inability to use the foot in a normal way. These findings of the independent medical examiner simply mean that when she uses her foot, Lewis is going to notice the slight tenderness or discomfort a bit more quickly or more noticeably than usual. (*Universal City Studios, Inc*, p. 658.)

. . .

. . . Guided by the teaching of *Hale v. Morgan* [(1968) 22 Cal.3d 388 [149 Cal.Rptr. 375, 584 P.2d 512]: An award must meet the test of "fairness, reasonableness and proportionality in the overall scheme of the law and the purposes sought to be accomplished by that law." *Id.*, 22 Cal.3d, 658)], simply and basically stated, we conclude here that the award is so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair. [Footnote omitted.] On the evidence available in this record, the award demonstrates a windfall not just and fair compensation. (*Universal City Studios, Inc.*, p. 659.)

Associations' comment

There is no appellate court opinion that is certified for publication that directly states that, where a work restriction is recommended in order to avoid subjective complaints, the level of disability associated with the subjective complaints must be consistent with the level of disability assigned to the work restriction. While the employer in *Universal City* specifically attacked the WCAB's decision on that basis (*Universal City Studios, Inc. v. Workers' Comp. Appeals Bd.*, *supra*, 99 Cal.App.3d, 654) and the Court of Appeal's opinion stands for that proposition, the Court of Appeal did not succinctly define the rule. In the *Disability Retirement Law Resource*, with one exception to demonstrate an approved referee assignment practice, below, we follow California Rules of Court, rule 977, and do not cite as authority opinions of the Court of Appeal that are not certified for publication.

End comment.

- h) Is a member entitled to a disability retirement based on prophylactic restrictions that preclude the substantial performance of the member's usual duties where the necessity that the member perform those duties is foreclosed by the member taking a regular retirement for years of service and age?**

Association's comment:

There is no published opinion of an appellate court that addresses this issue. The issue may arise where a member first retires on a regular retirement for years of service and age and later files an application for disability retirement that is timely under the provisions of Government Code section 31722. We propose that the key issue is this: Why did the applicant retire? Was retirement compelled by incapacity, either in the form of an actual inability to perform or in the form of a prophylactic restriction, or did the applicant take advantage of his or her right to a regular pension, voluntarily discontinuing service without being compelled to do so by a medical condition, and then become disabled by way of the post-retirement onset of a medical condition that causes actual incapacity or requires the imposition of an incapacitating prophylactic work restriction?

The concept that a prophylactic restriction could be a valid basis for a finding of permanent disability was developed under the pre-2004-reform workers' compensation law. (See *Luchini v. Workers' Comp. Appeals Bd.* (1970), *supra*, 7 Cal.App.3d 141, 144 [86 Cal.Rptr. 453].) The purpose of the permanent disability provisions of the pre-reform law was to compensate an injured worker for impairment of a worker's earning capacity, impairment of a worker's bodily function, or a competitive handicap in the open labor market. (*Franklin v. Workers' Comp. Appeals Board* (1978) 79 Cal.App.3d 224, 237 [145 Cal.Rptr. 22].)

Under the 2004-reform law, work restrictions, including those that describe actual inability as well as those that are imposed for prophylactic purposes, continue to be utilized in workers' compensation matters, if requested, to facilitate the employer's accommodation of the employee's disability, though work restrictions no longer carry specific ratings. (Guides to the Evaluation of Permanent Impairment, Fifth Edition, AMA Press, page 24.) An examining physician's opinion on the applicant's work limitations continues to be a requirement of medical reports written for workers' compensation purposes. (Cal. Code Regs., tit. 8, § 10606, subd. (h).)

Under the pre-2004 reform law, a prophylactic restriction would be considered permanently disabling if it resulted in a reduced earning capacity. (*Levesque v. Workmen's Comp. Appeals Bd.*, (1970) 1 Cal.3d 627, 639-640 [83 Cal.Rptr. 208, 463 P.2d 432]; *Luchini v. Workers' Comp. Appeals Bd.*, *supra*.) An injured worker was entitled to compensation for an impaired earning capacity, loss of bodily function or reduced ability to compete in the open labor market, even if the injured worker was able to return to work and fully perform his or her duties with no loss of wages. (*Universal City Studios, Inc. v. Workers' Comp. Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647, 663 [160 Cal.Rptr. 597].)

On the other hand, the standard for a finding of permanent incapacity under the County Employees Retirement Act of 1937 is that the applicant is substantially incapacitated for his or her usual duties. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 694-696 [133 Cal.Rptr. 154] citing *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450].) A member who is entitled to a 100% permanent disability award under the workers' compensation law could, theoretically, be

denied a disability retirement because the employee retains the capacity to substantially perform his or her usual duties.

The purpose of the County Employees Retirement Law of 1937, including its disability retirement provisions, is stated in Government Code section 31451:

The purpose of this chapter is to recognize a public obligation to county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation for future services and to provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of the public service without prejudice and without inflicting a hardship upon the employees removed.

The issue is whether the applicant is being replaced because of incapacity for the betterment of public service without prejudice or hardship. If the applicant first takes a regular retirement, thereby removing herself from the obligations of the occupation, replacing the applicant is not necessary. A work restriction imposed after the employee has voluntarily taken a regular retirement does not accomplish the purposes of the law – the applicant does not suffer prejudice or hardship by being replaced. The applicant is already out of service and *replacement* is not any more an issue than it is for any other member who takes a regular retirement. Just as a retroactively imposed prophylactic restriction is illusory and a legal fiction, we submit that a prophylactic restriction from duties the member no longer is required to perform has no legal significance under the CERL of 1937.

The issue is whether disability abbreviated the applicant's career. If it did not, the applicant is not entitled to a disability retirement.

This potential limitation on the grant of a disability retirement must be distinguished from two situations that are frequently seen:

In the first situation, the member files an application for disability retirement and later files an application for a regular retirement for years of service and age. This is specifically permitted by Government Code section 31725.7 which provides in part as follows:

- (a) At any time after filing an application for disability retirement with the board, the member may, if eligible, apply for, and the board in its discretion may grant, a service retirement allowance pending the determination of his or her entitlement to disability retirement. If he or she is found to be eligible for disability retirement, appropriate adjustments shall be made in his or her retirement allowance retroactive to the effective date of his or her disability retirement as provided in Section 31724.

(b) . . . In the event a member retired for service is found not to be entitled to disability retirement he or she shall not be entitled to return to his or her job as provided in Section 31725.

In the first situation, Section 31725.7, by its clear terms, contemplates that the member first files an application for disability retirement and thereafter files an application for a regular retirement pending the determination on the disability retirement claim.

In the second situation, to be distinguished from a post-retirement imposition of a prophylactic restriction, the member is first removed from work either as a prophylactic measure, or because the member's medical condition prevents her from performing her usual duties. The member's physician continues to recommend that the member not return to her duties as a prophylactic measure. The member then retires for years of service and age and, following discontinuance of service, files an application for a disability retirement that is timely under the provisions of Government Code section 31722. In this kind of situation, the reason the applicant does not return to work and retires is the disability associated with the prophylaxis. The member leaves service because of disability and may be replaced consistent with the provisions of Government Code section 31451. Even if the prophylactic disability is not precisely defined until after the member discontinues service, it is not a disability that has its onset after the member has taken a regular retirement. To deny an incapacitated member a disability retirement on the basis that medical advice that the member not to return has been rendered moot by an intervening regular retirement would seem to be based on circular reasoning and a subversion of the purpose of disability retirement law.

End comment.

11. Disability due to termination

Associations' comment

In the case of a termination, two areas of controversy are involved when the stress of the termination causes physical and/or mental injuries and disability.

(1) Disability:

The first area of controversy involves the question of whether disability that came on after termination can be the basis of a disability retirement. The association will assert that if the applicant stopped working because he or she was terminated, and not because of disability, the applicant is not entitled to a disability retirement pension.

(2) Service-connection:

Given that the applicant is permanently incapacitated, the second area of controversy involves a determination of whether those events that caused the incapacity "arise out of and in the course of employment" so as to qualify the applicant for a service-connected disability retirement. This second area of controversy is addressed below under the Section II, B, 3, b), (3), (c), [3], dealing with "service-connected Incapacity."

End comment.

Bray v. Workers' Comp. Appeals Bd. (1994) 26 Cal.App.4th 530 [31 Cal.Rptr.2d 580], dealt with an employee who was unexpectedly terminated and suffered psychiatric injuries which occurred after termination ". . . caused solely by the fact of termination." There was no evidence of any pre-termination injury or disability. The court held that "[P]osttermination injuries not resulting from pretermination events [are] not compensable under existing law in any event." (Id., p. 539.)

. . . [T]he fact of job termination by an employer, without more, cannot result in liability to the terminated employee by way of a workers' compensation award. (*Bray*, p. 540.)

In *Haywood v. American River Fire Protection District* (1998), *supra*, 67 Cal.App.4th 1292 [79 Cal.Rptr.2d 749] a firefighter was terminated after a series of disciplinary actions. He claimed that he was permanently incapacitated for his duties because of a psychiatric reaction to the disciplinary proceedings that resulted in his termination. There was no evidence that Haywood had sustained an incapacitating injury before the disciplinary actions. The Superior Court granted Haywood's petition for writ of mandate to compel the District to grant him a disability retirement. The Court of Appeal reversed the Superior Court and remanded the case with instructions to deny Haywood's petition.

As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically unable to perform his usual duties and one who has become unwilling to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. (*Haywood*, p. 1297.)

. . .

As we have noted, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was properly terminated for cause. There is no claim, or evidence which would support a claim, that the termination for cause was due to behavior caused by a physical or mental condition. And there is no claim, or evidence which would support a claim, of eligibility for disability retirement that could have been presented before the disciplinary actions were taken. Instead, Haywood asserts he has become psychologically unable to return to employment with the District as the result of his reaction to the disciplinary proceeding which resulted in a complete severance of the employment relationship. (*Haywood*, p. 1306.)

...

For all the reasons stated above, we conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed. (*Haywood*, p. 1307.)

In *Smith v. City of Napa, et al.* (2004) 120 Cal.App.4th 194 [14 Cal.Rptr.3d 908], the city dismissed a firefighter after he failed remedial tests of his competency at required skills. On the day he was dismissed, he filed an application for disability retirement. The CalPERS Board of Administration denied the application, without considering its merits, on the basis that Smith's employment had been terminated, citing the Court of Appeal's decision in *Haywood*. Smith filed a petition for writ of mandate to compel the city and the CalPERS board to consider his application. The Superior Court summarily dismissed the petition. The Court of Appeal affirmed the trial court's judgment on the bases that (1) Smith's dismissal for cause extinguished former firefighter's right to disability retirement, and (2) his right to disability retirement had not matured prior to his dismissal.

In the published part of this opinion, we reject [Smith's] criticisms of the *Haywood* holding as dictum extraneous to its ratio decidendi and as inconsistent with Supreme Court precedent. We also explain an oft repeated qualification in *Haywood* that its ruling does not apply to a dismissal that "preempts" an otherwise valid claim for disability retirement. ([*Haywood v. American River Fire Protection District*,] 67 Cal.App.4th at pp. 1297, 1306, 1307.) Contrary to the belief of the defendants, it does not refer only to a dismissal *intended* to thwart a claim for disability retirement, because a dismissal for cause cannot defeat an employee's *matured* right to a disability retirement antedating the event providing cause for the dismissal. The plaintiff, however, does not qualify for this restated exception to *Haywood*. We reject the remainder of his arguments in the unpublished portion of the Discussion. We will affirm the judgment. [Italics in original.] (*Smith*, p. 198.)

...

[In *Haywood*] [w]e noted the lack of any evidence that Haywood was eligible for a disability retirement before the dismissal, or of any basis in a physical or mental disability for the conduct resulting in the dismissal. (*Haywood, supra*, 67 Cal.App.4th at p. 1306.) We concluded that the legislative intent underlying the disability retirement laws presupposed a continuing if abated employment relationship -- the disabled annuitant can petition to return to active service, and the employing agency can compel testing to determine if the disability is no longer continuing (at which point it can insist on a return to active service). Therefore, if an applicant is no longer eligible for reinstatement because of a dismissal for cause, this also disqualifies the applicant for a disability retirement.

(*Id.* at pps. 1305 - 1306.) To interpret the statutes otherwise overrides the power of public agencies to discipline employees, and would reward poor employees with early retirement. (*Id.* at p. 1306.) Finally, we rejected an argument that the timeliness of an application for disability retirement is determinative of eligibility. (*Id.* at pp. 1306 1307.)

In the first place, our conclusion that a dismissal for good cause unrelated to a medical disability disqualifies an employee for a disability retirement was essential to the dispute before us and our analysis. Nothing about it exceeds the necessary ratio decidendi of the case. We therefore reject the plaintiff's characterization of the principle as mere unpersuasive dicta. (*Smith*, pp. 203-204.)

. . .

It is not a material factual distinction from *Haywood* that the plaintiff desired to continue working. *Haywood* contrasted the "unwilling" firefighter with an employee "unable" to perform job duties. That was, however, only the manner in which the facts in *Haywood* presented the dichotomy. The distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.

Equally immaterial is the plaintiff's emphasis on the filing date of his application for disability retirement. That he filed it on the effective date of his dismissal rather than thereafter is a distinction without a difference. As we stated in *Haywood*, the timeliness of the application is a procedural issue without any significance to the substantive entitlement to a disability retirement. (67 Cal.App.4th at p. 1307.)

This leaves the sole subject on which the plaintiff has correctly interpreted *Haywood* in contrast with the defendants. As earlier noted, we repeatedly cautioned that our holding would not apply where the cause for dismissal was the result of a disabling medical condition, or where the dismissal would be "preemptive of an otherwise valid claim for disability retirement." (67 Cal.App.4th at p. 1307.) This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability (*id.* at p. 1305, 79 Cal.Rptr.2d 749 [citing § 21153]) or indirectly through cause based on the disability (*Patton v. Governing Board* (1978) 77 Cal.App.3d 495, 501-502 [143 Cal.Rptr. 593]).

Our use of the term "preempt" admittedly could lead one to the interpretation that both defendants have embraced: an intent to thwart an otherwise valid claim for disability. However, as the plaintiff has correctly attempted to argue throughout the CalPERS proceedings, even if an agency dismisses an employee solely for a cause *unrelated* to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect. (*Willens v. Commission on Judicial Qualifications* (1973), *supra*, 10

Cal.3d 451 at pp. 458 459 [110 Cal.Rptr. 713, 516 P.2d 1]; *Skaggs v. City of Los Angeles* (1954) 43 Cal.2d 497, 503-504 [275 P.2d 9]; see *Pearson v. County of Los Angeles* (1957) 49 Cal.2d 523, 543-544 [126 Cal.Rptr. 633, 319 P.2d 624].) Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot "preempt" the right to receive a disability pension for the duration of the disability. (See *In re Gray* (1999) State Personnel Bd. Precedential Dec. No. 99 08, p. 6 [disability retirement effective before dismissal does not forestall dismissal; however, dismissal does not affect receipt of disability retirement].) Conversely, "the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures. . . ." (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749 [129 Cal.Rptr. 289, 548 P.2d 689] (*Dickey*).)

The key issue is thus whether his right to a disability retirement matured before the plaintiff's separation from service.¹¹ A vested right matures when there is an unconditional right to immediate payment. (*In re Marriage of Mueller* (1977) 70 Cal.App.3d 66, 71 [137 Cal.Rptr. 129]; see *In re Marriage of Brown* (1976) 15 Cal.3d 838, 842 [126 Cal.Rptr. 633, 544 P.2d 561].) In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties. (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672 [197 P.2d 710] ["the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary"].)¹² In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

¹¹ Neither the facts nor the briefing in the present case require us to decide whether the event extinguishing a right to a disability retirement is the effective date of the dismissal, the date of the decision to dismiss the employee, or the date of the underlying conduct giving cause for the dismissal.

¹² *Dickey* pointed out that *Tyra's* discussion of when the right to disability was sufficiently mature to enforce did not apply to the question of when the right had vested so as to entitle the employee to the independent judgment standard of review in a writ of administrative mandate. (*Dickey, supra*, 16 Cal.3d at pp. 749–750, 751.)

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however.

It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal.

Rather, he did not even initiate the process until after giving cause for his dismissal. (*Smith*, pp. 205-207.)

The Court of Appeal noted that there were medical reports, generated before Smith was dismissed, that Smith asserted showed that he was incapacitated before he was dismissed. The Court observed,

. . . At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. [Citations.] And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal. [Footnote omitted] The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. [Citations.] Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff. [Italics in the original.] (*Smith*, p. 207.)

12. Effect of employer accommodation and a permanent or indefinite assignment to light duty

Associations' comment

What does "permanent assignment" mean? No one in public service is promised, entitled to, or reasonably can expect an assignment that is "permanent" in the literal sense of "continuing or enduring without fundamental or marked change" (Webster's New Collegiate Dictionary) for the rest of the member's career. The duration of a member's assignment depends on the needs of the public employer, the continuity of those needs, and the performance of the employee. An incapacitated member is not entitled to some greater right to continuity of an employment assignment than is enjoyed by an uninjured member. Rather, what an incapacitated member can expect when offered an assignment compatible with his or her disability is an assignment that is not temporary, that is, it is not one that is limited to a certain duration, not one that might end on the happening of an anticipated event – such as the hiring of someone who will replace the incapacitated member – nor is it only a temporary light duty assignment that will only be available until the applicant's disability retirement application is resolved.

Experience instructs that some county officials who are asked if a *permanent* assignment within an applicant's restrictions is available, understand by the word "permanent" that the assignment must be one guaranteed to last throughout the applicant's career. Given such a construction of the word "permanent," there are few county managers who will be willing to commit the county to such an accommodation. Nor, given such a construction, would it be fair to the injured member for a county manager to say that such a guarantee can be made. However, the more reasonable construction of the term "permanent assignment" is that it is one of *indefinite* duration – one that could, or may not, last for the member's career. An assignment that is of

indefinite duration is as *permanent* an assignment as any public employee is given. Therefore, when an inquiry is made of county managers concerning the availability of *permanent* assignments in the county or district service, care should be taken to insure that the managers understand that the inquiry goes to the availability of assignments of indefinite duration.

End comment.

- a) An employee who is permanently incapacitated for the usual duties of his or her assignment may not be entitled to a disability retirement pension if the employer can accommodate the employee's incapacity.**

Burden of Proof

Which party has the burden to prove an accommodation? No case directly answers this question. However, if the employer is asserting that the employee is not permanently incapacitated because of the existence of an accommodation, it is arguably the employer's burden. California Evidence Code § 500 states:

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

Depending on how or when the issue of accommodation arises, it could be argued that the employee must disprove an accommodation in order to establish incapacity.

Definition of Incapacity

To review, the Court of Appeal in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877, defined incapacity as follows:

We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties.

Relevant Cases

- 1. *Meyers*: In a city disability retirement case, the court held that, in determining the validity of an accommodation, the pension Board must determine as a matter of fact whether the employee could perform the duties and functions of "any other position in the same classification of positions to which the city may offer to transfer him," and that such a determination could be made retrospectively, provided that the Board's findings were based on evidence showing how the employer could and would have accommodated the employee. Such evidence must be substantial**

– reasonable in nature, credible, and of solid value. *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.

Meyers v. Board of Administration for the Federated City Employees Retirement Fund (2014) 224 Cal.App.4th 250 involved a construction inspector for the City of San Jose who sustained a back injury in February 2003 that necessitated a three-level spinal fusion in August 2003. He returned to work in December 2003 but continued with medical treatment due to ongoing symptoms. In July 2004, he was reassigned as a sidewalk inspector, presumably to accommodate his symptoms. In his workers' compensation case, he was examined by Dr. Horowitz. Dr. Horowitz took him off work in October 2004, noting that Meyers position as a sidewalk inspector required repetitive bending, which exacerbated his low back pain. In February 2005, Dr. Horowitz issued work restrictions precluding bending, crawling, crouching, kneeling, lifting or carrying more than 25 pounds, pushing/pulling with significant force, and frequently extending or rotating his head and neck.

Meyers applied for a service-connected disability retirement in March 2005. He separated from city service in May 2005. In October 2005, Dr. Horowitz concluded that Meyers could not return to his job. In November 2005, a city workers' compensation adjuster notified Meyers that, based on Dr. Horowitz's February 2005 work restrictions, the city had no modified or alternative work available for him.

The Board's medical director, Dr. Rajiv Das, examined Meyers in December 2005 in connection with his application for disability retirement and issued work restrictions that precluded repetitive bending and stooping, lifting weights greater than 20 pounds, and sitting more than 15-20 minutes at a time without the opportunity to stand. When asked by the Board whether the work restrictions imposed by Dr. Das could have been accommodated at the time Meyers separated from city service, the employer responded in the affirmative in January 2006. However, by that time, Meyers was not eligible to return to work because he had already separated from service in May 2005.

The Board denied Meyers's application on the grounds that (1) the requirements of the position of an associate construction inspector were within his work restrictions and that (2) the city was able to accommodate the work restrictions. Meyers's appeal to the Superior Court was denied on similar grounds. He then appealed to the Court of Appeal.

On appeal, Meyers argued that the city was required to "*actually* accommodate him, not to merely assert it could have in theory."

The appellate court considered whether there was substantial evidence to support the trial court's findings. It began its analysis with the definition of incapacity as defined by the San Jose Municipal Code:

'[I]ncapacitated for the performance of duty' [means] 'disability of a member...of permanent or extended and uncertain duration, occurring while such member is an employee of the city...as a result of injury or disease...which renders the member physically or mentally incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of the position then held by him and of any other position in the same classification of positions to which the city may offer to transfer him, as determined by the retirement board on the basis of competent medical opinion.'

The court first addressed whether substantial evidence supported the conclusion that Meyers was physically able to carry out the duties of his current position as an associate construction inspector assigned to the sidewalk section. The job description for a sidewalk inspector did not require any lifting, nor did it require sitting for more than 15-20 minutes without the ability to stand. However, the evidence demonstrated that the job of a sidewalk inspector required repetitive bending and stooping in order to inspect sidewalks. Multiple medical experts had precluded Meyers from repetitive bending and stooping. Accordingly, the court concluded that substantial evidence did not support the trial court's conclusion that Meyers was physically able to perform the duties of a sidewalk inspector because the job required repetitive bending.

The Court of Appeal next considered whether substantial evidence supported "the conclusion that Meyers was physically able to perform the duties of 'any other position ... to which the city may offer to transfer him.'" Meyers argued that the phrase "any other position ... to which the city may offer to transfer him" meant "any other position ... to which the city in fact offers to transfer him." Respondent, the San Jose Board, interpreted the phrase to mean "any other position ... to which the city theoretically could have offered to transfer him." The Board reasoned that the inquiry into whether Meyers could have been accommodated by the city at the time of separation (in May 2005) was necessarily theoretical because it was made after the fact (in January 2006). The salient issue was whether an "offer in fact" versus a "theoretical offer" was required to prove a reasonable accommodation in post-retirement situations.

The court held:

In determining whether a member has a disability within the meaning of the municipal code, the Board necessarily must determine as a matter of fact whether the member could perform the duties and functions of 'any other position in the same classification of positions to which the city may offer to transfer him ...'

... That is not to say the Board's inquiry cannot be performed retrospectively. But the Board's findings must be based on evidence showing how the City could and would have accommodated the member. No such evidence exists here.

The court criticized the city's accommodation memo because it was:

Lacking any explanation of what the DOT [the city department that employed Meyers] understood accommodation to mean or how it intended to achieve it, the memorandum leaves the reader with many questions. Did the DOT conclude it could have accommodated Meyers because it saw no conflict between the duties of a sidewalk inspector and Meyers's work restrictions (a conclusion we reject above)? Did the DOT determine it could have modified Meyers's duties as a sidewalk inspector in view of his restrictions? Did the DOT believe it could have transferred Meyers to another position? If so, what was that position and its associated duties? In our view, the DOT's bald assertion that, in retrospect, it could have accommodated Meyers at the time of his May 2005 separation does not constitute substantial evidence that Meyers was physically able to perform the duties of any DOT position.

The Court of Appeal remanded the matter back for a further administrative hearing to address the above-noted questions.

2. *Barber*: In a city disability retirement case, it was held that the lack of an open light duty position that was within the capabilities of a partially disabled lieutenant fire fighter was a basis for a finding that the member was permanently incapacitated.

Barber v. Retirement Board (1971), *supra*, 18 Cal.App.3d 273 [95 Cal.Rptr. 657] involved a firefighter for the City and County of San Francisco. After losing a leg in a work-related accident, Barber returned to duties in the Fire Department's bureau of assignments. For a time, he performed the same duties as lieutenants. He took and passed the lieutenant's examination, but was rejected because of the amputation. He challenged the city and county's decision before the civil service commission, which ruled that he was medically qualified to be a lieutenant. On his promotion, he was then transferred to the department's training division where he was an instructor. Twelve days later, the chief of the department petitioned the retirement board to retire Barber based on the claim that Barber was only capable of light duty and could not perform the duties required of him in the Training Division. During the administrative hearing, the chief testified that, while he had not observed Barber's performance at the Training Division, he knew that Barber could not perform the physical aspects of his duties. The retirement board found Barber to be permanently incapacitated and granted him a service-connected disability retirement. Barber filed a petition for writ of mandate to compel the board to vacate its directive to retire him. The trial court denied Barber's petition and the Court of Appeal affirmed. The Court agreed with Barber that the retirement board was bound by the ruling of the civil service commission on his fitness for duty as a lieutenant, but only in the context of the fact that, at the time of the hearing before the commission, Barber was assigned to the department's bureau of assignments. There, he performed light duties that were also performed by two other lieutenants. The commission's decision was not that Barber could perform *any* duties to

which a lieutenant might be assigned, but merely that he could perform *some* duties to which lieutenants were assigned. Having found substantial evidence to support the retirement board's decision that Barber was restricted to light duties, and there being no open lieutenant positions where his duties would be within his capabilities, the Court of Appeal affirmed the trial court's denial of his petition for writ of mandate, saying:

Barber first contends that the Chief's interpretation of the term "his duty" in section 171.1.3 of the [city] charter [footnote omitted] to mean any and all duties that are performed by firemen appears unreasonable and arbitrary in view of the evidence that some men in the fire department were assigned to permanent limited duty positions. We see merit in this contention. As there is no judicial or legal construction of the term as used in the city charter provisions, the question is one of first impression. The courts will ordinarily follow a contemporaneous administrative construction of a statute which is reasonably susceptible of more than one interpretation but such a construction cannot be followed where it is clearly erroneous (*Hoyt v. Board of Civil Service Commrs.*, (1942) 21 Cal.2d 399, 407 [132 P.2d 804]). We think that in view of the well recognized public policy favoring the employment and utilization of physically handicapped persons (Welf. & Inst. Code, § 10650), the Chief's interpretation here was too broad. Under the circumstances, where there were permanent light duty assignments, a narrower construction declaring "his duty" in section 171.1.3 to refer to duties required to be performed in a given permanent assignment within the department would more reasonable. (*Barber*, p. 278.)

3. *Craver*: In a city disability retirement case, it was held that, where there was an available light duty position that was within the capabilities of a member who was incapacitated for his or her usual duties, the member was not entitled to a disability retirement pension.

Craver v. City of Los Angeles (1974), *supra*, 42 Cal.App.3d 76 [17 Cal.Rptr. 534] involved a city policeman who, after sustaining a work-related injury to his back and undergoing a laminectomy, claimed that he was permanently incapacitated. He applied for a disability retirement. The city's retirement commission denied the application and the trial court denied the police officer's petition for writ of mandate. The Court of Appeal reversed the trial court's judgment and remanded the case to the trial court for further proceedings on the ground that the trial court used the substantial evidence test instead of its independent judgment. The Court of Appeal provided additional direction to the trial court:

In remanding this case to the trial court so that it can exercise its independent judgment, we feel obliged to discuss the standard to be applied in determining whether appellant is entitled to a pension. He contends that the standard should be whether a person can perform the usual duties of a police officer.

Respondent maintains that only when an officer becomes physically or mentally incapacitated to the extent that he is unable to perform the duties to which he is, last was or would be assigned by his department will he be entitled to the benefit of a disability pension. Appellant [Craver] relies primarily on *Mansperger v. Public Employees' Retirement System*, 6 Cal.App.3d 873 [86 Cal.Rptr. 450] [2nd Dist.], and respondent [city] relies on *Barber v. Retirement Board*, 18 Cal.App.3d 273 [95 Cal.Rptr. 657]. (*Craver*, p. 79.)

The Court quoted the City of Los Angeles charter provision dealing with disability retirements and stated,

. . . Our question thus becomes whether appellant was "so physically ... disabled ... as to render necessary his retirement from active service. ..."

We agree with the court in *Barber v. Retirement Board*, *supra*, 18 Cal.App.3d at page 278, that where there are permanent light duty assignments and a person who becomes "incapacitated for the performance of his duty . . . shall be retired," that person should not be retired if he can perform duties in a given permanent assignment within the department. He need not be able to perform any and all duties performed by firemen or, in the instant case, policemen. Public policy supports employment and utilization of the handicapped. (*Barber v. Retirement Board*, *supra*.) If a person can be employed in such an assignment, he should not be retired with payment of a disability retirement pension. (*Craver*, pp. 79-80.)

4. ***Harmon*: In a CERL of 1937 disability retirement case, one basis for finding that a deputy sheriff was not incapacitated was that the possibility that there were light duty positions within the capabilities of a disabled deputy sheriff had not been foreclosed, even though the Sheriff's policy was that all deputies had to be capable of the full range of duties.**

Harmon v. Board of Retirement (1976), *supra*, 62 Cal.App.3d 689 [133 Cal.Rptr. 154] involved a deputy sheriff for the County of San Mateo who claimed to be permanently incapacitated as a result of a back injury. Physicians opined that, while Harmon had only mild degenerative changes, work restrictions were indicated based on the severity of Harmon's subjective complaints. But evidence of Harmon's activities developed through surveillance by an investigator impeached the credibility of Harmon's subjective complaints. The Assistant Sheriff testified that the Sheriff's position was that each deputy had to be 100% fit for any duties to which the deputy might be assigned, but also testified about the availability of assignments to duties less strenuous than patrol duties, such as "bailiff, process serving, desk officer or jail front office duty." The Board of Retirement denied Harmon's application, the superior court denied Harmon's petition for writ of mandate, and the Court of Appeal affirmed. The Court of Appeal stated,

Before examining the foregoing evidence it is necessary to determine what is meant by the requirement that the employee be "permanently incapacitated physically or mentally for the performance of his duties in the service." (Gov. Code, § 31724, fn. 1 above. [Footnote omitted]) In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873 [86 Cal.Rptr. 450], the court was concerned with the phrase "incapacitated for the performance of duty" as used in section 21022 of the Government Code covering the retirement of highway patrol or local safety members of the state public employees' retirement system. There the employee, a fish and game warden, was not disabled, except for activities requiring heavy lifting and carrying. The court decided, "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties." (6 Cal.App.3d at p. 876. See also *Cansdale v. Board of Administration* (1976) 59 Cal.App.3d 656, 664 [130 Cal.Rptr. 880].) In *Barber v. Retirement Board* (1971) 18 Cal.App.3d 273 [95 Cal.Rptr. 657], the shoe was on the other foot. A fireman was fighting compulsory retirement. In reviewing the matter the court rejected the fire chief's contention that "incapacitated for the performance of his duty" as found in the provisions for compulsory retirement in a city charter meant "any and all duties that are performed by firemen." (18 Cal.App.3d at p. 278, italics the court's.) It concluded, "We think that in view of the well recognized public policy favoring the employment and utilization of physically handicapped persons (Welf. & Inst. Code, § 10650), the Chief's interpretation here was too broad. Under the circumstances, where there were permanent light duty assignments, a narrower construction declaring 'his duty' in section 171.1.3 to refer to duties required to be performed in a given permanent assignment within the department would be more reasonable." (*Id.* See also *Craver v. City of Los Angeles, supra*, 42 Cal.App.3d 76, 79-80.)

In *Mansperger v. Public Employees' Retirement System*, the court upheld the findings of the governing board of the retirement system and the trial court that the employee was not entitled to a retirement pension. It stated, "While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden." (6 Cal.App.3d at pp. 876-877.) [Footnote 2 omitted] Here even accepting in full the facts and opinions in the doctor's reports, and disregarding the testimony of the investigator and the supporting motion pictures, the record supports the implied finding that the deputy was not incapacitated for the performance of the duties of bailiff or other duties set forth in the civil service classification which did not involve heavy lifting or frequent necessity, as on patrol, for the use of considerable physical effort to subdue arrestees or prisoners.

The deputy seeks to avoid the foregoing conclusion by reference to testimony of the assistant sheriff that since July 1, 1973, it was the policy of the sheriff's office

not to restore officers to duty unless they were 100 percent fit for any duty to which they might be assigned, and that at the time of the hearing before the referee in April 1974, some eight months after the deputy, not the sheriff, had terminated the employment relationship, there was no position available in the sheriff's office which would not involve a significant risk of violence. He relies upon *Barber v. Retirement Board, supra*, where the board, the trial court, and the Court of Appeal upheld the compulsory retirement of the fire lieutenant sought by the fire chief because there was no light duty available for one of the lieutenant's rank with his disability. (18 Cal.App.3d at pp. 279-280. See also *Dobbins v. City of Los Angeles* (1970) 11 Cal.App.3d 302, 305-306 [89 Cal.Rptr. 758]; and *O'Neal v. City of San Francisco* (1969) 272 Cal.App.2d 869, 874-875 [77 Cal.Rptr. 855].) In this case the sheriff is not a party seeking to force the deputy to retire. Under the provisions of the County Employees Retirement Law of 1937, the employer is entitled to secure judicial review of a decision denying an employee retirement because the retirement board, as here, is not satisfied from the medical examination and other evidence that the member is incapacitated for the performance of his duties. If no such action is taken by the employer and the denial becomes final the employer must reinstate the employee. [Footnote omitted.] Moreover, the assistant sheriff's testimony when taken as a whole does not foreclose the possibility that there were positions in the sheriff's office which could be performed by one subject to the disabilities which the doctors reported that the deputy suffered. (*Harmon, pp.* 694-697.)

The *Harmon* court went on to note that video of Harmon's activities could not be ignored and it could not be said that the trial court's finding that Harmon was not disabled was erroneous as a matter of law. Further, the court held that the county's stipulation in the workers' compensation case that Harmon had a 33% permanent disability did not bind the Board of Retirement on the issue of Harmon's capacity to perform his duties.

Associations' comment

In its statement that if the employer fails to seek judicial review of a board's denial of a disability retirement, it "must reinstate the employee," the *Harmon* court appears to be saying that the fact that there are no positions available is irrelevant if the board's decision becomes final—the employee must be reinstated even if there are no positions available. (Accord *Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240, 1246-1247 [21 Cal.Rptr.2d 896].)

End comment.

5. O'Toole: A department's policy that there were no permanent light duty positions was not substantial evidence that there were no permanent light duty positions.

O'Toole v. Retirement Board (1983) 139 Cal.App.3d 600 [188 Cal.Rptr. 853] involved a dispute over whether a retired police officer had to be able to perform the full range of duties to which a police officer might be assigned in order for the employer to deny his

application for a disability retirement pension. O'Toole had been a police officer for the City and County of San Francisco. He sustained an injury to the inner ear that caused diminished hearing, persistent ringing in his ears and episodes of dizziness. There was no dispute that O'Toole was incapacitated for his duties as a police officer. He was assigned to administrative duties as a public affairs officer, a position he held for over seven years. He retired to take a position with another employer. The retirement board denied his application for a disability retirement. The police chief admitted that there were light duty positions to which permanently disabled police officers would be assigned, but the department will tell the retirement board that there are no light duty positions "because, again, the Charter requires the Retirement Board to retire someone with a disability." (*O'Toole*, p. 604.) The superior court granted O'Toole's petition for a writ of mandate to compel the board to grant a service-connected disability retirement. The Court of Appeal reversed and directed the trial court to issue an order denying O'Toole's petition.

We do not agree with the trial court's findings that the police department has no light duty assignments available for O'Toole. Despite the police commission policy disfavoring limited duty positions, the fact of the matter is that as of 1978, the San Francisco Department had at least 40 "Permanent and Indefinite Light Duty Officers" even though, if asked, the police chief would tell the Board that no light duty assignments were available whenever an industrially injured officer wanted to retire.

Our case is distinguishable from *Barber v. Retirement Board, supra.*, 18 Cal.App.3d 273, where there were only two permanent light duty positions available in the fire department for a person of Barber's rank and condition and those positions were currently filled by two officers with more seniority than Barber. The court found that the addition of another lieutenant in the clerical bureau would constitute an unwarranted and unnecessary expense for the city.

Looking at the realities of this case, O'Toole was employed as a public affairs officer for some six and one-half years following the inception of his disability. He could have continued in his position had he not chosen to retire. . . .

The record establishes that as a matter of police department practice there was a permanent light duty assignment as a public affairs officer available to O'Toole as long as he wanted the job. If there was one fact clear, it is that O'Toole was not incapacitated for the performance of the duties of this permanent position with the police department.

It comes down to this: Is a police department paper policy that there are no permanent limited duty positions--a policy honored in the breach rather than in the observance--substantial evidence that there are no such positions? We think not. (*O'Toole*, pp. 604-605.)

6. *Stuessel*: In a city pension case, a police officer was found not to be permanently incapacitated where he was given a light duty

assignment that he could perform without carrying a weapon or effecting arrests, he retained his peace-officer classification, salary, and fringe benefits, and had the same promotional opportunities as others in the police-officer classification.

Stuessel v. City of Glendale (1983) 141 Cal.App.3d 1047 [190 Cal.Rptr. 773]. Stuessel was a police officer who sustained an injury to his left upper extremity. Because Stuessel claimed that he could not use a weapon or effect arrests because of his injury, the department removed Stuessel's right to carry a concealed weapon or make arrests. Stuessel was assigned to a permanent modified light duty position as a front desk or operations officer or a combination of both, duties for which he was not incapacitated. He was told he retained his police officer classification, salary, and fringe benefits. He applied for a service-connected disability retirement and, following the denial of the application, filed a petition for writ of mandate to compel the city to retire him. Stuessel argued that, as a police officer, he had a right to carry a weapon and make arrests. If he was to be deprived of those rights and responsibilities, he argued, he should be retired. The department should not be allowed to, in effect, classify as "police work" the duties of a civilian position. The superior court denied the petition and the Court of Appeal affirmed, saying,

The central issue in this case is whether a police officer, who is industrially incapacitated from the full performance of his "in field" duties, may be placed in a permanent modified light duty position within the police division of the City as a front desk or operations officer, or combination of both, where he is not incapacitated from carrying out the requirements of such position.

We shall hold that where, as here, such employee retains his police officer classification, continues to receive the same salary and fringe benefits and has the same promotional opportunities as other employees in the police officer classification, he may be placed in such available permanent modified light duty position even though he no longer has the right to carry a firearm or make arrests as a peace officer. (*Stuessel*, p. 1051). . .

There was substantial evidence to support the trial court's finding that the permanent modified light duty positions existed before the onset of Stuessel's disability and were available within the police division. Further, there was substantial evidence that he retained his police officer classification and his rights to receive the same salary and fringe benefits and promotional opportunities as other employees in the police officer classification. There was also substantial evidence that he was not incapacitated from the performance of duties in a given permanent assignment within the police division of the City. As was said in *Craver*: "Public policy supports employment and utilization of the handicapped. [Citations.] ¶ If a person can be employed in such an assignment, he should not be retired with payment of a disability retirement pension. (*Craver v. City of Los Angeles*, *supra*, 42 Cal.App.3d at p. 80.)" (*Stuessel*, p. 1053.)

Applicants' comments on *Stuessel*

Stuessel involved a policeman employed by a city operating under PERS. We submit that the *Stuessel* opinion does not apply to CERL of 1937 cases.

The California Supreme Court's opinion in *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, at 338, (also pages 344-345) [14 Cal.Rptr.3d 857, 92 P.3d 350]) provides support for the Applicants' contention that the offer of a permanent modified assignment does not negate the grant of a disability retirement if it does not provide the same or similar promotional opportunities as the injured member's assignment at the time the member became permanently disabled. The Supreme Court stated,

We conclude that in order to qualify for disability retirement under section 21156, Mr. Nolan will have to show not only that he is incapacitated from performing his usual duties for Anaheim, but also that he is incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies. Assuming Mr. Nolan makes such a prima facie showing, the burden will then shift to Anaheim to show not only that Mr. Nolan is capable of performing the usual duties of a patrol officer for other California law enforcement agencies, but also to show that similar positions with other California law enforcement agencies are available to Mr. Nolan. By similar positions, we mean patrol officer positions with reasonably comparable pay, benefits, and promotional opportunities.

The Supreme Court did not cite any authority for its statement about promotional opportunities. The Associations may argue that this *ipsi dixit* statement may be only dictum and not part of the Court's *ratio decidendi*. On the other hand, the Court introduced the promotional opportunities limitation with the phrase "We conclude . . ."

End comment.

Associations' comment on *Stuessel*

The *Stuessel* court explained that it was holding that a disability retirement could be denied a police officer assigned to a permanent modified light duty position where the police officer retains his police officer classification, continues to receive the same salary and fringe benefits, and has the same promotional opportunities as other employees in the police officer classification. We question whether this means that retaining promotional opportunities is a prerequisite to finding an injured member to be capable of substantially performing his or her duties in a given assignment. The issue is whether the employee retains the capacity to substantially perform his or her usual duties, not whether an employee has the opportunity to be promoted. Retention of promotional opportunities is not part of the *Mansperger/Harmon* test and it is not a CERL statutory prerequisite.

The rules of *Mansperger* and *Stuessel* can be resolved. *Mansperger* was found capable of substantially performing his usual duties. The duties with which he would have trouble were remote and uncommon. *Stuessel* was incapacitated for the kind of duties commonly associated with peace-officer occupations (carrying a weapon,

effecting arrests) and presumably would have been retired for disability but for the fact that the city assigned him to duties for which he was capable. The *Stuessel* court's approval of the city's actions was qualified by the fact that his police officer classification was continued, along with his salary and fringe benefits and promotional opportunities. The importation of standards from employment discrimination law shows that the court was judging the city's action in terms of its fairness to the employee.

There is consistency among the approaches used by the *Stuessel* court and the courts in *Curtis v. Board of Retirement* (1986) 177 Cal.App.3d 293 [223 Cal.Rptr. 123] and *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118 [85 P.2d 956]. Both *Curtis* and *Brooks* are discussed further, below.

Curtis is often cited for the proposition that an applicant is not disqualified for a disability retirement by the fact that she is able to do some other kind of job than the one she had been doing for the county when she was injured. For example, a retirement association's chief executive officer cannot be denied a disability retirement by proof that the duties of a receptionist are within his or her capabilities.

In *Brooks*, below, the city assigned an injured police officer, presumably incapacitated for his pre-injury work as a patrol officer, to work as a traffic officer and an investigator, and to perform certain clerical work. There was no evidence that this kind of work was not performed by other officers of equal rank. Brooks contended that he should be retired for disability under a more lucrative pension ordinance in effect earlier when he was pulled off patrol, arguing that he was then already disabled for his duties. When he was granted a service-connected disability retirement, the ordinance had been amended to reduce the pension from two-thirds of salary to one-half. The city argued that he was not disabled while the former ordinance was in effect because he continued performing the duties of a police officer. The Court of Appeal ruled that Brooks was not disabled while he was assigned to the ordinary duties of a police officer, and his duties in the lighter, post-injury assignments were also the ordinary duties of a police officer. They were duties to which other fully capable police officers would be assigned.

Like Brooks, the duties to which Stuessel was assigned were those of a police officer, although he did not carry a weapon or effect arrests.

Note that in *Harmon v. Board of Retirement*, *supra*, a 1976 opinion in a CERL of '37 case out of the County of San Mateo, the member, a deputy sheriff who was subsequently found not to be incapacitated, had been disqualified for a promotion to sheriff's sergeant because of his disability. (*Id.*, 62 Cal.App.3d, 692.) Harmon's having been denied a promotional opportunity on the basis of his disability was not a factor in the *Harmon* court's analysis.

In *Barber v. Retirement Board*, *supra*, a 1971 non-CERL of 1937 case out of the City and County of San Francisco, a firefighter was assigned to light administrative duties after having a leg amputated below the knee. After a year and a half in the light duty assignment, he applied for a promotion to lieutenant. The department rejected him for promotion because of his amputation, but Barber successfully challenged the

department's action before the civil service commission. The commission found Barber medically qualified for the duties of lieutenant. However, he was involuntarily retired for disability because there were no open light-duty lieutenant positions. Barber clearly wanted to continue working, but his promotion ironically pulled the rug out from under him.

If the employer offers an indefinite term, modified or alternative assignment to a member who is incapacitated for the usual duties of his or her assignment at the time of a service-connected injury, the employer should meet the requirements of the Labor Code and the Code of Regulations which restrict the kinds of jobs the employer may offer. (See Lab. Code, § 4644, subd. (a), [Section 4644 repealed by Statutes of 2003, Chapter 635, § 14.3 (AB 227)] and Cal. Code Regs., tit. 8, §§ 10122 and 10126 [repealed] for injuries sustained on or after January 1, 1990 and before January 1, 2004, and Lab. Code, §§ 4658.5-4658.6 and Cal. Code Regs., tit. 8, § 10133.51, et seq., the Administrative Director's rules implementing the Labor Code provisions, applicable to injuries sustained on or after January 1, 2004.)

Labor Code section 4658.5 defines the supplemental job displacement benefit:

(a) Except as provided in Section 4658.6, if the injury causes permanent partial disability and the injured employee does not return to work for the employer within 60 days of the termination of temporary disability, the injured employee shall be eligible for a supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state-approved or accredited schools, as follows:

(1) Up to four thousand dollars (\$4,000) for permanent partial disability awards of less than 15 percent.

(2) Up to six thousand dollars (\$6,000) for permanent partial disability awards between 15 and 25 percent.

(3) Up to eight thousand dollars (\$8,000) for permanent partial disability awards between 26 and 49 percent.

(4) Up to ten thousand dollars (\$10,000) for permanent partial disability awards between 50 and 99 percent.

(b) The voucher may be used for payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement. No more than 10 percent of the voucher moneys may be used for vocational or return-to-work counseling. The administrative director shall adopt regulations governing the form of payment, direct reimbursement to the injured employee upon presentation to the employer of appropriate documentation and receipts, and other matters necessary to the proper administration of the supplemental job displacement benefit.

(c) Within 10 days of the last payment of temporary disability, the employer shall provide to the employee, in the form and manner prescribed by the administrative director, information that provides notice of rights under this section. This notice shall be sent by certified mail.

(d) This section shall apply to injuries occurring on or after January 1, 2004.

Labor Code section 4658.6 provides as follows:

The employer shall not be liable for the supplemental job displacement benefit if the employer meets either of the following conditions:

(a) Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the administrative director, modified work, accommodating the employee's work restrictions, lasting at least 12 months.

(b) Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the administrative director, alternative work meeting all of the following conditions:

(1) The employee has the ability to perform the essential functions of the job provided.

(2) The job provided is in a regular position lasting at least 12 months.

(3) The job provided offers wages and compensation that are within 15 percent of those paid to the employee at the time of injury.

(4) The job is located within reasonable commuting distance of the employee's residence at the time of injury.

End comment.

7. *Winslow*: In a city pension case, a police officer who had been retired for disability was found to be no longer permanently incapacitated because he could be returned to duties within his capabilities, even though he remained permanently disabled for the duties he was performing at the time of the injury that caused the incapacity for which he was retired.

Winslow v. City of Pasadena (1983) 34 Cal.3d 66, 70-71 [192 Cal.Rptr. 629, 665 P.2d 1]:

As in *Craver* and *Barber*, and in contrast to *Newman v. City of Oakland Retirement Bd.* (1978) 80 Cal.App.3d 450 [145 Cal.Rptr. 628], the relevant charter provision before us permits reinstatement when the employee can

"perform the duties of the rank or position he held at the time of retirement," providing additionally that a reinstated member shall return "at the rank and in a position of the same grade as the member occupied at the time of retirement. Thus, no charter requirement conditioned Winslow's reinstatement upon his capacity to serve either as a motorcycle officer or in every other police position. Rather, the charter permits his reinstatement to any equivalent position which his health permits. Here, the record shows that the positions created were intended to be filled by a "regular police officer," which was the position held by petitioner upon his retirement. His ordered reinstatement would be to the same rank and "in a position of the same grade" as that which he formerly held."

. . . Plaintiff argues that, at best, Dr. Gillis' report merely concluded that he could perform the duties of a desk officer, but did not suggest that he could perform the full range of duties of a police officer. Thus, plaintiff contends, there was no change in the original disability which would justify his reinstatement in a new position. However, ample evidence supported the board's conclusion that plaintiff was not totally disabled, preventing service in an available and appropriate position. The board could consider Dr. Gillis' report and Winslow's own testimony regarding his capacity to work during 1978 and 1979. From this record, it could reasonably be concluded that plaintiff's disability was no longer total.

Applicants' comment

The Board of Retirement's duty is, first, to make a finding on whether the applicant is permanently incapacitated for his or her usual duties and *thereafter* apply accommodation rules, if any apply. The fact that the Board, when formulating a decision on the issue of incapacity, takes into consideration whether the employer can make accommodations for the applicant's disability is an ongoing source of dispute between members of the applicants' bar, and Board counsel and advocates for respondents.

End comment.

b) How "light" can the light duty be and still be an accommodation as opposed to a completely different occupational classification?

Associations' comment

When a limited-duty assignment is sufficient to keep an otherwise incapacitated member on the job is a controversial question. Two opinions of the Court of Appeal have addressed the issue.

Curtis v. Board of Retirement is often cited for the proposition that an application for a disability retirement cannot be defeated simply by the employer offering the applicant some other kind of job than the job the applicant was doing at the onset of disability.

The court in *Brooks v. Pension Board* held that if the applicant is able to work, performing duties to which other employees of the same rank are assigned, even though the applicant is not able to perform all the duties performed by those in that same rank, the applicant is fit for duty.

Curtis v. Board of Retirement (1986), *supra*, 177 Cal.App.3d 293, 297-298 [223 Cal.Rptr. 123]:

By the terms of Government Code section 31720 [footnote omitted], the appellant need be incapacitated only for performance of duty and it is not enough to disqualify appellant to show that she is able to do some other kind of job than she has been working in the county.

The court in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877 [86 Cal.Rptr. 450], in a case involving injuries to a game warden's arm that he contended made him physically incapacitated from performing his duties, stated as follows: "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the *substantial* inability of the applicant to perform his usual duties. [¶] While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens." (Italics in original.)

Applicants' comment

Curtis supports the applicants' contention that it is the job duties to which the applicant was assigned when she became disabled that constitute the standard against which the applicant's incapacity is to be judged, not the duties of any job to which the applicant might be assigned.

End comment.

Associations' comment

The disposition in *Curtis* was that the case was sent back to the trial court because new evidence in the form of additional medical reports generated after the retirement board's decision were offered into evidence and should have been considered by the trial court. Also, nothing in the Court of Appeal's statement of the facts about Curtis' case indicates that the respondent was asserting that Curtis could perform duties other than the ones she was performing when she allegedly became disabled. The court's statement that Curtis could not be disqualified for a disability retirement by a showing that she could return to other duties does not meet the requirements of *stare decisis*. The appellate court's discussion of how incapacity is to be determined is only dicta, that is, it is not a ruling on the case which would serve as precedent or authority for the way future cases

should be decided. (See *Weissman v. Los Angeles County Employees Ret. Assoc.* (1989) 211 Cal.App.3d 40, 46 [259 Cal.Rptr. 124].) The court did not rule on Curtis' claim of incapacity. The court's statements quoted above are at odds with the decisions in *Barber, Craver, Harmon, O'Toole, and Schrier*. Our research shows that no other court has cited *Curtis* as authority for the proposition that the ability to perform duties other than those to which the applicant was assigned when she allegedly became disabled cannot disqualify the applicant for a disability retirement.

End comment.

In *Brooks v. Pension Board* (1938), *supra*, 30 Cal.App.2d 118 [85 P.2d 956], the City of Alameda's pension law was changed while Brooks was employed with the city as a police officer. One of the issues was whether he was incapacitated for duty prior to the change in the law. It was in Brooks' interest to establish that he was permanently incapacitated for his job before the change in the law. He asserted that the fact that he was actually on the job until after the change in the law did not negate the fact that he was incapacitated for the duties of a police officer before the change in the law. He asserted that before the pension law was amended, he was assigned to limited duties and could not perform all the duties to which a police officer might be assigned. Therefore, he argued, he was permanently incapacitated before the change in the law.

The Board granted Brooks a retirement pension based on two-thirds of his salary under the ordinance before its amendment. Later, the Board decided that his pension should have been limited to one-half of salary under the amended ordinance which was in effect when the Board granted his application for a service-connected disability retirement. The Board directed that a credit be taken for the over payment. Brooks filed a petition for writ of mandate contesting the credit. That petition was denied by the superior court. The Court of Appeal affirmed, saying in the opinion,

. . . The size of the department and the work that may be assigned to one of the same rank are matters to be taken into consideration. A traffic officer standing for hours at a busy intersection of streets might be disabled from performing such work, and still completely and effectively patrol a beat on foot, drive a vehicle or do other work performed by the officers or employees of the same rank. If the officer or employee is disabled to the extent that he is unfit to perform the duty of the rank to which he may be assigned, then he should be retired. The determination of this question is left under this ordinance to the discretion of the pension board and should not be disturbed unless the exercise of such discretion is abused.

Upon the hearing of the petition for a writ of mandate in the present case the court found that at no time prior to the March, 1933, amendment did petitioner become physically disabled from the performance of his duties, etc. This finding is supported by testimony that appellant [*sic*], after the accident, was actually doing police work in the department as a traffic officer, an investigator of violations of the law, and certain clerical work. There is no evidence in the record to show that this class of work was not performed by officers of equal rank. In

People ex rel. Metcalf v. McAdoo (1906), 184 N. Y. 268, 272 [77 N. E. 17, 18], the court said: "Fitness for police duty means the ability to discharge with average efficiency the duty of the grade to which the member belongs."

Appellant relies upon the case of *Simmons v. Policemen's Pension Com.* (Deal) (1933), 111 N. J. L. 134 [166 Ad. [sic: A] 925], wherein the court said: "If a policeman is unable to perform the ordinary every day duties of a policeman, and is permanently unfitted therefore, he is under permanent disability, and it is no answer to say that the statute does not entitle him to retire, because he is able to sit at a desk and make entries in a book. ... We think the theory of our statute is that a fireman is a fireman, a policeman a policeman, and neither a desk clerk." We cannot adopt the holding in the Simmons case. If clerking at a desk is a class of work to which some members of the same rank are assigned, and the member of the department has the ability to discharge with average efficiency the duties thereof, then the officer or employee is fit for duty within the grade to which the member belongs.

As was said in *People ex rel. Metcalf v. McAdoo, supra*: "A large police force must have some members of unusual ability who are peculiarly fit to discharge the duties of their positions. It must have some of a low degree of efficiency who are barely able to fill the requirements of the office. The statute refers to neither of these classes, but to the great mass of the force, representing its average efficiency."

Clark v. Board of Police Pension Fund Commrs., (1937) 189 Wash. 555 [66 Pac. (2d) 307], is a case in which a pensioned police officer was directed to return to duty. Similar questions were involved as in the present case. The court affirmed the judgment. In the decision the court commented upon *Simmons v. Policemen's Pension Fund Com. (Deal.)*, *supra*, and *People ex rel. Metcalf v. McAdoo, supra*, and adopted the rule that if the member of the department is reasonably able to perform the ordinary duties of a police officer he should be restored to service. (*Brooks*. p. 121-123.)

c) What if a peace officer is unable to perform all activities required for POST certification?

(1) What is POST?

The Commission on Peace Officer Standards and Training is established under Penal Code section 13500. It consists of 15 members appointed by the Governor from various law enforcement sectors, peace officer unions and the public. Its authority is defined in Penal Code section 13503, which includes, among other things, the following statement of the Commission's mission:

To develop and implement programs to increase the effectiveness of law enforcement and when those programs involve training and education courses to cooperate with and secure the cooperation of state-level officers, agencies, and

bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs. (Pen. Code, § 13503, subd. (e).)

The Commission has established regulations that are published in the POST Administrative Manual. Some of the Commission's regulations are codified in the California Administrative Code; others are not. (Cal. Code Regs., tit. 11 § 9050, subdivision (a).) The Administrative Manual is undergoing revision at the time of this writing. Commission on POST Uncodified Regulations, section 1000 states the objectives of the Commission as follows:

- (a) To enhance professionalism and raise the level of competence of California law enforcement by establishing:
 - (1) Minimum selection standards relating to physical, mental, and moral fitness which shall govern the selection of all peace officers, and dispatchers, and
 - (2) Minimum training standards for all peace officers, dispatchers and records supervisors, and
 - (3) Continuing training requirements for various levels of peace officers and dispatchers, and
 - (4) Professional certificate programs for peace officers, dispatchers and records supervisors.
- (b) To provide services and aid to local law enforcement as authorized by law.

Participation in POST is voluntary on the part of a law enforcement agency, but if the agency participates, it agrees to abide by POST minimum standards for selection and training, and other regulations. (Cal. Code Regs., tit. 11, § 9030, subd. (a)(2).) Not all law enforcement agencies participate in POST. (See Frequently Asked Questions at <http://www.post.ca.gov/selection-standards.aspx> [delete spaces in address line].)

There is a distinction between POST standards of physical, emotional, and mental fitness for duty, on the one hand, and POST standards for the issuance of certificates that a peace officer has received education and training in various areas of peace officer functions. The former refer to general standards of fitness for duties as defined by the employing agency and the latter involve specific professional skills that may or may not be required in a particular assignment. (Pen. Code, § 13510.1.)

Penal Code section 13510.1 requires the Commission on POST to establish a certification program. Subdivision (b) of Section 13510.1 provides,

Basic, intermediate, advanced, supervisory, management, and executive certificates shall be established for the purpose of fostering professionalization, education, and experience necessary to adequately accomplish the general

police service duties performed by peace officer members of city police departments, county sheriffs' departments, districts, university and state university and college departments, or by the California Highway Patrol.

What kinds of POST certifications there are is addressed in Title 11, California Code of Regulations, section 9070, entitled, "Professional Certificates." Professional certificates are awarded to peace officers who achieve increasingly higher levels of education, training, and experience in the pursuit of professional excellence. The POST Basic Certificate is the only professional certificate that is required; all others are voluntary. There are three categories of certificates and six levels for each category. Each category and level is described in Section 9070.

Another certification, a POST "certificate of completion," issued by a course presenter, is encouraged, but not required except that a presenter of a POST-certified instructor development course listed in Commission on POST Uncodified Regulations section 1070 or presenters of the Academy Director/Coordinator Workshop or Recruit Training Officer Workshop "shall" issue a certificate of completion to all students who successfully complete the training. (Cal. Code Regs., tit. 11 § 9076, subd. (c).)

(2) Statutes and POST regulations governing pre-employment physical, emotional and mental fitness for duty assessments.

Government Code section 1031 provides in part,

Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards:

- (a) Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship, except as provided in Section 2267 of the Vehicle Code.
- (b) Be at least 18 years of age.
- (c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose a criminal record.
- (d) Be of good moral character, as determined by a thorough background investigation.
- (e) Be a high school graduate, pass the General Education Development Test indicating high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year, four-year, or advanced degree from an accredited college or university. . . .
- (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

- (1) Physical condition shall be evaluated by a licensed physician and surgeon.

(2) Emotional and mental condition shall be evaluated by either of the following:

(A) A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry accredited by the Accreditation Council for Graduate Medical Education, and has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued after completion of the psychiatric residency program.

(B) A psychologist licensed by the California Board of Psychology who has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued postdoctorate.

The physician and surgeon or psychologist shall also have met any applicable education and training procedures set forth by the California Commission on Peace Officer Standards and Training designed for the conduct of preemployment psychological screening of peace officers.

(g) This section shall not be construed to preclude the adoption of additional or higher standards, including age.

(h) This section shall become operative on January 1, 2005.

Note that, as of this writing, education and training procedures for physicians and surgeons or psychologists conducting preemployment psychological screenings of peace officers have not been established by the Commission on POST.

Penal Code section 13510 grants the Commission on POST the power to adopt rules establishing minimum standards of physical, mental and moral fitness for the *recruitment* of certain peace officers listed in the section and the *training* of those peace officers. (Pen. Code, § 13510, subd. (a).)

Subdivision (b) of Penal Code section 13510 provides,

The commission shall conduct research concerning job-related *educational* standards and job-related *selection* standards to include vision, hearing, physical ability, and emotional stability. Job-related standards that are supported by this research shall be adopted by the commission prior to January 1, 1985, and shall apply to those peace officer classes identified in subdivision (a). The commission shall consult with local entities during the conducting of related research into job-related *selection* standards. (Italics added by Associations.)

Rules adopted by the Commission on POST for the pre-employment physical, emotional, and mental fitness assessments are found at Title 11, California Code of Regulations, section 9050, *et seq.* Section 9050 provides, in part,

§ 9050. Peace Officer Selection Requirements.

(a) The purpose of these regulations is to implement the minimum peace officer selection standards set forth in California Government Code Section 1031 and as authorized by California Penal Code Section 13510. Peace officer training requirements are addressed separately in Commission Regulations 1005 and 1007. All POST documents and forms mentioned in these regulations are available on the POST website (www.post.ca.gov).

(1) Every POST-participating department and/or agency (hereinafter referred to as "department") shall ensure that every "peace officer candidate," as defined in subsection 9050 (b), satisfies all minimum selection requirements specified in the following regulations unless waived by the Commission on a case by case basis. Statutory requirements in these regulations cannot be waived by the Commission.

- Reading and Writing Ability Assessment (Regulation 9051)
- Oral Interview (Regulation 9052)
- Background Investigation (Regulation 9053)
- Medical Evaluation (Regulation 9054)
- Psychological Evaluation (Regulation 9055)

(2) All requirements specified in these regulations shall be satisfied prior to the date of employment. For purposes of these regulations, "date of employment" is defined as date of appointment as a peace officer or, at the department's discretion, the date the candidate is hired as a peace officer trainee and enrolled in a POST-certified Basic Course.

(b) Peace Officer Candidate Definition

For purposes of these regulations, a "peace officer candidate" is any individual, regardless of rank or Penal Code classification, who applies for a peace officer position with a POST-participating department, regardless of the individual's prior law enforcement experience either at that department or at a different department within the same city, county, state or district.

...

(d) Adoption of Additional Requirements and/or Higher Standards

The requirements described herein serve as minimum selection requirements. Per Government Code Section 1031(g) [*sic*] and Penal Code Section 13510(d) [*sic*], the adoption of more rigorous requirements, higher standards, additional

assessments and/or more in-depth evaluations than those stated in these regulations is at the discretion of the employing department.

The terms of Title 11 California Code of Regulations, section 9054 (medical evaluation) and section 9055 (psychological evaluation) show (1) that POST criteria are designed to measure pre-employment qualifications of applicants for peace officer positions and (2) that what duties, powers, demands, and working conditions the peace officer position entails, and against which POST requirements the applicant will be judged, are set by the hiring agency.

The medical evaluation must be performed only after the employing department has made a conditional offer of employment and must be performed within one year prior to the date of employment. (Cal. Code Regs., tit. 11, § 9054, subd. (b).)

The medical screening procedures and evaluation criteria used in the conduct of the medical evaluation shall be based on the peace officer duties, powers, demands, and working conditions *as defined by the department.* This information shall be provided to the physician, along with any other information (e.g., risk management considerations) that will allow the physician to make a medical suitability determination. The POST Medical Screening Manual may be adopted or adapted for use by the department, if and as appropriate. However, the use of the manual is discretionary. (Cal. Code Regs, tit. 11 § 9054, subd. (c). Italics added.)

The psychological evaluation, like the medical evaluation, must be performed only after the employing department has made a conditional offer of employment and must be performed within one year prior to the date of employment. (Cal. Code Regs., tit.11, § 9055, subd. (b).) Subdivision (c) of Section 9055 provides,

(1) The psychological screening procedures and evaluation criteria used in the conduct of the psychological evaluation shall be based on the peace officer duties, powers, demands, and working conditions *as defined by the department.* This information shall be provided to the evaluator, along with any other information (e.g., risk management considerations) that will allow the evaluator to make a psychological suitability determination.

(2) Every peace officer candidate shall be evaluated, at a minimum, against job-related psychological constructs herein incorporated by reference contained and defined in the POST Peace Officer Psychological Screening Dimensions (2005): Social Competence, Teamwork, Adaptability / Flexibility, Conscientiousness/ Dependability, Impulse Control, Integrity / Ethics, Emotional Regulation/Stress Tolerance, Decision Making / Judgment, Assertiveness/ Persuasiveness, and Avoiding Substance Abuse and Other Risk-Taking Behavior. (Italics added.)

POST peace officer selection standards and related information can be accessed online at www.post.ca.gov/data/sites/1/post_docs/po.pdf [delete spaces from address line]. The standards accessible on the POST web site include Patrol Officer

Psychological Screening Dimensions (approved July 20, 2006) “for use in the *pre-employment* psychological evaluation of peace officers,” a document that is the foundation of a yet-to-be-released POST Psychological Screening Manual for the evaluation of peace officers (www.post.ca.gov/peace-officer-psychological-screening-dimensions.aspx; [http:// lib. Post. Ca. gov/ Publications/ psychological- traits .pdf](http://lib.Post.Ca.gov/Publications/psychological-traits.pdf) [delete spaces from address line]), though the foundational document itself is apparently designed specifically for “patrol” officers. (Italics added.)

Note that the Peace Officer Psychological Screening Dimensions (2005) referred to in Title 11, California Code of Regulations, section 9055, subdivision (c)(2), is not identical to the Patrol Officer Psychological Screening Dimensions approved in 2006 and currently in use. The former Peace Officer Screening Dimensions was focused on detecting *job-relevant psychopathology*, including *personality disorders*, that might impact a determination of psychological suitability for work as a peace officer. The current Patrol Officer Screening Dimensions goes beyond identifying psychological disorders, and includes an assessment of personality *traits* and other *psychological concerns* that might result in counterproductive job performance or an inability to withstand the psychological demands of the position. ([http:// www. post. ca. gov/ selection-standards.aspx](http://www.post.ca.gov/selection-standards.aspx) [FAQ’s re Cal. Code of Regs., tit.11, § 9055 [delete spaces from address line].) There is also an optional manual (Cal. Code Regs., tit. 11, § 9054, subd. (c)) setting forth a protocol for medical examinations at [www. post. ca. gov/ medical – screening – manual .aspx](http://www.post.ca.gov/medical-screening-manual.aspx) [delete spaces from address line].

The purpose of Government Code section 1031 is to set standards for preemployment assessment of Peace Officer Candidates (defined in Cal. Code Regs., tit. 11 § 9050, subd. (b)) for peace officer positions, including physical and psychological and moral standards. The POST education and training standards that physicians and psychologists are required by the Legislature to meet, but which as of this writing have not been developed, are those “designed for the conduct of *preemployment* screening of peace officers.” (Italics added; Gov. Code, § 1031, subd. (f)(2). As the Supreme Court stated in *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793 [118 Cal.Rptr.2d 167, 42 P.3d 1034],

Section 1031 requires peace officers to meet certain "minimum standards" including being "of good moral character, as determined by a thorough background investigation." (*Id.*, subd. (d).) If the minimum standards are to have any real meaning, a candidate has to meet the standards *prior to becoming a peace officer*. In other words, a law enforcement agency cannot first grant peace officer status to a civilian, including full peace officer powers, and then conduct its background investigation. (Italics added by Associations. *County of Riverside*, p. 806.)

(Contra: *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049 [68 Cal.Rptr.3d 1], discussed below in Section II, 12, c), (3).)

- (3) If a sheriff establishes a policy that all deputies must be physically and mentally able to perform all peace officer**

functions included in the Basic Certificate requirements established by the Commission on POST, is a deputy who is permanently disabled from the performance of any of those functions, such as carrying and using a weapon, effecting an arrest, or serving and executing a search warrant, to be considered permanently incapacitated?

Associations' comment

No. The test for permanent incapacity under the CERL of 1937 is whether the deputy is permanently unable to substantially perform his or her usual duties (*Harmon v. Board of Retirement* (1976), *supra*, 62 Cal.App.3d 689, page 694-697), not whether the deputy is capable of performing all the duties to which the deputy might be assigned (*Schrier v. San Mateo County Employees' Retirement Association* (1983), *supra*, 142 Cal.App.3d 957, 963), or for which the deputy might be POST-certified.

POST certification is not a condition of employment. The California Attorney General has analyzed the nature of POST certification in two opinions. In the first opinion, the Attorney General addressed the issue of whether sheriffs or city chiefs of police would be covered by the Public Safety Officers Procedural Bill of Rights when they are unable to exercise peace officer authority because they have not met the training and basic certificate requirements established by POST. The Attorney General opined,

. . . The Legislature has expressly indicated that the purpose behind the [Public Safety Officers Procedural Bill of Rights Act] is 'the maintenance of stable employer-employee relations.' ([Gov. Code,] § 3301.) The [A]ct concerns the employment of peace officers, not whether such officers are authorized to act with peace officer authority. Indeed, the requirements of Penal Code sections 832 [requiring all peace officers to complete a certain basic course of training within 90 days following the date of employment and before exercising police officer powers], 832.3 [requiring the successful completion of a course of training approved by the Commission on Peace Officer Standards and Training before an officer may exercise the powers of a peace officer, except as a trainee under certain circumstances], and 832.4 [requiring that officers obtain a basic certificate issued by the Commission on Peace Officers Standards and Training within 18 months of employment in order for such officers to exercise the power of a peace officer after the expiration of the 18 month period] are not a condition of employment but simply a condition of the exercise of peace officer authority. (63 Ops.Cal.Atty.Gen. 829, 833 (1980).)

In another opinion, the California Attorney General stated,

The requirements of [Penal Code] sections 832.3 and 832.4 are not conditions of employment, but rather are limitations placed upon the exercise of peace officer powers. (*Gauthier v. City of Red Bluff* (1995) 34 Cal.App.4th 1441, 1448, fn. 3 [41 Cal.Rptr.2d 35].) Thus the officers who fail to meet the requirements may retain their "status" as peace officers, although their powers would change. (See

Service Employees International Union Local 715 (AFL-CIO) v. City of Redwood City (1995) 32 Cal.App.4th 53, 59-60 [38 Cal.Rptr.2d 86]; 78 Ops.Cal.Atty.Gen. 209, 212-213 (1995); 72 Ops.Cal.Atty.Gen. 167, 172 (1989); 65 Ops.Cal.Atty.Gen. 618, 626 (1982); 63 Ops.Cal.Atty.Gen. 829, 833-834 (1980).) Even though a police officer or deputy sheriff has not received training (§ 832.3) or obtained the basic certificate (§ 832.4), he or she would nevertheless be considered “designated” as a peace officer in section 830.1, subdivision (a) [“Any deputy sheriff, . . . any police officer . . . is a peace officer”] for purposes of section 830 [“no person other than those designated in this chapter is a peace officer”].

We conclude that if a police officer or deputy sheriff fails to complete the training prescribed by the Commission or fails to obtain the basic certificate issued by the Commission, such officer may exercise only non-peace officer powers; the officer may not exercise the powers of arrest, serving warrants, carrying concealed weapons without a permit, or similar peace officer powers. (Brackets in original. 80 Ops.Cal.Atty.Gen. 293, 297 (1997).)

Likewise, in 90 Ops.Cal.Atty.Gen. 7 (2009), page 9, footnote 3, the Attorney General distinguished peace officer status and peace officer powers:

We have previously distinguished between a person’s attaining the status of a peace officer and exercising the powers of a peace officer. The former depends upon the appointment to a statutorily defined “peace officer” position, while the latter depends upon, among other things, whether the officer has satisfied applicable training requirements. (See 86 Ops.Cal.Atty.Gen. 112, 113-115 (2003); 85 Ops.Cal.Atty.Gen.203, 207 (2002); 80 Ops.Cal.Atty.Gen. 293, 294-295 (1997); see also 51 Ops.Cal.Atty.Gen. 110, 112 (1968).) We are concerned here only with the question of a person’s peace officer status.

For all the more reason, a sheriff is not required to release a deputy for disability or apply for a disability retirement on behalf of a deputy who received the POST Basic Certificate, but is no longer able to perform one or more duties that are included in the training regimen leading to the POST Basic Certificate. If the deputy is incapacitated for activities that are POST Basic Certificate requirements, the Sheriff has the power to restrict the deputy’s duties from those activities, including those duties involving the exercise of peace officer powers. (See, for example, *Stuessel v. City of Glendale* (1983), *supra*, 141 Cal.App.3d 1047 [190 Cal.Rptr. 773]: Disability retirement denied city police officer who was unable to carry a weapon or make arrests, but was relieved of those duties.) In the first instance, the Sheriff, not the Commission on POST, determines the partially disabled deputy’s assigned duties, what capabilities the deputy must have to substantially perform his usual duties, and what additional certified or non-certified training might be required. Ultimately, the Board of Retirement, subject to judicial review, determines whether the deputy is incapacitated. (Gov. Code, § 31725.)

If a disabled deputy is unable to perform a duty that is a POST certification requirement in a county in which the sheriff requires that the deputy be capable of all POST

certification requirements, evidence may, and likely will, show that there are assignments in the department that do not require performance of that duty, as was the case in *Harmon v. Board of Retirement* (1976), *supra*, 62 Cal.App.3d 689 [allegedly incapacitated deputy denied disability retirement in a sheriff's department that had a policy that deputies would not be returned to duty unless they were "100 percent fit for any duty to which they may be assigned" and where there was no position available in the department which would not involve a significant risk of violence; assistant sheriff's testimony did not foreclose the possibility that there were positions in the department which could be performed by one subject to the disabilities from which doctors reported the deputy suffered. (*Id.*, 694-697).] But in any case, the inability to perform the full range of duties is not the legal test for incapacity under the CERL of 1937; the legal test is the *Mansperger* test: inability to substantially perform the applicant's usual duties. (*Ibid.*)

Note that the Glendale police officer in *Stuessel v. City of Glendale* (1983), *supra*, 141 Cal.App.3d 1047 [190 Cal.Rptr. 773] retained his peace officer classification although he could not carry a weapon or make arrests and the city relieved him of those functions. Likewise, in *Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240, [21 Cal.Rptr.2d 896], a deputy marshal, who was determined in a workers' compensation case to be restricted from carrying a weapon due to a psychiatric condition, was denied a disability retirement by the board of retirement. The deputy was returned to duty in spite of the Marshal's opposition. Likewise, the deputy in *Schrier v. San Mateo County Employees' Retirement Association* (1983), *supra*, 142 Cal.App.3d 957 [191 Cal.Rptr. 421] was returned to duty in spite of an inability to drive a patrol car in pursuit situations. His attorney's argument that Schrier's ability to perform his duties was to measured by the "full range of duties" standard was rejected by the Court of Appeal, the court ruling that the *Mansperger* definition of incapacity (substantial inability to perform his usual duties) was applicable to cases under the CERL of 1937. (*Id.*, p. 961.)

In *Hanna v. County of Los Angeles* (2002), *supra*, 102 Cal.App.4th 887, 894-895 [125 Cal.Rptr.2d 686], a deputy sheriff received a workers' compensation award based on a finding that she was precluded from stressful employment and could no longer be a peace officer. She filed an application for a service-connected disability retirement that was denied by the Board of Retirement. She requested an administrative hearing, but withdrew the request when the department refused to reinstate her because the hearing was pending. The department did not request an administrative hearing nor did it file a petition for writ of mandate under Government Code section 31725. The Court of Appeal held, among other things,

In this case, the Retirement Board denied Hanna's application for disability retirement and the Department did not request a hearing by a board-appointed referee or seek judicial review of the decision. Based on these facts, section 31725 mandates the Department reinstate Hanna to paid status as a deputy sheriff regardless of the work restriction. The Department may refuse to allow Hanna to perform some of the duties of a deputy sheriff, but it must pay her as a deputy sheriff.

End comment.

Applicant's comment

We assert that under Government Code section 1031, subdivision (f), if a deputy sheriff is, due to injury or illness, not free of any physical, emotional, or mental condition that might adversely affect the deputy's exercise of the powers of a peace officer, the deputy must be retired for disability.

In *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049 [68 Cal.Rptr.3d 1], the county dismissed for mental disability, and retired, a Deputy Sheriff III. Deputy Sheriff III is a patrol officer position in the County of Yuba. Sager contested her dismissal. The Court of Appeal held that the standards that a peace officer must meet under Government Code section 1031 applied as a matter of law (*id.*, p. 1057) to the assessment of Sager's fitness for duty and POST pre-employment psychological fitness standards were applicable to that assessment.

The evidence of Sager's behavior that led to her dismissal for disability included the following:

The Sheriff testified that she had known Sager for 20 years and things were always in turmoil around Sager. Sager was concerned with other people's business and would get angry. The Undersheriff testified that Sager had performance issues tending to problems with emotional control and anger management and interpersonal sensitivity in getting along with others, her peers, her supervisors; not being real flexible; being argumentative; "those kinds of things." (*Id.*, pp. 1054-1055.) Behaviors inconsistent with POST psychological standards that Sager demonstrated included refusing to comply with psychiatric treatment recommendations after a month off duty to deal with a mental health crises in 1992; in January 2000 while emotionally upset, delivering a complaint concerning personnel issues to the Sheriff at her home, after which she took six weeks off to deal with her emotional problems; in July 2000, an attempted suicide; in November 2000, impulsively declaring to the Sheriff that she quit and handing in her identification and weapon after a less senior officer was placed in charge when the supervising sergeant was absent due to illness; in June 2001 using department resources to locate a woman she believed was having an affair with her husband and then confronting both of them at the woman's home, and making a veiled threat to the woman; in December 2001, confronting the woman in a courtroom and telling her to stop sleeping with her husband in a tone loud enough for others to hear. (*Id.*, pp. 1051-1052.)

The *Sager* court's clearest statements concerning the applicability of Government Code section 1031 and POST pre-employment psychological fitness standards to veteran peace officers are the following:

. . . As we explain, section 1031 applied as a matter of law to Sager's fitness, and the POST standards were conceded to be relevant by Dr. Falzett [Sager's expert who opined that Sager could return to work]. In fact, they are incorporated into

Sager's job description, and therefore her ability to comply with them forms an important part of her "usual" duties. (*Sager*, p. 1057.)

After quoting the relevant parts of Section 1031, (quoted in full, above, at II, A, 12, c), (2)) the court stated,

There are two features of this statute worth noting. First, *subdivision (f)* requires a peace officer to be "free from any physical, emotional, or mental condition that *might* adversely affect the exercise of the powers of a peace officer." (Italics added [by the *Sager* court].) Second, the professionals who make that determination "shall also have met any applicable education and training procedures set forth by [POST] designed for the conduct of preemployment psychological screening of peace officers." (§ 1031, *subd. (f)*.) Thus, Dr. Wolf's opinion that section 1031 embraced POST standards is confirmed by the fact that section 1031 evaluators must have been trained on POST standards. [Dr. Wolf, the county's expert, opined that Sager was incapacitated.]

Sager's position is that the section 1031 standards are relevant to and only to whether a person should be given peace officer status, either because she or he is a new candidate or has had a gap in service and wishes to return to being a peace officer. [Citations.]

We agree that the statute applies in those two cases, but the section 1031 standards must also be maintained throughout a peace officer's career. Section 1031 reflects a minimum set of standards for allowing a new recruit to become a peace officer and it would be illogical to conclude the Legislature believed those standards disappeared once an officer began working. The first sentence of section 1031 provides: "Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards" It does not say "each candidate" must meet the standards, it requires every "class" of peace officers, that is, every peace officer in California, to meet those standards. At least two of the standards reflect fundamental law enforcement qualifications: good moral character (§ 1031, *subd. (d)*) and mental fitness (§ 1031, *subd. (f)*). If Sager's position is correct, an officer who lost his or her moral compass would be immune from these standards and only subject to a moral character standard if the applicable job description in that department reiterated that standard as a defined duty of that classification of officers. That absurd result highlights the flaw in Sager's position.

One of the cases Sager cites confirms our view in part: "A public agency must enforce the criteria for peace officers in *Government Code section 1031* at the time of hire, prior to a transfer between agencies, and also possibly when an employee changes positions within the same agency. [Citation.] *Moreover, peace officers must certify compliance with the criteria that the [POST] promulgates [citations] both as a matter of continuing education and after a break in active status.*" (*Pitts v. City of Sacramento* (2006)], *supra*, 138 Cal.App.4th [853] at p. 857, fn. 4 [41 Cal.Rptr.3d 838], italics added [by the *Sager* court].)

Thus, the POST standards, which flesh out the section 1031 standards, are "a matter of continuing education." In our view the section 1031 standards are incorporated by law into every peace officer's job description. (*Sager*, pp. 1058-1059.)

The *Sager* court held that POST standards were applicable to the assessment of Sager's fitness, citing testimony from the county's mental health expert (Dr. Wolf) that he used criteria set by POST, including anger management, emotional control, acceptance of criticism, interpersonal sensitivity, and teamwork, finding that Sager had so many deficits in those areas that Sager could not exercise peace officer powers; the testimony of Sager's expert (Dr. Falzett) that POST set forth standards that are to be followed by evaluators when determining whether an individual is fit for duty and that he reviewed the POST standards in forming his opinion about Sager; the testimony of the Sheriff that a deputy had to be free from mental and emotional conditions that might affect her job; the testimony of the Undersheriff that a deputy sheriff III had to be able to control anger and emotions, accept criticism in a constructive way and be able to work as a member of a team; Sager's job description that required skill in remaining calm and taking appropriate action in difficult situations, exercising sound, independent judgment within procedural guidelines, and having "[s]trength, stamina and other psychical and psychological characteristics to meet P.O.S.T. standards." (*Sager*, pp. 1059-1060.)

. . . Thus, even under Sager's view that *section 1031* and POST do not *necessarily* define a peace officer's duties, *they do in her case because her job description incorporates those standards.* (Italics in original. *Sager*, p. 1060.)

The Court of Appeal reversed the trial court and upheld the county's retiring Sager for disability. We submit that, under *Sager*, if a disabled peace officer is employed by a department participating in the POST program and is unable to meet Government Code section 1031, subdivision (f), and POST standards, the member is incapacitated and must be granted a disability retirement. Specifically, if a deputy sheriff is not free of any physical, emotional, or mental condition that might adversely affect the deputy's exercise of the powers of a peace officer, the deputy must be retired for disability.

Our position is also supported by *Hulings v. State Dept. of Health Services* (2008) 159 Cal.App.4th 1114 [72 Cal.Rptr. 3d 81], in which the same court that decided *Sager* decided a case involving a state peace officer who transferred from one department to a peace officer position in another department of the state. After failing probation in the new position, he transferred back to his former peace officer position under a civil service rule that made such a transfer back mandatory. Hulings' original department then required that he undergo the Government Code section 1031, subdivision (f), pre-employment background check, including medical and psychological testing before returning to work. Hulings contested the department's requirement that he undergo medical and psychological testing. He filed a petition for writ of mandate to require the department to reinstate him with back pay. The trial court issued the writ, finding that Hulings' mandatory reinstatement was not subject to a background check under Section 1031, subdivision (f). The Court of Appeal affirmed. The Court of Appeal held that Section 1031 governed pre-employment minimum standards and re-entry into peace

officer positions, circumstances that did not apply to Hulings. The court referred to its opinion in *Sager*:

DHS, or any appointing power, still retains authority to assure its employees are fit for their positions.³ Under Government Code section 19253.5, the appointing power may require an employee to submit to a medical examination to evaluate his capacity to perform the work of his position. Government Code section 19572 provides 24 grounds for discipline. Further, complaints against a peace officer may be investigated pursuant to Penal Code section 832.5.

³ This court recently held the standards set forth in Government Code section 1031 must be maintained throughout a peace officer's career. (*Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049 [68 Cal.Rptr. 81] (*Hulings*, p. 1125.)

End comment.

Association's comment on *Hulings*

Government Code sections 19253.5 and 19572 apply to the state civil service, not to counties and their civil service employees. (*Sienkiewicz v. County of Santa Cruz* (1987) 195 Cal.App.3d 134, 141 [240 Cal.Rptr. 451]: Government Code section 19253.5 applies to the state civil service, not to counties. It also is limited to those civil service employees who are either not eligible to retire for disability or who waive their right to retire. (57 Ops.Cal.Atty.Gen. 86, 87 (1974).) In the case of one eligible to retire for disability, the employer may apply for a disability retirement under Government Code section 21153 of the Public Employees Retirement Law. (*Ibid.*, citing former Gov. Code, § 21023.5, repealed Stats 1995 ch. 379 § 1, a statute similar to Gov. Code, § 21153.) The *Hulings* court's reference its own decision in *Sager* is not additional authority. It is a mere reiteration of the court's ruling in *Sager*, although it does answer the question: Did the court really mean that?

Associations' reply to Applicants' comment on *Sager*

The controversial legal issue in *Sager* was whether the psychological standards applicable in pre-employment screenings are applicable to the assessment of fitness for duty of veteran peace officers. (*Sager*, pp. 1058-1059.) The *Sager* court ruled that they did apply because (1) Government Code section 1031 applies to "[e]ach class of public officers or employees declared by law to be peace officers," not just "candidates" for those positions; and (2) it would be illogical to assume that the Legislature intended that only candidates be psychologically fit and that psychological "standards would disappear once an officer began working." (*Sager*, p. 1059.)

The facts of *Sager* support the implied conclusion of the Court of Appeal that the weight of the evidence supported the county's finding that *Sager* was permanently incapacitated under the *Mansperger* definition and its action in retiring *Sager* for disability. Whether the county's assessment of *Sager*'s psychological fitness for duty was performed using "psychological constructs" set out by Section 9055, subdivision (c), the Peace Officer Psychological Screening Dimensions, or the American Psychiatric

Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) would seem to be a moot point.

While the *Sager* opinion is not a model of clarity in many respects, the court was clear in its following statements found at 156 Cal.App.4th, 1059:

We agree that the statute [Gov. Code, § 1031] applies in those two cases [(1) the person is a new candidate for a peace officer position; (2) the person has a gap in service and wishes to return to a peace officer position] but *section 1031* standards must also be maintained throughout a peace officer's career.

. . .

In our view the *section 1031* standards are incorporated into every peace officer's job description. (Brackets added by Associations.)

The "section 1031 standards" to which the court refers are all those listed in the section, including statutory minimum standards on age, citizenship, education, and legal history, as well the mandates for a pre-employment background investigation, and medical and psychological evaluations. (*Sager*, p. 1059.) But with respect to issues in *Sager's* case in particular, the "section 1031 standards" the court was referring to are those contained in Government Code section 1031, subdivision (f), which requires that those in each class of peace officers "[b]e found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer." The court found that *Sager* failed to carry her burden to prove that the county's decision was not supported by the weight of the evidence. (*Sager*, p. 1061.) The county's decision, by way of its adopting a decision of an Administrative Law Judge, concluded,

Pursuant to the POST [(Peace Officer Standards and Training)] standards and Government Code section 1031, subdivision (f), appellant has emotional and mental conditions which adversely affect her exercise of peace officer powers and incapacitate her from performing her usual and customary duties as a Deputy Sheriff" (Bracketed insert is in the opinion. *Sager*, p. 1053.)

The problem with the *Sager* opinion is not that the psychologist on whose opinion the county relied apparently used the criteria established by the Commission on POST for pre-employment assessments of psychological fitness. Though we dispute that use of either the POST Peace Officer Psychological Screening Dimensions or POST Patrol Officer Psychological Screening Dimensions is a protocol that is required by Government Code section 1031 for the assessment of the psychological fitness for duty of a veteran officer, both Screening Dimensions seem to be reasonable guides, using factors that should be considered in the assessment of a peace officer's psychological fitness for duty. (See factors listed in Cal. Code Regs, tit. 11, § 9055, subd. (c)(2) quoted above.) As stated in POST's Peace Officer Selection Requirements, Frequently Asked Questions regarding Cal. Code of Regs., tit. 11, § 9055 (<http://www.post.ca.gov/selection-standards.aspx> [delete spaces from address line]),

The POST psychological screening dimensions provide validated, behaviorally-defined peace officer psychological attributes. Each dimension includes a job-related, behaviorally-based definition and a list of associated positive and counterproductive peace officer work behaviors, based on the input of numerous subject matter experts in the field of law enforcement and psychology. The dimensions provide common terminology for psychologists and hiring authorities in evaluating the psychological suitability of peace officer candidates.

Rather, the problem with the *Sager* opinion is its construction of Government Code section 1031, and more particularly subdivision (f), as applying, not only to pre-employment assessments of physical, emotional, and mental fitness for duty, but to the assessment of fitness for duty of veteran peace officers as well. By way of this construction, a veteran peace officer is not fit for duty if the officer is not “free from *any* physical, emotional, or mental condition that *might* adversely affect the exercise of the powers of a peace officer.” This test of for a veteran officer’s physical and psychological fitness for duty is at odds with the *Mansperger* test of incapacity and the line of cases that have applied the *Mansperger* test to the disability retirement claims of partially disabled peace officers. (See the discussion at Section II, A; 3, above.)

The *Sager* court did state that Sager agreed that “incapacity for duty” means “the substantial inability of the applicant to perform his usual duties” and cited *Mansperger* and *Hosford* with implicit approval. But beyond its touching base with the *Mansperger* test of incapacity, the *Sager* court did not address the inconsistency between the *Mansperger* test and the *Sager* court’s own proffered test of capacity for duty that requires a veteran peace officer to be free from *any* physical, emotional, or mental condition that *might* adversely affect the exercise of peace officer powers.

Further, the *Sager* court did not address appellate court opinions in cases in which peace officers were held not to be permanently incapacitated though they had physical or psychological disabilities that not only *might* have adversely affected their exercise of peace officer powers, the disabilities *did* incapacitate them for the performance of certain peace officer powers: *Stuessel v. City of Glendale* (1983), *supra*, 141 Cal.App.3d 1047 [190 Cal.Rptr. 773] [city police officer could not carry a weapon or make arrests as a result of an injury to his left upper extremity]; *Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240, [21 Cal.Rptr.2d 896] [a deputy marshal restricted from carrying a weapon due to a psychiatric condition]; *Schrier v. San Mateo County Employees' Retirement Association* (1983), *supra*, 142 Cal.App.3d 957 [191 Cal.Rptr. 421] [deputy sheriff unable to drive a patrol car in pursuit situations]; *Hanna v. County of Los Angeles* (2002), *supra*, 102 Cal.App.4th 887, 894-895 [125 Cal.Rptr.2d 686] [deputy sheriff precluded from stressful employment and could no longer be a peace officer]; *Winslow v. City of Pasadena* (1983) 34 Cal.3d 66, 70-71 [192 Cal.Rptr. 629, 665 P.2d 1] [city police officer with obstructive and restrictive lung disease and hypertension requiring avoidance of emotional stress could do the light duty work of a desk officer separated from the public]; *O'Toole v. Retirement Board* (1983) 139 Cal.App.3d 600 [188 Cal.Rptr. 853] [police officer unable to perform duties of police officer due to injury to both inner ears]. As this line of appellate court opinions demonstrates, *Sager* does not support an argument that a physical or mental deficit that

might impair a veteran peace officer in the exercise of one or more peace officer functions, a deficit that might disqualify an applicant for hire, justifies the veteran peace officer being pulled off the job and retired for disability. This is particularly true if the deficit is in an area that the officer does not encounter as part of her usual duties. (*Mansperger v. Public Employees' Retirement System* (1970), *supra*, 6 Cal.App.3d 873, 876-877 [86 Cal.Rptr. 450]; *Harmon v. Board of Retirement of San Mateo County* (1976), *supra*, 62 Cal.App.3d 689, 694-696 [133 Cal.Rptr. 154]; *Mansperger* standard applicable to cases arising under the CERL of 1937.)

The *Sager* court also did not address the fact that a requirement that veteran peace officers be free of any physical or mental condition that *might* adversely affect their ability to exercise the powers of a peace officer fails to meet the minimum standard for making a finding of fact in a civil case: the existence of the fact must be shown to be at least *probable*. (*Spolter v. Four Wheel Brake Co.* (1950) 99 Cal.App.2d 690, 693 [222 P.2d 307]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416-417 [71 Cal.Rptr. 697, 445 P.2d 313]; *Paneno v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 136, 153 [5 Cal.Rptr.2d 461]; see the further discussion of standard of probability in Section III, B, below) Mere possibility is not sufficient. (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1701 [20 Cal.Rptr.2d 778]; *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403 [209 Cal.Rptr. 456]; see Section III, D, 2, below.) Government Code section 1031, subdivision (f)'s phrase "might adversely affect" is the equivalent of requiring only a possibility of an adverse affect. That a veteran peace officer has a medical or psychological condition that could possibly have an adverse affect on her exercise of peace officer powers is an insufficient basis on which to pull her off the job and retire her for disability.

A requirement that a veteran peace officer must "be free from *any* physical, emotional, or mental condition that *might* adversely affect the exercise of the powers of a peace officer" under Government Code section 1031, subdivision (f), is, in effect, a re-packaging of the argument that peace officers must be capable of the "full range of duties" to which they might be assigned, an argument that the appellate courts have rejected in public employee disability retirement cases generally, and, for our purposes, in CERL of 1937 cases in particular. Aside from its citation of *Mansperger v. Public Employees Retirement System* (1970), *supra*, 6 Cal.App.3d 873, 876 [86 Cal.Rptr. 450] and *Hosford v. Board of Administration* (1978), *supra*, 77 Cal.App.3d 854, 859-860 [143 Cal.Rptr. 760], none of those opinions are addressed in *Sager*.

The *Sager* court's construction of Government Code section 1031 is in conflict with numerous opinions of the appellate courts that address what is and what is not a permanent incapacity in the case of a partially disabled peace officer.

Applying Government Code section 1031, subdivision (f) to issues of physical disability is even more problematic than applying it to psychological disability. It would be unreasonable to expect that a deputy with decades of service would be capable of meeting the same physical fitness standards that a candidate must meet. The physical demands placed on a deputy can be expected to decrease as the deputy accumulates experience and age, and is placed into supervisory positions, though in a particular

case, this is not necessarily so. Also, unlike the pre-employment POST Patrol Officer Psychological Screening Dimensions established by the Commission on POST, participating agencies are not required to use the physical examination protocols provided by POST in pre-employment physical fitness assessments (POST Medical Screening Manual). Use of the Manual is discretionary. (Cal. Code Regs, tit. 11 § 9054.) In effect, there are no “POST standards” per se; only those standards that individual law enforcement agencies adopt.

There are other deficiencies in the *Sager* court’s analysis.

None of the statutes (Gov. Code, § 1031; Pen. Code, § 13500, et seq.) or POST regulations, whether codified (Cal. Code Regs., tit. 11, § 9050, et seq.) or uncoded (Commission on POST Uncoded Regulations, § 1000, et seq.), that govern POST activities make any reference to on-going fitness for duty determinations or the applicability of POST pre-employment physical, emotional and/or mental fitness standards to the assessment of fitness for duty of veteran peace officers. As indicated in Commission on POST Uncoded Regulations, section 1000, (quoted above at II, A, 12, c), (2)) the Commission’s objectives are to establish minimum standards of physical, mental, and moral fitness governing the *selection* of peace officers, establishing minimum standards for training and continuing training programs, and establishing a professional certificate program.

When the *Sager* court referred to “POST standards,” it did not cite any statutory or regulatory reference. We submit that the court was not referring to the standards prerequisite to the issuance of certificates related to various POST educational and training programs, “professional” or otherwise. Rather, from its recitation of psychological factors discussed by the county’s expert, Dr. Wolf, who testified that he referred to “POST standards” in his evaluation of *Sager*, it appears that the court was referring to the psychological and behavioral standards (“job-related psychological constructs”) used in pre-employment assessments of psychological fitness that are listed in Title 11, California Code of Regulations, section 9055, subdivision (c)(2) (quoted at II, A, 12, c), (2), above), and the POST Peace Officer Psychological Screening Dimensions (2005) or Patrol Officer Psychological Screening Dimensions (adopted July 20, 2006).

Notwithstanding the *Sager* court’s statements at *Sager v. County of Yuba, supra*, 156 Cal.App.4th, 1058, that the testimony of the county’s expert, Dr. Wolf, confirmed that Government Code section 1031, subdivision (f), in the context of a psychological evaluation of a veteran officer, embraced POST pre-employment standards because “*section 1031* evaluators, like Dr. Wolf, must have been trained on POST standards,” as of this writing, the Commission on POST has not established any educational or training procedures for physicians or psychologists who perform pre-employment assessments of emotional and/or mental fitness under Government Code section 1031. That the court would rely on testimony of a psychologist to establish a point of regulatory law, rather than cite the law itself, is curious.

Along the same lines, the *Sager* court bolstered its thesis that, through Government Code section 1031, subdivision (f), "POST standards" applied to psychological fitness assessments of veteran officers by referring to the testimony of Sager's expert, Dr. Falzett:

When *Dr. Falzett* was asked, "Do you know whether or not POST sets forth standards that are to be followed by evaluators when determining whether an individual is fit for duty?" he answered: "Yes. As far as my--they do, yeah"; and he further testified that *he had reviewed the POST standards in forming his opinion about Sager*. [Italics are the *Sager* court's.] *Sager*, p. 1060.)

Neither the *Sager* court nor Dr. Falzett cited any statutory or regulatory authority for the proposition that POST sets forth standards that are to be followed by evaluators when determining whether an individual, other than a "Peace Officer Candidate (Cal. Code Regs, tit. 11 § 9050), is fit for duty. As stated above, there is no authority directing that the POST pre-employment psychological fitness protocol is to be used in assessments of the psychological fitness of veteran officers. Again, the *Sager* court looked to testimony of a psychologist to establish a point of regulatory law rather than cite the law, with predictably inaccurate results.

All of these points go to show that *Sager* is deficient in its analysis and dubious authority for the proposition that a veteran peace officer's physical, emotional, and mental fitness for duty is, under Government Code section 1031, subdivision (f), tested by whether the officer has any condition that might adversely affect the exercise of peace officer powers.

We submit, further, that the *Sager* court's statement that all peace officers must meet standards of Government Code section 1031 throughout their careers is mere dicta, unnecessary to the court's decision, and not precedent that must be followed in other cases. (See *Weissman v. Los Angeles County Employees Ret. Assoc.* (1989) 211 Cal.App.3d 40, 46 [259 Cal.Rptr. 124], regarding the significance of *dicta*.)

At issue was whether Sager was substantially incapacitated for her usual duties. The County of Yuba's Job Description for Deputy Sheriff III, requires that the incumbent have "Strength, stamina and other psychical and psychological characteristics to meet P.O.S.T. standards." (*Sager*, p. 1060.) The county's decision was that Sager had emotional and mental conditions which adversely affected her exercise of peace officer powers and incapacitated her from performing her usual and customary duties as a Deputy Sheriff. Having found that Sager failed to meet her burden to prove that the county's decision that Sager was incapacitated was not supported by the weight of the evidence, the court need not have gone further. It was unnecessary for the court to then apply the requirements of *Sager's* job description to all peace officers in the state or to apply the provisions of Government Code section 1031, subdivision (f), the regulatory implementation of which had always been limited to the evaluation of "Peace Officer Candidates," to fitness for duty assessments of veteran peace officers. The requirements for continued employment of all peace officers in the state was not at issue in *Sager* and the Commission on POST does not attempt to set them.

For example, in Los Angeles County, beyond the requirement that an applicant for Deputy Sheriff complete a POST certified training program or have one year of law enforcement experience and possess a POST Basic Certificate, the job classification description does not incorporate "POST standards." Also, the Los Angeles County job classification for Deputy Sheriff requires that the applicant, as opposed to an incumbent, must be free of any medical condition that "*would* interfere with the satisfactory performance of the essential duties of this position" as opposed to *might adversely affect* the exercise of the powers of a peace officer." (Italics added. Gov. Code, § 1031, subd. (f).) "POST standards" are not incorporated into the job description of a Los Angeles Deputy Sheriff, as they were in Sager's job description.

End comment.

13. What if the applicant's job was eliminated while the applicant was off work following an injury?

Associations' comment

There is a distinction between the availability of the job and one's capacity to perform it. In a disability retirement case, the issue is whether the applicant is capable of substantially performing the usual duties of the job. The fact that the job is eliminated does not extinguish the member's right to a disability retirement nor is it a reason to grant a disability retirement. The fact that the job no longer exists may be a fact that is relevant to the applicant's motivation in applying for the disability retirement pension and an assessment of the credibility of the applicant's claim of incapacity. The claim of permanent incapacity could be a pretext in order to avoid the adverse consequences of the elimination of the applicant's position.

We submit that what impact the elimination of a position has on the analysis of an application for disability retirement is answered by analogy to the impact a disciplinary discharge. In *Smith v. City of Napa* (2004), *supra*, 120 Cal.App.4th 194, at 205 [14 Cal.Rptr.3d 908], a case dealing with the retirement application filed by a firefighter on the very day he was dismissed for cause, the Court of Appeal reasoned,

. . . [I]f a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot "preempt" the right to receive a disability pension for the duration of the disability. [Citation.] Conversely, "the right [to a disability retirement or full salary for a work-related disability] may be lost upon occurrence of a condition subsequent [i.e., an occurrence subsequent to acceptance of employment] such as lawful termination of employment before it [the right to a disability retirement pension or full salary] matures" (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749 [129 Cal.Rptr. 289] (*Dickey*)). [¶] The key issue is thus whether his right to a disability retirement matured before the plaintiff's separation from service. [Footnote omitted] A vested right matures when there is an unconditional right to immediate payment. (Bracketed inserts added by Associations.)

The facts may run a gamut from what appears to be an easy black and white issue to shades of gray:

Case 1: assume an applicant sustains a permanently incapacitating injury and files an application for disability retirement. Then the day before the Board of Retirement will consider a staff recommendation to grant, the applicant's position is eliminated. The right to a disability retirement having matured prior to the elimination of the job, this is not a difficult case.

But Case 2: assume the applicant's position is eliminated and she is dismissed from service. Then, within four months of being dismissed, the applicant files an application for disability retirement on the basis of a disability caused by a heart attack that occurred after her dismissal. Since discontinuance of service occurred before the right to a disability retirement matured, this also may not be a difficult case based on the rationale of *Haywood v. American River Fire Protection District* (1998), *supra*, 67 Cal.App.4th 1292 [79 Cal.Rptr.2d 749].

A more difficult case might be where the injury occurred before the job was eliminated, but the residuals were not permanent until after the job elimination. Would it make a difference if the applicant was off work from the day of the injury versus having returned to work and working consistently through the day the job was eliminated? It would seem so.

End comment.

14. Inability to work with specific people as causing permanent incapacity

Associations' comment

Under workers' compensation law, inability to work with a single, named supervisor, did not entitle an injured worker to status as a qualified injured worker who was entitled to rehabilitation benefits where there were available jobs in the same occupation with the same employer. The issue of whether an injured worker needs vocational rehabilitation was focused on the employee's capacity to perform the usual and customary duties of the job, not under whose supervision those duties would be performed. (*Save Mart Stores v. Workers' Comp. Appeals Bd. (Gwin)* (1992) 3 Cal.App.4th 720, 726-727 [4 Cal.Rptr.2d 597].)

The *Save Mart Stores* court distinguished inability to work under a named supervisor from inability to work for the same employer. While the issue in CERL of 1937 disability retirement cases (Is the applicant substantially incapacitated for his or her usual duties?) is not identical to the eligibility test that was used for vocational rehabilitation in *Save Mart Stores* (Is the employee precluded from the usual and customary duties in the job she held at the time of injury and, if so, can the employee be reasonably expected to return to gainful employment through the provision of vocational rehabilitation benefits?), there is enough similarity that the opinion in *Save Mart Stores* may be instructive.

In *Save Mart Stores*, the WCAB and the Court of Appeal construed former Title 8, California Code of Regulations, section 10003 which provided,

“As used in this Article: [¶] . . . [¶]

“(c) 'Qualified injured worker' means an employee:

“(1) The effects of whose injury, whether or not combined with the effects of a prior injury or disability, if any, permanently preclude, or are likely to preclude the employee from engaging in his or her usual and customary occupation or the position in which he or she was engaged at the time of injury (hereinafter referred to as 'medical eligibility'); . . .

The Court of Appeal explained,

The Board interpreted the language of rule 10003, subdivision (c) literally in finding that Gwin is a qualified injured worker because the injury to her psyche precluded her from returning to the position that she had at the time of injury, which was under Jerry Sauer [, her supervisor]. [¶] [¶]

. . . . Given the doctors' evaluation that Gwin was otherwise able to return to work but for the presence of the personnel director, Jerry Sauer, it would be absurd to require that Sauer is the sine qua non of Gwin's return to Save Mart.

The concept of qualified injured worker focuses on the performance of duties within the labor market. It does not focus upon the identity of persons with whom or under whom an injured worker performed those duties.

Assuming that, we see no logical reason why the drafters of rule 10003 could have intended that the actions of one person, not the employer, would disqualify a worker from returning to work or even to intend that the phrase “same position” necessarily excludes equivalent positions within the same company.

Because the Board erred, as a matter of law, in applying an incorrect interpretation of rule 10003, the order awarding rehabilitation benefits must be vacated. (*Save Mart Stores*, p. 726-727.)

End comment.

15. Reinstatement and cancellation of disability retirement allowance after a disability retirement has been granted

Government Code section 31729 provides as follows:

The board may require any disability beneficiary under the age 55 to undergo medical examination. The examination shall be made by a physician or surgeon appointed by the board at the place of residence of the beneficiary or other place mutually agreed upon. Upon the basis of the examination the board shall

determine whether the disability beneficiary is still physically or mentally incapacitated for service in the office or department of the county or district where he was employed and in that position held by him when retired for disability.

Government Code section 31730 provides,

If the board determines that the beneficiary is not incapacitated, and his or her employer offers to reinstate that beneficiary, his or her retirement allowance shall be canceled forthwith, and he or she shall be reinstated in the county service pursuant to the regulations of the county or district for reemployment of personnel.

Government Code section 31731 provides,

If any disability beneficiary under age 55 refuses to submit to medical examination, his pension shall be discontinued until his withdrawal of such refusal, and if his refusal continues for one year, his retirement allowance shall be cancelled.

Associations' comment

In *Schrier v. San Mateo County Employees' Retirement Association* (1983), *supra*, 142 Cal.App.3d 957 [191 Cal.Rptr. 421], a deputy sheriff was retired in 1975 on the basis that he was permanently incapacitated due to orthopedic and ocular problems. The retirement association, under the authority of Government Code section 31729, arranged to have Schrier re-examined by a physician in 1978. Based on the physician's opinion, the Board of Retirement found that Schrier was not substantially incapacitated for his usual duties. He was ordered to return to work. Schrier petitioned for a writ of mandate challenging the Board's actions. The superior court denied his petition. The Court of Appeal affirmed.

The trial court found that Schrier's physical condition had substantially improved. The Court of Appeal rejected Schrier's claims that his department required that he be capable of the "full range of duties" of a deputy sheriff, that he was denied equal protection of laws in that others similarly situated were permitted to remain retired, and that to require that he return to work would deny him his rights as a safety member. (*Schrier*, p. 963.)

End comment.

The Court of Appeal in *Schrier* stated,

. . . . The only current limitation which affects his incapacity is the possible inability to drive a pursuit vehicle. However, there are many permanent full-time positions in the sheriff's office which do not require vehicular pursuit. (*Schrier*, p. 961.)

. . .

Appellant urges a "full range of duties" construction of section 31729 to impose the requirement that unless he is fully fit for vehicular pursuit, he be found incapacitated. Existing authority does not support this position. . . . Most persuasive, however, is *Harmon v. Board of Retirement*, supra., 62 Cal.App.3d at pp. 694-695, in which the court, defining the phrase "permanently incapacitated physically or mentally for the performance of his duties in the service" as contained in section 31724, adopted the construction of Mansperger and Barber, supra ["Incapacity" means the substantial inability to perform one's usual duties.]. Sections 31724, 31729 and 31730 are all in article 10, entitled "Disability Retirement," of the County Employees' Retirement Law. (Gov. Code, § 31450 et seq.) They were enacted simultaneously, deal with the same subject matter and are in pari materia. As such, they should be harmonized and similarly construed. (Citations.) Schrier, p. 962.

- a) Is the member entitled to a due process hearing prior to the member's disability retirement pension being terminated on the basis that the member is no longer incapacitated?**

Associations' comment

There is no reported appellate court decision dealing with this issue in a case arising under the CERL of 1937. However, the Court or Appeal, interpreting provisions of the Public Employees Retirement Law that are similar to Government Code sections 31729 and 31730, held that a member is not entitled to a pre-termination hearing. (*Cansdale v. Board of Administration* (1976) 130 Cal.App.3d 656 [130 Cal.Rptr. 880], interpreting former Gov. Code, §§ 21028-21029, repealed (Stats 1995 ch. 379, § 1) and reenacted in Gov. Code, §§ 21192-21193 (Stats 1995 ch. 379 § 2).) The *Cansdale* court reasoned that, when his disability pension was terminated, Cansdale had a right to return to work, under protest, and to paid status. Therefore, whether his income was a pension or salary, his receipt of income would be uninterrupted pending the outcome of his administrative hearing. Given his right to a steady stream of income, there was no deprivation of a property interest, which would have required a pre-deprivation hearing.

Government Code section 21192, similar to CERL of 1937's Government Code section 31729, provides, among other things, that the PERS Board of Administration or, in certain cases involving local public safety employees, the governing body of the retired member's employer, may require the recipient of a disability pension under the minimum age for voluntary retirement, to undergo medical examination. On the basis of the medical examination, the board or governing body is to determine whether the member is still incapacitated for duty in the position the member held when he or she was retired for disability.

Government Code section 21193, similar to CERL of 1937's Government Code section 31730, provides, among other things, that if the determination is that the disability retirement pension recipient is not incapacitated for duty in the position held when the

member was retired for disability and the member's employer offers to reinstate the member, his or her disability retirement allowance "shall be cancelled immediately, and he or she shall become a member of this system."

In *Cansdale*, a California Highway Patrol officer was given a disability retirement pension effective May 4, 1968 after he was found to be permanently incapacitated from injuries he sustained in a motorcycle accident. Cansdale was subsequently employed in private industry. An investigator for the California Bureau of Investigations tailed him and took films of his activities for approximately two years. The films showed Cansdale engaged in activities that indicated that he might not have been incapacitated for his duties as a CHP officer. On January 17, 1972, Cansdale was referred by the board to an orthopedic surgeon for examination. The physician concluded in a medical report dated January 18, 1972 that Cansdale had recovered to the extent that he could resume his duties as a CHP officer. Cansdale was notified of the physician's opinion on January 28, 1972. On March 1, 1972, Cansdale's disability retirement pension was terminated. Cansdale did not return to work or contact the CHP to offer to return to work under protest. An administrative hearing was held after which the Board made its final determination on December 12, 1973.

Among the issues addressed on appeal was Cansdale's claim that Government Code section 21029 was unconstitutional because it makes no provision for an opportunity for a hearing before the recipient's disability pension is cancelled and it is well established that notice and an opportunity to be heard must be provided before a person may be deprived of a significant property interest. Cansdale argued that, irrespective of the final disposition of the issue of incapacity for duty, he should recover the amount of the disability pension between the date it was terminated and the date of the Board's final decision.

The Court of Appeal rejected Cansdale's argument. The court reasoned that Cansdale would be entitled to full retroactive relief if he prevailed in his administrative hearings and, therefore, "his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim." [Citation.]

The question would seem to be whether Cansdale was, because of the Board's unilateral action, deprived of continuing income, whether it be labeled disability benefits or salary. Both Cansdale and the CHP were notified about one month in advance of the cancellation of Cansdale's disability payments and that he was eligible to be reinstated as a state traffic officer. Under the statute he had a right to such reinstatement although he was not given an opportunity for a hearing before March 1. Nothing in the record suggests that he was prevented from notifying both the Board and the CHP that he would appear for work under protest on March 1, and would perform only such tasks that were consistent with his assessment of his condition. The CHP, of course, might at that point have attempted to fire him; but as *Skelly v. State Personnel Bd.*, *supra*, (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] makes clear, before he could be disciplined, suspended, or fired, he would have been entitled to notice and an opportunity for a hearing at which time he could have tested the validity of the Board's order in

requiring him to return to work under penalty of being deprived of either his disability pension or salaried income.

This is not to say that such a procedure is the most efficient. Had Cansdale followed that procedure, it would doubtless have been inefficient and time-consuming in that it might very well have turned out that two hearings on the same issue were being held, one to challenge any discipline the CHP might have attempted to impose; a second to challenge the Board's determination that he was no longer disabled.

The issue, however, is not efficiency but whether the statutory system as further explained by *Skelly* deprives Cansdale of a significant property interest without prior notice and an opportunity for a hearing. It seems that the procedure does not, and we therefore reject Cansdale's request for disability benefits from March 1, 1972, to December 12, 1973.

Under Government Code section 31730, there are two prerequisites to the termination of a disability pension: (1) the board must determine that the beneficiary is not incapacitated, and (2) the employer must offer to reinstate the beneficiary. Unlike in Cansdale's case, the onus of contacting the department is not placed on the CERL of 1937 retiree/beneficiary. The employer must make the offer.

End comment.

16. Disability retirement benefits for members who are substantially incapacitated for their usual duties, but who retain the capacity to perform other duties in county service.

a) Nonwork-related injuries

Government Code section 31725.5 allows members with nonservice-connected disabilities to return to work for the same employer in a different position that has been identified as being within the disabled member's capacity. It provides,

If the board finds, on medical advice, that a member in county employment, although incapacitated for the performance of his duties, is capable of performing other duties in the service of the county, the member shall not be entitled to a disability retirement allowance if any competent authority in accordance with any applicable civil service or merit system procedures offers and he accepts a transfer, reassignment, or other change to a position with duties within his capacity to perform with his disability. If this new position returns to the member compensation less than that of the position from which he was disabled, the board, in lieu of a disability retirement allowance, shall pay him the difference in such compensation until the compensation of the new position equals or exceeds the compensation (including later changes) of the former position, but such amount shall not exceed the amount to which he would otherwise be entitled as a disability retirement allowance. Such payments in lieu of disability retirement

allowance shall be considered as a charge against county advance reserve for current service.

If a new position cannot be arranged at the time of eligibility for disability retirement allowance, such disability retirement allowance to which the member is entitled under this article shall be paid until such time as a new position is available and accepted.

If a disability retirement allowance is paid and the member later accepts such a new position, the period while on disability retirement shall not be considered as breaking the continuity of service and his rate of contributions shall be based on the same age as it was at the date of disability. The member's accumulated contributions shall be the same as at the date his disability retirement began less the amount charged to his accumulated normal contributions.

Nothing in this section shall be construed to require a member to accept reassignment or transfer in lieu of a disability retirement allowance.

The provisions of this section become effective in any county only when the board of supervisors adopts an ordinance providing for their implementation by the board of retirement which may include application to persons retired for disability before such effective date.

The provisions of this section shall only apply to members eligible to retire for nonservice-connected disability.

Associations' comment:

Refer to Section 31725.5 for its technical provisions. The general idea is this: Section 31725.5 involves a four-step process:

- First, the Board finds that the applicant is permanently incapacitated for his or her duties for nonservice-connected reasons.
- Second, the Board finds that the applicant is capable of performing other duties for the county. This involves an analysis of at least one other position in county service similar to the analyses that were performed for vocational rehabilitation purposes in workers' compensation cases before legislative reforms eliminated the necessity for such analyses in that system.
- Third, the county offers the position to the applicant.
- Fourth, the applicant accepts the position.

This benefit is a voluntary one on the part of the applicant. If the applicant does not agree to accept the benefit, then, because the applicant has been found to be permanently incapacitated, a disability retirement follows as a consequence. Whether

the applicant receives a pension depends on whether the applicant has satisfied the prerequisites for receipt of a nonservice-connected disability retirement pension.

Assuming all four steps are completed, and assuming the salary of the applicant's new position is less than the position for which the applicant has been found permanently incapacitated, the disability retirement benefit is the difference between the new, lesser paying position and the higher paying position, assuming the applicant is otherwise eligible to receive a nonservice-connected disability retirement pension. The maximum disability retirement benefit would be the amount of the disability retirement pension allowance the applicant would have received had the applicant not returned to work under Section 31725.5. If the applicant is found to be permanently incapacitated before the arrangements for the new position can be made, the applicant receives the disability retirement pension until the new position is available and the interim period is not considered a break in the continuity of service.

End comment.

b) Service-connected disabilities

Government Code section 31725.6, applicable to those members who became incapacitated before January 1, 2004, allows members, whom the board has found to be permanently incapacitated with service-connected disabilities, to return to work for the same employer in a new position through a rehabilitation program. If the new position pays less than the member's former position, the retirement association makes up the difference up to the amount of the pension allowance the member would have received had the member retired on a service-connected disability retirement. This benefit is referred to as the "supplemental disability allowance payment." (Gov. Code, § 31725.6, subd. (e).) Section 31725.6, subdivision (a), provides,

(a) When the board finds, based on medical advice, that a member in county service is incapacitated for the performance of the member's duties, the board shall determine, based upon that medical advice, whether the member is capable of performing other duties. If the board determines that a member, although incapacitated for the performance of the member's duties, is capable of performing other duties, the board shall inform the appropriate agency in county service of its findings and request that the agency immediately initiate a suitable rehabilitation program for the member pursuant to Section 139.5 of the Labor Code, whereby the member could become qualified for assignment to a position in county service consistent with the rehabilitation program.

Associations' comment

Section 31725.6's purpose, to provide employment in county-service for a member who is permanently incapacitated for his or her usual duties, is identical to that of Section 31725.5, but Section 31725.5 is applicable to service-connected disabilities of those who became incapacitated before January 1, 2004. While the first three of the four steps outlined in the Associations' comment to Section 31725.5 apply as well to service-

connected disabilities under Section 31725.6, Section 31725.6 also weaves into the process the provisions of the Labor Code's former rehabilitation law applicable to work-related injuries.

Subdivisions (b) through (h) of Section 31725.6 provide,

(b) When the appropriate agency in county service receives such a request from the board, the agency shall immediately refer the member to a qualified rehabilitation representative for vocational evaluation. During the course of the evaluation, the rehabilitation representative shall consult with the appropriate agency in county service to determine what position, if any, in county service would be compatible with the member's aptitudes, interests, and abilities and whether rehabilitation services will enable the member to become qualified to perform the duties of the position.

(c) Upon completion of the vocational evaluation of the member, the rehabilitation representative shall develop a suitable rehabilitation plan and submit the plan for concurrence by the member and the appropriate agency in county service and, thereafter, the agency shall forward the plan to the Division of Industrial Accidents for approval pursuant to Section 139.5 of the Labor Code.

(d) Upon receipt of approval of the rehabilitation plan, the appropriate agency in county service shall notify the board that the agency is either proceeding to implement an approved rehabilitation plan that will qualify the member for a position in county service specified in the plan or is unable to provide a position in county service compatible with the approved rehabilitation plan.

(e) Upon commencement of service by the member in the position specified in the approved rehabilitation plan, the member shall not be paid the disability retirement allowance to which the member would otherwise be entitled during the entire period that the member remains in county service. However, if the compensation rate of the position specified in the approved rehabilitation plan is less than the compensation rate of the position for which the member was incapacitated, the board shall, in lieu of the disability retirement allowance, pay to the member a supplemental disability allowance in an amount equal to the difference between the compensation rate of the position for which the member was incapacitated, applicable on the date of the commencement of service by the member in the position specified in the approved rehabilitation plan, and the compensation rate of the position specified in the plan, applicable on the same date. The supplemental disability allowance shall be adjusted annually to equal the difference between the current compensation rate of the position for which the member was incapacitated and the current compensation of the position specified in the approved rehabilitation plan. The supplemental disability allowance payments shall commence upon suspension of the disability retirement allowance and the amount of the payments shall not be greater than the disability retirement allowance to which the member would otherwise be entitled. Supplemental disability allowance payments made pursuant to this

section shall be considered as a charge against the county advance reserve for current service, and all of these payments received by a member shall be considered as a part of the member's compensation within the meaning of Section 31460.

(f) From the time that the member is eligible to receive a disability retirement allowance until the appropriate agency is able to provide the position in county service specified in the approved rehabilitation plan, and the member has commenced service in that position, the disability retirement allowance to which the member is entitled under this article shall be paid. Upon commencement of service by the member in the position specified in the approved rehabilitation plan, the period during which the member was receiving disability retirement payments shall not be considered as breaking the continuity of the member's service, and the rate of the member's contributions shall continue to be based on the same age at entrance into the retirement system as the member's rates were based on prior to the date of the member's disability. The member's accumulated contributions shall not be reduced as a result of the member receiving the disability retirement payments, but shall be increased by the amount of interest that would have accrued had the member not been retired.

(g) Notwithstanding Section 31560, a member whose principal duties, while serving in the position for which the member was incapacitated, consisted of activities defined in Section 31469.3 shall, upon commencement of service by the member in the position specified in the approved rehabilitation plan, continue to be considered as satisfying the requirements of Section 31560, notwithstanding the actual duties performed during the entire period that the member remains in county service.

(h) If, within one year from the date that the member has been eligible for a disability retirement allowance, the appropriate agency in county service has offered to the member, in writing, the position specified in the rehabilitation plan which had previously been concurred, in writing, by the member and approved by the Division of Industrial Accidents pursuant to Section 139.5 of the Labor Code, the member shall, within 30 days of receipt of the notice, report for duty at the location specified in the notice. If the member refuses to report for duty within the time specified, the appropriate agency in county service may apply to the board to have the member's allowance discontinued. The board shall be authorized to discontinue the member's disability retirement allowance if based upon substantial evidence of the refusal of the member to report to work without reasonable cause. However, the board shall not be authorized to impair any other of the rights or retirement benefits to which the member would otherwise be entitled.

Associations' comment, continued

Unlike Section 31725.5, Section 31725.6 does not contain the express provision that a member is not required to accept reassignment or transfer in lieu of a disability

retirement allowance. However, under Section 31725.6, the "concurrence" of the member in the rehabilitation plan is required. (Section 31725.6, subdivisions (b) and (h).) Once the member has concurred, however, subdivision (h) of Section 31725.6 provides that the Board "shall be authorized to discontinue the member's disability retirement allowance" if, based on substantial evidence, the Board finds that the member's refusal to report to work in the new position is without reasonable cause.

By legislation effective January 1, 2004, the vocational rehabilitation provisions of the workers' compensation law under Labor Code § 139.5 were repealed (Stats. 2003, ch. 635, § 14.) and a new Section 139.5 was enacted. (Stats. 2003, ch. 635, § 14.2.) The new law created a supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state approved or accredited schools. The amount of the benefit was set at different values depending on the level of permanent disability found. The new supplemental job placement benefit was applicable to injuries sustained on or after January 1, 2004.

Subsequently, effective April 19, 2004, Labor Code section 139.5, with its supplemental job displacement benefit, was repealed (Stats. 2004, ch. 34, § 4, (SB 899)) and a new Section 139.5 was enacted (Stats. 2004, ch. 34, § 5) reestablishing the former vocational rehabilitation law for employees injured prior to January 1, 2004 (*id.*, ch. 34, § 5, subdivision (k)) with a sunset provision extinguishing the benefit again effective January 1, 2009 (*id.*, § 5, subdivision (l)). If an injured worker's rights to vocational rehabilitation benefits were not solidified in a final award before January 1, 2009, those rights were extinguished by the repeal of the statutes and regulations governing rehabilitation effective January 1, 2009. (*Beverly Hilton Hotel v. Workers' Comp. Appeals Bd.* (2009) 176 Cal.App.4th 1597 [99 Cal.Rptr.3d 50].) Senate Bill 899 was enacted as an urgency measure and was effective immediately, except as otherwise provided in the bill. (Stats. 2004, ch. 34, § 49.) The supplemental job displacement benefit and its voucher system remains alive in Labor Code sections 4658.5 (employee eligibility)- 4658.6 (employer liability), applicable to injuries sustained on or after January 1, 2004. (Lab. Code, § 4658.5, added Stats 2003 ch. 635, § 14.4 (AB 227); amended Stats 2005 ch. 22, § 144 (SB 1108), effective January 1, 2006; amended by Stats 2008 ch. 179, § 176 (SB 1498), effective January 1, 2009. Lab. Code, § 4658.6, added Stats 2003 ch. 635, § 15 (AB 227).)

Section 31725.6 and its connection to Labor Code section 139.5 was apparently overlooked by the Legislature when it repealed the former Section 139.5 and then enacted a new Section 139.5. In order to correct the oversight, Government Code section 31725.6 was amended so as to apply only to those incapacitated before January 1, 2004. Section 31725.65 was enacted by urgency legislation effective August 30, 2004 and was applicable to injuries sustained on or after January 1, 2004. (AB 2982, 2004 Reg. Sess., ch. 379.) In addition to two technical changes, Subdivision (i) was added to Section 31725.6 and reads,

This section shall apply only to members who were incapacitated for the performance of the member's duties prior to January 1, 2004, and who are eligible to retire for service-connected disability.

Section 31725.65 provides as follows:

(a) When the board finds, based on medical advice, that a member in county service is incapacitated for the performance of the member's duties, the board shall determine, based upon that medical advice, whether the member may be capable of performing other duties. If the board determines that a member, although incapacitated for the performance of the member's duties, is capable of performing other duties, the board shall notify the appropriate agency in county service of its findings.

(b) When the appropriate agency in county service receives that notification from the board, the agency shall immediately inform the member of any vacant county positions that may be suitable for the member, consistent with his or her disability, and shall consult with the member in an effort to develop a reemployment plan that shall identify what position, if any, in county service would be compatible with the member's aptitudes, interests, and abilities.

(c) Upon approval by the member of the reemployment plan, the appropriate agency in county service shall notify the board that the agency is proceeding to implement the approved reemployment plan.

(d) Upon commencement of service by the member in the position specified in the approved reemployment plan, the member shall not be paid the disability retirement allowance to which the member would otherwise be entitled during the entire period that the member remains in county service. However, if the compensation rate of the position specified in the approved reemployment plan is less than the compensation rate of the position for which the member was incapacitated, the board shall, in lieu of the disability retirement allowance, pay to the member a supplemental disability allowance in an amount equal to the difference between the compensation rate of the position for which the member was incapacitated, applicable on the date of the commencement of service by the member in the position specified in the approved reemployment plan, and the compensation rate of the position specified in the plan, applicable on the same date. The supplemental disability allowance shall be adjusted annually to equal the difference between the current compensation rate of the position for which the member was incapacitated and the current compensation of the position specified in the approved reemployment plan. The supplemental disability allowance payments shall commence upon suspension of the disability retirement allowance and the amount of the payments shall not be greater than the disability retirement allowance to which the member would otherwise be entitled. Supplemental disability allowance payments made pursuant to this section shall be considered as a charge against the county advance reserve for current service, and all of these payments received by a member shall be considered as a part of the member's compensation within the meaning of Section 31460.

(e) From the time that the member is eligible to receive a disability retirement allowance until the appropriate agency is able to provide the position in county service specified in the approved reemployment plan, and the member has commenced service in that position, the disability retirement allowance to which the member is entitled under this article shall be paid. Upon commencement of service by the member in the position specified in the approved reemployment plan, the period during which the member was receiving disability retirement payments shall not be considered as breaking the continuity of the member's service, and the rate of the member's contributions shall continue to be based on the same age at entrance into the retirement system on which the member's rates were based prior to the date of the member's disability. The member's accumulated contributions shall not be reduced as a result of the member receiving the disability retirement payments, but shall be increased by the amount of interest that would have accrued had the member not been retired.

(f) Notwithstanding Section 31560, a member whose principal duties, while serving in the position for which the member was incapacitated, consisted of activities defined in Section 31469.3 shall, upon commencement of service by the member in the position specified in the approved reemployment plan, continue to be considered as satisfying the requirements of Section 31560, notwithstanding the actual duties performed during the entire period that the member remains in county service.

(g) This section shall apply only to members who are incapacitated for the performance of the member's duties on or after January 1, 2004, and who are eligible to retire for service-connected disability.

Features of Section 31725.6 were perpetuated in Section 31725.65, though the paragraphing was altered. Subdivision (e) provides that, if the member has to wait to be assigned to the new position, the member will receive the full service-connected disability retirement allowance to which the member is entitled. When the member begins the new position, the period during which the member received the pension will not be considered a break in service and credit for contributions will be given as if the member had not retired.

Section 31725.65, subdivision (f), provides that, if the member was a safety member, that status will be continued in the new position even if it is otherwise a general membership position.

Subdivision (g) of Section 31725.65 provides that the Section is only applicable to members who are incapacitated on or after January 1, 2004.

Note that there was still a disconnection between the revived Labor Code section 139.5, which applied to those with *injuries* sustained prior to January 1, 2004 and the amended Government Code section 31725.6, which applies to those who were *incapacitated* prior to January 1, 2004. "Injury" for workers' compensation purposes and "incapacity" for disability retirement purposes are not synonymous. One may have been injured prior to

January 1, 2004 and not become incapacitated until after January 1, 2004. (Section 31725.65 was amended for technical changes only again in Statutes of 2005, chapter 22, § 90 (SB 1108), effective January 1, 2006.)

17. When is the member's capacity to substantially perform the usual duties of the job measured?

Associations' comment

We are not aware of any opinions of the appellate courts that speak to the issue. We propose that there are three points at which, depending on the circumstances, the member's incapacity should be measured:

- (a) In the ordinary case, when the Board makes its decision on the issue of incapacity.
- (b) In the case of a "point seven" application, when the member retired for years of service and age.
- (c) In the case of a post-disability retirement re-evaluation of the member's capacity to return to duty, when the Board makes its decision on the issue.

a) In the ordinary case, the board's goal should be to gain as accurate picture as possible of the applicant's capacity to substantially perform his or her usual duties as of the time the Board makes its decision. Why?

When the member has not taken a regular retirement and remains in service, the appropriate time to measure the member's capacity to substantially perform his or her usual duties is at the time the Board makes its decision. This conclusion is mandated by the fact that the member who has been found not to be incapacitated has a right to return to work, either because the member's is no longer temporarily disabled or, under Government Code section 31725, last sentence, the employer has dismissed the member for disability (see the discussion above in Section I, O). It would make little sense to measure the member's capacity as of any time other than the time the member would be going back to work, performing his or her usual duties. This is not to say that the Board should only consider the opinion of the last examining physician, but the Board should evaluate the evidence addressing the member's stable, permanent and stationary condition so that it does not send back to work a member who does not have the capacity to substantially perform his or her usual duties. Reliable evidence that supports a claim that there has been a change in the member's ability to substantially perform his or her usual duties may warrant a reopening of the record.

b) In the case of a "point seven" application under the provisions of Government Code section 31725.7, the member's incapacity is measured as of the time when the member retired for years of

service and age. Why?

Where the member takes a regular retirement pending the resolution of an application for a disability retirement, the appropriate time to measure whether the member was permanently incapacitated was when the employer-employee relationship last existed and the member had a right to go back to work if he or she had not permanently lost the capacity to substantially perform his or her usual duties. Under Section 31725.7, subdivision (b), second sentence, the applicant waives the right to be returned to duty if the member is found not to be incapacitated.

Measuring the member's capacity after the member has taken a regular retirement would be inconsistent with the purpose of the disability retirement provisions of the County Employees Retirement Law of 1937. The disability retirement provisions of the CERL of 1937 are not a life-long disability policy. All members who are fortunate to live a long life eventually become incapacitated for the duties they once performed. The purpose of the CERL of 1937's disability provisions is to provide a safety net for members whose careers are abbreviated by disability and to replace them without prejudice or hardship for the betterment of the public service. (Gov. Code, § 31451.) The issue is, as it is for any applicant for disability retirement: Was the member compelled to retire because the member was permanently incapacitated? Whether the member became permanently incapacitated at a later time, that is, after he retired for years of service and age, is not material.

c) In the case of a post-disability retirement re-evaluation of the member's capacity to return to duty under Government Code sections 31729-31730, the member's capacity is measured based on the most recent information available when the Board makes its decision on the issue. Why?

The rationale for this proposition is the same as for a), dealing with the ordinary application filed by one in service. The Board does not want to return to duty a retired member who does not have the capacity to substantially perform the usual duties of her assignment. Again, this does not mean that the Board must accept the last assessment of the member's capacity for duty, but reliable evidence of the member's current capacity should be considered.

B. If the member is incapacitated, is the incapacity service-connected?

If the member is substantially incapacitated for his or her usual duties, the next question is whether the incapacity is "service-connected," or, in other words, "work-related" under the law. Whether an incapacity will be considered service-connected is governed by a statute (Gov. Code, § 31720) addressing incapacities that are established to in fact be caused in whole or substantial part by a work-related injury and by other statutes that address incapacities that are presumed to be work-related even in the absence of proof that they are in fact work-related. (Gov. Code, §§ 31720.5-31720.9.) Both the general statutory provision and the specific statutory presumptions are discussed below.

In general, under the CERL of 1937, other public pension systems, and workers' compensation law, an injury and the resulting incapacity for duty or permanent disability are considered work-related if the injury arises out of and in the course of employment, a formula that is frequently shortened to the acronym "AOE-COE" (pronounced as the individual letters.)

1. General statutory provision

Government Code section 31720, provides in pertinent part as follows:

Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

(a) The member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity . . .

2. Distinguish "service-connected disability pension" from the similar sounding "service pension."

For those new to the area of public pension law, there is often some confusion caused by the use of the terms "service," as in "service pension" and "service-connected," as in "service-connected disability pension."

"Service pension" refers to the regular pension a member of the retirement association earns based on his or her years of service and age at the time of retirement. "Service pension" and "regular retirement" are synonymous with "regular pension," "retirement," or "pension for years of service and age." These terms distinguish the basis of the pension from a disability retirement pension.

"Service-connected disability retirement" or "service-connected disability retirement pension" refer to a retirement or pension for incapacity caused by a work-related injury or illness. It is sometimes referred to by its acronyms "SCDR" or "SCD" just as its nonservice-connected cousin for a permanent incapacity caused by an injury or illness that is not work-related is sometimes referred to as a "NSCDR" or the shorter "NSCD."

3. In order to be considered "service-connected," the injury must both arise out of and occur in the course of employment – it must be "AOE-COE" – and the employment must contribute substantially to the incapacity.

Government Code section 31720 sets forth the general requirements for an injury to be considered service-connected under the County Employees Retirement Law of 1937. The courts "have found that the County Employees Retirement Act of 1937 . . . and the Workers' Compensation Act 'are related in subject matter and harmonious in purpose.' . . . [C]ourts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law." (*Bowen v. Board of Retirement* (1986), *supra*, 42 Cal.3d 572, 578, fn. 4 [229 Cal.Rptr. 814, 724 P.2d 500].) For this reason, in this Resource reference is frequently made to court opinions construing parallel

workers' compensation statutes and judicially created law dealing with issues that come up under the CERL of 1937.

Labor Code section 3600 sets forth the general requirements for an injury to be considered work-related under the Workers Compensation Act. It provides in pertinent part,

(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

Both the workers' compensation law and the CERL of 1937 provide that injuries will be considered to be caused by the employment when they arise out of ("AOE") and in the course of employment ("COE").

As will be shown in more detail below, "AOE" refers to a requirement that the injury have its source in a RISK or HAZARD of employment, as opposed to a risk or hazard that is personal to the employee or to which members of the general community ("the commonalty") are exposed. It includes risks that, while also risks of the commonalty, are greater or special for the employee by virtue of some aspect of his or her employment.

"COE" on the other hand, refers to the requirement that the incapacitating injury or illness occur in the TIME, PLACE, and CIRCUMSTANCES of employment.

The elements of "arise out of employment" and "occur in the course of employment" are separate elements and both must be satisfied in order for the job to be considered the legal cause of an injury. (*Associated Oil Co. v. Industrial Acc. Comm.* (1923) 191 Cal. 557, 562 [217 P. 744].) Experience instructs that, as a general rule, if an injury occurs in the course of employment, it also arises out of employment. Of course, there are exceptions.

However, the elements may be so intertwined in a particular case that a fine line cannot be drawn between the AOE and COE pieces of the equation and facts that show that the AOE element has been satisfied may also be the facts that establish that the COE element has been satisfied. (1 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 4.04, Concurrence of Conditions.)

a) Arise out of employment

Arise out of employment refers to the RISK of injury having its source in the employment.

. . . . The phrase "arising out of the employment" refers to the cause of the injury and the risks or hazards presented by the employment. Generally, an injury will arise out of the employment when "there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." In the work setting it is sufficient for compensability that an injury "appear to have had its origin in a risk connected with the employment and to have flowed from the source as a rational consequence." . . . (1 Hanna, *supra*, § 4.02[1] Statutory Condition, footnotes omitted.)

The risk must be one of employment, not one common to the neighborhood. The "arise out of employment" element excludes risks to which the employee is exposed apart from employment.

. . . . 'It [the injury] arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would be equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.' (*In re McNichols* (1913), 215 Mass. 498, [L. R. A. 1916A, 306, 102 N. E. 697].) This appears to us to be a good general definition of the term "arising out of the employment," and we think it fairly includes such a case as this. . . . (*Kimbol v. Industrial Acc. Comm.* (1916) 173 Cal. 351, 353-354 [160 P. 150].)

(1) Infectious disease: The risk of contracting the disease on the job must be greater than the risk to which members of the general community are exposed.

Where risk of contracting the disease on the job is greater than the risk of the "commonalty," the risk is work-related. (*City and County of San Francisco v. Industrial Acc. Comm. (Slattery)* (1920) 183 Cal. 273 [191 P. 26]: While there was an epidemic of influenza to which the commonalty was exposed, the applicant, a hospital steward, had a greater risk of exposure because he attended to a dozen patients ill with fully developed disease, and his death from the disease was held to be work-related.)

Where risk of contracting the disease at the job is the same as the risk common to the neighborhood, the risk is not work-related. (*Pattiani v. Industrial Acc. Comm.* (1926)

199 Cal. 596, 600-601 [250 P. 864]: An employee who traveled throughout the United States contracted typhoid fever while in New York. His risk of contracting the contagion, however, was no greater than any other member of the commonalty and his injury was held to be not work-related.)

Applicants' comment

In *Pattiani*, the "commonalty," was the population in New York and but for his employment, he would not have been traveling there. The Doctrine of Positional Risk that had been established in the 1916 *Kimbol* case, and which is discussed further below, was not advanced by the applicant and was not applied by the Supreme Court. Rather, the applicant asserted, but failed to prove, that his bout with typhoid fever was related to raw oysters he ate in New York. But with a general epidemic of typhoid fever in New York, the Doctrine of Positional Risk would appear to have been determinative where, in service to his employer, the employee traveled from his headquarters in a city where the disease was not epidemic to a city where the disease was epidemic.

End comment.

In *Bethlehem Steel Co. v. Industrial Acc. Comm. (George)* (1943) 21 Cal.2d 742 [135 P.2d 153], there was evidence that an epidemic of contagious eye disease, known as kerato conjunctivitis, existed in shipyards and in the community. But the number of cases in the community outside of shipyards was much less in proportion compared to the proportion of those in the shipyard population who were stricken with the disease. The higher severity of the epidemic in the shipyards supported a finding that employees in the shipyards were subjected to a special exposure in excess of that of the commonalty, and that their contracting the disease was proximately caused by an "injury arising out of employment," that is, by reason of a "risk incident to employment."

(2) Doctrine of Positional Risk: If the employment brings the employee to the particular place where injury occurs, the injury arises from a risk of employment.

If the employment requires the employee to be in what turns out to be the place where injury occurs, the injury arises from the employment. The risk of harm does not have to be foreseeable or one over which the employer has control. (*Pacific Indemnity Co. v. Industrial Acc. Comm. (Raymond)* (1948) 86 Cal.App.2d 726, 729 [195 P.2d 919]: An employee who, while on her employer's premises, was injured by a falling window that was dislodged by an explosion on nearby property was entitled to workers' compensation, irrespective of the fact that the injury may have been the result of a fortuitous and unforeseen circumstance.)

The concept is dramatized by the "stray bullet" cases. (See *Industrial Indemnity Co. v. Industrial Acc. Comm. (Baxter)* (1950) 95 Cal.App.2d 804 [214 P.2d 41]: While substituting for a bar tender, the manager of an inn was struck by a bullet fired at a customer by his irate wife. Held: the Doctrine of Positional Risk was applied and the manager's death was held to be work-related; *Truck Ins. Exchange v. Industrial Acc.*

Comm. (1957) 147 Cal.App.2d 460 [305 P.2d 55]: A farm worker was hit by a .22 caliber bullet fired by a 10 year-old boy who was in a neighboring field. The Doctrine of Positional risk was applied and the farm worker's injury was held to be work-related.)

If an employee is at work, sitting at a desk by a window and is struck by a bullet fired from a rifle far from the employment, having nothing to do with the employer or the employee, the employee's injury arises from a risk of the employment. The employment that brought the employee to the time, place, and circumstances of the injury is the source of the risk.

On the other hand, if the danger is one to which all members of the community were exposed, the risk is not one of employment. Extrapolating from the "stray bullet" example, such a risk of the commonalty might be a situation in which the entire community is attacked. Where the risk for the employee is the same as for the commonalty, the risk does not arise out of employment.

(3) Examples of issues associated with the 'arise out employment' element:

Editor's note

The examples in this section are not exhaustive of the AOE issue, but are intended to demonstrate how the issue might arise in more typical cases. For more complete discussions, refer to 1 Hanna, *supra*, Chapter 4, The Relationship Between Injury and Employment, §§ 4.02 and 4.04 to 4.95; 1 Herlick, California Workers' Compensation Law, 6th Ed. (December 2010, Release No. 10) Chapter 10, The Injury; 1 Larson, Workers' Compensation Law, Chapters 1-10 and 2 Larson, Chapters 20-46, and 3 Larson, Workers' Compensation Law, Chapter 51. Keep in mind that certain limitations on the compensability of injuries enacted as part of workers' compensation reform legislation packages beginning in 1989 are not applicable to cases arising under the CERL of 1937. (See *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044].)

End Editor's note

Consider how the risk of injury is associated with the employment and ask: Did the job bring the employee to the "position of risk" or "zone of danger" or create some special or greater risk of injury for the employee than the risk to which members of the community are exposed? Some risks flow from the employment only or from a mix of employment and personal sources; some flow from sources only personal to the employee; and others flow from sources having no connection with either the employer or the employee.

- (a) Injury from a source not connected to the employment or the employee -- so-called "neutral risks" -- are usually work-related.**

In *Kimbol v. Industrial Acc. Comm.* (1916), *supra*, 173 Cal. 351 [160 P. 150], the employee was injured when the floor above employer's premises collapsed from weight of items stored there by another, having no connection with the employer. The Doctrine of Positional Risk, explained above, was applied and the injury was held to be work-related.

In *Madin v. Industrial Acc. Comm.* (1956) 46 Cal.2d 90 [292 P.2d 892], the employees, a man and his wife who resided in an employer-provided bunkhouse, were injured when a bulldozer that was parked nearby and which had no connection with the employees or the employer, was started by some neighborhood boys and ran away, crashing through the bunkhouse. The Doctrine of Positional Risk was applied and the employees' injuries were held to have arisen out of the employment.

(b) Injury associated with the risk of natural calamities ordinarily does not satisfy the “arise out of” element unless there is, in addition, a special risk above that to which the commonality is exposed.

In the case of an earthquake, distinguish the risk of the earthquake itself and the risk of injury from factors of employment that might be incidental sources of risk. The risk of injury from the earthquake, including the collapse of the employer's building where the employee worked, does not arise from employment.

The responsibility of an employer for an injury sustained by his employee resulting from an earthquake or other like peril has frequently been the subject of judicial determination, and the rule applied by the courts almost universally is as follows: "As a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquake, floods, etc. These are considered as 'force majeure,' [editor's note: "force majeure" is a force that cannot be anticipated or controlled; similar in meaning to an "Act of God"] which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than any other person. Every human being is liable to suffer from events in which he has no share of responsibility." [Citations.] (*London G. & A. Co., Ltd. v. Industrial Acc. Comm. (Mosteiro)* (1927) 202 Cal. 239, 242 [259 P. 1096].)

In the *Mosteiro* case, the injury sustained by the employee was found to be work-related because the evidence showed that the building in which he worked as a janitor was of substandard construction and would have survived the 1925 Santa Barbara earthquake had it been properly constructed. The risks of nature associated with the earthquake were thereby "humanized" and were greater for *Mosteiro* than for the public at large in the vicinity of the earthquake.

Where a wall collapsed during an earthquake, causing bricks to fall through a floor, shattering milk bottles the employee was handling, which in turn cut and injured him, the injury was held to be work-related because the employee, by virtue of his employment

and his handling of glass bottles, was subjected to a greater risk of injury than the community at large. (*Enterprise Dairy Co. v. Industrial Acc. Comm.* (Wilson) (1927) 202 Cal. 247, 250-251 [259 P. 1099].)

(c) Injuries from altercations with coworkers

- (i) Incapacity related to an injury sustained by any participant in an on-the-job altercation between or among coworkers caused by a dispute related to a personal grievance, i.e., one that is not connected with employment, does not arise from the employment, and is not service connected.**

Such an injury does not arise from a risk or hazard of employment, but arises from a risk personal to the participants. It is, therefore, not work-related. (*Pacific Employers Ins. Co. v. Industrial Acc. Comm. (Decker)* (1956) 139 Cal.App.2d 260, 263 [293 P.2d 502]: Employee attacked and killed by a fellow worker who was a paranoid schizophrenic.)

It is undoubtedly the law that when a workman is not exposed to a peculiar risk because of his employment but is only exposed to a risk common to the general public, and is injured by that source, the injury is not compensable. More specifically, it is well settled that injuries resulting from assaults by fellow workmen when the attack results from personal animosity unconnected with the employment, are not compensable. (See cases collected and analyzed in 1 Larson, *Workmen's Compensation Law*, p. 109; *Horovitz on Workmen's Compensation*, p. 136.) But this rule is inapplicable if the employment increases or contributes to the risk of assault. The question here is whether, under any reasonable interpretation of the evidence, the assault by Schultz, who was laboring under an insane delusion of persecution by Decker and who had no real grievance against Decker but only thought he did, can be said to have been a risk of the employment.

- (ii) Incapacity related to an injury sustained in an altercation with a coworker caused by a dispute related to the employment, arises from the employment**

Early in the development of workers' compensation law, the predominant judicial view was that interpersonal frictions arising from the conditions of employment were an incident of industry. Injuries sustained as a result of altercations associated with those frictions were, and continue to be, considered to arise out of employment. (*San Diego & Arizona Ry. Co. v. Industrial Acc. Comm. (Rote)* (1924) 193 Cal. 341, 343 [223 Pac. 972]; *Globe Indemnity Co. v. Industrial Acc. Comm. (Kopp)* (1924) 193 Cal. 470, 471 [225 Pac. 273]; *Globe Indemnity Co. v. Industrial Acc. Comm. (Marmurowicz)* (1934) 2 Cal.2d 8 [37 P.2d 1039].)

(iii) Injuries sustained by the initial physical aggressor

(a) The initial physical aggressor's injuries are not work-related under workers' compensation law.

Under workers' compensation law, an exception to the rule that altercations among coworkers arising out of the conditions of employment satisfy the "AOE" element is that an injury sustained by an initial physical aggressor does not meet the conditions of compensability (i.e., work-relatedness) under Labor Code section 3600. Such injuries are specifically excluded under Section 3600, subdivision (a)(7).

Enacted in 1961, Subdivision (a)(7) overturned the California Supreme Court's ruling in *State Comp. Ins. Fund v. Industrial Acc. Comm. (Hull)* (1952) 38 Cal.2d 659 [242 P.2d 311]. Hull was injured during an altercation with his foreman. Hull had taken a swing with his fist at his foreman, missing his mark, and a fight ensued during which he was injured. In *Hull* the Supreme Court disapproved of *dicta* in its own decision in *Globe Indemnity Co. v. Industrial Acc. Comm. (Marmurowicz)* (1934) 2 Cal.2d 8 [37 P.2d 1039]. In *Marmurowicz*, a waiter was stabbed during an argument with a kitchen employee assigned to make salads on orders from waiters. The Court's decision in *Marmurowicz* stood for the proposition that an injury to an employee sustained in an altercation having its source in a dispute connected to the employment was considered "compensable," that is, work-related, unless the injured employee was the initial aggressor. The exception for the initial aggressor was considered *dicta* because the applicant, Marmurowicz, was not an initial aggressor and the announced rule was not essential to the Supreme Court's decision. (See *Weissman v. Los Angeles County Employees Ret. Assoc.* (1989) 211 Cal.App.3d 40, 46 [259 Cal.Rptr. 124], regarding the significance of *dicta*.)

The Supreme Court in *Hull* traced the judicially created rule excluding the initial aggressor's injuries from coverage to the first California workers' compensation statutes that excluded coverage for injuries that resulted from the intentional misconduct of employees. But the provisions for the exclusion for misconduct were not carried forward into the redrafts of the workers' compensation laws over the years. Rather, they were replaced with provisions that reduced the amount of compensation where the employee engaged in serious and willful misconduct. In *Hull*, the Supreme Court put an end to the judicially created initial aggressor rule, characterizing it as improperly importing tort concepts of fault into the system of workers' compensation that expressly awards compensation without regard to fault. The Supreme Court's rationale is contained in its quotation from *Hartford Acc. & Indem. Co. v. Cardillo* (1940) 112 F.2d 11, 17 [72 App.D.C. 52], cert. den. 310 U.S. 649 [60 S.Ct. 1100, 84 L.Ed. 1415]:

. . . This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon

temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. Any other view would reintroduce the conceptions of contributory fault, action in the line of duty, nonaccidental character of voluntary conduct, and independent, intervening cause as applied in tort law, which it was the purpose of the statute to discard. It would require the application of different basic tests of liability for injuries caused by volitional conduct of the claimant and those resulting from negligent action, mechanical causes and the volitional activities of others.

With the enactment of Labor Code section 3600, subdivision (a)(7), an initial physical aggressor does not recover for injuries sustained in an altercation under workers' compensation law even if the altercation has its source in a work-related dispute. That the injured worker not be the initial physical aggressor in an altercation with a co-worker is a condition of compensability, i.e., work-relatedness. (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719 [100 Cal.Rptr. 301].)

(b) The incapacity resulting from an injury sustained by the initial aggressor may or may not be service-connected under the CERL of 1937.

Associations' comment

Pursuant to the initial aggressor exclusion in workers' compensation law, an injury that otherwise would meet the requirements that an injury arise out of and in the course of employment is not considered work-related where the injury is sustained by the initial aggressor. There is no express provision in the CERL of 1937 excluding the initial aggressor's injuries from a finding of "service-connection" similar to Labor Code section 3600, subdivision (a)(7). The California Supreme Court ruled in *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044] that legislation amending the workers' compensation law does not apply to public employee disability retirement law "absent a clear indication from the Legislature" otherwise. (*Pearl*, p. 197.) Therefore, the argument can be made that, with respect to the CERL of 1937, the law remains as announced in *State Comp. Ins. Fund v. Industrial Acc. Comm.* (*Hull*) (1952) 38 Cal.2d 659 [242 P.2d 311], discussed above.

On the other hand, an argument might be made that, by enacting Labor Code section 3600, subdivision (a)(7), the Legislature intended to declare the public policy of the State to be that expressed in the Supreme Court's decision in *Globe Indemnity Co. v. Industrial Acc. Comm.* (*Marmurowicz*) (1934) 2 Cal.2d 8 [37 P.2d 1039], rendering injuries sustained by an initial aggressor non-work-related. There is no published appellate court opinion dealing with this factual situation arising in a CERL of 1937 case.

Whether or not there is a public policy against compensating the initial physical aggressor, just because a fight occurs on the job does not mean that an injury sustained in the fight is service-connected. Notwithstanding that the CERL of 1937 does not have an express initial-aggressor exclusion, the member must still establish under Government Code section 31720 that the injury arose out of and in the course of employment. This is so whether the injured worker is or is not the initial aggressor. (Compare *City of Stockton v. Workers' Comp. Appeals Bd. (Jenneiahn)* (2006) 135 Cal.App.4th 1513, 1524 [38 Cal.Rptr.3d 474] which addresses Labor Code section 3600, subdivision (a)(9)'s exclusion for injuries sustained during a social, recreational or athletic activity except where the activity is a reasonable expectancy of, or is expressly or impliedly required by, the employment. The *City of Stockton* court explained that Subdivision (a)(9) does not replace the basic requirements that the employee establish that at the time of the injury, the employee was performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment (Lab. Code, § 3600, subd. (a)(2)) and the employment was the proximate cause of the injury. (Lab. Code, § 3600, subd. (a)(3)). It only narrows the situations in which the injured employee might qualify for compensation.

The same can be said for Labor Code section 3600, subdivision (a)(7)'s initial aggressor exclusion. It does not dispense with or substitute for Section 3600's other requirements, including that the injury arise out of and in the course of employment. It only narrows the situations in which the injured employee can recover.

End comment.

(d) Injuries from horseplay

(i) Injuries sustained by participants in horseplay do not arise out of employment.

Injuries related to participation in horseplay are not related to an employment-related risk. They do not arise out of employment and, therefore, are not work related. (*Hodges v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 894 [147 Cal.Rptr. 546]: During an impromptu sparring match between two car salesmen that began when one heard that the other had been a boxer, the former boxer backed up and fell to the ground, injuring himself. Neither participant in the horseplay carried ill feelings for the other and the motivation for the horseplay had nothing to do with the employment. The injured salesman's injury was held to be not work-related.)

(ii) The rules applicable to horseplay and altercations compared.

In *Hodges*, the Court of Appeal stated,

In any event, it is improvident to attempt to compare the rule denying compensation to the "initial physical aggressor" in the altercation cases with the ruling denying compensation to all participants in the horseplay cases. The bases for the two rules are completely disparate. The basis for the horseplay

rule is that the injury does not arise out of the employment (*Ehrhart v. Industrial Acc. Com.*, *supra*, [(1925) 71 Cal.App. [295] at p. 298 [234 P. 908]; see 2 Hanna, *Cal. Law of Employee Injuries and Workmen's Compensation* (2d ed.) §§ 8.03[6][c] and 10.03[1][d]) and does not occur in the course of employment (see 1 Larson, *Workmen's Compensation Law*, § 23.61). Compensation is denied the "initial physical aggressor" in altercation cases as a matter of legislatively declared policy even if the altercation and the injury arose out of and occurred in the course of the employment. (Lab. Code, § 3600; see *Mathews v. Workmen's Comp. Appeals Bd.*, *supra*, [(1972)] 6 Cal.3d [719] at p. 737 [100 Cal.Rptr. 301].) Applicant is mistaken in claiming that only the "initial physical aggressor" is denied compensation in altercation cases. If the altercation and thus the injury did not arise out of and in the course of the employment, no participant in the altercation may recover compensation; denial of compensation is not limited to the "initial physical aggressor." (Lab. Code, § 3600; see 2 Hanna, *Cal. Law of Employee Injuries and Workmen's Compensation*, §§ 10.03[1][a], 10.03[1][b].)

Additionally, while there are some analytic similarities between the problems presented by altercation cases and those involved in horseplay cases, the two may not properly be equated. Altercations involve interaction between persons characterized by an atmosphere of animosity and a willingness to inflict bodily harm frequently arising from frictions inherent in the employment; horseplay involves no such animosity and usually bears no such relationship to the employment. (See *Mathews v. Workmen's Comp. Appeals Bd.*, *supra*, 6 Cal.3d at p. 726; *Argonaut Ins. Co. v. Workmen's Comp. App. Bd.*, *supra*, (1967) 247 Cal.App.2d 669 at p. 682 [55 Cal.Rptr. 810].) As explained by Larson: "While assaults and horseplay have some features in common, they also have some differences which make it doubtful whether the reasoning of assault cases can be taken over bodily and applied to horseplay. This reasoning pictures the day-to-day enforced contact of divergent personalities under the strains of industrial life, with the not improbable culmination in flare-ups of temper as the direct result of this environment. There is something relentless and inescapable about the emotional explosion that is thus ultimately thrust upon the claimant 'aggressor' virtually against his will. But in a horseplay case, the most one can say is that the employment environment provides temptation and opportunity, rather than implacable emotional pressure. Hence, when a prankster sets out to play a practical joke, there is a higher probability that the action may amount to a deliberate and conscious deviation from employment than in the assault cases, in which almost every instance of violence is a spontaneous and unpremeditated reaction to the play of the surroundings on the claimant's temperament." (1 Larson, *Workmen's Compensation Law*, § 23.50, p. 5-118; see also 2 Hanna, *Cal. Law of Employee Injuries and Workmen's Compensation* (2d ed.) §§ 10.03[1][a], 10.03[1][b].) (Footnote omitted.) (*Hodges*, pp. 901-902.)

(iii) Injuries to coworkers who do not participate in the horseplay arise out of employment.

Injuries from horseplay sustained by non-participants are compensable under the Doctrine of Positional Risk. (*Pacific Employers Ins. Co. v. Industrial Acc. Comm. (Carmel)* (1945) 26 Cal.2d 286 [158 P.2d 9].)

Considering, as we may, the propensities and tendencies of mankind and the ordinary habits of life, it must be admitted that wherever human beings congregate, either at work or at play, there is some frolicking and horseplay. Accordingly, an injury sustained by a nonparticipating employee through the horseplay of fellow workers arises "out of" and "is proximately caused by the employment" within the meaning of section 3600 of the Labor Code. . . . (*Carmel*, p. 294.)

(e) Injury from an assault by a third party

(i) An injury caused by the personal animosity of a third party does not arise out of employment even if the attack occurs on the employment premises.

When the employee/victim is attacked at work by person with a purely personal motive, the risk is personal, not work-related. The job must be more than merely the place where an assailant carries out the attack. (*Transactron, Inc. v. Workers' Comp. Appeals Bd. (Cornelius)* (1977) 68 Cal.App.3d 233 [137 Cal.Rptr. 142]: Receptionist shot and killed by her boyfriend in a restroom where she ran to hide. Her death arose from personal risk, not from an employment-related risk. This was so even though a fellow employee told the assailant where on the employer's premises the victim could be located.)

The deaths of dairy workers living in a employer-provided bunkhouse who were attacked and killed there by assailants for reasons related to their personal lives, not the job, were not work-related where the job premises did not place the injured employees in a peculiarly dangerous position. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Castellanos, et al.)* (1982) 133 Cal.App.3d 643 [184 Cal.Rptr. 111.]

Effective January 1, 2010, Labor Code section 3600, which defines the conditions of "compensability," that is, the "work-relatedness" of an injury for workers' compensation purposes, is amended to add subdivision (c) which provides that a purely personal motive on the part of the attacking third-party that is based on the third party's perception of the injured employee's race, religion, color, national origin, age, gender, disability, sex, or sexual orientation is deemed not to be a personal relationship or personal connection for purposes of granting or denying a workers' compensation claim. Specifically, Section 3600, subdivision (c) provides,

For purposes of determining whether to grant or deny a workers' compensation claim, if an employee is injured or killed by a third party in the course of the employee's employment, no personal relationship or personal connection shall be deemed to exist between the employee and the third party based only on a determination that the third party injured or killed the employee solely because of

the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation.

Associations' comment

Government Code section 31720 was not amended as was Section 3600, nor did the Legislature otherwise indicate an intent that Government Code section 31720 would be governed by Section 3600, subdivision (c). There is no basis to apply Labor Code section 3600, subdivision (c) by analogy. (See *Pearl v. Workers Comp. Appeals Bd.* (2001), *supra*, 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044].)

End comment.

- (ii) An injury caused by a third party with no known motive, or a motive that is not personal against the employee/victim, arises out of employment.**

The risk of such an injury is work-related under the Doctrine of Positional Risk where the injured worker's only connection to the danger is his or her location at work. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Castellanos, et al.)*, *supra*, 133 Cal.App.3d 643, 655.)

- (iii) An injury caused by a third party whose motive is based on a personal grievance against the employee/victim having nothing to do with the employer, but who uses the conditions of the employment to effectuate the attack, arises out of employment.**

The death of a table pad saleswoman, who would go to customers' homes and was lured by her ex-husband, acting as a prospective customer, to a location where he killed her, was held to arise out of employment. (*California Comp. & Fire Co. v. Workmen's Comp. Appeals Bd. (Schick)* (1968) 68 Cal.2d 157 [436 P.2d 67].)

In the instant case, the board's conclusion that Mrs. Schick's employment contributed to her death is amply supported by the evidence. There can be no doubt that her duties placed her in an isolated location, that the nature of her work was a factor in the husband's elaborate scheme and at the very least facilitated the assault, and that this was a contributory cause of her death. As the board suggested, if Schick had attempted to accomplish his purpose in a more public place, a rescuer might have intervened in Mrs. Schick's behalf. We cannot say that the assault upon her was so remotely connected with her employment that as a matter of law it must be held not to arise therefrom. (*Schick*, p. 160-161.)

- (f) A second injury sustained while en route to or from a medical appointment for treatment of a prior work-related**

injury arises out of the employment, unless there is a substantial deviation for purposes unrelated to attending the appointment.

Laines v. Workmen's Comp. Appeals Board (1975) 48 Cal.App.3d 872, 877 [122 Cal.Rptr. 139].

. . . The causal connection exists even though (1) the employee's earlier industrial injury is not a factor contributing to the second injury, and (2) the trip did not begin at the employee's place of work. The mere fact that a work connected injury is the reason for the trip to the doctor establishes the necessary causal relationship to the employment. (Footnote omitted.) (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 4.67.)

The *Laines* court reasoned that where a visit to a doctor is based on the statutory obligation of the employer to furnish and the employee to submit to medical examination and treatment that is not dangerous (Lab. Code, § 4600, et seq.), "an injury sustained in the course of such a visit should be held to be an injury arising out of and in the course of employment within the meaning of section 3600 of the Labor Code." (*Laines*, p. 877.)

However, where the injured worker's medical care provider's office was only 8 miles from her home and the worker was injured when she ran a stop sign shortly after she began her trip to receive medical care, starting from her mother's home which was 130 miles from the injured worker's own home and the place of her medical appointment, the second injury sustained en route to the medical appointment was outside of the reasonable geographical area of the employer's compensability risk and did not arise out of her employment. What constitutes a reasonable distance must be determined on a case-by-case basis. (*Esquivel v. Workers' Comp. Appeals Bd.* (2009) 178 Cal.App.4th 330 [100 Cal.Rptr.3d 380].)

(g) An injury associated with employer-required medical treatment arises out of employment, even though the medical condition being treated is not work-related.

In *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [190 Cal.Rptr. 904], a nurse filed for workers' compensation benefits for an injury she sustained while undergoing treatment for tuberculosis. Maher's condition was discovered when she had to undergo tests as a precondition to her employment at the employer's hospital and her test for TB was positive. She was required to undergo treatment for her preexisting disease in order to continue working for the employer and she developed an adverse reaction to the treatment. The employer contested Maher's claim for benefits, arguing that her injury did not arise out of or in the course of her employment. A workers' compensation judge agreed, finding that petitioner's injuries were not compensable because the tuberculosis test was diagnostic and was given before she began her employment with respondent. The workers' compensation appeals board affirmed and denied reconsideration. On appeal, the court held that petitioner's disability was

compensable because the medical care rose out of and in the course of employment. It was the treatment that caused petitioner's illness, and the treatment was required as a condition of her continued employment. Accordingly, the decision of the board was annulled, and the case was remanded.

However, there is no dispute that it was the treatment to which petitioner submitted which caused her illness and the treatment was required as a condition of her continued employment. While the medical care was necessitated by petitioner's preexisting nonindustrial tuberculosis, it was clearly required for the benefit of both the employer and the employee. The record also indicates that petitioner sought treatment from individuals recommended by her employer.

Prior California cases indicate that injury from medical treatment is compensable where the treatment is required at least partially for the employer's benefit or where it is required as a condition of employment. This is true whether the medical treatment aggravates a preexisting industrial injury or a preexisting nonindustrial condition (*Wickham v. North American Rockwell Corp.* (1970) 8 Cal.App.3d 467, 473-474 [87 Cal.Rptr. 563], or whether the treatment is "furnished by the employer, his insurance carrier, or was selected by the employee" (*Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230, 233-234 [60 P.2d 276])).

In finding that petitioner is entitled to compensation, this court merely applies these previously enunciated principles to a slightly different factual setting. It is clear that petitioner's injury was linked in some causal fashion to her employment. (*Kimbol v. Industrial Accident Commission, supra*, 173 Cal. at p. 353.) Further, it is evident that petitioner was "performing a duty imposed upon [her] by [her] employer and one necessary to perform before the terms of the contract [would be] mutually satisfied." (*State Comp. Ins. Fund v. Ind. Acc. Com.*, [(Glennan) (1924) 194 Cal. 28, 33, at 35 [227 P. 168]], italics omitted.) As such, her injury arose out of and in the course of her employment. (*Maher, pp.* 737-738.)

(h) An injury from normal bodily movements does not arise from employment absent some aggravation or contribution by the employment.

The risk of injury from an underlying physical defect does not arise out of employment. (*Luera v. Workers' Comp. Appeals Bd.* (1994) (Writ Denied) 59 Cal.Comp.Cases 768.) In *Luera*, the applicant was a chronic diabetic who sustained a fracture in her foot while walking at her employer's premises. The editorial summary of the case, among other things, states,

The Board, citing the cases of *Montgomery v. Industrial Acc. Comm.* (1956) (Writ Denied) 21 Cal.Comp.Cases 8, *Carr v. Ind. Acc. Comm.* (1957) (Writ Denied) 22 Cal. Comp. Cases 2, *Randazzo v. United States Products Company* (1958)

(Commission Decision) 23 Cal. Comp. Cases 227, and *Bickley v. Ind. Acc. Comm.* (1942) (Writ Denied) 7 Cal. Comp. Cases 92, noted that spontaneous sprains or fractures in the course of normal bodily movements are not compensable, neither are disabilities due to inherent defects or congenital conditions rather than external causes. The Board was persuaded that substantial evidence supported the finding that the applicant did not sustain injury AOE/COE. The record reflected that the applicant was an insulin-dependent diabetic for probably 20 years, who was diagnosed prior to the alleged injury as suffering from peripheral neuritis/neuropathy of diabetic origin. According to the Board, it was clear from the alleged injury history that on March 16, 1992, there was no mechanism of injury involved. The applicant testified that she had been walking in a normal fashion when her foot snapped, and that she had not been bearing weight on that foot when it snapped. Further, there was no testimony in the record that her foot had collided with any object in the store or that she had twisted her foot while walking.

The Board was also persuaded that the medical report of Dr. Ranallo constituted substantial evidence to justify a finding of no industrial injury, and that this finding was further supported by the IME report of Dr. Latta, in which the doctor opined that virtually all of the applicant's complaints were related to the diabetic condition and that it was probable that her present condition would be the same, even absent any industrial incident, as a consequence of her diabetic peripheral neuropathy. (*Luera*, p. 769-770.)

Where there is aggravation and some contribution by the employment, the injury is work-related. (*Smith v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 588 [78 Cal.Rptr. 718].) In *Smith*, an employee with pre-existing cardiomyopathy died of congestive heart failure three years after he stopped working in a strenuous assignment as a tree laborer.

“ . . .[E]ven though an employee's underlying heart disease was not caused by his employment, his disability or death is compensable if such disease is aggravated or accelerated by his work.” (*Smith*, p. 592.)

Applicants' comment

If the injury occurs in the time, place and circumstances of employment, that is, the “course of employment,” it may not be possible to parse out what is a purely personal risk of injury and to what extent there is an employment-related risk. We submit that if there is some connection between the onset of injury and the circumstances of employment, the “AOE” piece of the formula for a finding of service-connection is satisfied.

End comment.

- (i) Injury from idiopathic seizure: Distinguish an injury related to the seizure itself from any injury the**

**employee might sustain as a result of the employee's
body striking the employer's property.**

The risk of injury from the idiopathic seizure itself is not work-related. The risk of injury the employee runs from the body striking part of the employer's premises as a result of the seizure is work-related. (*National Auto etc., Insurance Co. v. Industrial Acc. Comm.* (1946) 75 Cal.App.2d 677 [171 P.2d 594]: An employee suffered an epileptic seizure and fell, striking his head on a saw horse before falling to the floor.)

The courts in other jurisdictions seem about evenly divided on the question whether a traumatic injury suffered by his body striking the floor or ground is compensable where the fall was induced by the employee's idiopathic condition. Holding such an injury compensable are [citations]. Denying compensation for such an injury are [citations].

We do not find it necessary to make a choice between these conflicting cases because the authorities are overwhelming that where the injury is contributed to by some factor peculiar to the employment it arises out of the employment even though the fall has its origin solely in some idiopathy of the employee. [Citations omitted other than *Connelly v. Samaritan Hospital*, (1932) 259 N.Y. 137 [181 N.E. 76]; *Varao's Case*, (1944) 316 Mass. 363 [55 N.E.2d 451].]

In *Varao's Case*, *supra*, the employee was seized with dizziness caused by a hypertensive heart. He fell against an iron motor box and fractured his skull. In affirming an award for his consequent death the Supreme Judicial Court of Massachusetts said (55 N.E.2d at p. 452):

"The motor box was attached to a machine which was located by the side of a passageway along which one performing the duties of a foreman would travel, and the location of the motor box could be found to be a special danger to one seized with a heart attack while passing along the passageway."

In *Connelly v. Samaritan Hospital*, *supra*, the employee fell against a table in a laundry. In holding the resulting injury compensable the Court of Appeals of New York reasoned (181 N.E. at p. 79):

"The hazard that in a fall she might incur injury, by striking against the table near which she was working at the time of the fall, attached to the place of employment. To that potential danger only those in that place were subject, and thus her employment called her into a zone of special danger. The potential danger of injury from a fall at some other place might have been no less. It was not the same. Though there is danger of injury, from some combination of conditions, at all times and at all places, the potential danger that any particular combination will arise and cause injury is limited both in time and space, and within those limits there is a zone of special danger from that source. Whenever conditions attached to the place of employment or otherwise incident to the

employment are factors in the catastrophic combination, the consequent injury arises out of the employment." (*National Auto etc., Insurance Co.*, p. 680-681.)

(i) Self-inflicted injury

Associations' comment

Since its enactment in 1917, the Workers' Compensation Act has excluded a self-inflicted injury from the definition of a work-related injury. (Lab. Code, § 3600, subd. (a)(5).) There is no express provision in the CERL of 1937 excluding a self-inflicted injury from service-connection. However, apart from any statutory exclusion, we submit that it would be unlikely that a court would find that a self-inflicted injury arises out of employment if the injury meets the standards set by the appellate court for exclusion under Labor Code section 3600, subdivision (a)(5).

The Court of Appeal has ruled that in order for an injury to be excluded under Labor Code section 3600, subdivision (a)(5), the employee must have specifically intended to produce the injury. It is not enough that the employee have the general intent to perform the act that resulted in the injury (*Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 539-541, [94 Cal.Rptr.2d 186].) In *Smith*, a police officer was confronted, questioned, and criticized by a superior officer over his handling of an arrest some seven months before. Unable to recall the specifics, Smith attempted to distance himself from the superior officer, but she followed him, reiterating her criticism. Smith and the superior officer began raising their voices. Smith became angry and frustrated. He turned to a wall and hit it with his closed fist, sustaining a serious injury to his hand. The workers' compensation administrative law judge ruled that Smith's injury was not excluded by Section 3600, subdivision (a)(5), because he did not intend to injure himself. The Workers' Compensation Appeals Board granted the employer city's petition for reconsideration and found that the injury was excluded because Smith intended to do the act of hitting the wall and, given his training in boxing, the injury to his hand was a foreseeable consequence. The WCAB relied on the editorial report of a previous three-member panel decision that defined the required intent similar to the general intent standard applicable to certain crimes (e.g., battery) under criminal law. (*Paul v. Glidden-Durkee, etc.* (1970) (Writ Denied) 35 Cal.Comp.Cases 273.) Under the general intent standard, it is not necessary that the bad actor specifically intend the kind of harm that results. It is sufficient that the bad actor have the general intent to do the act itself. The Court of Appeal reversed the Board, reasoning that the WCAB's decision erroneously introduced concepts of fault, foreseeability, and negligence that were eliminated from the workers' compensation formula of work-relatedness.

While applicant may have acted rashly or impulsively, or may have been negligent or even reckless in punching the wall, there is no evidence that he deliberately sought to injure himself, thereby breaking the chain of causation. Mere carelessness or contributory negligence of the injured does not break the causative connection (between employment and injury) unless such intervening carelessness or negligence is the sole and exclusive cause of the injury. (*Beaty*

v. Workers' Comp. Appeals Bd. (1978) 80 Cal.App.3d 397, 403 [144 Cal.Rptr. 78].) Here, it clearly was not. (*Smith*, p. 539.)

The required specific intent to self-inflict injury was found in *Blue Cross of California v. Workers' Comp. Appeals Bd. (Sanders)* (1998) (Writ Denied) 63 Cal.Comp.Cases 431. The WCAB concluded that the employee, who attempted to commit suicide, acted with specific intent to harm himself and found that his injuries were not work-related. The evidence supporting the conclusion was the following: He told his psychiatrist he wanted to kill himself. Two days later, he parked his vehicle along side a road and exited the vehicle with the intention of stepping in front of an oncoming vehicle. However, he was interrupted by a California Highway Patrol Officer. On leaving the scene, he saw a concrete column and drove into it at 50 miles per hour in a failed attempt to end his life. Blue Cross, the employee's health carrier, petitioned the Court of Appeal for a writ of review overturning the WCAB decision and the Court denied the petition.

For further discussion of this topic, see I Hanna, *Cal. Law of Employee Injuries and Workers' Compensation*, Rev. 2d Ed. (April 2011, Release No. 73), § 4.21, Injury Intentionally Self-inflicted, and § 4.22, Suicide.

b) Course of Employment

"Course of employment" refers to the TIME, PLACE AND CIRCUMSTANCES of employment.

[The phrase "course of employment"] generally refers to the time, place and circumstances under which the injury occurs. It requires that at the time of injury the employee be performing the work the employee was hired to perform. (1 Hanna, *supra*, § 4.03[1], Statutory Condition.)

(1) Primary circumstance: employee must have been performing service to the employer

. . . . An injury is in the course of employment when, at the time of injury, the employee was performing service incidental to the employment. (1Hanna, *supra*, § 4.03[2], Service growing out of and incidental to employment.)

"Service" includes performance of

- reasonable activities
- expressly or impliedly authorized
- directed toward fulfillment of employment duties
- for the employer's benefit. (*Ibid.*)

"Service" includes doing of all those reasonable things which are expressly or impliedly authorized by the contract of employment or which are reasonably directed toward the

fulfillment of the employer's requirements and that are performed for the employer's benefit. (*Southern California Rapid Transit District, Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158, 164 [151 Cal.Rptr. 666].)

The course of employment requirement is not satisfied only by those injuries that occur while the employee is actually engaged in manipulating the tools of employment. (*Judson Manufacturing Co. v. Industrial Acc. Comm. (Gallia)* (1916) 181 Cal. 300, 302 [184 P. 1].) In the *Gallia* case, an employee of a manufacturing company was struck and killed by an engine operated by a railroad company while he was on his way to work along a path crossing the tracks. The employee's death was found to have resulted from an injury arising out and in the course of his employment. The path, although not a public highway, was not only the sole means of ingress and egress for the employees to and from their place of work, but was the means of access required and authorized by the manufacturing company.

(2) That the employee is paid for an activity is a key indicator that the activity is in service to the employer

The fact that the employee is paid for an activity that is usually not considered in the course of employment, for example, traveling to and from work, is a key indicator that the activity is of service to the employer, that employer considers the activity a valuable service by the employee (otherwise why would the employer pay the employee for the service), and is "in the course of employment." (I Hanna, *Cal. Law of Employee Injuries and Workers' Comp. Rev. 2d Ed.* (April 2011, Release No. 73) § 4.154, Exception [to the Going and Coming Rule] When Wage and Travel Expenses Are Paid.

(3) Issues associated with the "course of employment" element:

Editor's note

The examples in this section are not exhaustive of the COE issue, but are intended to demonstrate how the issue might arise in more typical cases. For more complete discussions, refer to 1 Hanna, *supra*, Chapter 4, §§ 4.03-4.04 and 4.110-4.158; 1 Herlick, *California Workers' Compensation Law*, 6th Ed. (December 2010, Release No. 10) Chapter 10, The Injury; 1 Larson, *Workers' Compensation Law*, Chapters 12-17 and 2 Larson, Chapters 20-29. Keep in mind that certain limitations on the compensability of injuries enacted as part of workers' compensation reform legislation packages beginning in 1989 are not applicable to cases arising under the CERL of 1937. (See *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044] which dealt with the issue of whether legislation restricting workers' compensation psychiatric claims was applicable to an application for disability retirement under the Public Employees Retirement Law.)

End Editor's note.

(a) Issues associated with the time of employment:

As a general rule, an employee performing service for the employer after normal hours remains in the course of employment. (1 Hanna, *supra*, §§ 4.116; 4.130.)

But an employee is not in the course of employment when the employee is on the employer's premises outside regular working hours for purely personal reasons. (*State Dept. of Institutions v. Industrial Acc. Com* (1941) 46 Cal.App.2d 439 [116 P.2d 79]: Applicant left work, but stopped by the employer's building to pick up her passenger, a co-worker. Applicant left her car to check on the passenger's whereabouts, slipped on the steps outside the employer's building and broke her arm. Held: the injury did not occur in the course of the applicant's employment.)

An employee injured when she returned to work for her own convenience after hours to pick up her check and that of her husband was not in the course of employment because she was not performing service to the employer. (*Robbins v. Yellow Cab Co.* (1948) 85 Cal.App.2d 811 [193 P.2d 956].)

But compare: Employee injured when he returned to work on his day off to pick up a paycheck was within the course of employment because the employer encouraged the practice. (*Mono County Sheriff's Department v. Workers' Comp. Appeals Board (Hysell)* (1992) (Writ Denied) 57 Cal.Comp.Cases 201.)

(b) Issues associated with the place of employment:

(i) Going and coming rule.

Under the judicially created "going and coming rule," the employee is not in the course of employment during the normal commute from home to work and back. (*Ocean Acc. etc. Co. v. Industrial Acc. Comm. (Slattery)* (1916) 173 Cal. 313, 322 [159 P. 1041].) The going and coming rule is applicable to an application for a service-connected disability retirement application filed under the CERL of 1937. (*Singh v. Board of Retirement* (1996) 41 Cal.App.4th 1180, 1186-1187, fn. 6 [49 Cal.Rptr.2d 220].)

Various exceptions to the going and coming rule, based on a variety of ways in which the commute is not "normal," can bring the commute within the course of employment, e.g. the employer requires the employee to have an automobile for use on the job (*Smith v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 814 [73 Cal.Rptr. 253, 447 P.2d 365]).

The going and coming rule is also applicable to temporary trips away from work for personal reasons, such as lunch breaks. (1 Herlick, *California Workers' Compensation Law*, 6th Ed. (December 2010, Release No. 10) § 10.14, Going and Coming Rule; 1 Hanna, *California Law of Employee Injuries and Workers' Compensation*, Rev. 2d Ed. (April 2011, Release No. 73 §§ 4.150, The Going and Coming Rule, through 4.158, Home as a Second Jobsite Exception.)

Associations' comment

Note: Hanna (at 1 Hanna, *supra*, § 4.150) cites the opinion in *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d 150 [104 Cal.Rptr. 456, 501 P.2d 1176] as authority for defining the going and coming rule as “. . . travel to and from work is deemed in the course of employment unless it is an ordinary commute to a fixed place at a fixed time.” We dispute this statement. While the Supreme Court discussed the history of the going and coming rule by first dividing court opinions between those involving fixed work locations at fixed times and those that were not (*Hinojosa*, pp. 156-159), the Supreme Court did not “reformulate” the rule. *Hinojosa* involved an injury to a farm laborer whose employer, when work was finished at one ranch, would shift his employees to another ranch, necessitating that the employees provide for their own transportation. *Hinojosa* arranged to ride with a co-worker to and from work and from one ranch to the other during the workday. He was injured in an auto accident while on his way home in his co-worker's car. Citing *Smith, supra*, the Supreme Court distinguished between *routine* trips to and from work and the *extraordinary* situation in which the employer, expressly or implicitly made the automobile a necessity of the job.

In conclusion, we hold that the instant case clearly differs from the normal routine commute; it is instead the extraordinary situation in which the job is structured, and dependent upon, transportation from one place of work to another so that the use of an instrument of such transportation is a requisite of employment. The employer could have provided, at his own expense, company vehicles to transport the workers between his various farms during their workday. His failure to do so made it necessary for the workers to supply their own on-the-job transportation. Thus petitioner made use of the car from his residence to the first ranch, and thereafter from ranch to ranch and finally from ranch to his residence because the car was an essential requirement of the job; the presence of the car was requisite to performance of the job; the worker was impliedly required to bring the car to the job and to take it from the job. Thus the injury suffered in the car was covered by the Workmen's Compensation Act. (*Hinojosa*, p. 162.)

On the other hand, in *Hinson v. Workmen's Comp. Appeals Bd.* (1974) 42 Cal.App.3d 246 [116 Cal.Rptr. 792], another case involving a rancher's transportation arrangements with his workers, the court of appeal concluded that the employer had not imposed requirements that removed the ordinary commute from the control and convenience of the employee. *Hinson* was injured in an auto accident on the way to work. The employer had a pickup available that the foreman would use to take the tractor drivers to the fields and to return them to the shop at the end of each day's work; but at times the injured employee and the other drivers would use their own cars to get to the fields if they had driven them to work. *Hinson* testified that the foreman would “rather” that the employees take their own cars to the tractors, but that the use of his own car saved the employee a trip back to the shop after he finished work in the fields. The Court of Appeal held that a reasonable inference could be drawn that the employees' use of their cars on the job arose as a matter of convenience to all concerned, rather than at the employer's request and for the employer's particular advantage. The *Hinson* court stated,

We read *Hinojosa* to mean that an injury occurring during a particular transit from the home to the job is compensable when the transportation is accomplished by means imposed either as a condition of employment, such as the requirement that the employee use his own car during working hours, or that he use his own car at the special request of or as an accommodation to his employer. A practice adopted for the mutual convenience of the employer and the employee and left to the discretion of the employee (if he didn't want to take his car to the field he would be taken in the company pickup), does not rise to the status of a requirement of employment, nor does it establish such a "special" advantage to the employer as to extend the employer-employee relationship to the regular commute from the home to the place of work. (See *Hinojosa, supra*, 8 Cal.3d at p. 159.) (*Hinson*, pp. 250-251.)

The issue is not whether the employee is going to or from a fixed location at a fixed time, but whether, given the circumstances and nature of the employment, the employee's commute is "routine" versus "special" or "extraordinary." For example, in *City of San Diego v. Workers' Comp. Appeals Bd. (Molnar)* (2001) 89 Cal.App.4th 1385 [108 Cal.Rptr.2d 510] a police officer was, on his day off, injured in an auto accident while on his way to a courthouse to which he had been subpoenaed to testify. The Court of Appeal, in reversing an award in favor of the officer, stated,

. . . . The record shows that it is an integral part of a San Diego patrol officer's duties to testify, if subpoenaed to do so, in a proceeding arising out of his or her patrol work, and that such an officer testifies at such proceedings an average of twice a month. Molnar testified that he is subpoenaed to testify an average of one to two times per month. Testimony at the hearing also established that it is not unusual for officers to be called to testify on days when they are not scheduled to report to the station, and that the police department has various policies applicable to officers who testify on off-duty days. Pursuant to one such policy and a memorandum of understanding between the San Diego Police Officers Association and the San Diego Police Department, Molnar received overtime compensation for testifying on an off-duty day.

As observed in *Baroid v. Workers' Comp. Appeals Bd., supra*, (1981) 121 Cal.App.3d 558 [175 Cal.Rptr. 633], the common thread of the cases involving a special mission is that there is some deviation in the location, nature or hour of the work to be performed that distinguishes the special mission from the normal work commute. (*Id.* at p. 569.) In contrast here, there was nothing extraordinary about Molnar's travel to the courthouse. The location, nature and timing of the work were within the purview of Molnar's customary work responsibilities, and his travel to the courthouse was a commute that he regularly made in carrying out his duties as a traffic officer. Although police department policies required Molnar to attend court to testify regarding matters arising out of his work, his travels to court did not provide a special benefit to the City different than his commute to the police station to report for duty. We conclude that Molnar's commute to the courthouse was not a special mission but instead was within the purview of the going and coming rule, and thus he is not entitled to receive

workers' compensation benefits for injuries suffered during the commute. (*City of San Diego* p. 1388-1389.)

End comment.

(ii) Arrival and departure (access/egress) cases

The employee is in the course of employment when the employee reaches the entrance to his or her place of employment, including employer provided parking facilities. (1 Herlick, California Workers' Compensation Law, 6th Ed. December 2010, Release No. 10) § 10.15, Entrance; Exit; Parking Lot; 1 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 4.152, Employer's Premises.)

The courts tend to extend the employer's premises line and the "course of employment" to coincide with a special employment-related risk of injury. (*Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585 [190 Cal.Rptr. 158, 660 P.2d 382].) In *Parks*, a schoolteacher who had left the employer's premises to begin her commute home was stopped by a throng of students leaving school and while stopped, she was battered and injured by three students. Held: Parks' injuries were in the course of her employment because a special risk of assault was created by the employment-related throng of students that flowed onto the street that she used to leave the work location.

(c) Situations associated with the circumstances of employment:

There is no comprehensive list of circumstances that will determine whether an injury is or is not in the course of employment. But here is a list of some of those circumstances:

(i) Activities that are reasonably related to employment, though not specifically authorized, are in the course of employment.

The course of employment continues during a normal practice of taking work home, known and approved by the employer, when it cannot be performed at the work location. (*Bramall v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151 [144 Cal.Rptr. 105].)

Activities that might otherwise be reasonably related to employment and might otherwise be considered in the course of employment may be placed outside the course of employment by the employer.

Auto Lite Battery Corp. v. Industrial Acc. Comm. (1947) 77 Cal.App.2d 629, 631 [176 P.2d 62]:

It is well settled in this state that an employer may so limit the scope of an employee's duties that if he steps outside the scope of those duties and

undertakes to perform work which he is not employed to do he is not acting within the scope of his employment. [Citations.]

(ii) Authorized activities performed in an unauthorized manner, even criminal misconduct, may be within the course of employment.

In *Williams v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [116 Cal.Rptr. 607], a part-time delivery man sustained personal injuries in a rear-end collision that occurred while he was driving his car at high speeds, pursued by the police for running a red light, on his way back to his employer's office after completing assigned errands and deliveries.

. . . . [T]he fact that he was performing that duty in a "negligent" or unlawful manner did not constitute abandonment of employment. . . .

Where an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment. (*Associated Indem. Corp. v. Ind. Acc. Com.*, 1940 18 Cal.2d 40, 47 [112 P.2d 615]; *Auto Lite etc. Corp. v. Ind. Acc. Com.*, 77 Cal.App.2d 629, 632 [176 P.2d 62].) "[The employee's] transgression of rules, instructions, or established custom, as the case may be, is wholly within the sphere of the employment. It may constitute serious and willful misconduct of the employee, but it does not take him out of the course of his employment." (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed.) § 9.02 [1][c].)

Illegal or even criminal conduct by an employee in the course of his employment does not necessarily remove him from the scope of employment. (*Williams*, pp. 940-941.)

An injury sustained by a bus driver due to his reckless driving was held to be within the course of employment. He was doing the "thing" that he was hired to do and it can be anticipated that drivers will occasionally violate the rules of the road. (*Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 249, 254 [252 Cal.Rptr. 26].)

(iii) Disability resulting from termination, discipline or investigation of an allegation of criminal conduct

(a) Injury sustained as a result of investigation into alleged criminal conduct off the job for which the employee was not charged and for which no discipline was imposed is not service-connected.

In *City of Los Angeles v. Workers' Comp. Appeals Bd. (Rivard)* (1981) 119 Cal.App.3d 355 [174 Cal.Rptr. 25], the Appeals Board held that a police officer sustained a work-related injury to his psyche resulting from his treatment by the police department for

which he worked during its investigation of the accusation that he had solicited someone to murder his wife and/or conspired to murder her. The Court of Appeal reversed the Appeals Board's decision.

Here, however, the underlying activity for which the police department investigated applicant (solicitation of someone to murder applicant's wife) was unconnected with his duties within the course of his employment, but related to his personal marital problems.

In our view a police officer who is accused of criminal activity *which pertains to matters outside of his functioning as a police officer* is in no different a position from any private citizen accused of criminal activity. In the event such accusations should prove to be false, his rights should be no greater than any to which the ordinary private citizen is entitled since such accusation dealt not with his actions in the capacity of a police officer but in the capacity of a private citizen. [Italics in original.] (*City of Los Angeles*, pp. 364-365.)

For the same result in the disability retirement case brought by the same city employee, see *Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405 [210 Cal.Rptr. 509].

(b) Injury sustained as a result of discipline for noncriminal misconduct outside the scope of employment is not service-connected.

In *Rockwell International v. Workers' Comp. Appeals Bd. (Haylock)* (1981) 120 Cal.App.3d 291 [175 Cal.Rptr. 219], the employee was disciplined for fleeing from a security guard and attempting to destroy evidence of drinking on the job. While a co-worker drove a pickup at a high rate of speed, Haylock allegedly climbed into the back of the pickup and tossed out a mop bucket that contained ice and beer. Haylock contended that he was innocent of the wrongdoing and allegedly suffered an emotional injury from the disciplinary action. The Court of Appeal remanded the case to the Appeals Board for further evidence, directing that "Rockwell, by its special defense, has the burden of proof by a preponderance of the evidence, that the conduct for which applicant was disciplined was outside the course of applicant's employment." (*Rockwell*, p 298.)

The question presented herein is what impact on the compensability of applicant's claimed industrial injury is there whether or not the conduct for which applicant was disciplined was outside the course of applicant's employment. (*Rockwell*, p. 296.)

...

It is clear that in *Pacific Tel. & Tel. Co.* (1980) 112 Cal.App.3d 241, [169 Cal.Rptr. 285] the employee's conduct of forging signatures on contracts (if indeed he did so) would be outside the course of employment. No rational distinction can be made between the treatment as to compensability under the Workers'

Compensation Act of criminal conduct and of noncriminal conduct which is also outside the course of employment. To hold otherwise would lead to some inconsistent results under the Workers' Compensation Act. (*Rockwell*, p. 298.)

. . .

Accordingly, we hold that if applicant were disciplined for conduct outside the course of his employment, any injury sustained as a consequence of such discipline is not compensable under the Workers' Compensation Act. (*Ibid.*)

(c) Injury resulting from allegation of criminal conduct on the job, for which the employee is exonerated, but involving an act that, if true, is not in the course of employment, is service-connected.

In *Traub v. Board of Retirement* (1983) 34 Cal.3d 793 [195 Cal.Rptr. 681], a County of Los Angeles deputy probation officer was accused of negotiating a sale of drugs with a former inmate ward and was discharged. As a result of the discharge, which was eventually overturned, he became permanently psychiatrically incapacitated. The Board of Retirement granted Traub a nonservice-connected disability retirement, but denied him the larger service-connected disability pension on the basis that the conduct for which he was accused was not service-connected and the Board's decision was upheld by the Superior Court. The California Supreme Court held that Traub's disability was service-connected and reversed the trial court.

The issue is whether disability from an employer's investigation of, and dismissal for, employee wrongdoing is service-connected when (1) proof of the charges would establish misconduct outside the scope of employment but (2) the charges are not proved and the dismissal is set aside.

We conclude that psychiatric injury resulting from an employer's investigation of ultimately unproved charges against an employee arises out of and in the course of the employment whether or not the alleged misconduct was within the scope of employment. (*Traub*, p. 796.)

. . . .

While illegal conduct in the performance of a job-related act will not preclude a finding that resulting disability is service-connected (*Williams v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937 [116 Cal.Rptr. 607] [*supra*]), the present charges if sustained would have established illegal activity wholly unrelated to plaintiff's duties and thus outside the scope of his employment. And for purposes of analysis we assume, without deciding, that had plaintiff been demonstrated to be guilty of those charges, and his termination upheld, he would not be entitled to a disability pension by reason of the resultant stress. But the fact is that the charges were not proved, (footnote omitted) the purported determination was overturned, and plaintiff was reinstated to his former job with

back pay. To say that he should be barred from a disability pension because of unsubstantiated charges that he engaged in misconduct, whether within or outside the scope of his employment, seems to us wholly illogical, and contrary to applicable legal principles. (*Traub*, pp. 799-800.)

...

We therefore conclude that when an employee is investigated and disciplined by the employer on charges of misconduct that are unproved and therefore presumably false, and the discipline set aside, the resulting psychological stress and injury arises out of and in the course of employment within the meaning of section 31720. (*Traub*, p. 801.)

(iv) Activities for the employee's personal comfort and convenience are within the course of employment.

Visits to the restroom, coffee breaks, getting a drink of water and other acts in furtherance of the employee's personal comfort are incidental – that is, reasonably anticipated as an expected part of or naturally appertaining to – an employee's work-related activities and are within the course of employment. Ordinarily, personal comfort issues do not arise unless the employee leaves the employer's premises.

The "personal comfort" doctrine holds that "the course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee. On the other hand, acts which are found to be departures effecting a temporary abandonment of employment are not protected." (*State Comp. Ins. Fund v. Workmen's Comp. App. Bd.* [(Cardoza)] (1967) 67 Cal.2d 925, 928 [64 Cal.Rptr. 323, 434 P.2d 619].)

In each of the California cases cited in support of the application of this doctrine one common factor noted in the opinions is that the employee was being paid during the time involved. *Western Greyhound Lines v. Industrial Acc. Com.* (*Brooks*) (1964), *supra*, 225 Cal.App.2d 517, [37 Cal.Rptr. 580] and *Rankin v. Workmen's Comp. Appeals Bd.* (1971) 17 Cal.App.3d 857 [95 Cal.Rptr. 275], are further premised on a finding of some substantial connection with the employment.

In *Western Greyhound Lines, supra*, an award finding a bus driver's injury during a coffee break compensable was affirmed, although it was incurred in a restaurant across the street from the employer's premises. Speaking for the court, Justice Taylor stated: "Presumably, the applicant would not have been at Foster's Restaurant at Seventh and Market Streets at 1:45 a.m. had she not been working on a late night shift. She was drinking coffee because she had been driving a bus and would be again in a short time. Thus, she was exposed to the danger she encountered as a Greyhound employee. *Since she was paid during this time, her employment continued during such time* and all of the cases

dealing with injuries and assaults during employment are applicable (*Pacific Indemnity Co. v. Industrial Acc. Com.*, [(*Raymond*) (1948)] 86 Cal.App.2d 726 [195 P.2d 919]; *Truck Ins. Exch. v. Industrial Acc. Com.* [(*Patterson*) (1957)] 147 Cal.App.2d 460 [305 P.2d 55]; *California Cas. Indem. Exch. v. Industrial Acc. Com.*, [(*Duffus*) (1942)] 21 Cal.2d 461 [132 P.2d 815]; 1 Larson's Workmen's Compensation Law, p. 112). We conclude that the applicant's injuries occurred in the course of and arose out of her employment." (*Id.*, at p. 521, italics added [by the *Mission Ins. Co.* court].)

In *Rankin, supra*, the court (again Justice Taylor) stated, at page 860: "Where the cases have allowed recovery on the 'personal comfort theory' or as an exception to the 'going and coming rule,' the injuries have occurred either on the employer's premises or at a time when the employee was being compensated for his labors, or at a time when the employee was performing some special service off the premises at the instance and request of the employer and for the employer's benefit [citations]." *Mission Ins. Co. v. Workers' Comp. Appeals Bd.*, (1978) 84 Cal.App.3d 50, 53-54 [148 Cal.Rptr. 292].

(v) Social, recreational, or athletic activities may or may not be in the course of employment.

Under the workers' compensation law, social, recreational, or athletic activities are not considered in the course of employment unless participation is a reasonable expectancy of the employment or is expressly or impliedly required by the employment. (Lab. Code, § 3600, subd. (a)(9); *Ezzy v. Workers' Comp. Appeals Bd.* (1983) 146 Cal App 3d 252 [194 Cal.Rptr. 90].)

Section 3600, subdivision (h), now section 3600, subdivision (a)(8) [now subdivision (a)(9)], originated as Assembly Bill No. 2555 (1977-1978). The bill analysis prepared by the Assembly Committee on Finance, Insurance, and Commerce when that committee heard Assembly Bill No. 2555 stated "[the] thrust of [the proposed legislation] appears to overrule . . . *Goodman v. Fireman's Fund American Insurance Company* (1974) 74 OAK 49472, [which] found that a water skiing injury to an airline stewardess during a four-day layover in Tahiti was an employment-related injury" and therefore compensable. According to the bill analysis, the legislation was also intended to overrule *Lizama v. Workmen's Comp. Appeals Bd.* (1974) 40 Cal.App.3d 363 [115 Cal.Rptr. 267], which held compensable an injury to a janitor, who, after receiving permission from his employer, used a company power saw after work hours. The committee report emphasized that the activities were held compensable because they were reasonably foreseeable or expectable in the work setting.

Section 3600, subdivision (a)(8) [now subdivision (a)(9)] was therefore intended to draw a brighter line delimiting compensability by replacing the general foreseeability test with one of "reasonable expectancy" of employment.

....

Prior to the enactment of section 3600, subdivision (a)(8) [now subdivision (a)(9)], the general rule was that athletic injuries were "not compensable unless either (1) the employee is required by the employer to take part in such activities, (2) the employer sponsors the activity primarily to obtain advertising benefit from the use of his or her name in connection with the team, or (3) the employer encourages participation in such activities. Relevant factors indicating the purpose of an athletic activity such as a baseball team are: (1) whether the employer purchases the athletic uniforms or equipment; (2) whether such uniforms bear the employer's name or insignia; (3) whether wages are paid during practice or play; and (4) whether participation is voluntary." (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1982), § 9.03[2], p. 9-32.2. [Footnote citing case authority omitted.]

These factors outlined in the Hanna volume, while they predate the passage of section 3600, subdivision (a)(8) [now subdivision (a)(9)], are still relevant to the extent that they help bring the focus to the objective reasonableness of applicant's subjective belief that participation in an activity is an expectancy of employment.

We conclude that it was the Legislature's intent to eliminate from the workers' compensation scheme only those injuries which were remotely work-connected. The use of such terms as "reasonable expectancy" and "impliedly required" in section 3600, subdivision (a)(8) [now subdivision (a)(9)] is evidence that the Legislature recognized the potential use by employers of indirect means to encourage participation in an activity, and that such indirect encouragement changes the voluntary character of such participation. The Legislature intended that injuries occurring under such circumstances should be considered work-connected, and must fall within the coverage of the workers' compensation scheme. (*Ezzy*, pp. 261-263.)

Applicants' comment

The Legislature did not amend Government Code section 31720 to mirror Labor Code section 3600, subdivision (a)(9) and, therefore, courts applying the CERL of 1937 to social, recreational and athletic activities would not apply Section 3600, subdivision (a)(9) by implication or analogy. See *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 197 [109 Cal.Rptr.2d 308, 26 P.3d 1044]:

Although both the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. We may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]; cf. *People v. Goodloe* (1995) 37 Cal.App.4th 485, 491 [44 Cal.Rptr.2d 15] ["When a particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion . . . is that a different legislative intent existed".])

The Court of Appeal also reasoned that "[t]he Legislature did not amend Government Code section 21166 nor any other provision of [the Public Employees' Retirement Law] to *preclude* application of [Labor Code] section 3208.3 to PERS disability determinations either when it enacted or amended section 3208.3." (Italics added.) This reasoning turns on its head the proper inquiry under *Garrick v. Board of Pension Commissioners* (1971), *supra*, 17 Cal.App.3d 243, at page 246 [94 Cal.Rptr. 598], i.e., whether the Legislature clearly intended to include within Labor Code section 3208.3's reach the standard for industrial psychiatric injury under the Public Employees' Retirement Law. As discussed, we find no clear indication of that legislative intent. If the Legislature wanted Labor Code section 3208.3's standard to apply to the Public Employees' Retirement Law, it could have easily so stated. Where there is uncertainty on the point, we may not assume that the Legislature intended to amend the Public Employees' Retirement Law merely by implication. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1488 [280 Cal.Rptr. 847] [provisions of the Public Employees' Retirement Law must be "liberally construed in favor of pensioners if they are ambiguous or uncertain"].)

End comment.

Associations' comment

That Labor Code section 3600, subdivision (a)(9) may not be applied by analogy does not mean that an injury sustained during social, recreational or athletic activities will be found to be service-connected. Apart from a specific exclusion for social, athletic and recreational activities such as Labor Code section 3600, subdivision (a)(9), an applicant for a service-connected disability retirement still must establish that the injury arose out of and in the course of employment. Even Labor Code section 3600, subdivision (a)(9) does not dispense with or substitute for Section 3600's requirements that the injury arise out of and in the course of employment. It only narrows the situations in which the injured employee can recover. (*City of Stockton v. Workers' Comp. Appeals Bd. (Jenneiahn)* (2006) 135 Cal.App.4th 1513, 1524 [38 Cal.Rptr.3d 474].)

In the *City of Stockton* case, a police officer claimed that his participation in an off-duty pick-up basketball game at a private facility, during which he sustained an injury, was in the course of his employment because he believed that, as a police officer, his employer expected him to exercise and stay fit. The Court of Appeal rejected the police officer's claim. The court explained that the employee must establish that he or she held a belief that the activity at issue was a reasonable expectancy of employment, whether the employee held such a belief was subject to the substantial evidence test, and that the employee held such a belief had to be objectively reasonable.

In considering these issues, we must focus our attention on the specific activity in which the employee was involved when the injury occurred. This is so because subdivision (a)(9) is not intended to replace the basic requirement that to be compensable, (1) an injury must occur while the employee is performing service growing out of and incidental to his or her employment and acting in the course

of employment, and (2) the employment must be the proximate cause of the injury. (§ 3600, subd. (a)(2) & (3); *Wilson v. Workers' Comp. Appeals Bd.* (1987), *supra*, 196 Cal.App.3d [902] at p. 905 [239 Cal.Rptr. 719].) Subdivision (a)(9) was intended to limit, rather than to expand, the scope of liability that an excessively liberal application of the basic test might support. (*Meyer v. Workers' Comp. Appeals Bd.* (1984), *supra*, 157 Cal.App.3d 1036 at pp. 1040–1041 204 Cal.Rptr. 74; *Hughes Aircraft Co.[v. Workers' Comp. Appeals Bd.* (1983), *supra*, 149 Cal.App.3d 571 at p. 575 196.Cal.Rptr. 904.) (*City of Stockton*, p. 1524.)

For situations in which peace officers' injuries sustained during off-duty training activities in preparation for physical fitness tests were found work-related, the "reasonable expectancy of employment" requirement having been satisfied, see *Tomlin v. Workers' Comp. Appeals Bd.* (2008) 162 Cal.App.4th 1423 [76 Cal.Rptr.3d 672] and opinions cited therein.

End comment.

4. The employment must contribute substantially to the incapacity.

Pursuant to the 1979 amendment to Government Code section 31720, in addition to the requirement that the incapacity be a result of an injury arising out of and in the course of employment, the employment must also contribute substantially to the incapacity in order for the incapacity to be considered service-connected. There must be substantial evidence of a "real and measurable" connection between the disability and the employment.

a) Background of the "substantial contribution" amendment

In *Heaton v. Marin County Employees Retirement Bd.* (1976) 63 Cal.App.3d 421 [133 Cal.Rptr. 809] the Court of Appeal interpreted the provisions of Government Code section 31720 before the 1979 amendment which added the "contributes substantially" language.

Appellant [Board] points out that the trial judge concluded that the disability arose out of a variety of causes, but that a part of the cause arose from employment. In the view of the judge it was this small part that entitled respondent to a full retirement for disability. Appellant challenges this interpretation. It appears that this question is one of first impression in this court. (*Heaton*, p. 426.)

. . . .

[T]he disability does not have to be entirely service-connected. The section states that a member 'permanently incapacitated ... shall be retired for disability... if, and only if: ...(a) His incapacity is a result of injury or disease arising out of and in the course of his employment,' not the result thereof. ...Had the legislature determined that the incapacity had to be completely service-connected the Legislature would have stated that his incapacity must be the result of his employment. (*Heaton*, p. 428.)

Associations' comment

The Board in *Heaton* argued that any standard for employment-related causation less than *sole* cause, or *the* cause, would be unfair because any "infinitesimal" employment cause would result in a full disability retirement pension, whereas under workers' compensation law, apportionment, the concept that an employer's liability was limited to the effects of the work-related injury, mollified the defendant's loss. The *Heaton* court rejected the Board's argument, saying that the Board's remedy was with the Legislature. The *Heaton* court did not rule that any infinitesimal employment contribution was sufficient to establish a service-connection. In using the term "infinitesimal," the court was only relating the Board's argument in which it tried to characterize the extreme of the trial court's rationale and the applicant's argument. However, the *Heaton* court's decision was interpreted by many to mean precisely that any infinitesimal employment-related contribution was sufficient. The "evil of *Heaton*" (as the opinion was characterized by counsel for the applicant in the *Bowen* case) was the opinion's implications and the perceptions of readers, not the appellate court's rationale.

b) The substantial contribution amendment – the Legislature's response to the implications of *Heaton*

The Legislature reacted to what was perceived to be the *Heaton* court's "a result" test by adding to Government Code section 31720 the requirement that the employment contribute substantially to the incapacity in order for an incapacity to be considered service-connected. What the term "contributes substantially" meant became highly litigated. That litigation was resolved with the California Supreme Court's decisions in *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578 [229 Cal.Rptr. 814, 724 P.2d 500] and *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].

End comment.

The Supreme Court stated in *Bowen*,

In the 1980 amendment to section 31720, the Legislature intended to disapprove not the entire body of case law construing that section, but only the "infinitesimal contribution" language in *Heaton*. (*Gatewood v. Board of Retirement, supra*, [(1985)] 175 Cal.App.3d 311 at p. 319 [220 Cal.Rptr. 724].) Therefore, we may rely on prior case law to define the appropriate test for industrial causation under section 31720. For example, in *DePuy v. Board of Retirement, supra*, (1978) 87 Cal.App.3d 392, 398-399 [150 Cal.Rptr. 791], the court stated that an "infinitesimal" or "inconsequential" connection between employment and disability would be insufficient for a service-connected disability retirement. Instead, the court concluded that "while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be *real and measurable*. There must be substantial evidence of some connection between the disability and the job." (*Id.*, at p. 399, italics added; cf., *Gelman v.*

Board of Retirement (1978) 85 Cal.App.3d 92, 97 [149 Cal.Rptr. 225] [requiring a "material and traceable" connection between employment and disability].)

This formulation of the substantial contribution test, requiring substantial evidence of a "real and measurable" connection between the disability and employment, would not disturb the Legislature's intent to reject the *Heaton* decision (*supra*, 63 Cal.App.3d 421). The substantial contribution test "would not include *any* contribution of employment to disability, no matter how small and remote." (*Lundak v. Board of Retirement, supra*, (1983) 142 Cal.App.3d [1040] at p. 1046 [191 Cal.Rptr. 446], original [*Lundak*] italics.). "Indeed, once the *Heaton* implications are checked, there is *no significant difference* between the pre- and postamended section 31720 tests for disability." (*Gatewood v. Board of Retirement, supra*, 175 Cal.App.3d at p. 319, original [*Gatewood*] italics.) In addition, this definition of substantial contribution also comports with the principle that pension legislation be applied fairly and broadly.

. . . . However, we conclude that the 1980 amendment to section 31720 rejected *Heaton* only, and did not change the test for service-connected disability. . . . (*Bowen*, p. 577-579.)

In *Hoffman v. Board of Retirement*, the California Supreme Court further explained its ruling in *Bowen*.

As we explained in *Bowen, supra, ante*, page 572, the 1980 amendment to section 31720 does not substantively change the test for a service-connected disability retirement. Relying on case law interpreting the preamended statute, we determined that the substantial contribution test of amended section 31720 requires substantial evidence of a real and measurable connection between an employee's disability and his employment in order for the employee to qualify for a service-connected disability retirement. (*Hoffman v. Board of Retirement* (1986) *supra*, 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].)

In *Pacheco v. Board of Retirement* (1986) 188 Cal.App.3d 631 [233 Cal.Rptr. 461] the Court of Appeal rejected an applicant's argument that, because the same trial judge in the *Bowen* and *Hoffman* cases also had decided his case before the Supreme Court issued its decisions in *Bowen* and *Hoffman*, the Court of Appeal should remand Pacheco's case to the superior court.

At the hearing below, appellant argued that the 1980 amendment changed existing law and imposed a more stringent standard of recovery and that it should therefore be given prospective application only. The trial court ruled, however, that the 1980 amendment merely clarified existing law and therefore applied retroactively. In so ruling, the trial court anticipated the Supreme Court's rulings in *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572 [229 Cal.Rptr. 814, 724 P.2d 500]; and *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590 [229 Cal.Rptr. 825, 724 P.2d 511]. The trial court further anticipated the Supreme

Court's rulings when it held that substantial causation meant a "material and traceable cause." (*Bowen, supra.*, at p. 578.) (*Pacheco*, pp. 634-635.)

Associations' comment

The *Heaton* court's equating *result*, meaning "effect of," with its antonym, *cause*, meaning "source of," was criticized by Court of Appeal in *Alesi v. Board of Retirement* (2000) 84 Cal.App.4th 597 [101 Cal.Rptr.2d 81], which dealt with an issue arising from an injury to a city employee.

Heaton's analysis confuses the distinct concepts of cause and effect. Because a "result" clearly falls into the latter category, *Heaton's* view that significant information about *causation* is communicated by the article modifying the word "result" is puzzling. When the phrases "a result" and "the result" are interpreted in accordance with their plain and commonsense meaning, the only distinction between them is that the former suggests one of two or more *results* whereas the latter suggests a sole result. Even that distinction is not very meaningful, however, as either phrase can be used to refer to one of several results.³

³ For example, the statement "Bob missed the meeting as the result of a flat tire" does not necessarily communicate that Bob's missing the meeting was the *only* result of his flat tire.

In any event, whether something is referred to as "a result" of X or "the result" of X, the reference communicates nothing about whether X was the sole *cause* or one of several causes of the result. Notwithstanding that linguistic fact, *Heaton* interpreted the articles "a" and "the" in the phrases "a result" and "the result" as referring to the *cause* or *causes* of the injury rather than the noun they modify, namely, "*result*." I.e., *Heaton*, construed the phrase "incapacity is a result of injury ... arising out of ... employment" to mean the injury arising out of employment is a *cause* (i.e., one of more than one cause) of the incapacity, and construed the phrase "incapacity is *the* result of injury arising out of employment (had the Legislature chosen to use it) to mean the injury arising out of employment was the sole cause of the disability. (*Heaton, supra*, 63 Cal.App.3d at p. 428, 133 Cal.Rptr. 809.)

Heaton's interpretation is not consistent with the plain meaning of the phrases "a result" and "the result" as both phrases refer to *effect* rather than *cause*. Thus, in the context of Charter section 141 and section 24.0501, neither phrase is determinative of whether an employment-related injury must be the *sole* cause, a *substantial* cause, or merely a cause of an employee's disability to entitle the employee to a disability retirement. It follows that *Alesi's* perceived conflict between Charter section 141 and section 24.0501 does not exist. (*Alesi v. Board of Retirement, supra*, 84 Cal.App.4th, 602-604. Italics are the *Alesi* court's.)

- c) Is the applicant's burden to prove that an in-service death is service-connected under Government Code section 31787 lighter than the burden to prove that an incapacity for duty is service-connected**

under Section 31720?

When the Legislature added to Government Code section 31720 the requirement that the employment contribute substantially to the incapacity in order for an incapacity to be considered service-connected, it did not amend Government Code section 31787, the section under which survivors may receive an augmented allowance where an in-service death is service-connected. Does this mean that a survivor does not have to prove that there was a real and measurable or material and traceable connection between the employment and the death, but may establish a right to a service-connected survivor's allowance by proving the existence of any, even an infinitesimal, connection?

Government Code section 31787, subdivision (a), provides as follows:

(a) If a member would have been entitled to retirement in the event of a service-connected disability, but dies prior to retirement as the result of injury or disease arising out of and in the course of the member's employment, the surviving spouse of the member shall have the right to elect, by written notice filed with the board, to receive and be paid in lieu of the death benefit provided for in Sections 31780 and 31781, an optional death allowance. ¶

Associations' comment

There is no reported opinion of an appellate court addressing this issue. However, as explained by the California Supreme Court in *Hoffman v. Board of Retirement*, *supra*, the substantial contribution amendment did not *change* the law, it only clarified what was always required in order for an incapacity to be considered service-connected, namely, substantial evidence of a real and measurable connection between the employment and the injury or illness that produced the incapacity. Specifically, in addressing the question of whether the substantial contribution amendment would apply retroactively to cases unresolved as of the day it took effect, the California Supreme Court explained,

As we explained in *Bowen*, *supra*, *ante*, page 572, the 1980 amendment to section 31720 does not substantively change the test for a service-connected disability retirement. Relying on case law interpreting the preamended statute, we determined that the substantial contribution test of amended section 31720 requires substantial evidence of a real and measurable connection between an employee's disability and his employment in order for the employee to qualify for a service-connected disability retirement. (*Id.*, at p. 579; *DePuy v. Board of Retirement* (1978) 87 Cal.App.3d 392, 399 [150 Cal.Rptr. 791, 12 A.L.R.4th 1150].) Since amended section 31720 operates to clarify existing law, it may be applied retroactively to Hoffman's application. (Italics added. *Hoffman*, p. 593.)

Therefore, just as Government Code section 31720 before the 1979 substantial contribution amendment required substantial evidence of a real and measurable connection in order to establish service-connection, an infinitesimal or inconsequential

contribution being insufficient (*Bowen v. Board of Retirement, supra*, 42 Cal.3d, 578), Government Code section 31787 requires substantial evidence of a real and measurable connection between the employment and an in-service death in order for death to be considered service-connected.

End comment.

d) What is the effect of a physician's use of a percentage estimate of the significance of employment contribution?

Associations' comment

Physicians will often attempt to define the relative importance of employment causation by the use of percentages. For example, the physician might state the opinion that the job was 25% responsible for a permanent incapacity and the other 75% is related to non-industrial factors.

The term "contributes substantially" in Government Code section 31720 has not been assigned a percentage figure. The Board of Retirement in the *Bowen* and *Hoffman* cases argued that the term "substantial" meant more than 50%. The Supreme Court majority found no basis for such an interpretation in the law. It cited with approval the Court of Appeal decision in *Lundak v. Board of Retirement* (1983), *supra*, 142 Cal.App.3d 1040, 1045 [191 Cal.Rptr. 446] for the proposition that the ". . . Legislature did not promulgate any quantitative guidelines for the word 'substantially[.]'" (*Bowen*, p. 577.)

In his dissenting opinion, Justice Malcolm Lucas proposed that the term "substantial" should be assigned a meaning of "more than 10% . . ." (*Bowen* p. 587.) However, "[t]he statements in the dissenting or concurring opinions of individual justices which do not have the concurrence of a majority of the justices are not precedent, and constitute only the personal views of the writer." (*People v. Superior Court of the City and County of San Francisco* (1976) 56 Cal.App.3d 191, 194 [128 Cal.Rptr. 314].) Justice Lucas's dissenting opinion, therefore, though deserving admiration, does not amount to legal authority.

Rather, the substantial contribution amendment to Government Code section 31720 requires substantial evidence of a real and measurable connection between the job and the incapacity. A physician's use of a percentage figure may be helpful in the assessment of the reliability of the evidence of an employment connection, but there is no percentage threshold above which the substantial contribution test is satisfied.

If a physician uses a low percentage level to demonstrate the importance of the employment in producing the incapacity, for example, the 1% to 5% range, this may tend to show that the physician's opinion that the incapacity is in any way service-connected is not "substantial" evidence, that is, the kind evidence on which reasonable people tend to rely. A small percentage figure may tend to show that, in the opinion of the physician, the employment contribution is "inconsequential" and, therefore, not a "substantial contribution." Rather, a low percentage assigned to the employment may

show that the idea that there is *any* real and measurable connection between the job and the injury, in light of the entire record, is only speculative. If the physician assigns a high percentage, for example, 30%, and supports the opinion with scientific rationale, this may tend to show that the evidence of service-connection is "substantial evidence" and reliable proof that the incapacity was in part, a real and measurable part, caused by the job.

But in either case, the physician's opinion, just as is the case for all expert opinions, is only as good as the facts on which it is based and the reasoning process by which the physician progresses from the facts to his conclusion. (*People v. Bassett* (1968) 69 Cal.2d 122, 141, [70 Cal.Rptr. 193, 443 P.2d 777].) If the physician states a percentage figure without supporting his or her opinion with a discussion of the data on which the physician relies and the reasoning by which the physician progresses from the data to the conclusion, the physician's opinion on the issue of service-connection is not "substantial evidence." Such an opinion cannot establish or refute the fact that the employment contributed substantially to the incapacity. See Sections IV, B-D, below for a discussion of the meaning of "substantial evidence."

Further, the *Bowen* and *Hoffman* opinions address the kind of minimum showing the applicant must make in order to establish a basis on which a finding in favor of the applicant can be made. That the evidence the applicant offers amounts to substantial evidence of a real and measurable connection may meet the applicant's initial burden of proof. But if the respondent also offers substantial evidence to the contrary, the question then is whether the applicant's evidence meets the applicant's burden of persuasion that the preponderance of evidence supports the applicant's position and, thereby, the applicant's ultimate burden of proof. The applicant's burden of proof does not shift. Where there is substantial evidence on both sides of the issue, the applicant's evidence must outweigh, or preponderate over, the evidence offered by the respondent. See a more detailed discussion of this topic at Section III, below.

End comment.

e) Work-related aggravation of a pre-existing condition as establishing that a permanent incapacity caused by that condition is service-connected.

[I]t is not the law that the aggravation must be the sole or proximate cause of the disability. . . . Instead the law, both statutory and decisional, is clear that all that is required is a material and traceable connection to appellant's mental deterioration that was caused by the stress of his county job. (*Gelman v. Board of Retirement* (1978) 85 Cal.App.3d 92, 96-97 [149 Cal.Rptr. 225].)

Associations' comment

The courts use a "but for" test. The member only has to prove that "but for" the aggravation of her medical condition by the work environment, she would not be incapacitated. On the other hand, if the answer to the "but for" issue is that the member

would be permanently incapacitated in the absence of the asserted employment aggravation, the incapacity is not service-connected.

End comment.

The court of appeal in *Gurule v. Board of Pension Commissioners* explained,

. . . . The basic principle enunciated by the [*Gelman*] opinion is that acceleration or aggravation of a preexisting condition is an incapacity that is a result of an injury arising out of the course of employment and therefore entitles the employee to a service-connected disability [retirement pension]. (*Gurule v. Board of Pension Commissioners* (1981) 126 Cal.App.3d 523, 526-527 [178 Cal.Rptr. 778].)

In *Lundak v. Board of Retirement* (1983), *supra*, 142 Cal.App.3d 1040 [191 Cal.Rptr. 446], cited with partial approval in (*Bowen v. Board of Retirement supra*, 42 Cal.3d, 578, the Court of Appeal stated,

. . . . It has been held, based on reasoning parallel to that behind the principle in workers' compensation law, that an employer takes his employee as he finds him, and therefore an acceleration or aggravation of a preexisting disability becomes a service-connected injury of that employment [citations], and that an applicant for a government retirement pension will be awarded service-connected benefits where he or she can show a material and traceable connection between the disability and employment. [Citation.] *Lundak*, p. 1043.)

. . . .

Prior to the 1980 amendment of Government Code section 31720, it had been held that employment had to have more than an "infinitesimal and inconsequential" relationship to the applicant's incapacity, although it could comprise "a very small part of the disability." (*DePuy v. Board of Retirement, supra*, [(1978)] 87 Cal.App.3d [392,] at p. 398 [150 Cal.Rptr. 791]) The *DePuy* court defined infinitesimal as "capable of being made arbitrarily close to zero, immeasurably or incalculably small," and inconsequential as "not regularly flowing from the premises, irrelevant, inconsequent (lacking worth, significance or importance)." (*Ibid.*) The court stated that while it was not the intent of the Legislature that the board make awards where such a slight causal connection was demonstrated, the contribution of the applicant's employment to his disability need only be "real and measurable" in order to support an award. (*Id.*, at p. 399.) The medical testimony regarding the contribution of appellant's two work-related accidents to his disability clearly established that it was more than "inconsequential," placing it somewhere between 10 and 60 percent. (Footnote omitted.) We think the record shows the contribution of appellant's employment to his disability meets the "small part" and "real and measurable" tests of *DePuy*. (*Lundak*, pp. 1044-1045.)

Associations' comment

While it is well settled that courts will look to workers' compensation law precedent for guidance when dealing with similar issues that arise in disability retirement matters (*Bowen v. Board of Retirement supra*, 42 Cal.3d, 578, fn. 4), the distinctions between workers' compensation law and disability retirement law must be kept in mind. How an aggravation of a pre-existing injury or illness is handled under the workers' compensation law is an example of a situation in which the distinctions between the two systems are important.

Aggravation of an existing infirmity is compensable as is an injury which is the result of cumulative work effects. (*Turner v. Workmen's Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1042 [117 Cal.Rptr. 358].

(Editor's note: "Compensable" means that the aggravation amounts to a work-related injury that results in a right to workers' compensation benefits, such as disability indemnity and medical treatment.)

There is a distinction between an aggravation of a pre-existing infirmity that results in a permanent disability, or that increases the level of a pre-existing permanent disability to the point that the employee is permanently incapacitated for his or her duties, on the one hand, and on the other hand an aggravation of an injury, illness or pre-existing disability that produces only a temporary increase in disability or need for medical care.

Under workers' compensation law, the employee is potentially compensated for either or both permanent or temporary types of aggravation. Under workers' compensation law, the injured employee will be compensated for an aggravation of a preexisting infirmity that causes a need for medical care, even though it causes no disability at all - temporary or permanent.

However, *Bowen* instructs that the only type of aggravation that is relevant in the service-connected disability retirement arena is one that is a real and measurable cause of permanent incapacity for the performance of duty. A permanent incapacity for duty is not service-connected if the work-related aggravation is infinitesimal or inconsequential to the genesis of the permanent incapacity. If the applicant would be permanently incapacitated apart from the employment injury/aggravation, the work-related injury is not *of consequence* and the incapacity is not service-connected, even though the injury might entitle the applicant to workers' compensation benefits.

End comment.

f) The slogan "the employer takes the employee as it finds him."

Associations' comment

The concept that "the employer takes the employee as it finds him", a concept established in the workers' compensation law, and applied to CERL of 1937 disability retirement cases, has been reduced to a comfortable slogan that misleads.

Furthermore, the decisions interpreting the workers' compensation law of this state (Lab. Code, div. 4), which adhere to the proposition that an employer takes his employee as he finds him, and that a disability from a preexisting injury or disease, or a death resulting therefrom, is compensable if the employee's work aggravates or accelerates the injury or disease, are authoritative. (See *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 282-283 [113 Cal.Rptr. 162, 520 P.2d 978]; *Ballard v. Workmen's Comp. App. Bd.* (1971) 3 Cal.3d 832, 837 [92 Cal.Rptr. 1, 478 P.2d 937]; *Smith v. Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 588, 592 [78 Cal.Rptr. 718, 455 P.2d 822]; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed.) §§ 11.01 [4][b]; 11.02 [1] and [2], 11.03 [5] [e], 14.04 [2][f].) While the County Employees Retirement Act [*sic*] of 1937 and the workers' compensation law serve different functions, they are related in subject matter and harmonious in purpose. (*Minor v. Sonoma County Employees Retirement Bd.* (1975) 53 Cal.App.3d 540, 544 [126 Cal.Rptr. 16]; *Pathe v. City of Bakersfield* (1967) 255 Cal.App.2d 409, 414-415, 416 [63 Cal.Rptr. 220].) Both laws are designed for the comfort, health, safety and general welfare of employees;[footnote omitted] as to the payment of death and disability benefits, each contains essentially similar language;[footnote omitted] both must be construed liberally. [Footnote omitted]. (*Kuntz v. Kern County Employees' Retirement Assn.* (1976) 64 Cal.App.3d 414, 421 [134 Cal.Rptr. 501].)

More accurately said, the employer takes the employee with all of the employee's underlying and pre-existing medical conditions, abnormalities, weaknesses, and susceptibilities to injury, known or unknown – the employer does not assume responsibility for pre-existing disabilities.

The Supreme Court in *Tanenbaum v. Industrial Acc. Comm.* (1935) 4 Cal.2d 615, 617-618 [52 P.2d 215] explained,

"It is now definitely settled that the acceleration, aggravation, or 'lighting up' of a pre-existing disease is an injury in the occupation causing the same. [Citations.] The underlying theory is that the employer takes the employee subject to his condition when he enters the employment, and that therefore compensation is not to be denied merely because the workman's physical condition was such as to cause him to suffer a disability from an injury which ordinarily, given a stronger and healthier constitution, would have caused little or no inconvenience. In such cases full compensation for the entire disability suffered is recoverable although the physical condition of the employee contributed to and increased the disability caused by the injury or prolonged and interfered with healing and recovery. In other words, there is no authority for prorating the extent of the disability due to the accident itself on the one hand and that due to the aggravation caused by the employee's physical condition on the other. [Citation.]

A work-related event that would not cause injury to a normal person, but injures the employee because of an underlying asymptomatic condition that makes her susceptible to injury, is the employer's responsibility under workers' compensation law and the

CERL of 1937. However, under the pre-2004-reform workers' compensation law, if the employee was already disabled by a pre-existing condition prior to sustaining a work-related injury, be it an aggravation or acceleration of the pre-existing condition, the employer's responsibility was limited to the extent that the work-related injury caused a need for medical care, temporary disability, or an increase in the level of permanent disability. (See *Franklin v. Workers' Comp. Appeals Bd., et al.* (1978) 79 Cal.App.3d 224, 235-247 [145 Cal.Rptr. 22].) While the statute addressed in the cited portion of *Franklin*, Labor Code section 4750, was repealed by the 2004 reform legislation and the law respecting apportionment was re-written to authorize apportionment of permanent disability based on causation (Lab. Code, § 4663), the principle that an employer is not responsible for pre-existing disability remains viable in Section 4663.

Under the CERL of 1937, a permanent incapacity is service-connected only if there is a real and measurable connection between the permanent incapacity and the employment. An infinitesimal or inconsequential connection is insufficient. (*Bowen v. Board of Retirement* (1986), *supra*, 42 Cal.3d 572, 577- 579 [229 Cal.Rptr. 814, 724 P.2d 500]; *Hoffman v. Board of Retirement* (1986), *supra*, 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].)

If the member was already incapacitated when hired – county and district personnel employees who do the hiring do make mistakes – and the extent of employment contribution to the member's permanent incapacity for duty was inconsequential, the incapacity is not service-connected, the employer-takes-him-as-it-finds-him slogan notwithstanding.

The important distinction is that a permanent disability resulting from the lighting up of a pre-existing *asymptomatic condition* is wholly the employer's responsibility, while the permanent disability that remains after an aggravation of a pre-existing *disability* should only be found to be service-connected if there is a real and measurable connection – more than infinitesimal or inconsequential – between the employment and the permanent incapacity that remains following the work-related injury.

If petitioner's injury . . . aggravated a previously *nondisabling condition*, he is entitled to recover for the entire resulting disability. 'It is well settled that the acceleration, aggravation or "lighting up" of a preexisting *nondisabling condition* is an injury in the employment causing it and "If the resultant disability is entirely due to the industrial injury lighting up the previous *dormant* condition, then the employer is liable for the disability and there can be no apportionment.'" [Citations. Italics added.] (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 375-376, fn. 2 [90 Cal.Rptr. 424, 475 P.2d 656].)

The authorities frequently cited for the proposition that the employer takes the employee as the employer finds her involve employees who were either not permanently disabled before they began the employment from which they sought disability benefits, or, if they had been disabled, their disabilities subsided, but they became permanently disabled again due to an injury on the job that exacerbated a preexisting, nondisabling condition.

For example, in *Smith v. Workmen's Comp. Appeals Bd.* (1968) 71 Cal.2d 588 [78 Cal.Rptr. 718, 455 P.2d 822], a County of Los Angeles employee who was a tree laborer, an occupation classified as arduous, was diagnosed with organic heart disease with congestive heart failure and chronic alcoholism in March 1964 after six years and nine months of service. He returned to work until August 1964 when he injured his toe. The toe was amputated. His physicians documented that the heart disease was possibly an alcoholic cardiomyopathy. Smith did not return to work and died three years later. In denying Smith's widow's claim for dependency benefits, the Appeals Board relied on the opinion of a physician who concluded that Smith's death was not at all related to the injury to his toe. The Supreme Court annulled the Appeals Board decision. The Court noted that it was not disputed that physical activity could aggravate and accelerate the underlying alcoholic cardiomyopathy and the physician on whose opinion the Appeals Board relied did not address the impact on Smith's heart of his physical work activities between the time of his diagnosis and his last day of work.

[E]ven though an employee's underlying heart disease was not caused by his employment, his disability or death is compensable if such disease is aggravated or accelerated by his work. [Citations.] (*Smith*, p. 592.)

In another frequently cited case, *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal.Rptr. 162], a machine operator involved in the manufacture of precision gears for 24 years died of a heart attack at work. Evidence showed that his job was emotionally stressful because of the precise nature of the work, the cost of materials that would be lost in the event of a mistake, Lamb's conscientiousness, and the workload in the ten days before his death. There was no evidence of pre-existing disability, although it was established that Lamb had underlying and progressive coronary artery disease. The referee found that Lamb's underlying disease had been aggravated by emotional stress. The Appeals Board reversed on the basis the opinions of two physicians who concluded that Lamb's job did not subject him to physical stress. The Supreme Court annulled the Appeals Board's denial of Lamb's widow's claim for dependency benefits. The Supreme Court reasoned that, although Lamb had underlying heart disease, the sole issue was whether the employment was a contributing cause of his death.

⁶The well settled law on this point is stated by Hanna as follows: 'Most cases of disability or death resulting from heart pathology involve a preexisting subnormal or diseased heart condition which is assertedly made disabling by the employment. The general principles governing such cases are:

'(1) the employee is entitled to compensation for any disability proximately caused by an industrial injury, whether his condition was average or subnormal;

'(2) he is entitled to compensation where an existing infirmity is aggravated by the employment, even though a normal man would not have been adversely affected by the same circumstances;

'(3) the rule is unchanged even where it is shown that the employee would eventually have died from the disease, regardless of the employment, if there is competent substantial evidence that the employment hastened or produced the disability or death;

'(4) the question of whether the employment precipitated the collapse of a diseased heart prior to the time when normal progress of the disease would have brought on such collapse is one of fact; and

'(5) if the employment precipitated the heart attack or aggravated a preexisting disease, apportionment will be granted if and to the extent that it can be medically established that the preexisting disease or its normal progression also contributed to the resulting disability.' (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. rev. 1973) s 11.03 (5) (e), p. 11 44.) (Fns citing cases omitted [by the court].) (*Lamb v. Workers' Comp. Appeals Bd.*, *supra*, 11 Cal.3d, p. 282, fn. 6.)

....

"Industry takes the employee as it finds him. A person suffering from a preexisting disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event." [Citations.] By the same token it is not the Board's assessment of the amount of stress inherent in a workman's employment which governs in matters of stress-caused injury, but rather the Board's determination of the amount of stress which the particular employment has in fact exerted upon the particular workman. [Footnote omitted.] (*Lamb*, pp. 282-283.)

Another case frequently cited in support of the principle that the employer takes the employee as it finds him is *Amico v. Workmen's Comp. Appeals Bd.* (1974) 43 Cal.App.3d 592 [117 Cal.Rptr. 831]. *Amico* concerned a carpenter who sustained a back injury in 1950. He was found by the Industrial Accident Commission to have a 37¾% permanent disability. He was incapacitated until he accepted back surgery in 1956. Following six months of post-surgical convalescence, Amico returned to work until 1972 when he sustained another injury. Amico's employer at the time of the 1972 accident was found to be entirely responsible for Amico's permanent incapacity because, at the time of that injury, having been completely rehabilitated from the 1950 injury, Amico did not have a pre-existing disability.

In *Duthie v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 721 [150 Cal.Rptr. 530], an administrator for McDonnell Douglas with a history of stressful assignments over a nine-year period, developed severe chest pains from progressive heart disease after receiving a written notice that a layoff was imminent.

Further, it is firmly established that [Labor Code] section 4663 [relieving the employer of liability for permanent disability to the extent that the disability results

from the natural progression of an underlying disease] mandates the apportionment of the employee's disability, not apportionment among the causes of his disability. This principle requires that apportionment be applied only in those situations in which the worker's disability would have occurred even without the industrial aggravation, as part of the normal progress of his preexisting disease. [Citations.] The preexisting disease need not be symptomatic and disabling at time of industrial injury, so long as it has manifested itself by the time claimant's permanent disability has reached a stationary ratable stage; [footnote omitted] however, a projection that, but for the industrial aggravation disability would have occurred anyway at 'some indefinite future time,' is not enough to support the apportionment of a disability. [Citations and footnote omitted.] This mandate has been a constant source of confusion in applying section 4663. Physicians, pursuing the science of etiology, are trained to look for all the causes of a given disease or condition. They are concerned with preventing or curing illnesses and so must address all these causes in their work. Section 4663 requires, however, that the doctor focus on the existence of the present disability and on whether it would have appeared in any form in the absence of industrial injury. (*Duthie*, pp. 728-729.)

Former Labor Code section 4663 was never applicable to cases arising under the CERL of 1937. However, if there is evidence that an injury or disease that causes permanent incapacity "would have occurred anyway," at the same point in time, even absent a work-related aggravation, that evidence would stand for the proposition that the work-related aggravation would be *inconsequential* to the development of the incapacity. Under *Bowen*, the work-related aggravation would not be a real and measurable cause. Court opinions dealing with Labor Code section 4663 (repealed Stats 2004 ch. 34, § 33, effective April 19, 2004), which regulated a similar subject matter, and the limits imposed by the courts for its application, can provide guidance in determining the validity of a medical opinion that the employment did not affect the occurrence of the permanent incapacity.

End comment.

5. Stress

a) 1937 Act Cases

Heaton v. Marin County Employees Retirement Bd. (1976), *supra*, 63 Cal.App.3d 421 [133 Cal.Rptr. 809], was a case dealing with a disability that was brought about by a stressful work situation. The Court of Appeal stated,

. . . . Moreover, section 31722 of the Government Code which sets out the requirements for applying for service-connected disability explicitly recognizes that such a disability may be mental as well as physical in nature. (*Heaton*, p. 431.)

Traub v. Board of Retirement (1983), *supra*, 34 Cal.3d 793, 799 [195 Cal.Rptr. 681, 670 P.2d 335]:

Disability from emotional stress caused by psychological pressures imposed by an employer is ordinarily service-connected if based on the employer's dissatisfaction with the employee's job performance. (*Albertson's, Inc. v. Workers' Comp. Appeals Bd. (Bradley)* (1982) 131 Cal.App.3d 308 [182 Cal.Rptr. 304.]

Glover v. Board of Retirement (1989), *supra*, 214 Cal.App.3d 1327, 1336-1337 [263 Cal.Rptr. 224]:

. . . . [W]hile the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job.

DePuy v. Board of Retirement (1978), *supra*, 87 Cal.App.3d 392, 399 [150 Cal.Rptr. 791]:

We must conclude while the causal connection between the stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job. The trial court erred in its conclusion the law of California requires the award of service-connected disability retirement benefits where there is an 'infinitesimal' and 'inconsequential' connection between the pensioner's duties and his disability.

b) Workers' Compensation cases

Associations' comment

In discussing stress-related disabilities under the CERL of 1937, parties often cite court opinions that interpret Labor Code provisions of the Workers' Compensation Act. Why is this accepted practice?

In *Traub v. Board of Retirement* (1983) 34 Cal.3d 793 [195 Cal.Rptr. 681] the Supreme Court addressed a deputy probation officer's claim that his incapacitating injury from emotional stress related to his being discharged for alleged criminal conduct for which he was eventually exonerated was service-connected. Without discussing why it was appropriated to do so, the Court cited as authority appellate court opinions dealing with workers' compensation claims.

The Supreme Court in *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, footnote 4 [229 Cal.Rptr. 814, 724 P.2d 500] stated that courts "[g]enerally, have found that the County Employees Retirement Act of 1937 (here at issue) and the Workers' Compensation Act are related in subject matter and harmonious in purpose.' (Citations

omitted.) In fact, courts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law."

The workers' compensation law in regard to psychiatric cases has undergone substantial amendments in the past twenty years, amendments that are not applicable to the CERL of 1937. (See *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044].) Pre-reform opinions on workers' compensation issues, therefore, continue to be valuable guides in dealing with similar issues in public employee disability retirement cases.

End comment.

(1) Albertson's, Inc.

In *Traub v. Board of Retirement* (1983), *supra*, 34 Cal.3d 793, 799 [195 Cal.Rptr. 681], a case dealing with the service-connectedness an emotional stress injury in a disability retirement case, the Supreme Court cited *Albertson's, Inc. v. Workers' Comp. Appeals Bd. (Bradley)* (1982) 131 Cal.App.3d 308 [182 Cal.Rptr. 304], a case dealing with job-relatedness of an emotional stress injury in a workers' compensation case, as authority for the proposition that disability from emotional stress caused by an employer's dissatisfaction with the employee's job performance is ordinarily service-connected

In *Albertson's, Inc.*, Bradley, a cake decorator, who was hyper-sensitized to stress due to a pre-existing, non-work-related, mild obsessive-compulsive psychiatric disorder, became disabled after alleged conflicts with her supervisor at work. The evidence showed that Bradley's assertions that she was subjected to harassment by her supervisor were, in fact, untrue, although the evidence also showed that, through the prism of her pre-existing psychiatric disorder, she perceived events at work as harassment. The workers' compensation judge ruled that Bradley had sustained a work-related injury and the employer petitioned the Workers' Compensation Appeals Board for reconsideration.

Because the Court of Appeal refers to the WCAB's decision in formulating the court's own ruling, in effect adopting the WCAB's rationale, an understanding of the WCAB's decision is key to understanding the opinion of the Court of Appeal. The Court of Appeal digested the WCAB's decision, and what the court refers to as "the board's reservation," as follows:

The board subsequently denied [the defendant's petition for] reconsideration. It said: "[W]e do not [intend] to suggest that it would be sufficient for purposes of finding industrial causation if the employment were an after the fact rationalization. Nor do we suggest what the result would be had the evidence established that the employment was a mere passive element that a nonindustrial condition happened to have focused on. In this case however, there was ample evidence supporting the judge's conclusion that the employment played an active role in the development of the psychological condition."
(*Albertson's, Inc.*, p. 313.)

The *Albertson's, Inc.* court stated the California law concerning perceived stress as follows:

... [A] subjective test (that is, one personal to the applicant) has been applied in California to injuries resulting from stress. “[I]t is not the Board's assessment of the amount of stress inherent in a workman's employment which governs in matters of stress-caused injury, but rather the Board's determination of the amount of stress which the particular employment has in fact exerted upon the particular workman.” (Fn. omitted.) [Citation omitted.] The proper focus of inquiry, then, is not how much stress should be felt by an employee in this work environment, based on a "normal" reaction to it, but how much stress is felt by an individual worker reacting uniquely to the work environment. (*Albertson's, Inc.*, p. 313. Parentheticals and the first two brackets are from the original.)

Associations' comment

Albertson's, Inc. stands for the proposition that whether a stress-related injury is to be considered work-related is determined by a subjective test. But the Court of Appeal went to some lengths to draw a line between what will be considered work-related and what will not. The following excerpt from the *Albertson's, Inc.* opinion shows the Court of Appeal's rationale.

This point was made by the Michigan Supreme Court in *Deziel v. Difco Laboratories, Inc.* (1978) 403 Mich. 1 [268 N.W.2d 1, 97 A.L.R.3d 121], which adopted a subjective standard crediting claimants' honest perception in a scholarly and far reaching opinion: “[All] people manufacture their own concepts of reality. [¶] 'Normal' persons are those who manufacture a reality which most closely parallels that which the vast majority of 'average' people encounter. Psychoneurotics and psychotics fail to manufacture or encounter the same reality because their reactions and adjustment mechanisms either distort, warp or completely fail. [para.] However, their distorted concept of reality is just as 'real' for them as the average person's concept of reality is for him. This is the critical insight. [para.] Once it is determined that (1) a psychoneurotic or psychotic is disabled and (2) a personal injury is established, it is only logical that we employ a subjective standard in determining whether the claimant's employment combined with some internal weakness or disease to produce the disability. A subjective standard acknowledges that the claimant is 'mis-manufacturing' or misperceiving reality, otherwise the person would not be a psychoneurotic or psychotic by definition.” (*Id.*, at pp. 12-13.)

In *Deziel*, the Michigan court adopted a "strictly subjective causal nexus" standard under which "a claimant is entitled to compensation [for mental injuries] if it is factually established that claimant honestly perceives some personal injury incurred during the ordinary work of his employment 'caused' his disability [para.] The focal point of this standard is the plaintiff's own perception of reality." (*Id.*, at p. 11.) The board's limiting language in this case, that the claimed causal relationship between employment and injury not be a mere "after-the-fact

rationalization," is equivalent to Michigan's "honest perception" rule. Its reservation of the question whether a psychiatric injury is compensable where the "employment was a mere passive element that a nonindustrial condition happened to have focused on" is a point of departure from the Deziel rule, which found industrial causation for a psychiatric disability where the applicant's job merely "[performed] the function of a convenient hook on which he can attach causation for troubles of all kinds and once this is set up, this traumatic event becomes the assigned cause by the patient." (*Deziel v. Difco, supra.*, 268 N.W.2d at p. 18.) [Italics in the original.]

The limitation by the [WCAB] finds support in a feature of California's workers' compensation law. Labor Code section 3600 requires not only that an injury "aris[e] out of and [occur] in the course of the employment," it also requires that the injury be "proximately caused by the employment, either with or without negligence." (Lab. Code, § 3600, subd. (c).) [Footnote omitted.] "While Labor Code section 3600 requires that an injury be 'proximately caused' by the employment, this term has received a much broader construction in workmen's compensation law than it has in tort law. All that is required is that the employment be one of the contributing causes without which the injury would not have occurred. (*Madin v. Industrial Acc. Com.*, 46 Cal.2d 90 [292 P.2d 892].) Warren L. Hanna observes: 'Thus our courts, in the name of liberal interpretation and the modern trend, have evinced a willingness, in fact, a determination, to accept almost any incidental, indirect, or merely contributing relationship or connection as a substitute for the "proximate cause" required by the compensation law.' (2 Hanna, California Law of Employee Injuries and Workmen's Compensation (2d Ed. (1969), § 8.03.)) (*Wickham v. North American Rockwell Corp.* (1970) 8 Cal.App.3d 467, 473 [; 87 Cal.Rptr. 563,]; see also *Wiseman v. Industrial Acc. Com.* (1956) 46 Cal.2d 570, 573 [297 P.2d 649].) (*Albertson's, Inc.*, p. 315 -316.)

The Court of Appeal in *Albertson's, Inc.* affirmed the WCAB's decision finding that the applicant, Bradley, had sustained a work-related injury, but limited its holding with the following statement:

Nevertheless, the statutory requirement retains sufficient force that compensation may not be awarded where the nature of the employee's duties "merely provided a stage for the event." [Citation.] The board's reservation [that when employment is only a passive factor and/or the relationship of injury to work is based on an after-the-fact rationalization] comports with the still persisting California requirement that "the employment itself must be a positive factor influencing the course of disease." [Citation.]" (*Albertson's, Inc.*, p. 316.)

Associations' comment

Note that *Albertson's, Inc.* deals with whether a work-related injury had occurred. It does not address whether any of the permanent disability, which the applicant might be left with after the healing period has run its course, is work-related. The record shows

that Bradley had significant pre-existing personal problems that may or may not have amounted to a pre-existing disability.

The Court of Appeal did not hold that the board must accept as undisputed the claimant's testimony regarding his or her perception of events at work or the testimony about how these events affected her. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, [224 Cal.Rptr. 758], discussed further below.)

End comment.

- (2) That stress occurs on the job does not mean that an injury produced by the stress is work-related. The employment must be more than merely the place where the injury occurred. It must be a positive factor in causing the injury.**

In *Atascadero Unified School District v. Workers' Comp. Appeals Bd. (Geredes)* (2002) 98 Cal.App.4th 880 [120 Cal.Rptr.2d 239], a bus driver had an affair with a co-worker. After the affair ended, co-workers, on the job, gossiped about Geredes, using terminology such as "tramp" and "husband stealer." The fact that there was gossip going on was passed on to the applicant. She complained to her supervisors who held meetings with the employees involved and the gossip stopped. Geredes filed an application for workers' compensation benefits on the basis of a psychiatric injury that she sustained as a result of the gossip. The workers' compensation judge denied the application on the basis that the injury did not arise out of employment. The WCAB reversed and, on review, the Court of Appeal reversed the WCAB, siding with the workers' compensation judge.

It is not sufficient for purposes of finding industrial causation if the nature of the employee's duties "merely provided a stage" for the injury (*Transactron, Inc. v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 233, 238 [137 Cal.Rptr. 142]); "if the employment were an after the fact rationalization" (*Albertson's, Inc., v. Workers' Comp. Appeals Bd. (Bradley)* (1982) 131 Cal.App.3d 308, 313 [182 Cal.Rptr. 304]); or if "the evidence established that the employment was a mere passive element that a nonindustrial condition happened to have focused on" (*ibid.*). A finding of industrial injury is proper only where the employment plays an "active" or "positive" role in the development of the psychological condition. (*Id.* at pp. 316-317; *Bingham v. Workmen's Comp. App. Bd.* (1968) 261 Cal.App.2d 842, 848 [68 Cal.Rptr. 4101].)

An injury that grows out of a personal grievance between the injured employee and a third party does not arise out of the employment if the injury occurred merely by chance during working hours at the place of employment, or if the employer's premises do not place the injured employee in a peculiarly dangerous position. Thus, when a third party intentionally injures the employee and there is some personal motivation or grievance, there has to be some work connection to establish compensability. [Citations.]

In finding no compensable injury, the WCJ stated: "Clearly, the source of applicant's problem is the rumors and gossip about the applicant. Those rumors and gossip about the applicant virtually all stemmed from acts and occurrences of applicant's personal life that all occurred off the job and had no connection with her employment.... Gossip about an individual's personal life ... is simply not part of the employment relationship. " This result is supported by the above cited case law and the decision of our Supreme Court in *LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [72 Cal.Rptr.2d 217, 951 P.2d 1184]. In that case, an employee who suffered a heart attack due to a preexisting heart condition while attending a work-related seminar did not suffer a compensable injury. The court stated: " ' [T]he statute requires that an injury "arise out of" the employment [I]t must "occur by reason of a condition or incident of [the] employment [Citation.] [T]he employment and the injury must be linked in some causal fashion.'" (*Id.* at p. 651, fn. omitted, quoting *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733-734 [190 Cal.Rptr. 904, 661 P.2d 1058].)

In awarding compensation, the WCAB relied on *Albertson's, Inc., v. Workers' Comp. Appeals Bd., supra*, 131 Cal.App.3d 308, reasoning that the injury is compensable because it was caused by an "actual event of her employment." We are not persuaded. With due respect to the WCAB, the facts in *Albertson's* differ markedly from the facts in this case. In *Albertson's*, the employee was out of work during the pendency of a union grievance arising from a layoff. When she returned to work 10 days later, she perceived that her supervisor's attitude toward her had changed. She asserted she overheard her supervisor ridiculing her and talking about getting rid of her with a coworker. Two other coworkers informed her that they too had overheard her supervisor expressing an intent to get rid of her. In *Albertson's*, the employee's psyche injury arose from a conflict between the employee and her supervisor relating to scheduling her hours and her temporary layoff, undeniably work-related issues. None of these facts are present here. The cases relied on by the WCJ and those cited above, especially the physical assault cases, are factually similar in that, as the District points out, Geredes is alleging a "verbal assault."

We agree with the WCJ that gossip about an employee's personal life is not part of the employee-employer relationship. Geredes's off-duty affair had nothing to do with her employment. Even though Geredes and her paramour were both employees of the District and the gossip occurred at work, the nature of her duties was not the proximate cause of her injury for it merely provided a stage for the event. (*LaTourette v. Workers' Comp. Appeals Bd., supra*, 17 Cal.4th 644.) In other words, the employment was not a contributory cause of the injury. [Citations.] (*Atascadero Unified School District*, pp. 884-885.)

(3) A claim of a work-related psychiatric injury must be supported by lay and expert evidence.

Government Code section 31720.3 (Stats 2008 ch. 370, § 4 (AB 2023), effective January 1, 2009) provides,

In determining whether a member is eligible to retire for disability, the board shall not consider medical opinion unless it is deemed competent and shall not use disability retirement as a substitute for the employer's disciplinary process.

Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp) (1981) 122 Cal.App.3d 905, 911-912 [176 Cal.Rptr. 365]:

Whether applicant sustained a compensable psychiatric injury as the result of her employment at Volt requires both lay and medical evidence for support. Lay testimony must support the occurrence of injurious incidents which are employment related. Lay testimony alone, however, cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition. [Citations.] "[Where] the truth is occult and can be found only by resorting to the sciences," the WCAB must utilize expert medical opinion. [Citation.] "The difficulty is that the problem was not one of lay theory, but one of diagnosis, prognosis and treatment in an occult branch of medicine." [Citation.]

In *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, at 786 [224 Cal.Rptr. 758], the court stated,

'[Factual] determinations of the Board must be upheld if there is substantial evidence in their support and the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence.' [Citation.] Here the Board expressly relied on Dr. Kimmel's report in making its finding that applicant did not sustain an industrially-caused injury. Viewed in light of the entire record (citation), that report constituted substantial evidence to support the finding.

The court in *Power*, at p. 787, stated that the Workers' Compensation Appeals Board acted reasonably in declining to give substantive credit to the claimant's testimony regarding her perceptions of the disability and its causes, explaining,

Applicant also contends that the Board erred in failing to resolve all reasonable doubts in his favor. However, in light of the foregoing analysis, this contention is meritless, if not specious. The principle of resolving all reasonable doubts in favor of the employee applies "[w]hen there is no conflicting evidence and the inference [of industrial causation] is undisputed[.] [In such a case,] the board in furtherance of the legislative command of liberal construction in favor of the workingman must find industrial causation." [Citation.] Here, however, the evidence as to both injury and industrial causation was conflicting. The WCJ did not properly address the conflict; the Board did.

Applicant seems to be arguing that *whenever* the evidence is in conflict, the principle of liberal construction *must* result in a finding in favor of the employee, irrespective of whether the evidence against him "has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5, *supra*.) Were this the

case, however, the *preponderance* of the evidence standard in section 3202.5 would be meaningless, as would the review process of the Board. [Italics in original.]

Under the workers' compensation law, medical opinions offered in support of the applicant's claim of psychiatric injury and disability must be framed in accordance with the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised (DSM-III-R) or a similar diagnostic manual approved and accepted nationally by psychiatrists. (Lab. Code, §§ 139.2, subd. (j)(4), and 3208.3, subd. (a).) Note: The only current nationally approved and accepted manual is DSM-IV-TR. "TR" stands for "Text Revision." DSM-V is scheduled for publication in May 2013.

Claims subject to the CERL of 1937 are not governed by Labor Code sections 139.2 or 3208.3.

(4) Workers' Compensation reform laws are not applicable to claims of psychiatric incapacity under public pension law.

Beginning in 1989, the Legislature enacted workers' compensation laws intended to restrict the compensability of workers' compensation psychiatric claims. (Lab. Code, § 3208.3.) This "reform" legislation includes, but is not limited to, provisions requiring the following:

(1) That the injury not be the result of a "good faith personnel action." This criterion relieves the employer of liability for otherwise job-related psychiatric injuries that are caused by reasonable personnel actions taken by the employer.

(2) That the injury be the result of "actual events in employment." This requirement is thought to require more than an honest misperception on the part of the employee.

(3) That the actual events of employment be the "predominant cause," applicable to injuries sustained on and after July 16, 1993, or 10% of all causes, applicable to injuries sustained on and after January 1, 1990 and up to July 15, 1993.

(4) That in the case of psychiatric injury resulting from injury as a victim of a violent act or from direct exposure to a significant violent act, that actual events in employment were a substantial cause (at least 35 to 40%) of all causes.

(5) That compensation shall not be paid on a psychiatric claim unless the employee has been employed for at least 6 months, unless the injury is caused by a sudden and extraordinary employment condition.

(6) That compensation shall not be paid where the claim is filed after a notice of termination of employment and the claim is for an injury that allegedly occurred before the notice of termination, unless certain specified statutory conditions are met that verify that injury occurred before the notice of termination.

Because the courts have looked to workers' compensation law for guidance when dealing with the issue service-connection of disabilities under retirement laws, some questioned whether the workers' compensation reforms were applicable to disability retirement applications based on psychiatric incapacity and whether the reforms restrict the associations' members' ability to obtain service-connected disability retirements. The Supreme Court's decision in *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044], a case dealing with a member of the Public Employees Retirement System, answers each question with a "No."

. . . . Before Labor Code section 3208.3's enactment in 1989, courts reasonably gave a similar construction to the similarly worded standards for industrial injury under Labor Code section 3600, subdivision (a), and Government Code section 20046. (See *United Public Employees v. City of Oakland* (1994) 26 Cal.App.4th 729, 733 [31 Cal.Rptr.2d 610] [statutes on the same subject of employee benefits and using the same statutory definition must be read together].) However, once the Legislature enacted Labor Code section 3208.3, it thereby eliminated what had been parallel language governing compensability of industrial injuries under the workers' compensation scheme and the Public Employees' Retirement Law. The enactment therefore undermines the rationale for similarly construing whether a psychiatric injury is industrial under the two statutory schemes.

As discussed, Labor Code section 3208.3 does not expressly provide that it apply to retirement disability claims under the Public Employees' Retirement Law. On the contrary, it refers to compensability under "this division," i.e., division 4 of the workers' compensation law. Although both the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. We may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]; cf. *People v. Goodloe* (1995) 37 Cal.App.4th 485, 491 [44 Cal.Rptr.2d 15] ["When a particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion ... is that a different legislative intent existed"].) (*Pearl*, pp. 196-197.)

6. Presumptions that incapacities from heart trouble, cancer, blood borne infectious disease and illness caused by exposure to biochemical substance are service-connected

a) How presumptions work

- (1) Proof that the job was a cause of incapacity is required in the ordinary, non-presumption case.**

Associations' comment

In a non-presumption case, a service-connected injury will be established only if the applicant can show that there is a link between the injury and the job. The applicant

must establish that the incapacitating injury or disease arose out of and in the course of employment by offering substantial evidence of a real and measurable, material and traceable connection between the employment and the injury or illness that causes the permanent incapacity. (*Bowen v. Board of Retirement* (1986), *supra*, 42 Cal.3d 572, 577-579 [229 Cal.Rptr. 814, 724 P.2d 500]; *Hoffman v. Board of Retirement* (1986), *supra*, 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].)

The connection between the employment and the incapacitating injury or illness normally must be established by a medical opinion from a physician. (*Peter Kiewit Sons v. Industrial Acc. Comm. (McLaughlin)* (1965), *supra*, 234 Cal.App.2d 831 [44 Cal.Rptr. 813] [injury to the back]; *City and County of San Francisco v. Industrial Acc. Comm. (Murdock)* (1953) 117 Cal.App.2d 455 [256 P.2d 81] [injury to the heart].) A physician must describe the mechanism by which the employment caused the injury. If the Board finds the physician's explanation to be competent (Gov. Code, § 31720.3), reliable, substantial evidence that is believable and of such weight that a determination in the member's favor would be required in the absence of contrary evidence, the employee has met his initial burden of proving the connection between the job and the injury. Then it is up to the respondent to produce evidence that will change the Board's mind. Ultimately, the Board determines from the evidence whether to draw an inference – that is, a logical and reasonable conclusion – from the evidence that there is or is not a causal connection between the employment and the incapacity. See further discussion of the burden of proof, below, in Section III.

- (2) In a presumption case, the member is relieved of the burden of proving that the injury or illness arose out of and in the course of employment and, once certain prerequisite facts are established, the connection between the job and a permanently incapacitating injury is presumed to exist.**

The laws that establish presumptions in favor of certain safety employees make establishing that a causal connection in fact exists between the incapacitating injury and the job unnecessary. The applicant's burden is only to prove the existence of the basic facts, such as being in a favored occupation for a specified amount of time and having a certain kind of disease, that give rise to the presumption that the connection exists.

(3) Presumptions generally.

A "**presumption**" is defined as an assumption of fact the law **requires** to be drawn from one or more other facts already established in the action. (Evid. Code, § 600.)

A presumption is distinguished from an "**inference**" which is a deduction about the existence of a fact that **may** logically and reasonably be drawn from one or more facts that are found to exist or are otherwise established in the case by stipulations, pleadings, or judicial or administrative notice. (*Ibid.*)

The trier of fact is not required to draw an inference as to the existence of a fact from another set of facts. A presumption, on the other hand, requires or compels the trier of

fact to presume the existence of a fact when another fact or set of facts is established. Neither a presumption nor an inference is evidence. Both are conclusions, one permitted (inference), one required (presumption), that are drawn from the existence of facts established in the case. (2 Jefferson's Cal. Evidence Benchbook (4th ed CJA-CEB 2011), Presumptions, § 48.2 (presumption) and § 48.1 (inference).)

Government Code section 31720.5 is an example of a presumption. It provides that once prerequisite facts are established (member is in a specified public safety occupation or active law enforcement, completed five years of service, develops heart trouble), incapacitating heart trouble is presumed to arise out of and in the course of employment.

Presumptions may be "rebuttable" or "conclusive." (Evid. Code, § 601.)

(a) Rebuttable presumption defined

A rebuttable presumption establishes the existence of a fact unless evidence is introduced which would support a finding that the presumed fact does not exist. (Evid. Code, §§ 604 and 606.)

(b) Conclusive presumption defined

A conclusive presumption is a finding of fact that the law requires to be made once prerequisite facts are established, even if there is evidence that would establish that the presumed fact is not true. Unless a presumption is by its terms conclusive, the courts will find a presumption to be rebuttable. (See Evid. Code, § 620, *et seq.*)

Associations' comment

Government Code section 31720.5's presumption that heart trouble suffered by those in certain public safety positions may be a conclusive presumption, although such a classification would be contrary to the opinion of the court in *Pellerin v. Kern County Employees' Retirement Association* (2006) 145 Cal.App.4th 1099, at 1106 [52 Cal.Rptr.3d 201]. See the discussion below at Section II, B, 6, a), (4), (e).

(4) Rebuttable presumptions

As noted above, presumptions are classified in Evidence Code section 601, *et seq.*, and are first classified as "conclusive" and "rebuttable." Rebuttable presumptions are further classified as either "presumptions affecting the burden of producing evidence" or "presumptions affecting the burden of proof."

(a) Rebuttable presumption affecting the burden of producing evidence

A presumption affecting the burden of producing evidence is one created only to aid in the determination of the action, not to further some other public policy. (Evid. Code,

§ 603; 1 Witkin, Cal. Evidence (4th ed. 2000-2011) Burden of Proof, § 54 Nature, p. 203.)

A presumption affecting the burden of producing evidence is based on an underlying logical inference that has such a high probability of truth that it makes sense to assume its truth absent evidence to the contrary. The court can thereby dispense with unnecessary proof of the presumed fact if the existence of the basic fact is established. An example of a presumption affecting the burden of producing evidence is the presumption that an item of mail properly addressed and mailed is received in the ordinary course of mail. (Evid. Code, § 641.) Another is that a writing carrying a particular date is truly dated. (Evid. Code, § 640.)

On the other hand, whether incapacitating heart trouble is service-connected is not an inference that logically and reasonably flows from the basic facts of five years of safety membership in an association operating under the CERL of 1937. Therefore, assuming that it is a rebuttable presumption, Government Code section 31720.5's presumption is identified as one created to achieve a public policy objective and one affecting the burden of proof. It is not merely a presumption created to streamline the administrative and judicial processing of a claim and only affecting the burden of producing evidence.

In the case of a presumption affecting the burden of producing evidence, if evidence sufficient to establish the nonexistence of the presumed fact is produced, the presumption "disappears." The trier of fact is then to determine the existence or nonexistence of the previously presumed fact based on the evidence and without regard to the presumption. (Evid. Code, § 604.) This means that the party having the burden of proof must establish the existence of the fact with the required degree proof, but without the help of the presumption. In civil proceedings, the general rule is that the required degree of proof is proof by a preponderance of the evidence. (1 Witkin, Cal. Evidence (4th ed., 2000-2011) Burden, § 55, Effect.)

For example, if a party proves that a letter was correctly addressed and properly mailed, the trier of fact is required to find that the letter was received. Evid. C, §641.

If the adverse party denies receipt, however, the presumption of receipt disappears and the trier of fact must weigh the evidence on both sides and decide if the letter was received.

Even in the face of contradictory evidence, inferences may nevertheless be drawn from the same circumstances that gave rise to the presumption. Evid. C §604; *Craig v. Brown & Root* (2000) 84 CA4th 416, 421, 100 CR2d 818. See also Comment to Evid. C § 604. (2 Jefferson's Cal. Evidence Benchbook (4th ed CJA-CEB 2011) Presumptions, § 48.18.)

(b) Rebuttable presumption affecting burden of proof

A presumption affecting the burden of proof, on the other hand, is one created to achieve some public policy objective that does not necessarily flow from a logical

underlying inference. (Evid. Code, § 605.) Once the basic facts giving rise to the presumption are established, the burden of proof shifts to the party against whom the presumption operates to prove the non-existence of the presumed fact by the applicable degree of proof, e.g., the preponderance of the evidence. Evidence Code section 606 provides, "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

The effect of a presumption that affects the burden of proof is explained in 2 Jefferson's California Evidence Benchbook, (4th ed CJA-CEB 2011), Presumptions, §§ 48.29-48.42. Where the basic facts giving rise to the presumption have been established by judicial notice, pleadings, stipulations or evidence, and the party against whom the presumption operates does not introduce evidence that tends to prove the nonexistence of the presumed fact or introduces evidence that is insufficient to support a finding of the nonexistence of the presumed fact, the trier of fact *must* find that the presumed fact exists. (*Id.*, § 48.30.) If the party relying on the presumption introduces evidence tending to prove the existence of the basic facts giving rise to the presumption and the party against whom the presumption operates offers evidence tending to prove the nonexistence of the basic facts, but offers no evidence tending to prove the nonexistence of the presumed fact, the trier of fact must find that the presumed fact exists but only if it finds that the basic facts exist. (*Id.*, § 48.31.)

If one party relies on the presumption that affects the burden of proof and introduces evidence that tends to prove the existence of the basic facts giving rise to the presumption, and the party against whom the presumption operates does not introduce evidence that tends to prove the nonexistence of the basic facts, but, instead, introduces evidence that tends to prove and is sufficient to support a court finding of the nonexistence of the presumed fact:

- The trier of fact must find that the presumed fact exists, unless the party against whom the presumption operates convinces the trier of fact, under the burden of proof standard applicable to the presumption, of the nonexistence of the presumed fact . . . (*Id.*, § 48.32.)

Similarly, where the party relying on the presumption introduces evidence tending to prove the existence of the basic facts and the party against whom the presumption operates introduces evidence tending to prove the nonexistence of both the basic facts and the presumed fact, the trier of fact must determine by the preponderance of the evidence whether the basic facts exist and, if so, the trier of fact is to presume the existence of the assumed fact unless it is convinced by the preponderance of the evidence that the assumed fact does not exist. (Jefferson's California Evidence Benchbook, *supra*, § 48.33.)

(c) Differences in the effect of the two types of rebuttable presumptions (presumption affecting the burden of producing evidence and presumption affecting the burden of proof) when evidence of the nonexistence of the

presumed fact is submitted.

The difference in the effect between the two types of rebuttable presumptions is:

(i) Presumption affecting the burden of producing evidence – presumption disappears.

Once evidence sufficient to support a finding of the nonexistence of the presumed fact is submitted, in the case of a presumption affecting the burden of producing evidence, the burden of proving the existence of the presumed fact by the preponderance of the evidence without regard to the presumption remains with the party who was relying on the presumption; that is, the presumption “disappears.” (Jefferson’s California Evidence Benchbook, *supra*, § 48.21.)

(ii) Presumption affecting the burden of proof – burden remains shifted to the party against whom the presumption operated.

In the case of the presumption affecting the burden of proof, once the party against whom the presumption operates and to whom the burden of proof has shifted submits evidence of the nonexistence of the presumed fact, the burden of proof as to the nonexistence of the presumed fact remains with that party. (Jefferson’s California Evidence Benchbook, *supra*, § 48.21; 1 Witkin, Cal. Evidence (4th ed. 2000-2011) Burden, § 56, Nature and § 57, Effect; 31 Cal.Jur.3d (2011) Evidence § 123, Effect; instructions.)

(d) Each of the CERL of 1937’s rebuttable presumptions of work-connection is one of public policy and affects the burden of proof, not merely the burden of producing evidence.

In *Gillette v. Workers’ Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312 [97 Cal.Rptr. 542] Labor Code section 3212’s heart presumption was at issue. The court stated,

We think it must be conceded that if the presumption applies here it is one of public policy. Therefore, where facts giving rise to the presumption have been proven at the outset, the burden of proof negating the presumption falls upon the employer. . . . (*Gillette*, p. 320.)

In *Pellerin v. Kern County Employees’ Retirement Association* (2006), *supra*, 145 Cal.App.4th 1099, at 1106 [52 Cal.Rptr.3d 201], the Court of Appeal reasoned to the same conclusion with respect to Government Code section 31720.5 (heart presumption), saying,

Section 31720.5 establishes a rebuttable presumption. (See *Robinson v. Board of Retirement* (1956) 140 Cal.App.2d 115, 117 [294 P.2d 724] [considering whether evidence rebutted presumption under former version of § 31720.5 as applied to death benefit].) The effect of some rebuttable presumptions is to shift

the burden of proof: Where, absent the presumption, one party would have the burden of proving some proposition, the presumption means the proposition is presumed true unless the other party proves it false. (Evid. Code, §§ 601, 605, 606.) The effect of other rebuttable presumptions is to shift the burden of producing evidence: If the presumption applies to a proposition, the proponent of the proposition need not prove it unless the opposing party produces evidence undermining it, in which case the presumption is disregarded and the trier of fact must decide the question without regard to it. (Evid. Code, §§ 603, 604.)

Although we have found no authority directly addressing the point, we conclude that the section 31720.5 presumption is a presumption affecting the burden of proof, not one merely affecting the burden of producing evidence.

The Law Revision Commission comment to Evidence Code section 605 states that presumptions affecting the burden of proof are those that are intended not only to facilitate factfinding but also to advance some substantive policy goal. The presumption at issue here is that when firefighters, law enforcement officers, and other safety employees suffer heart conditions, those heart conditions are caused by their employment. This is intended not only to make it easier to find facts in cases of that kind but also to help that class of employees by resolving doubts in their favor and consequently to effectuate the substantive policy goal of applying pension legislation broadly. (See *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 579 [229 Cal.Rptr. 814, 724 P.2d 500] [stating principle that pension legislation should be applied broadly].) When the section 31720.5 presumption applies, therefore, it means the employee does not have to prove industrial causation; instead, the agency must disprove it.

(e) Is the *Pellerin* court correct in concluding that Section 31720.5's presumption is rebuttable rather than conclusive?

Associations' comment

With the exception of Government Code section 31720.5's heart presumption, the CERL's presumptions of service-connection expressly provide that they are "disputable" (Section 31720.6's cancer presumption) or "rebuttable" (Section 31720.7's blood-borne infectious disease or MRSA skin infection; Section 31720.9's exposure to biochemical substances). Likewise, the various Labor Code presumptions of work-relatedness that favor certain public safety employees all expressly provide that they are "disputable."

The *Pellerin* court held that Section 31720.5's presumption was rebuttable, citing *Robinson v. Board of Retirement* (1956), *supra*, 140 Cal.App.2d 115, 117 [294 P.2d 724] with the introductory signal "See." "See" "should precede citations to cases that only indirectly support the text, citations to supporting dicta, and citations to a concurring or dissenting opinion." (Jessen, Cal. Style Manual (4th ed. 2000) § 1.4, p. 9.) Thus, the authority cited by the court in *Pellerin* was recognized as weak. The *Pellerin* court identified *Robinson* as having dealt with a former version of Section 31720.5, but the

Pellerin court did not discuss the differences between the section as it existed in 1956 and the section as it existed in 2006 and those differences may be significant in classifying the presumption under Section 31720.5 as “conclusive” or “rebuttable.”

Section 31720.5 was enacted in 1951 (Stats 1951, ch. 1098, § 27) to in provide, in part, that if a safety member “develops heart trouble, it shall be presumed in any proceeding under this chapter, by the board and the court in the absence of evidence to the contrary, that such heart trouble is an injury or disease occurring in and arising out of his employment.” The section was amended several times over the years, but the limiting language “in the absence of evidence to the contrary” was retained through the section’s amendment in 1961. (Stats 1961, ch. 1384, § 1.)

Section 31720.5 was last amended in 1974 (Stats 1974, ch. 9, § 1) to, in part, reword the operative presumption provision and delete the limiting language “in the absence of evidence to the contrary.” No other language was added that would have provided that presumption was disputable or rebuttable. In 1974 and to this day, all of the presumptions of service-connection or work-relatedness in the CERL of 1937 and the Labor Code have provided that the presumptions are disputable or rebuttable with the exception of Section 31720.5.

Also in the 1974 amendment, the Legislature added the following “non-attribution” language imported from Labor Code presumption statutes: “Such heart trouble so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation.”

What was the Legislature’s purpose in the 1974 amendments to Section 31720.5?

By deleting language providing that the presumption would only be operative “in the absence of evidence to the contrary” and not replacing the deleted language with any other language that would provide that the presumption was disputable or rebuttable, the Legislature signaled an intent that the presumption was not rebuttable, but was conclusive.

What then are we to make of the Legislature’s adding the “non-attribution” language? The argument would be that if the Legislature intended Section 31720.5’s presumption to be conclusive, the non-attribution provision would be mere surplusage. Rules for statutory construction provide that interpretations of statutes that render words used by the Legislature to be mere surplusage are to be avoided when possible. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [82 Cal.Rptr.2d 610].) By specifically providing that heart trouble is not to be attributed to disease existing prior to the development or manifestation, the Legislature was by implication, signaling its intent that the presumption could be rebutted by evidence attributing the heart trouble to contemporaneous cause, thereby signaling an intent that the presumption itself was to be considered rebuttable.

On the other hand, it can be argued that the clear wording of Section 31720.5’s presumption shows no provision for its being rebutted. Where the language is clear, the

language controls, and there is nothing to interpret or construe. (*Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4th 1233, 1239 [8 Cal.Rptr.2d 298].) By adding additional language prohibiting the attribution of heart trouble to pre-existing disease, the Legislature was simply emphasizing its intent that the presumption be ironclad and conclusive. The purpose of the rules of statutory construction is to ascertain the Legislature's intent and the starting point in that construction is the language used by the Legislature. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].) If it intended the presumption to be rebuttable and the court in *Robinson* had already interpreted it be so, why would the Legislature have removed language clearly providing that it could be rebutted by evidence to the contrary or at least replace that language with other language providing that the presumption was disputable or rebuttable. Even established rules of statutory construction will not be applied if the result would thwart the Legislature's intent. That the non-attribution rule would be rendered surplusage by construing Section 31720.5 as a conclusive presumption would not justify ignoring the Legislature's intent that it clearly expressed when it removed the words "in the absence of evidence to the contrary" from the first sentence of Section 31720.5. "Superfluity does not vitiate." (Civ. Code, § 3537.)

End comment.

(5) Is the presumption of service-connection treated the same as evidence of service-connection?

A presumption is not "evidence." (Evid. Code, § 600.) By shifting the burden of proof to the respondent, the law does not impose on the respondent any greater burden to prove the nonexistence of the presumed fact than proof by a preponderance of the evidence. That burden is not made greater by the presumption itself. The evidence offered by the respondent is not "weighed" against the presumption. As stated in the commentary to Evidence Code section 600,

. . . The most that should be expected of a party in a civil case is that he prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is that it establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

The Court of Appeal in *Gillette v. Workers' Comp. Appeals Bd.* (1971), *supra*, 20 Cal.App.3d 312 [97 Cal.Rptr. 542] stated,

A presumption is not evidence and the presumption of [Labor Code] section 3212 is not conclusive. Mr. Witkin, in the second edition of his treatise on California Evidence in sections 213 to 222 at pages 193 through 202, provides an extensive discussion under the general heading "Nature and Effect of Rebuttable Presumptions." We attempt to summarize it. *Smellie v. Southern Pacific Co.*

(1931) 212 Cal. 540, 549 [299 P. 529], asserting the presumptions were evidence[,] pronounced a rule sharply criticized over the years. With the adoption of the Evidence Code section 600, subdivision (a), the *Smellie* rule has been expressly repudiated. (Witkin, Cal. Evidence (2d ed. 1966) § 217, p. 197.) That Evidence Code section defines a presumption as “an assumption [*sic*] of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.” While scholars have not agreed as to the quantum of weight to be accorded a presumption, e.g., whether it is dispelled when the adverse party produces any evidence contrary thereto or only by credible evidence (*id.* at § 216, pp. 196-197), in civil cases presumptions usually have been divided between those “affecting the burden of producing evidence” and those “affecting the “burden of proof.”” (*Id.* at §§ 219, 220, pp. 199, 200.) “A presumption affecting the burden of proof is a presumption established to *implement some public policy. ...*” (*Id.* at § 221, p. 200.) “The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates *the burden of proof as to the nonexistence of the presumed fact.*” (Italics ours [the *Gillette* court’s].) (Evidence Code section 606.) The comment to that section states, “Certain presumptions affecting the burden of proof may be overcome only by *clear and convincing proof.*” (The last italics are ours [the *Gillette* court’s].)

In summarizing these matters this court is not necessarily wedding the provisions of the Evidence Code to the Labor Code. (See Lab. Code, § 5708.¹) We are, however, applying the rationale of the law relating to presumptions to the rebuttable presumption created by Labor Code section 3212.

¹ Labor Code section 5708 states: “All hearings and investigations before the appeals board or a referee are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.”

We think that it must be conceded that if the presumption applies here it is one of public policy. Therefore, where facts giving rise to the presumption have been proven at the outset, the burden of proof negating the presumption falls upon the employer. That we at least intimated in *State Employees' Retirement System v. Workmen's Comp. App. Bd. (McNerney)* (1968) 267 Cal.App.2d 611 [73 Cal.Rptr. 172], *supra*, under the facts there existing. Under the circumstances here extant the referee expressly found facts which - to use the definition of a presumption - gave rise to “an assumption of fact that the law requires to be made.” The “fact or group of facts” which the referee found were that petitioner while fighting a fire suffered a development and a manifestation of the heart trouble during employment. Those then were “facts found” giving rise to “an assumption of fact the law requires to be made.” Stated in another way (as it was stated in the *State Employees' Retirement System* case) “the development or manifestation during employment [i.e., in the case before us in the September 1968 episode],

will activate the presumption” - by the express mandate of section 3212. There was no evidence produced by the carrier that the 1968 manifestation of petitioner's atherosclerotic heart disease did not occur. Petitioner had testified that it did; he had elaborated upon it in the history given to Dr. Brown. Dr. Brown both included an account of this in his report and in his testimony and stated its significance. It constituted the critical element in his ultimate opinion that this incident was the first manifestation of a previously atherosclerotic heart disease. Dr. McHenry, on the other hand, did not even mention the “manifestation.” The referee commented upon that omission in his opinion and upon the fact that the carrier had produced no evidence to dispute petitioner's statement that he had related his symptoms at the time of their occurrence to another member of the fire department.

True, the referee had stated in his findings “the decision and award herein did not rest on the presumption provided in Section 3212.” In a sense it did not. It probably did not have to be premised. (See 2 Witkin, Summary of Cal. Law (1960) Workmen's Compensation, § 75, pp. 1716-1717.) But the presumption existed under the facts stated and the carrier did not sustain its burden to rebut it. (*Bussa v. Workmen's Comp. App. Bd.* (1968) 259 Cal.App.2d 261, 267 [66 Cal.Rptr. 204] (hg. den.)) [Parenthetical comments are in the original.] (*Gillette v. Workers' Comp. Appeals Bd.*, *supra*, 20 Cal.App.3d, 319-321.)

b) Specific presumptions

(1) Presumption that heart trouble is service-connected

(a) Section 31720.5

Government Code section 31720.5 provides,

If a safety member, a fireman member, or a member in active law enforcement who has completed five years or more of service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200) or both or under this retirement system or under the State Employees' Retirement System or under a retirement system established under this chapter in another county, and develops heart trouble, such heart trouble so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of employment. Such heart trouble so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation.

As used in this section, "fireman member" includes a member engaged in active fire suppression who is not classified as a safety member.

As used in this section, "member in active law enforcement" includes a member engaged in active law enforcement who is not classified as a safety member.

(b) Prerequisites for the heart presumption

(i) Safety membership or specified occupation

The applicant must be, or have been, a safety member, fireman member or a member in active law enforcement.

Associations' comment

Various statutes favor public employees who are involved in public safety occupations with more generous pensions for those who are classified as safety employees than the pensions than are earned by employees who are classified as general or miscellaneous members, or with presumptions that certain types of injuries or illnesses are work-related. The terms of the statutes are not at all uniform. For example, the presumption for bloodborne infectious disease and methicillin-resistant staphylococcus aureus skin infection (Gov. Code, § 31720.7) favors safety members, firefighters, probation officers and members in active law enforcement. "Member in active law enforcement" for purposes of Section 31720.7 means members employed by a sheriff's office, by a police or fire department of a city, county, city and county, or district or another public or municipal corporation or political subdivision, or who are described in Chapter 4.5 of the Penal Code, or members who are employed by a county forestry or firefighting department or unit, except any of those members whose principle duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers, and includes a member engaged in active law enforcement who is not classified as a safety member. The presumption for illness due to exposure biochemical substance (Gov. Code, § 31720.9) favors peace officer members as defined in Penal Code sections 830.1 to 830.5 and firefighter members. Section 31720.9 does not expressly include those who are engaged in active law enforcement or active firefighting who are not safety members, but does exclude a member whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers. The presumption for heart trouble (Gov. Code, § 31720.5) favors a safety member, a fireman member or a member in active law enforcement and provides that "fireman member" and "member in active law enforcement" includes a member engaged in active fire suppression or active law enforcement, respectively, who is not a safety member. However, Section 31720.5 does not contain a clarifying provision that excludes those whose principle duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers. Labor Code section 3212, which favors certain public safety workers with presumptions of work-relatedness for hernia, pneumonia, and heart trouble under the workers' compensation law, contains the clarifying provision excluding office workers employed by some safety-related organizations, but not others.

The explanation for these differences is simple: it is the result of some public safety employee groups being more successful than others in securing additional benefits from

the Legislature. (See *Saal v. Workers' Comp. Appeals Bd., et al.* (1975) 50 Cal.App.3d 291, 296-300 [123 Cal.Rptr. 506].) What is not so simple is determining how an appellate court opinion affects a particular case. If an appellate court construes the meaning of a statute that benefits an employee involved in "active law enforcement," and the statute being interpreted does not contain a provision excluding those whose principle duties are clerical or whose duties otherwise do not clearly fall within the scope of active law enforcement, how does the court's opinion affect the interpretation of another statute benefiting an employee involved in active law enforcement, where the statute being interpreted does contain a provision excluding those whose duties do not clearly fall within the scope of active law enforcement?

Those making decisions about the construction of statutes that benefit public employees who are involved in public safety-related occupations must be aware that an appellate court opinion construing one statute may have limited value in the interpretation of another statute, although both statutes ostensibly provide additional benefits for a single occupational group, e.g., firefighters or those involved in active law enforcement. (See *Riverside Sheriffs' Association v. Board of Administration* (2010) 184 Cal.App.4th 1 [2010 Cal.App. Lexis 565] wherein the court, citing *Biggers v. Workers' Comp. Appeals Bd.* (1999) 69 Cal.App.4th 431, 437, 439 [81 Cal.Rptr.2d 628], explained that a one's status as a safety member under PERS was irrelevant to the determination of her eligibility as one engaged in active law enforcement for purposes of full salary under Labor Code section 4850.)

Many of the court opinions addressing the meaning of "active law enforcement" and "active fire suppression" that are cited below deal with the proper classification of members into safety status, versus general or miscellaneous membership. Statutes regulating safety classification are more restrictive than a statute that extends a presumption to one involved in active law enforcement who is not a safety member. This distinction should be kept in mind when a court opinion addressing a classification issue is applied in a case dealing with the injured worker's eligibility for a presumption. Compare *Charles v. Workers' Comp. Appeals Bd.* (1988) 202 Cal.App.3d 781 [248 Cal.Rptr. 805] and *Charles v. Board of Administration* (1991) 232 Cal.App.3d 1410 [284 Cal.Rptr. 106], discussed further below.

End comment.

- (a) "Active fire suppression"**
- (b) The second paragraph of Section 31720.5 states that "fireman member" for purposes of Section 31720.5 includes a member engaged in active fire suppression who is not a safety member. The term "active fire suppression" is not defined in the statutes or in case law. However, similar terms, such as "active firefighting" and "active fire prevention," have been construed by the courts.**

- (i) The member does not have to be involved in extinguishing flames and rescuing victims in order to be entitled to the presumption.**

In *Taylor v. Workers' Comp. Appeals Bd.* (1983) 148 Cal.App.3d 678 [196 Cal.Rptr. 182], a heavy equipment operator for the Department of Forestry who assisted at or delivered equipment to fire sites approximately 24 times in an 18 year career was held to be entitled to the heart presumption under Labor Code section 3212. With respect to the Department of Forestry (now Department of Forestry and Fire Protection), Section 3212, similar to Government Code section 31720.5, does not have an exclusion for those whose duties do not clearly fall within the scope of active firefighting, although it does extend to "active firefighting members" of the Department "whose duties require firefighting . . ." The court rejected the WCAB's rationale that the presumption is limited to firefighters who "pull hoses, climb ladders, rescue victims, chop through doors and roofs and engage in like activities." (*Id.*, 148 Cal.App.3d, 680.)

Additionally, the semantical nuances between "fire prevention" and "fire fighting" are so elusive as to defy pragmatic distinctions. (Cf. Webster's New Internat. Dict. (3d ed. 1961) p. 855.) One who cuts fire lines to contain fires is as actively engaged in firefighting as one who extinguishes flames to prevent the fire from spreading. (*Taylor*, p. 682.)

- (ii) The applicant does not have to establish that he or she was engaged in physically arduous duties in order to qualify as a "firefighter."**

The companion argument that we should limit the scope of the presumption to "the physically active work of suppressing fires, in addition to the administrative control of those duties" is similarly flawed. To the extent that the suggested definition focuses on the activity of extinguishing flames, it completely ignores the well-reasoned analysis in *McNerney* and the persuasive dicta stated in *Buescher* [*Buescher v. Workmen's Comp. App. Bd.*(1968) 265 Cal.App.2d 520 [71 Cal.Rptr. 405]]. Moreover, to the extent importance is placed on control of administrative duties, it injects a factor neither found decisive in *McNerney* [*State Emp. Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611 [73 Cal.Rptr. 172]] nor relevant under the statute. And clearly the suggested limitation to physically active work in suppressing fires would include the firefighting duties performed by Taylor. (*Taylor*, p. 683.)

- (iii) The applicant does not have to establish that he or she was frequently engaged in active fire suppression.**

. . . Arguably, the Legislature intended that the term "active firefighting members" include only those who are commonly or frequently involved in firefighting activities. But in light of our analysis, we cannot conclude with any reasonable degree of certainty that the term "active firefighting members of the Department

of Forestry whose duties require firefighting" was intended to exclude those whose job duties involve only occasional or infrequent assistance at fire sites. In such circumstances, we are guided by relevant precedent: "The legislative command is that workmen's compensation laws shall be liberally construed 'with the purpose of extending their benefits for the protection of persons injured in the course of their employment.' (Lab. Code, § 3202.) (*Taylor*, p. 683.)

See also *Buescher v. Workmen's Comp. Appeals Bd.* (1968), *supra*, 265 Cal.App.2d 520 [71 Cal.Rptr. 405]: Equipment maintenance foreman might have been in "active firefighting" since he was required to be on call and at the location of fires where he was engaged in long, tiring hours, exposed to smoke, fumes and similar hazards envisioned by the Legislature when it provided benefits for active firefighters; *Charles v. Workers' Comp. Appeals Bd.* (1988), *supra*, 202 Cal.App.3d 781 [248 Cal.Rptr. 805]: Civilian paramedic for the City of Santa Ana was entitled to full salary under Labor Code section 4850 as a member of a fire department whose duties involved active firefighting. It was established that city firefighters occasionally performed the paramedic duties that Charles performed as part of his normal duties. The Court of Appeal stated, "[W]e conclude those who perform some of the duties of firemen and who assume some of the physical and emotional risks firemen encounter come within the Legislature's "firefighter" rubric and are entitled to the benefits of the statute." (*Id.*, 202 Cal.App.3d, 783.). However, compare *Charles v. Board of Administration* (1991), *supra*, 232 Cal.App.3d 1410 [284 Cal.Rptr. 106]: The same paramedic who was the applicant in *Charles v. Workers' Comp. Appeals Bd.*, *supra*, was denied status as a *safety worker* because (a) he did not actually fight fires and rescue people from burning buildings, and (b), the city had not exercised its statutory option to accept civilian paramedics as safety workers.

In *State Employees' Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611 [73 Cal.Rptr. 172], cited above, a dispatcher for the Department of Forestry was held to be entitled to presumption under Labor Code section § 3212. The Court of Appeal stated,

The process of firefighting includes persons performing tactical and logistic functions as well as those who physically extinguish the flames. The preparation of fire plans and the dispatch of personnel and equipment are integral to the process. The statute does not confine itself to those who physically extinguish the flames; rather, it comprehends 'active firefighting members ... whose duties require firefighting.' The notion is a transient one, progressing back from the fire line to some undetermined point in the tactical-logistic activities. McNerney's functions were such that the WCAB found him in the covered category. [Citation.] A court cannot say, as a matter of law, that this finding is without substantial support in the evidence. (*McNerney*, p. 615.)

(c) "Active law enforcement"

In *Ames v. Board of Retirement* (1983) 147 Cal.App.3d 906 [195 Cal.Rptr. 453], a correctional officer for the County of Tulare petitioned for a court order compelling the

county to classify him as a safety member. Ames worked in a correctional facility operated by the Sheriff's Department. After his request for classification as a safety member was denied by the Board of Retirement and his petition for writ of mandate was denied, Ames appealed. The Court of Appeal reversed the trial court and directed it to issue the writ.

As we noted in *Neeley [v. Board of Retirement]* (1974) 36 Cal.App.3d 815, [111 Cal.Rptr. 841], the key to finding "active law enforcement" is (1) contact with prisoners on a regular basis; (2) exposure to hazards from prisoner conduct; and (3) risk of injury from the necessity of being able to cope with potential dangers inherent in the handling of prisoners. [Citation.]

It is undisputed that a correctional officer II has contact with prisoners on a daily basis. Clearly, he is also exposed to hazards and risk of injury from prisoner conduct. Not only must he supervise and transport minimum security prisoners, but he must do the same with the medium security prisoners as well. His primary duty is to maintain security. He is expected to use authority with prisoners and is expected to have sufficient strength to restrain and run down inmates and to "use physical force and take a life if necessary; ..." (*Ames*, p. 916.)

In *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567 [108 Cal.Rptr. 293] animal control officers for the City of San Bernardino, originally sworn as police officers and classified as safety members, were reclassified as miscellaneous members when the Board determined that the original classification was a mistake. The officers challenged the Board's action and the superior court issued a writ of mandate setting the reclassification aside. The Court of Appeal reversed the trial court. The court summarized the facts concerning the officer's occupations as follows:

When petitioners were employed, they were sworn in as police officers and were issued identification cards showing them to be police officers. They wore uniforms bearing the insignia of police officers, carried guns, and were required to be trained in the use of firearms. Their primary duties involved the enforcement of state and local laws and ordinances pertaining to the licensing, control and maintenance of animals. In performing those duties they sometimes used marked police vehicles equipped with police radios and were occasionally called upon to serve as back up officers at the scene of a crime. At the time of employment, each petitioner was informed he would be entitled to the same retirement benefits as policemen and each accepted employment on the strength of that representation. (*Crumpler*, p. 572.)

The court cited an opinion of the Attorney General, saying,

The phrase "active law enforcement service" appears in various sections of the Public Employees' Retirement Act (e.g., §§ 20017.5, 20021.5) as well as in the County Retirement Law of 1937 (e.g., §§ 31469.3, 31470.3, 31470.6, 31558) and the Labor Code (e.g., §§ 4850, 3212). In an opinion discussing the meaning of the term "active law enforcement" for the purpose of determining eligibility as a

“safety member” under the County Employees' Retirement Law of 1937 (§§ 31469.3, 31470.3), the Attorney General observed: “. . . . It is not possible to provide any more than a broad definition of what constitutes active law enforcement within the intendment of the County Employees' Retirement Law. We would say generally that it includes positions, the principal duties of which pertain to the active investigation and suppression of crime; the arrest and detention of criminals and the administrative control of such duties in the offices of the sheriff and district attorney. It is suggested that active law enforcement work means 'physically active' work such as the arrest and detention of criminals. While the main reference is to duties which expose officers and employees to physical risk in the law enforcement filed [*sic*] (see Gov. Code sec. 31901), we believe that the statute reaches persons who are supervising the performance of such duties in the sheriff's and district attorney's offices.” (22 Ops.Cal.Atty.Gen. [227 (1953)] at p. 229.) (*Crumpler*, p. 577.)

In upholding the Board's reclassification, the Court of Appeal said,

The provision of a special category of retirement membership for policemen relates to the hazardous nature of their occupation. (*Cf. Kimball v. County of Santa Clara* (1972), 24 Cal.App.3d 780, 785 [101 Cal.Rptr. 353].) [Editor's note: *Kimball* involved a claim by a sheriff's correctional officer for full salary under Labor Code section 4850.] The phrase “active law enforcement service” as used in section 20020 was no doubt intended to mean law enforcement services normally performed by policemen. As the Attorney General has suggested, it means the active enforcement and suppression of crimes and the arrest and detention of criminals. (22 Ops.Cal.Atty.Gen., *supra*, 227, 229.) In a loose sense animal control officers are engaged in active law enforcement but so are a myriad of other public employees such as building inspectors, health officers, welfare fraud investigators and the like but their duties can hardly be said to constitute “active law enforcement service” as contemplated by the statute. The crimes with which policemen normally deal are those against persons and property and not violations of police regulations. Petitioners' duties as animal control officers cannot be said to “clearly fall within the scope of active law enforcement service” as that term is used in section 20020. [Footnote omitted.] The board's determination that petitioners were improperly classified as local safety members must be upheld. (*Crumpler*, pp. 578-579.)

In *Neeley v. Board of Retirement* (1974), *supra*, 36 Cal.App.3d 815 [111 Cal.Rptr. 841]

two identification technicians for the Fresno County Sheriff's Department were denied their request to be classified as safety members under Government Code section 31469.3 because, although they were subject to the same physical examinations as safety members, were required to qualify with various weapons each year, were subject to emergency call, and had been called out in emergencies in the past, their infrequent emergency service did not constitute their principal duties as required by Section 31469.3 and they were excepted from “active law enforcement” by Government Code section 31470.3 which provides that those whose principal duties do not fall within the

scope of active law enforcement are ineligible for safety status, even though they might occasionally be subject to call and occasionally do perform duties that are within the scope of active law enforcement.

In *Boxx v. Board of Administration* (1980) 114 Cal.App.3d 79 [170 Cal.Rptr. 538], the Court of Appeal affirmed the judgment of the trial court and held that a retired housing authority patrolman was originally misclassified as a miscellaneous member, but was entitled to classification as a local safety member. As a miscellaneous member with less than five years of service, he would not have been entitled to a disability retirement for incapacitating injuries he had sustained in an on-the-job traffic accident. The Court of Appeal applied the standards discussed in *Crumpler*, saying,

Respondent was uniformed, armed and designated as a peace officer. Respondent was also required to make arrests for criminal activity occurring in and around HACLA property. In May of 1975 he was sworn in as a "peace officer."

According to Housing Authority of the City of Los Angeles Manual of Policies and Operations for HACLA Patrol Officers, the primary duties of a patrolman are "... the preservation of peace within the housing developments, the protection of life and property therein against attacks by criminals or injury by the careless and inadvertent offender." The manual goes on to define probable cause for arrest and to cite numerous to cite numerous penal statutes which the patrolmen are responsible for enforcing.

The primary duty of respondent was the "active investigation and suppression of crime" and "the arrest and detention of criminals." (22 Ops.Cal.Atty.Gen. [227 (1953)], *supra*, at p. 229.) [Footnote omitted] Even appellant PERS refers to respondent's duties as "police-like." (*Boxx*, pp. 86-87.)

In *Schaeffer v. California Public Employees' Retirement System* (1988) 202 Cal.App.3d 609 [248 Cal.Rptr. 647], a Placer County correctional officer petitioned for a writ to compel the Board of Administration to classify him as a local safety member. The trial court denied the petition and the Court of Appeal affirmed.

In [Government Code] section 20021.5 the Legislature has excluded from the category of county peace officer, and hence local safety member, those employees "whose functions do not clearly come within the scope of active law enforcement service even when such an employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement service" In section 20021.9 [Repealed 1995. Now § 20439] the Legislature expressly made it optional with a county whether to classify as county peace officers custodial employees "having as their primary duty and responsibility the supervision and custody of persons committed to such jail or facility" Placer County did not elect to treat its correctional officers as county peace officers. Accordingly, in order for appellant to establish his entitlement to safety member status he must establish that his duties clearly came within the

scope of active law enforcement and this burden cannot be met by evidence showing that his primary duty and responsibility was the supervision and custody of persons committed to jail or a correctional facility.

Under this standard it is clear that appellant cannot prevail. His entire case was built on the theory that a person whose primary duty and responsibility is the supervision and custody of persons committed to jail or a correctional facility ought to qualify for local safety member status. The Legislature has decided otherwise. While it is clear that appellant disagrees with the Legislature's decision to make such status optional for custodial employees, and with his county's election not to give its custodial employees that status, in the absence of constitutional infirmity, and appellant suggests none, we are bound by the clear statutory language. Appellant is not entitled to local safety member status because his employer did not elect to treat him as such. (*Schaeffer*, pp. 612-613.)

. . . .

Appellant's evidence, even viewed in a light most favorable to him, simply established that he was a person whose primary duties and responsibilities were the supervision and custody of persons committed to jail or local correctional facilities. As such it was optional with the county whether to treat him as a local safety member under PERS. The county elected otherwise. As a matter of law appellant is not entitled to the status of local safety member. (*Schaeffer*, p. 615.)

In *Glover v. Board of Retirement* (1989), *supra*, 214 Cal.App.3d 1327 [263 Cal.Rptr. 224], the head cook in a county jail facility suffered a permanently incapacitating heart attack. He asserted that he was entitled to the benefit of the presumption of service-connection under Government Code section 31720.5 on the basis that he had been in "active law enforcement." The Court of Appeal affirmed the trial court's judgment upholding the Board of Retirement's refusal to extend the presumption to Glover, saying,

The common thread running through the foregoing cases [*Ames*, *Kimball* and *Neeley*] is the concept that the classification of a "safety member" engaged in active law enforcement is largely controlled by the extent to which the category exposes its holders to potentially hazardous activity. In all three cases the court considered whether the applicant's duties exposed him to potential dangers inherent in the arrest, detention or handling of prisoners, in maintaining institutional security or in transportation of prisoners, all part of active law enforcement. In *Ames* and *Kimball* they did, for their primary duties were to maintain security; in *Neeley*, they did not, and we conclude the same as to Glover. (*Glover*, p. 1333.)

. . .

We can no more equate Glover's supervision of the food preparation by the inmate staff and occasional breaking up of a fight with the "handling" of prisoners associated with active law enforcement, as urged by appellant and which was the primary duty of both Ames and Kimball, than we can hold that Glover's daily contact as head cook with inmates in a work relationship and "just sometime" breaking up an occasional fight, made him a "member engaged in active law enforcement." Glover did not "handle" the inmates as prisoners in the sense that he was involved in their arrest, detention, supervision, discipline, search or transportation or maintaining security, as in *Ames* and *Kimball*. He was strictly a cook and his contact with the inmates was solely on a work basis.

We reject appellant's contention that Glover was in the category that the heart disability he suffered must be presumed to be service-connected and he needed to make no further showing that his disability was service-connected, and thus was entitled to a service-connected disability retirement allowance. (*Glover*, pp. 1335-1336.)

In another classification dispute, *Riverside Sheriffs' Association v. Board of Administration* (2010), *supra*, 184 Cal.App.4th 1 [2010 Cal.App. Lexis 565] the sheriffs' association, as the representative of deputy coroners, sought to overturn a Board decision denying a request to reclassify deputy coroners from miscellaneous members to local safety members. The Court of Appeal affirmed the judgment of the trial court denying the association's petition for writ of mandate. The Court of Appeal reiterated a detailed summary of the deputy coroner's duties which is too lengthy to quote here, but included the following:

Applicants for deputy coroner must be of good moral character and meet the physical, mental and emotional standards for peace officers. ([Gov. Code,] § 1031.) To be appointed, an applicant must have completed a 64-hour arrest and firearms training course, as well as an 80-hour death investigation course. In contrast, county deputy sheriffs must undergo a 664-hour training course prescribed by the Commission on Peace Officer Standards and Training.

A deputy coroner carries a badge and wears a uniform that is indistinguishable from those of deputy sheriffs. While on duty, he or she is armed with a handgun, baton, pepper spray and safety vest. However, deputy coroners have only limited peace officer powers. (Pen. Code, § 830.35.) Unlike deputy sheriffs, their power to make arrests does not extend to any public offense committed within the state. (*Riverside Sheriff's Assoc.*, p. 6.)

With respect to exposure to hazardous activity, the court related, in part,

Despite their dry job description and infrequent need to investigate crimes and make arrests, deputy coroners are occasionally exposed to hazardous and emotionally charged situations. . . .

¶. . . .

There are certain “implied expectations” placed on deputy coroners. They are expected to back up deputy sheriffs and other sworn peace officers when requested, help clear residences and other structures, engage in crowd control, search suspects if another same-gender officer is unavailable, and make arrests while on duty whenever there is danger to property or persons. Although these expectations do not appear in any written document, meeting them is part of the job. (*Riverside Sheriff’s Assoc.*, pp. 7-8.)

In reaching its conclusion that the deputy coroners were not entitled to safety status, the court stated

These cases all support the Board’s ruling that the deputy coroners do not qualify for safety member status because their principal duties do not clearly fall within the scope of active law enforcement. While the evidence showed that deputy coroners are sometimes exposed to hazardous conditions, some of which are perhaps even greater than those in the cases cited above, their primary function is to investigate causes of death in unusual (both criminal and noncriminal) cases. Their normal duties do not include chasing or apprehending criminals or otherwise engaging in active crime suppression, even though they may, in unusual situations, provide logistical support to those law enforcement officers who are “on the firing line.” Our conclusion is underscored by the fact that the statute itself expressly excludes sheriff employees who are only “occasionally” called upon to engage in active law enforcement service. ([Gov. Code,] § 20436 [subd.] (a).) Given the strong deference we must give to the Board’s construction of its own statutes, we cannot say its determination excluding deputy coroners from safety member status was clearly erroneous. (*Riverside Sheriff’s Assoc.*, p. 11.)

Associations’ comment

The CERL of 1937’s Government Code section 31470.3, like the PERL’s Section 20436, subdivision (a), cited by the court in *Riverside Sheriffs’ Association*, provides that “those whose principal duties clearly do not clearly fall within the scope of active law enforcement, even though such a person is subject to occasional call, or is occasionally called upon to perform duties within the scope of active law enforcement[,] are ineligible” for safety status.

End comment.

(ii) Length of service under specified pension system or systems.

(a) The applicant must have completed five years of service under one or more of the following kinds of pension systems:

County Peace Officers’ Retirement Law (Gov. Code, § 31900, et seq.) or

County Fire Service Retirement Law (Gov. Code, § 32200, et seq.) or both,

"This retirement system" (County Employees Retirement Law of 1937, Gov. Code, § 31450, et seq.)

Public Employees Retirement System (Public Employees Retirement Law, Gov. Code, § 20000, et seq.)

Under a retirement system established under "this chapter," the County Employees Retirement System of 1937, in another county.

(b) The "five years or more of service" does not have to be entirely with the county from which the member is retiring.

Service for earlier employment with a public body where the employee was a member of the Public Employees' Retirement System is to be counted in determining whether the presumption [under Government Code section 31720.5] is applicable, regardless of whether membership in the Public Employees' Retirement System is maintained. (53 Ops.Cal.Atty.Gen. 175 (1970), at 176.)

(iii) Is there "heart trouble?"

A myocardial infarct, or "heart attack," is not the only kind of heart trouble that gives rise to the presumption. (*Knowles v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 1027, 1033 [89 Cal.Rptr. 356].)

Arteriosclerosis of the coronary arteries which is disabling is heart trouble and gives rise to the presumption. (*Ibid.*)

The question is: Has the heart been placed in a troubled condition? (*Muznik v. Workmen's Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622 [124 Cal.Rptr. 407].)

. . . . As defined in Webster's Dictionary, the term "trouble" when used as a noun covers a wide range of meanings, including distress, affliction, anxiety, annoyance, pain, labor, or exertion. The intent of the authors of the amendment adding the phrase "heart trouble" to section 3212 was no doubt to have the meaning of that phrase encompass any affliction to, or additional exertion of, the heart caused directly by that organ or the system to which it belongs, or to it through interaction with other afflicted areas of the body, which, though not envisioned in 1939, might be produced by the stress and strain of the particular jobs covered by the section.⁵ (See *Stephens v. Workmen's Comp. Appeals Bd.* [(1971)], *supra*, 20 Cal.App.3d 461, 465-467 [97 Cal.Rptr. 713].)

⁵ We do not say that hypertension, in every instance, constitutes "heart trouble;" nor do we conclude that disorders in other areas of the body that do not place the heart in a "troubled" condition, qualify as "heart trouble." (*Muznik v. Workmen's Comp. Appeals Bd.*, *supra*, 51 Cal.App.3d, 635.)

Associations' comment

We make reference to editorial summaries of petitions for writs of review filed in workers' compensation cases. The citation of editorial reports of denied petitions for writs of review in the California Compensation Cases does not violate California Rules of Court, rule 977, because the editorial reports are not opinions of the Court of Appeal that are certified for nonpublication. In *County of San Joaquin v. Workers' Comp. Appeals Bd.* (2004) 117 Cal.App.4th 1180 [12 Cal.Rptr.3d 406], a party cited the Court of Appeal to an opinion of the Court involving Vons Companies, Inc., that was not certified for publication, but which was printed in the California Compensation Cases. The court explained the difference between the editorial summaries of cases in which petitions for writs of review were denied and unpublished opinions of the Court of Appeal, stating,

Decisions in California Compensation Cases are commonly cited in compensation cases, where that reporter is considered "a basic research tool." (2 Cal. Workers' Compensation Practice [(CEB, 4th ed 2002)], *supra*, § 22.48, p. 1368; see Jessen, Cal. Style Manual (4th ed. 2000) § 1.22[B], p. 23.) Many of these decisions summarize the Board's holding, stating that a writ to the Court of Appeal was denied, and may be cited to show the administrative interpretation of the Board. (*Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 827, fn. 7, [45 Cal.Rptr.2d 197]; see 2 Cal. Workers' Compensation Practice, *supra*, § 21.32, p. 1292.) However, some unpublished Court of Appeal cases are also published in Cal.Comp.Cases. These cannot reflect an administrative interpretation because they are not Board decisions. We agree that such decisions, like other unpublished appellate decisions, are not citable. (Cal. Rules of Court, rule 977; see 2 Cal. Workers' Comp. Practice, *supra*, § 21.32, p. 1292.) We will not discuss the *Vons* case. *County of San Joaquin*, pp. 1186-1187.)

End comment.

Under the Labor Code's heart presumption provisions, any heart trouble that develops or manifests itself during service may give rise to the presumption, even heart trouble that is not the result of hypertensive cardiovascular disease or coronary arteriosclerosis, or any other stress-related heart disease. (E.g. cardiomyopathy, rheumatic heart disease, endocarditis, cardiomegaly. See *Muznik v. Workmen's Comp. Appeals Bd.*, *supra*, 51 Cal.App.3d, 635.) Government Code section 31720.5 does not expressly require that the development or manifestation occur during service. See further discussion of this point below at Section II, B, 6, b) (1) (c), [1].

If hypertension has not placed the heart in a troubled condition, the presumption does not arise. *Hamilton v. Workers' Comp. Appeals Bd.* (1979) 93 Cal.App.3d 587, 591 [155 Cal.Rptr. 721] instructs,

. . . . Nor may "hypertension" reasonably be equated with "heart trouble" because it sometimes, but not necessarily, is a precursor of the latter ailment. Medically as shown by the evidence they are at least, ordinarily distinct pathological conditions. Legal authority agrees. (See *Hart v. Workers' Comp. Appeals Bd.*,

(1978) 82 Cal.App.3d 619, 625 [147 Cal.Rptr. 384]; *Permanente Medical Group v. Workers' Comp. Appeals Bd.*, (1977) 69 Cal.App.3d 770, 778-779 [138 Cal.Rptr. 373]; *Muznik v. Workers' Comp. Appeals Bd.*, [(1975)] 51 Cal.App.3d 622, 635, fn. 5 [124 Cal.Rptr. 407].)

Coronary arteriosclerosis that is asymptomatic and non-disabling is not sufficient to give rise to the presumption. (*Permanente Medical Group, Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Coyne)* (1977) 69 Cal.App.3d 770, 778 [138 Cal.Rptr. 373], interpreting *Stephens v. Workmen's Comp. Appeals Bd.* (1971), *supra*, 20 Cal.App.3d 461 [97 Cal.Rptr. 713].)

Arteriosclerosis that appears in a part of the body removed from the heart (e.g. cerebrovascular system) does not give rise to the presumption.

The simple facts of this case are that the employee's disability manifested itself from the process of the disease in a part of the body removed from the heart, and all of the medical evidence showed that his stroke was not caused by or occasioned by the stress of his employment. Even if we were to hold, contrary to *Muznik*, that the presumption was to apply to any disability occasioned by a failure anywhere in the entire cardiovascular system, the findings of the judge, as approved by the appeals board, demonstrate that the presumption was rebutted. *Stephens* requires no more.

We are also mindful of the liberal mandate of section 3202 of the Labor Code. We recognize that the Legislature in its wisdom can create disputable presumptions, subject to medical evidence to the contrary. Nevertheless, liberal construction should not require the public, employers or consumers to shoulder the risks of hereditary vascular weaknesses or structural infirmities which are neither occasioned nor aggravated by the stress of employment. (*Permanente Medical Group, Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.*, *supra*, 69 Cal.App.3d, 779.)

Peripheral arteriosclerosis in the lower extremities, in a case in which there is also no heart trouble, has been held not to give rise to the presumption. (*Quigg v. Workers' Comp. Appeals Bd.*(1982) (Writ Denied) 47 Cal.Comp.Cases 291.)

Arteriosclerotic disease of the peripheral vasculature and abdominal aorta is not presumptively work-related, even if there is also presumptively work-related heart trouble present in the form of left ventricular hypertrophy, where there is no causal connection between the left ventricular hypertrophy and the arteriosclerotic disease of the peripheral vasculature and abdominal aorta. (*Bennett v. Workers' Comp. Appeals Bd.* (1986) (Writ Denied) 51 Cal.Comp.Cases 139.)

Calcific congenital bicuspid aortic stenosis is heart trouble and gives rise to the presumption. (*City of Berkeley v. Workers' Comp. Appeals Bd. (Pomeroy)* (1982) (Writ Denied) 47 Cal.Comp.Cases 801.)

Idiopathic hypertrophic subaortic stenosis is heart trouble that activates the presumption. (*Zegalia v. Workers' Comp. Appeals Bd.* (1981) (Writ Denied) 46 Cal.Comp.Cases 132.) Zegalia was a correctional officer employed by the State Department of Corrections. The heart trouble presumption favoring officers and employees in the California Department of Corrections having custodial duties, Labor Code section 3212.2, does not have a non-attribution provision. Therefore, the presumption may be rebutted by evidence attributing the heart trouble to pre-existing disease. In *Zegalia* the presumption was rebutted by evidence that the hypertrophic subaortic stenosis was congenital and the employment could not aggravate or accelerate it. The rebuttal evidence that defeated Zegalia's claim is the kind of rebuttal evidence that is proscribed in a case covered by the non-attribution provision in Government Code section 31720.5. Labor Code section 3212.10, which extends presumptions that heart trouble and other ailments are work-related to peace officers of the Department of Corrections who have custodial or supervisory duties of inmates or parolees, among others, also does not contain a non-attribution provision. (Cf., *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Alexander)* (2008) 166 Cal.App.4th 911 [82 Cal.Rptr.3d 920].)

Aortic valve disease is heart trouble and activates the presumption. In *Miller v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 350 [266 Cal.Rptr. 908], an agreed medical examiner opined that the aortic valve disease was not work-related and new and further disability following valve replacement surgery was not related to an occupational injury. A WCAB decision based on the agreed medical examiner's opinion was annulled because there was no evidence that attributed the aortic valve disease to a contemporaneous, non-work-related event.

Mitral valve disease manifesting while the employee is in service raises the presumption. (*State Emp. Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611 [73 Cal.Rptr. 172]; *Parish v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 92 [258 Cal.Rptr. 287].) Note: Government Code section 31720.5 does not expressly require that the development or manifestation occur during service. See further discussion of this point below at Section II, B, 6, b) (1) (c), [1].

Congenital aortic valve insufficiency and coarctation of the aorta causing left ventricular hypertrophy, although first manifest at age 12, gives rise to the presumption where the disease further developed after the employee began work as a police officer. (*City of Concord v. Workers' Comp. Appeals Bd. (Pearsall)* (1986) (Writ Denied) 51 Cal.Comp.Cases 5.)

There is a basis for the argument that the Legislature meant the presumption to arise only in cases of heart diseases affected by stress and/or strain. In *Muznik v. Workmen's Comp. Appeals Bd.*, *supra*, 51 Cal.App.3d, at 635, the Court of Appeal stated,

Given these cases and the mandate that section 3212 is to be liberally construed and that statutory language is to be given its commonly understood meaning, the

phrase "heart trouble" assumes a rather expansive meaning. This result is further evidenced by the Legislature's decision not to utilize a medical term or to list or require any specific malady for the presumption of section 3212 to become operative, but rather, to employ a lay term which is not necessarily related to physical deterioration or "disease" at all. As defined in Webster's Dictionary, the term "trouble" when used as a noun covers a wide range of meanings, including distress, affliction, anxiety, annoyance, pain, labor, or exertion. The intent of the authors of the amendment adding the phrase "heart trouble" to section 3212 was no doubt to have the meaning of that phrase encompass any affliction to, or additional exertion of, the heart caused directly by that organ or the system to which it belongs, or to it through interaction with other afflicted areas of the body, which, though not envisioned in 1939, might be produced by the stress and strain of the particular jobs covered by the section. [Footnote omitted]

See the discussion of the history and purpose of the heart presumptions statutes in *City and County of San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103, 109-112, [148 Cal.Rptr. 626, 583 P.2d 151]. The purpose of the heart presumption laws was, in part, to recognize a link between stress and heart trouble. There is no court opinion that specifically restricts the presumption to certain kinds of heart disease. As it stands now, all kinds of heart trouble give rise to the presumption, though the presumptions arising from some kinds of heart trouble that are not associated with emotional stress or physical strain are probably more susceptible to being rebutted than others.

A cardiac neurosis without actual organic heart trouble may be work-related, but not on the basis of the presumption. The presumption is not that heart trouble is present, but that once it is found, the heart trouble is work-related. (*Baker v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal.App.3d 852, 859 [96 Cal.Rptr. 279].)

(c) Did the disease develop or manifest itself as required?

- (i) Section 31720.5 does not expressly require that the disease develop or manifest while the member is in service. Is an "in service" requirement understood or implied?**

Associations' comment

There is no appellate court opinion in a CERL of 1937 case holding that heart trouble must develop or manifest "in service" in order for the presumption to arise. An in-service requirement is not express. The question is this: Does the absence of an express "in service" requirement create an ambiguity in the statute that warrants going beyond the plain meaning of the words the Legislature used in Government Code section 31720.5 and the use of extrinsic aides to determine the legislative intent?

A review of Section 31720.5's legislative history may provide an easy answer to the question, but obtaining legislative history materials is beyond this writer's resources.

Resort to extrinsic aides to determining the legislative intent will only be made if there is ambiguity in the statute.

'To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent.' [Citation.] If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. [Citation.] 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [Citation.] (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047 [80 Cal.Rptr.2d 828].)

....

"Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning. [Citation.]" (*Id.*, at p. 1055.)

The purpose of rules of statutory construction is to determine the Legislature's intent.

The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*People v. Trevino* (2001) 26 Cal.4th 237, 240 [109 Cal.Rptr.2d 567, 27 P.3d 283]; *People v. Gardeley* (1996) 14 Cal.4th 605, 621 [59 Cal.Rptr.2d 356, 927 P.2d 713].) To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. (*Trevino*, at p. 241; *Trope v. Katz* (1995) 11 Cal.4th 274, 280 [45 Cal.Rptr.2d 241, 902 P.2d 259].) When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 [38 Cal.Rptr.2d 650, 889 P.2d 970]; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008 [239 Cal.Rptr. 656, 741 P.2d 154].) (*Nolan v. City of Anaheim* (1994) 33 Cal.4th 335, at 340-341 [14 Cal.Rptr.3d 857, 92 P.3d 350].)

The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] Moreover, "every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." [Citation.] If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)

That there is ambiguity in Section 31720.5, and an "in service" requirement is implied, is supported by several factors:

- The words "develop or manifest" in Section 31720.5 are meaningless unless they refer to some period of time.
- If the "in service" requirement is not implied, the words "develop or manifest" could be removed from Section 31720.5 and the meaning of the statute would not change.

Rules of statutory construction guide the courts to interpret a statute so as to give meaning to all the words of a statute and not render any words meaningless. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [82 Cal.Rptr.2d 610].)

Because not implying an in-service requirement would render the words "develop or manifest" meaningless, thus making the statute and the Legislature's intent unclear, resort may be made to the legislative history and other aides of statutory construction to the end that the Legislature's intent can be effectuated.

- With the exception of the presumption favoring certain peace officers who were required to wear a "duty belt" that lower back impairments are work-related (Lab. Code, § 3213.2), a presumption that has no cousin under the CERL of 1937, the parallel provisions of the Labor Code dealing with presumptions all require that heart trouble be shown to have manifested or developed *in service*. (Lab. Code, §§ 3212-3213.)
- "Similar phrases or sentences used in statutes *in pari materia* will be given the same interpretation, including similar words used in different code sections or provisions standing *in pari materia*. (58 Cal.Jur.3d (2011) Statutes, § 123. Construing provisions governing same subject; statutes in pari materia.) The heart presumptions in the CERL of 1937 and the workers' compensation law appear to be *in pari materia*, calling for consistent results when the two statutory schemes are applied to the same facts.

The term "*in pari materia*" means "[o]n the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." (Black's Law Dictionary, Eighth Edition.)

It is a basic rule of statutory interpretation that, when a statute is but one in a series of like statutes and a particular phrase or expression appears in each of them [,] those other statutes may be looked to as a guide to the proper construction or interpretation of the instant statute. (*Frediani v. Ota* (1963) 215 Cal.App.2d 127, 133 [29 Cal.Rptr. 912].)

- Assuming that it is a rebuttable presumption as found by the court in *Pellerin* and is not a conclusive presumption, Government Code section 31720.5 shifts the

burden of proof on the issue of service connection from the public safety worker, who would otherwise have to prove that his or her heart trouble arose out of and in the course of employment and that the employment contributed substantially to the disability (Gov. Code, § 31720), to the employer to prove that the heart trouble did not arise out of and occur in the course of employment.

The function of section 31720.5 is to provide a means of establishing the causation element of section 31720. (*Pellerin v. Kern County Employees Retirement Assoc.*, *supra*, 145 Cal.App.4th, 1107.)

It is not reasonable that the Legislature would have intended that Section 31720.5 would be a substitute means of establishing that employment was a cause of heart trouble where the heart trouble neither developed nor manifested while the member was in service. If the employment was a cause at all, even presumptively, factors while the member was in service would have at least been contemporaneous with the development of the heart trouble, although the member might not be able to establish a cause and effect relationship. It is not reasonable that the Legislature would have intended that heart trouble that developed or manifested solely before or after service would be a substitute for proof that the heart trouble arose out of and in the course of employment.

Rules of statutory construction will not be mechanically applied if they would achieve a result the Legislature did not intend. (See *Delaney v. Baker* (1999) 20 Cal.4th 23, 41 [82 Cal.Rptr.2d 610].) There appears to be no legislative purpose that would mitigate against implying an "in service" requirement merely because the Legislature used the words "develop or manifest" without the term "in service." There is no reason to conclude that the Legislature intended that the heart presumption in the retirement context would operate differently in this regard from the similar workers' compensation presumption laws.

The Supreme Court in *Pearl v. Workers' Comp. Appeals Bd.*, *supra*, 26 Cal.4th, at 190, stated that, although the Public Employees Retirement Law and the workers' compensation law are aimed at the same goals, they are distinct systems. "It should not be assumed that the provisions of one apply to the other absent a clear indication from the Legislature." The Court in *Pearl* addressed the issue of whether amendments to the Labor Code that made it more difficult for an employee to secure workers' compensation benefits for psychiatric injuries were applicable to claims for disability retirement under the Public Employees Retirement Law. The Supreme Court held that the workers' compensation reforms were not applicable to disability retirement claims governed by the Public Employees Retirement Law. Rather than the reforms making the two systems of disability compensation, i.e., workers' compensation and public employee disability retirement, *in pari materia*, the reforms did just the opposite. What had been *in pari materia* was no longer.

. . . . Before Labor Code section 3208.3's enactment in 1989, courts reasonably gave a similar construction to the similarly worded standards for industrial injury under Labor Code section 3600, subdivision (a), and Government Code section

20046. (See *United Public Employees v. City of Oakland* (1994) 26 Cal.App.4th 729, 733 [31 Cal.Rptr.2d 610] [statutes on the same subject of employee benefits and using the same statutory definition must be read together].) However, once the Legislature enacted Labor Code section 3208.3, it thereby eliminated what had been parallel language governing compensability of industrial injuries under the workers' compensation scheme and the Public Employees' Retirement Law. The enactment therefore undermines the rationale for similarly construing whether a psychiatric injury is industrial under the two statutory schemes.

As discussed, Labor Code section 3208.3 does not expressly provide that it apply to retirement disability claims under the Public Employees' Retirement Law. On the contrary, it refers to compensability under "this division," i.e., division 4 of the workers' compensation law. Although both the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. We may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]; cf. *People v. Goodloe* (1995) 37 Cal.App.4th 485, 491 [44 Cal.Rptr.2d 15] ["When a particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion ... is that a different legislative intent existed"].) (*Pearl*, pp. 196-197.

This is an area of controversy, but if it is a given that "in service" development or manifestation is a prerequisite to application of the presumption of service-connection, heart trouble that neither develops nor manifests during service does not give rise to the presumption under rules developed in workers' compensation cases.

For example, in *Hamilton v. Workers' Comp. Appeals Bd.* (1979) 93 Cal.App.3d 587, [155 Cal.Rptr. 721] a deputy sheriff had labile hypertension while in service but he had no heart problem. After retirement he drank excessively and developed alcoholic cardiomyopathy. The heart trouble neither developed nor manifested during service and the presumption was, therefore, not applicable. The Court of Appeal affirmed the WCAB's decision denying the application for worker's compensation benefits.

Hamilton is consistent with dicta in *State Employee's Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611, [73 Cal.Rptr. 172] to the effect that the presumption is not activated if both development and manifestation occur prior to employment. The Court of Appeal in the *McNerney* case stated,

As noted earlier, such statutory provisions [presumptions] are to be liberally construed in the claimant's favor. Section 3212 is designed to favor a class of public employees by restricting preemployment heart disease as a factor preventing compensations for in-service "heart trouble." [Citation.] This objective is frustrated by postulating in-service manifestation as a condition activating the presumption and preemployment development as a condition barring it. More in keeping with the statutory objective is the interpretation that *either* event,

development or manifestation during employment, will activate the presumption; that only where *both* events, development and manifestation, precede the employment, is the presumption unavailable.

The same phraseology characterizes the 1959 amendment and the same interpretation should prevail. Under this interpretation, either in-service development or in-service manifestation will activate the prohibition against attribution to preexisting disease.³ Such an interpretation favors the employee who comes to the job with no preemployment history of cardiovascular ailment. It is consistent with the general concept of workman's compensation law that, as to preexisting conditions, the employer takes the applicant as he finds him. (*Buescher v. Workmen's Comp. App. Bd.*, *supra*, (1968) 265 Cal.App.2d 520 at p. 533 [71 Cal.Rptr. 405].) It does not however, prevent an employer from resorting to evidence of heart disease recognized as such (i.e., developed and manifested) preceding the employment.

³The disputable presumption and the 1959 amendment prohibiting its rebuttal by evidence of preexisting disease are not coextensive, however. The employer may properly attempt to rebut the presumption by evidence other than proof of preexisting disease. (*Bussa v. Workmen's Comp. App. Bd.*, *supra*, [(1968)] 259 Cal.App.2d [261] at p. 265 [66 Cal.Rptr. 204.]) (Italics in original. *State Employee's Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)*, *supra*, 267 Cal.App.2d, 617-618.

In *Anderson v. Workers' Comp. Appeals Bd.* (1980) (Writ Denied) 45 Cal.Comp.Cases 481, a police officer had heart trouble in the form of a congenital heart block. One physician stated that it developed during the employee's employment. Another physician reviewed military records that showed that the heart block was diagnosed before the employee became a police officer.

In annulling the judge's award, the Workers' Compensation Appeals Board explained that the first physician's opinion that the heart trouble developed during the employee's employment was not substantial evidence because the physician did not demonstrate that he reviewed the military medical records. The Appeals Board found that the heart block developed and manifested before the applicant's employment as a police officer. Therefore, the presumption did not arise.

Under the Labor Code presumptions, if either development or manifestation occurs *during* service, the presumption arises irrespective of what caused the development or manifestation.

In *City of Buena Park and R. L. Kautz and Co. v. Workers' Comp. Appeals Bd. (Manchester)* (1982) (Writ Denied) 47 Cal.Comp.Cases 1153A, a fireman had a congenital heart condition which was asymptomatic until after he was hired by the City. An Independent Medical Examiner opined that the disease was not caused, accelerated, or aggravated by employment and "may" have "manifested" itself irrespective of employment. The WCAB apparently took the physician's use of the word "may" to mean that the heart trouble may not have manifested without environmental factors of employment. The California Compensation Cases report of the case implies that the presumption was activated and was not rebutted.

Note that under the Labor Code's heart presumption provisions, the cause of the manifestation of heart trouble does not have to be proven to invoke the presumption that the heart trouble is work-related. The manifestation itself, while the member is in service, gives rise to the presumption. Then the question is this: Is there convincing substantial evidence, evidence that is not inconsistent with the intent of the Legislature when it created the presumption and the non-attribution rule (see discussion in the next subsection), that shows that the heart trouble is not work-related? (See *City of Monterey v. Workers' Comp. Appeals Bd. (Greathouse)* (1990) (Writ Denied) 55 Cal.Comp.Cases 92A: Pneumonia resulting from treatment for nonindustrial lung cancer was found presumptively work-related under the workers' compensation law's presumption that pneumonia suffered by those in certain public safety occupations is work-related. The presumption having been triggered, the WCAB turned to the defendant's evidence and found that the presumption had not been rebutted.)

If the first manifestation of disease was prior to employment, but there was further development after hire, the presumption arises. (See *City of Concord v. Workers' Comp. Appeals Bd. (Pearsall)* (1986) (Writ Denied) 51 Cal.Comp.Cases 5.)

End comment.

(d) What kind of evidence rebuts the presumption of service-connection?

Associations' comment

Government Code section 31720.5 is the only presumption of service-connection in the CERL of 1937 or the Labor Code that does not include an express provision that the presumption is rebuttable or disputable. The following discussion is based on an acceptance of the conclusion of the court in *In Pellerin v. Kern County Employees' Retirement Association* (2006), *supra*, 145 Cal.App.4th 1099, at 1106 [52 Cal.Rptr.3d 201] that the presumption of service-connection for heart trouble under Government Code section 31720.5 is a rebuttable presumption. See the discussion above at .

(i) Non-attribution provision: proof that the heart trouble is related to pre-existing disease is eliminated as a basis for rebutting the presumption by the non-attribution provision in the second sentence of Government Code section 31720.5.

The **presumption** in Government Code section 31720.5 is patterned after the workers' compensation law's presumptions for heart trouble contained in Labor Code section 3212, et seq., that benefit public employees engaged in various public safety occupations. The **non-attribution provision** in Section 31720.5 is also patterned after the non-attribution provisions of the heart presumption statutes in the Workers' Compensation Act.

Some of the Workers' Compensation Act's presumptions favoring certain public safety employees provide that the injury or illness "shall in no case be attributed to any disease

existing prior to that development or manifestation.” The non-attribution provisions have two effects: (1) the presumption cannot be rebutted by evidence that the injury or illness was caused by a pre-existing disease (*Turner v. Workmen’s Comp. Appeals Bd., City of Fort Bragg, et al.* (1968) 258 Cal.App.2d 442, 449-450 [65 Cal.Rptr. 825]; *Bussa v. Workmen’s Comp. Appeals Bd.* (1968), *supra*, 259 Cal.App.2d 261, 265-266 [66 Cal.Rptr. 204]; *Parish v. Workers’ Comp. Appeals Bd.* (1989) 210 Cal.App.3d 92, 96-97 [258 Cal.Rptr. 287]), and (2) where the permanent disability was a result of the combined effects of the presumptively work-related injury and the natural progression of an underlying disease process, there could be no apportionment to that part of the disability that might have been non-work-related under the provisions of former Labor Code section 4663 (repealed Stats 2004 ch. 34, § 33, effective April 19, 2004). (*Ferris v. Indust. Acc. Comm.* (1965) 237 Cal.App.2d 427, 432 [46 Cal.Rptr. 913]; *cf.*, *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Alexander)* (2008) 166 Cal.App.4th 911 [82 Cal.Rptr.3d 920] [medical apportionment based on causation under Lab. Code, § 4663 (added Stats 2004 ch. 34, § 34 (SB 899), effective April 19, 2004; amended Stats 2006 ch. 836, § 1 (AB 1368), effective January 1, 2007) not applicable to injuries covered by Labor Code sections 3212-3213.2]. Lab. Code, § 4663, subd. (e).) The only apportionment allowed was that for a pre-existing *disability*. (*State Compensation Insurance Fund v. Industrial Acc. Comm. (Quick)* (1961) 56 Cal.2d 681, 685-686 [365 P.2d 415] [permanent disability resulting from a presumptively work-related heart attack reduced by the percentage of permanent disability that pre-existed pursuant to former Lab. Code, § 4750 (repealed Stats 2004 ch. 34, § 37 (SB 899), effective April 19, 2004)].) Given Labor Code section 4750, providing for apportionment to pre-existing disability, has been repealed, there is an issue as to whether the ruling in *Quick* remains viable. The justification for the 2006 amendment to Labor Code section 4663, *viz.*, that all the presumptions in the Labor Code contained non-attribution provisions, was false. (See the Legislative Counsel’s Digest of Assembly Bill 1368 quoted in *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Alexander)* (2008), *supra*, 166 Cal.App.4th, at 918-919.)

In *City and County of San Francisco v. Workers’ Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103, 112, [148 Cal.Rptr. 626, 583 P.2d 151] the Supreme Court explained that, prior to the enactment of the non-attribution provisions, the Labor Code’s presumptions that heart trouble is work-related would “disappear” upon the presentation of evidence that the heart trouble is not service-connected. The Court cited the editorial summary of *McCutcheon v. Workmen’s Comp. Appeals Bd.* (1968) (Writ Denied) 33 Cal.Comp.Cases 261 in which it was reported that, in opposing a correctional officer’s widow’s petition for writ of review, the Appeals Board argued that the presumption under Labor Code section 3212.2 was only a presumption affecting the burden of producing evidence and disappeared when contrary evidence was offered. [Editorial Note: Labor Code section 3212.2, creating a presumption that heart trouble in an employee of the Department of Corrections having custodial duties is work-related, does not contain a non-attribution clause. It is, therefore, similar to Labor Code section 3212 before the non-attribution provision was added.] The Court in *Wiebe* explained that such rebuttal evidence might include a medical opinion that heart trouble was not related to the stress and strain of employment.

The Appeals Board's position in *McCutcheon* that the presumption was merely a presumption affecting the burden of producing evidence was clearly wrong although that fact was not pointed out by the Supreme Court in *Wiebe*. (See *State Employee's Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611, 617-618 [73 Cal.Rptr. 172]: the presumption that heart trouble is work-related is one affecting the burden of proof and does not "disappear" in the face of contrary evidence. The employer still carries the burden to prove the nonexistence of the presumed causal relationship by the preponderance of evidence.)

In *Havel v. Industrial Acc. Comm.* (1957) 154 Cal.App.2d 737, 742-743 [316 P.2d 680], a case decided before the non-attribution provision was added to the workers' compensation presumption laws, a City of Burbank police officer became disabled following a heart attack. The Industrial Accident Commission ruled that Havel's heart disease was not work-related, relying on the opinions of two physicians. The Court of Appeal affirmed the Commission's decision, saying,

When a presumption is controverted by other evidence, an issue of fact is raised which it is the duty of the trier of facts to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it is manifestly without support in the evidence. [Citation.]

The *Havel* court's statement is correct as far as it goes. However, the court did not address which party had the burden of proof on the existence or nonexistence of the presumed fact. The Commission found, in effect, that the opinions of the defendant's experts were more persuasive and, inferentially, constituted the preponderance of the evidence. Irrespective of which party carried the burden, the preponderance of the evidence favored the defendant.

Similarly, in *Geoghegan v. Retirement Board* (1990) 222 Cal.App.3d 1525 [272 Cal.Rptr. 419], a case dealing with a presumption provision in a city charter not containing a non-attribution provision, evidence that the applicant's myocardial infarct was precipitated by cold and altitude while applicant was on vacation was found to rebut the presumption.

Given our required deference to the adequately supported factual determinations of the trial court, the conclusion is inescapable that plaintiff's disability was due to the myocardial infarction caused by the cold and altitude encountered while skiing. (*Geoghegan*, p. 1531.)

In *Stephens v. Workmen's Comp. Appeals Bd.* (1971), *supra*, 20 Cal.App.3d 461 [97 Cal.Rptr. 713], a state correctional officer whose last assignment, for nine and a half years, was that of a tower officer, stopped working due to pain in his legs caused by arteriosclerosis and an occlusion caused by either an embolus or a thrombus. Both the employer and the applicant agreed that the level of stress for a tower officer was excessive. Stephens' consultant in cardiology testified that the advanced stage of arteriosclerotic disease in Stephens' legs meant that his coronary arteries were also

probably in an advanced stage of occlusive disease because arteriosclerosis would be more advanced in the coronary vessels than in the vessels of the legs.

Employees of the Department of Corrections involved in custodial duties have the benefit of a presumption under Labor Code section 3212.2 that heart trouble developing or manifesting during service arises out of and in the course of employment. The Legislature enacted the non-attribution provision for the heart presumptions provided in Labor Code sections 3212 and 3212.5 in 1959. Also in 1959, the Legislature enacted Labor Code section 3212.2, but, as pointed out in the discussion of the *McCutcheon* case, above, the Legislature did not include a non-attribution provision in Section 3212.2. The court in *Stephens* stated that, because Section 3212.2 had no non-attribution provision, the employer was not prohibited from offering in its defense evidence that Stephens' arteriosclerotic disease was attributed to pre-existing disease. The employer offered, however, the opinion of a physician who considered any medical opinion that there was a link between stress and coronary artery disease to be a "ridiculous assumption." The Court of Appeal held that such a medical opinion could not rebut the presumption.

Dr. DeSilva [defendant's consultant in cardiology] stated and restated that in his opinion stress and stressful occupations do not cause or relate to acceleration of any arteriosclerosis. He argued that the majority of medical opinion was to that effect. He even characterized the theory (and thus the opinion of Dr. Friedman [Stephens' expert in cardiology]) as being a "ridiculous assumption." That requires this court at this point to pause to reflect where that leaves us in this matter.

Statistically we cannot assert at the appellate level on the basis of this record that the majority of doctors do accept the proposition that stress and tension relate to acceleration of arteriosclerosis of the coronary artery. But what we can and must assert is that the Legislature has declared that in workmen's compensation applications stress and tension are to be taken into consideration. We have pointed out above that sections 3212 and 3212.2 have allied the state in workmen's compensation cases with those medical practitioners who disagree with doctors holding Dr. DeSilva's beliefs. It is impermissible for a compensation carrier to "repeal" this legislation, wiping out the presumption created by section 3212.2, by seeking out a doctor whose beliefs preclude its possible application. It is impermissible for the board or its referee to accept the opinion of a physician so disposed as the basis for disallowing a claim. (*Stephens*, pp. 466-467.)

. . .

Still, this court may not usurp the board's exclusive fact finding power. Section 3212.2 creates a presumption. That presumption, however, is rebuttable. It was and is possible, both fairly and legally, for the board to find that the presumption never arose; that it was absent because no heart trouble which is disabling exists. It could have disbelieved Dr. Friedman; but it could not reject his opinion without substituting the

opinion of a doctor willing to accept the premises Dr. DeSilva refuses to accept that stress and tension do cause heart trouble. (Footnote omitted.) (*Stephens*, p. 468.)

(ii) Evidence that a heart attack is "attributed to" a nonindustrial exertion may be a basis for rebutting the presumption.

In *Turner v. Workmen's Comp. Appeals Bd., City of Fort Bragg, et al.* (1968), *supra*, 258 Cal.App.2d 442 [65 Cal.Rptr. 825], a police officer for the city suffered a heart attack while on duty. The only medical evidence came from a physician who opined that Turner's heart attack was the spontaneous result of a longstanding pre-existing arteriosclerotic disease. Turner had been abalone fishing, free diving and prying abalone from rocks, the morning of March 25. He rested throughout the rest of the day before reporting to work at midnight. His chest pain came on two and a half hours later. The reporting physician, however, reviewed Turner's activities in the twenty-four hours before his heart attack and found that Turner had done nothing that was excessive or unusual. On that basis, he concluded that Turner's heart attack was not work-related. The Workmen's Compensation Appeals Board's referee and the Board found that Turner's heart attack was not work-related. The Court of Appeal granted Turner's petition for a writ of review and issued an order annulling the Appeals Board's decision on the basis that the presumption had been raised but not rebutted with proper evidence. But, in a footnote, the court provided some direction as to the kind of evidence that might rebut the presumption without contravening the non-attribution rule.

Paraphrased [*sic*] in terms of the "commonly understood meaning" of the word "attributed" in section 3212.5 as amended, the statute provides that a policeman's in-service heart trouble shall *in no case* be "explained as caused or brought about by" a preexisting disease. (See, e.g., Webster's Third New International Dictionary (1967) p. 142; italics added.) Directed by this plain language, we hold that under the 1959 amendment the statutory presumption cannot be rebutted by evidence of preexisting heart disease, as distinguished from "other evidence" that the in-service heart trouble was not industrially caused.⁷

⁷An illustration of "other evidence" of nonindustrial causation, which may still rebut the section 3212.5 presumption under the 1959 amendment, was suggested in the present case by Dr. Breall's finding that petitioner, during the 24 hours preceding his hospitalization, did nothing "of an unusual or excessive nature with respect to physical or emotional exertion." Under appropriate circumstances, for example, Dr. Breall might have "attributed" the March 26 heart attack to the nonindustrial "exertion" involved in petitioner's abalone fishing on March 25. (*Turner*, p. 449. Italics in the original.)

Associations' comment

Though cited by the Supreme Court in *City and County of San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)*, *supra*, 22 Cal.3d, at 111–112, as authority for the proposition that the reach of the presumption is only a "modest" one, limited by the prospect that heart trouble can be attributed to a contemporaneous event, the *Turner* court's direction in Footnote 7 is of questionable value. Unusual or excessive exertion, short of coming close to drowning, would not have a deleterious effect on the heart if the

coronary vessels were not already narrowed by coronary artery disease. Since a heart attack related to unusual or excessive exertion would not have occurred but for the disease that was already present, and that disease, no doubt, would be said to have developed during the officer's employment, the heart attack would be considered one caused by the combined effects of the presumptively work-related coronary arteriosclerosis and the specific non-industrial exertion. There still would be an work-related component. In order for an injury to be considered work-related, the employment does not have to be the sole cause; it is enough that the employment contributed to the injury. (*Employers Mut. Liability Ins. Co. v. Industrial Acc. Comm.* (1953) 41 Cal 2d 676, 680 [263 P.2d 4].) *Turner* is, therefore, weak authority for the proposition that the presumption can be rebutted by showing that the heart trouble was the result of a contemporaneous event. The reach of the presumption is, therefore, anything but "modest."

End comment.

In *Johnson v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 770 [210 Cal.Rptr. 28], the police chief for the Town of Los Gatos developed atrial fibrillation which led to the formation of emboli that caused, first, a myocardial infarct and, later, a cerebrovascular accident, leaving Johnson totally disabled. After initially providing workers' compensation benefits on a voluntary basis, the city stopped payment based on the opinion of a physician who concluded that Johnson's condition was the result of a "slow sinus syndrome" which he described as a congenital or degenerative condition, unrelated to stress and strain. According to the physician, Johnson had the disease when he was hired in 1955 and his disability was not work-related. The workers' compensation judge found that Johnson's illness was work-related and imposed a penalty for unreasonable refusal to pay benefits. The Workers' Compensation Appeals Board granted the defendant's petition for reconsideration and annulled the workers' compensation judge's decision. The Court of Appeal granted Johnson's petition for writ of review and annulled the Appeals Board's decision. The court cited the decision in *City and County of San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103, *supra*, and its discussion of the impact of the non-attribution provision.

The [Wiebe] court stated the effect of the preclusion clearly. It "does not guarantee [covered] employees that they will recover workers' compensation benefits for a heart attack which occurs during the course of their employment, but leaves the employer free to rebut the statutory presumption by proving that some *contemporaneous* nonwork-related event - for example, a victim's strenuous recreational exertion - was the sole cause of the heart attack." (*Wiebe, supra.*, at p. 112; italics added.) That is, an employer may rebut the presumption, but only with proof of causation by a nonindustrial event occurring at the same time as the heart trouble developed or manifested itself. (Brackets and parenthesis in original. *Johnson*, p. 775.)

The Court of Appeal reasoned that, by definition, a congenital condition is one existing at birth and a degenerative condition is one that worsens over time. There was no reasonable doubt that the medical opinion on which the city relied contravened the non-

attribution provision of Labor Code section 3212.5 and, therefore, the court ordered that the penalty for unreasonable refusal to provide compensation imposed by the workers' compensation judge be reinstated.

Note that in *Johnson*, the cause of the emboli in the coronary arteries that in turn caused the myocardial infarct was a condition of the heart itself, namely, atrial fibrillation. Compare this situation with *Blue Cross of California v. Workers' Comp. Appeals Board (Hootman)* (2000) (Writ Denied) 65 Cal.Comp.Cases 397 in which it was held that the presumption under Section 3212.5 did not arise and/or was rebutted by proof that applicant's heart trouble was caused by pancreatic cancer that caused a stroke or strokes and may have caused blood clots to form in the heart. The evidence showed that there was no abnormality of the heart that itself would have caused clots to form in the heart.

Note also that the Court of Appeal in *Johnson* stated that the employer was "free" to rebut the presumption by proving that a contemporaneous nonwork-related event was the *sole* cause of the heart attack. This is a more accurate statement of the law than given in the *dicta* in the *Wiebe* and *Turner* opinions each of which refers to a hypothetical contemporaneous nonwork-related exertion as being a basis to rebut the presumption when underlying and already developed, presumptively work-related arteriosclerosis would be a concurrent, work-related contributing cause. The Court of Appeal in *Johnson* avoided the *Wiebe/Turner* misstep when it defined the employer's chance of rebutting the presumption as requiring proof that a contemporaneous nonwork-related event was the *sole* cause.

(iii) Evidence that a heart attack is attributed to concurrent employment activities may be a basis for rebutting the presumption.

In *Bussa et al. v. Workmen's Comp. Appeals Bd.* (1968) 259 Cal.App.2d 261 [66 Cal.Rptr. 204], a fire fighter for the City of Oakland with fifteen years of service collapsed and died instantly of a heart attack while handling fire extinguishers he serviced for another employer, Acme Fire Extinguisher Company. Bussa had worked for Acme six years while on his days off from his fire-fighting job. Bussa's widow first filed an application for death benefits under the retirement provisions of the city charter and the retirement board granted her service-connected death benefits. She then filed an application with the Workmen's Compensation Appeals Board for dependency benefits, naming both the city and Acme as defendants.

The Court of Appeal noted that the widow had failed to raise the res judicata effect of the finding by the board of retirement that her husband's death was job-related in her petition for reconsideration before the Appeals Board. Therefore, the court could not address that issue in the review proceedings.

The Workmen's Compensation Appeals Board, appearing as a party before the Court of Appeal, argued that the presumption of work-connection was rebutted by evidence that the heart attack was the result of the decedent's pre-existing heart disease. The Court

of Appeal rejected the Appeals Board's argument, citing its own decision in *Turner v. Workmen's Comp. Appeals Bd., City of Fort Bragg, et al.* (1968) 258 Cal.App.2d 442, *supra*, as authority. The court held,

“. . . Accordingly, we hold that the medical evidence attributing the decedent's fatal heart attack to coronary atherosclerosis -- a pre-existing heart disease -- cannot and does not rebut the presumption that his death was caused by his employment as a city fireman.

In *Turner v. Workmen's Comp. App. Bd., supra*, 258 Cal.App.2d 442, we also pointed out that under the 1959 amendment of Labor Code section 3212.5, the presumption that the employee's in-service heart trouble was industrially caused “may be controverted by other evidence” (*id.*) of nonindustrial causation: i.e., by evidence thereof other than proof of pre-existing heart disease.” (*Bussa*, p. 265.)

After explaining that none of the medical experts had attributed the heart attack to any other of the decedent's quite strenuous activities off the job, the court raised the issue of whether decedent's employment by Acme was such other evidence to which the heart attack could properly be attributed. The specifics of the decedent's activities for Acme were not in the record, but with the annulment and remand to the Board, the Court of Appeal directed that the record could be developed.

Under the circumstances, we hold, as previously stated, that the statutory presumption that the decedent's death arose from his employment by respondent city is not and cannot be rebutted by evidence attributing it to pre-existing heart disease; and we annul the order under review for the reason that it cannot be determined from the present record whether the presumption is or can be rebutted by evidence that his death arose from his employment by Acme. The facts of the Acme [concurrent] employment, medical opinion specifically directed to such facts, and the question whether such evidence rebuts the presumption against respondent city, remain to be pursued upon the remand next ordered. (*Bussa*, pp. 267-268.)

(e) Note: The heart presumption is not extended beyond termination of service or the last day in which the member worked in a specified capacity as other presumptions of service-connection are.

(2) Presumption that cancer in those in certain public safety occupations is service-connected

(a) Government Code section 31720.6

Enacted by Senate Bill 558 in 1999 and effective January 1, 2000, Government Code section 31720.6 extended to those in certain public safety occupations in counties and districts operating under the County Employees Retirement Law of 1937 a presumption that cancer is service-connected, subject to certain prerequisites.

On September 7, 2000, Section 31720.6, was amended by AB 2176, Chapter 317, Statutes of 2000, to remove redundant language and to identify the list of human carcinogens maintained by the Director of the Department of Industrial Relations as "known carcinogens" in addition to those carcinogens recognized by IARC. The amended section provides as follows:

(a) If a safety member, a firefighter, or a member in active law enforcement who has completed five years or more of service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200) or both or under this retirement system or under the Public Employees' Retirement System or under a retirement system established under this chapter in another county, and develops cancer, the cancer so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of employment. The cancer so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.

(b) Notwithstanding the existence of nonindustrial predisposing or contributing factors, any safety member, firefighter member, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of cancer shall receive a service-connected disability retirement if the member demonstrates that he or she was exposed to a known carcinogen as a result of performance of job duties.

'Known carcinogen' for purposes of this section means those carcinogenic agents recognized by the International Agency for Research on Cancer, or the Director of the Department of Industrial Relations.

(c) The presumption is disputable and may be controverted by evidence, that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer, provided that the primary site of the cancer has been established. Unless so controverted, the board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(d) 'Firefighter,' for purposes of this section, includes a member engaged in active fire suppression who is not classified as a safety member.

(e) 'Member in active law enforcement,' for purposes of this section, includes a member engaged in active law enforcement who is not classified as a safety member.

In addition, AB 2176, Chapter 317, Statutes of 2000 amended Government Code section 31722, a section that sets time limits on when an application for disability retirement may be filed. Effective January 1, 2001, Section 31722 provides,

The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

See the further discussion of the 2000 amendment to Section 31722, above at Section I, E.

The same public safety occupations in counties covered by PERS had been covered by the cancer presumption under Labor Code section 3212.1 since its enactment in 1982 (firefighters) and amendment in 1989 (peace officers). PERS claims for service-connected disability retirements are adjudicated using the procedural rules of the Workers' Compensation Appeals Board. Legislative history materials show that proponents of the presumption urged the enactment of Section 31720.6 to bring the County Employees Retirement Law of 1937 into conformity with the law applicable to those covered under PERS. An effort was made in subdivision (a) of Section 31720.6 to coordinate the systems by allowing service for entities operating under other retirement laws to qualify as service that can be counted toward the 5-years-of-service requirement in Section 31720.6.

(b) Prerequisites for application of the cancer presumption.

(i) Occupation

The applicant must be, or must have been, a safety member, a firefighter, or a member in active law enforcement. (§ 31720.6, subd. (a).)

(a) "Active fire suppression."

"Firefighter," for purposes of Section 31720.6, includes a member engaged in active fire suppression who is not classified as a safety member. § 31720.6, subd. (d).) See the discussion, above, in the section dealing with the "heart presumption" concerning the meaning of "active fire suppression."

(b) "Active law enforcement."

"Member engaged in active law enforcement," for purposes of section 31720.6 includes a member engaged in active law enforcement who is not classified as a safety member. (§ 31720.6, subd. (e).) See the discussion, above, in the section dealing with the "heart presumption" concerning the meaning of "active law enforcement."

(ii) Length of service (5 years) under specified pension system or systems.

The applicant must have completed five years or more of service under a pension system established by Government Code sections 31900, et seq., or Government Code sections 32200, et seq., or both or under a retirement system established under this retirement system (i.e., the County Employees Retirement Law of 1937) or the Public Employees Retirement System or a retirement system established under the County Employees Retirement Law of 1937 in another county. (§ 31720.6, subd. (a).)

Deleted from AB 2176 were provisions that would have provided (1) that the five years of service must be in the specified capacity or occupation and (2) that an applicant with less than five years of safety service would not be able to count his or her time as a general member toward the five years. (AB 2176, Senate amendment of May 24, 2000, page 2, second full paragraph and page 3, line 19, "in this capacity" deleted. See page 4, line 26 of the Senate amendment of May 24, 2000.)

(iii) The member developed cancer

The applicant must have developed cancer. (§ 31720.6, subd. (a).)

Like the "heart presumption" in Section 31720.5, there is no express requirement that the development occur while the member is in service. Such a requirement is express in the workers' compensation law's cancer presumption. (See Lab. Code, § 3212.1, subd. (b).)

Associations' comment

An in-service development or manifestation requirement might be implied for the same reasons that an "in service" requirement might be implied for the heart presumption, discussed above in Section II, B, 6, b), (1), (c), [1].

Two references to the term "developing or manifesting" in subdivision (a) of Section 31720.6 that were going to be deleted as of the March 28, 2000 version of AB 2176 were left in the final version, keeping Government Code section 31720.6 more consistent with Labor Code section 3212.1 which contains an express "in service" development or manifestation requirement. The fact that the Labor Code version and the Government Code version are close matches and the fact that Section 31720.6 was written so that service under a PERS system counted toward the years-of-service requirement under Section 31720.6 support the argument that the two sections are *in pari materia* and should be read together. As noted above, one of the points made by proponents of SB 558 was that making a cancer presumption available to safety personnel under the CERL of 1937 was the equitable thing to do since safety employees under PERS received the benefit of the presumption under Labor Code section 3212.1.

However, as far as we are aware, the issue has not been addressed by an appellate court in a published decision and no appellate court has adopted this position. The

opposing argument is that if the Legislature had intended there to be an “in service” requirement, it would have said so, and it is not for a court to re-write the statute to include a requirement where it is absent in the plain wording the Legislature used. An appellate court will be guided to an interpretation of the statute by the principle that its goal is to give effect to the Legislature’s purpose in enacting the law.

There were legislative missteps in framing Section 31720.6. Language was imported from the workers’ compensation law that failed to account for the distinctions between workers’ compensation law and public employee disability retirement law. This fact, however will not find its way into an appellate court’s analysis of the Legislature’s intent. An appellate court begins with the assumptions that the Legislature understood what it was doing and was apprised of the design and state of the law with respect to both statutory systems. The appellate court will look first to the language of the statute to discern the Legislature’s intent. If the Legislature’s intent cannot be determined from the language the Legislature used, a court may refer to the legislative history for what it might show. The Court of Appeal in *City of Long Beach v. Workers’ Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, at 311-312 [23 Cal.Rptr.3d 782] stated,

When interpreting a statute, we are guided by the familiar principle that we must discover the intent of the Legislature, being careful to give the statute's words their plain meaning. (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1261, 8 Cal.Rptr.3d 532, 82 P.3d 740; *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2004) 117 Cal.App.4th 350, 355, [12 Cal.Rptr.3d 12].) If the language of the statute is unambiguous, we presume the Legislature meant what it said and need not resort to extrinsic sources to determine the Legislature's intent. (*Bonnell v. Medical Board, supra*, at p. 1261, 8 Cal.Rptr.3d 532, 82 P.3d 740; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919, 129 Cal.Rptr.2d 811, 62 P.3d 54; *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd., supra*, at p. 355, 12 Cal.Rptr.3d 12.) If the statutory language is susceptible of more than one reasonable construction, we may look to the legislative history in aid of ascertaining legislative intent. (*People v. Robles* (2000) 23 Cal.4th 1106, 1111, [99 Cal.Rptr.2d 120, 5 P.3d 176].) The words of the statute must be construed in context, keeping in mind the nature and purpose of the statute. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) "It is our task to construe, not to amend, the statute. "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted. . . ." [Citation.] " (*People v. Leal* (2004) 33 Cal.4th 999, 1008, 16 Cal.Rptr.3d 869, 94 P.3d 1071.) We avoid any construction that produces absurd consequences. (*Bonnell v. Medical Board, supra*, at p. 1263, 8 Cal.Rptr.3d 532, 82 P.3d 740.)

(iv) Cancer causes incapacity

The applicant must be permanently incapacitated for the performance of duty as a result of cancer in order to be entitled to the presumption. (§ 31720.6, subd. (b).)

Associations' comment

This provision of Section 31720.6 expresses what is implied in Section 31720.5's heart presumption. It is implied in Section 31720.5 that the presumption does not operate unless there is heart trouble and the heart trouble is in fact incapacitating. Section 31720.6 expressly provides that the presumption is not effectuated unless the cancer is incapacitating. It is not a presumption that the cancer is incapacitating. Incapacity is one of the prerequisite facts that the applicant must establish in order to trigger the presumption.

End comment.

(v) Exposure to a known carcinogen on the job

The applicant must demonstrate that he or she was exposed to a known carcinogen as a result of performance of job duties. (§ 31720.6, subd. (b); *Sameyah v. Los Angeles County Employees Retirement Association* (2010) 190 Cal.App.4th 199, 212 [117 Cal.Rptr.3d 893].) If the applicant fails to introduce substantial evidence of an on-the-job exposure to a known carcinogen, the presumption does not arise.

(a) "Known carcinogen" defined

"Known carcinogen" is defined for the purposes of Section 31720.6 as a carcinogenic agent recognized by the International Agency for Research on Cancer (IARC) or the Director of the Division of Industrial Accidents. [For the IARC list of carcinogens go to the IARC web site at www.iarc.fr/. For lists of all materials studied, whether found to be carcinogenic, probably carcinogenic, possibly carcinogenic, not classifiable as to carcinogenicity to humans, or probably not carcinogenic to humans, go to <http://monographs.iarc.fr/ENG/Classification/index.php> [delete spaces in the address line], (address as of 12/12/09). For the list of carcinogens recognized by the Director of the Division of Industrial Accidents, see Cal. Code Regs., tit. 8, § 330, located on the web at www.dir.ca.gov/title8/330.html [delete spaces in the address line] (address as of 12/12/09).]

(b) Types of evidence that do or do not establish exposure to a known carcinogen

Where the carcinogen is a virus, "[e]vidence that [the member] *might* have come into contact with an inmate or suspect who *might* have had a virus is not sufficient evidence of a carcinogenic exposure." (*Sameyah v. Los Angeles County Employees Retirement Association* (2010), *supra*, 190 Cal.App.4th 199, 212.)

In *Gomez v. Workers' Comp. Appeals Board* (2006) (Writ Denied) 71 Cal.Comp.Cases 66, a deputy sheriff sought the benefit of the cancer presumption in Labor Code section 3212.1, but was found to have failed to prove that he was exposed to a known carcinogen on the job. The editorial summary of the case states,

. . . . Dr. Majcher addressed Applicant's exposure to carcinogens by noting that Applicant was exposed to toxic chemicals in the form of "meth labs" and various fires. However, he was uncertain whether Applicant was exposed to asbestos. Dr. Majcher found that Applicant's diabetes was related to his usage of steroids during his cancer treatment.

The report of Applicant's QME, Dr. Robert Weissman, was also introduced at trial. Dr. Weissman's history of Applicant, as taken from Applicant, noted that Applicant believed he worked at a site that was located on top of a toxic dump. It was further noted that Applicant had never gone to methamphetamine labs but was present at various home and car fires. Dr. Weissman stated, in relation to the fires, that vinyl chlorides cause brain cancer. Dr. Weissman did not take a history of the types of fires Applicant was exposed to, what involvement Applicant had with the fires, the substances that were burned to produce carcinogens, or the length of the exposures. However, his report did provide a list of carcinogenic substances, issued by the International Agency for Research on Cancer (IARC), to which Applicant potentially could have been exposed. (*Gomez*, p. 67.)

The workers' compensation judge ruled that the applicant had failed to establish the necessary exposure. Her response to the applicant's petition for reconsideration is described as follows:

In her report, the WCJ noted that neither the report of Dr. Majcher nor that of Dr. Weissman was sufficient evidence to show that Applicant was exposed to a known carcinogen, as defined by IARC or the Director of Industrial Relations, as required by Labor Code § 3212.1(b) for application of the presumption of industrial causation. According to the WCJ, Dr. Weissman's conclusory statements that Applicant was exposed to some fires and potentially exposed to some toxic substances was not sufficient to trigger the Labor Code § 3212.1 presumption, since this statute required an actual, rather than a potential, demonstration of exposure. Moreover, Dr. Majcher's opinion focused on whether Applicant could establish an industrial nexus to his cancer, rather than focusing on whether Applicant was exposed to carcinogens, and was based on a misunderstanding of the applicable law. Applicant offered no other evidence of exposure to a known carcinogen. Based on the WCJ's determination that neither medical report introduced at trial constituted substantial evidence upon which to rely, she concluded that Applicant failed to meet his burden of establishing injury AOE/COE under Labor Code § 3202.5. (*Gomez*, p. 67-68.)

In *Stavropoulos v. Workers' Comp. Appeals Bd.* (2005) (Writ Denied) 71 Cal.Comp.Cases 99 the widow of city police officer was found to have not met her burden to prove that her husband was exposed to a known carcinogen.

Applicant obtained a QME report from Dr. Jeffrey Hirsch, who reported that Decedent was exposed to methamphetamine labs as part of his duties as a police officer, that pulmonary abnormalities have been documented in people with repeated exposure to methamphetamine labs, that phosphine is a chemical

found in methamphetamine labs, and that the National Library of Medicine's toxicology database has linked phosphine with chromosomal damage that can lead to cancer. Dr. Hirsch also opined that Decedent was exposed to unnamed combustion byproducts as the result of being around fires while on duty. Dr. Hirsch reported that Decedent's exposure to inhaled carcinogens aggravated or accelerated his lung cancer, which led to his early death. He based his theory on two articles concerning the "synergistic" or "multiplicative" combined effects of exposure to asbestos and exposure to cigarette smoke as the causes of lung cancer. Dr. Hirsch discussed Decedent's heavy tobacco use and "heavy history of carcinogenic exposures" but did not discuss the effects of Decedent's exposure to toxic chemicals.

Defendant's QME, Dr. Revels Cayton, an expert in chemical and toxic exposure, issued a report in which he noted that no deaths have been linked to phosphine exposure and that phosphine was not listed as a carcinogen by the International Agency for Research on Cancer. Dr. Cayton pointed out that Decedent's exposure to smoke at fires was only occasional. He concluded that the only carcinogen Decedent was exposed to in a dose that would cause lung cancer was tobacco.

At the trial on the issue of injury AOE/COE, Applicant testified that her husband raided buildings that contained methamphetamine or PCP labs, and that he would search and secure the buildings, make arrests, gather evidence, and call the hazardous materials team. Applicant further testified that Decedent would be called to fires to maintain order. According to Applicant, Decedent never mentioned any chemicals to which he had been exposed. (*Stavropoulos*, pp. 100-101.)

The applicant filed a petition for reconsideration before the WCAB, which the board denied, saying,

The WCAB denied reconsideration, initially noting that the Labor Code § 3212.1 presumption did not apply because Applicant failed to establish that Decedent was exposed to a known carcinogen while on duty, as required under *Faust v. City of San Diego* (2003) 68 Cal.Comp.Cases 1822 (Appeals Board en banc opinion) in order for the presumption to attach. In this regard, the WCAB noted that phosphine, a chemical that Dr. Hirsch indicated was found in methamphetamine labs, was not a carcinogen, as defined by the International Agency for Research on Cancer, and was not identified in the California Code of Regulations. Furthermore, Dr. Hirsch did not name any carcinogen to which Decedent was exposed at fires.

With regard to Applicant's contention that Decedent's lung cancer was aggravated or accelerated by exposure to toxic chemicals, the WCAB stated in relevant part:

"In this case applicant contends that Dr. Hirsch substantiates the impact exposure to toxic chemicals had on aggravating or accelerating decedent's lung cancer and hastening his death. However, we disagree because Dr. Hirsch does not support that contention at all. In the first place Dr. Hirsch only addresses the 'synergistic' or 'multiplicative' effect of carcinogens. However, as was explained above, Dr. Hirsch does not identify by name any carcinogen that the deceased was exposed to. Secondly, Dr. Hirsch cites two medical articles to support his assertion regarding synergy. However, both of these articles deal with the affects [sic] of exposure to asbestos and cigarette smoke in combination. Those articles are not relevant because this case does not involve exposure to asbestos. Third, Dr. Hirsch notes the 'heavy history of carcinogenic exposure' which the deceased sustained. This is not an accurate history because there is no evidence of any exposure to a carcinogenic substance. Finally, Dr. Hirsch never discusses the effects of exposure to a toxic chemical and decedent's lung cancer. Therefore, Dr. Hirsch's report is not substantial evidence that decedent's exposure to toxic chemicals hastened his death because it is speculative as it relies on articles regarding asbestos when exposure to asbestos is not involved in this matter, it is based on an inaccurate history as it assumes a heavy exposure to carcinogens when there is no evidence of such exposure and, for that same reason, his conclusion regarding exposure and synergy are [sic] not based on the facts. Further, no other doctor renders an opinion regarding an exposure by the deceased to toxic chemicals which hastened his death. Accordingly, Dr. Hirsch's report lacks convincing force and a probability of truth and does not justify a finding that decedent's exposure to toxic chemicals hastened his death." (Stavropoulos, pp. 100-102.)

(c) Does any amount of exposure to a carcinogen satisfy the "exposure" requirement?

Associations' comment

Section 31720.6 does not establish what is a legally sufficient exposure. The California Workers' Compensation Reporter has a summary of a Workers' Compensation Appeals Board three-member panel decision, *Leach v. West Stanislaus Fire Protection District* (2001) 29 Cal. Workers' Comp. Rptr. 188, 189, in which the panel ruled that a "minimal" exposure is enough to satisfy the applicant's burden to show exposure for purposes of Labor Code section 3212.1. However, this decision appears to be inconsistent with the Supreme Court's rulings in the *Bowen* and *Hoffman* cases. The Supreme Court held that proof of an "infinitesimal or inconsequential" employment contribution was not substantial evidence that there was in fact a causal link between the employment and incapacity. The Court explained that the substantial contribution amendment to Government Code section 31720 "checked" the implication of *Heaton v. Marin County Employees Retirement Bd.* (1976), *supra*, 63 Cal.App.3d 421 [133 Cal.Rptr. 809] that any infinitesimal or inconsequential work-related contribution would suffice to establish service-connection. (*Bowen v. Board of Retirement, supra*, 42 Cal.3d, at 576-578.) Using this rationale, proof of only a "minimal" exposure is not substantial evidence that an "exposure" within the meaning of Labor Code section 3212.1 or Government Code

section 31720.6 in fact happened. Under *Bowen's* requirement for substantial evidence of a real and measurable causal relationship in order to support a finding that a connection between employment and incapacity in fact exists, there must be substantial evidence of a real and measurable exposure to a carcinogen that could cause cancer, albeit not necessarily the cancer from which the applicant suffers. We submit that the applicant does not have to establish that a link in fact exists between the exposure and cancer, but the exposure must be sufficient to be a cause of a kind of cancer that is associated with the carcinogen before the burden of proof shifts to the respondent.

There may be a distinction between what evidence will trigger the presumption and what evidence will rebut it. Conceivably, and given that the primary site of the cancer is established, the same evidence of exposure that will trigger the presumption will also be the basis of rebutting the presumption once it has risen. That is, the evidence of exposure may be sufficient to trigger the presumption and shift the burden of proof to the employer. But expert opinion may also establish that the exposure was insufficient to have been a cause of the cancer and that there is in fact no reasonable link between the exposure and the cancer. While there is no statutory definition of the quantum of exposure that triggers the presumption, proof that the exposure was insufficient to be a cause of the cancer may suffice to rebut the presumption, at least where the primary site of the tumor is identified. The Court of Appeal in *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*, *supra*, 126 Cal.App.4th, 317-318, stated,

. . . . We agree that the burden placed upon the employer is a difficult one. However, we disagree that the standard is impossible to meet. . . . For example, perhaps it would be possible for an employer to show that the quantity of the carcinogen to which the employee was exposed, or length of time of the exposure, was too small or too brief to have had any detrimental effect.

However, once the presumption has been triggered, that the level of exposure to the carcinogen was insufficient to cause the kind of cancer from which the applicant suffers is not material if the employer is unable to establish the primary site of the cancer. In that case, the presumption is conclusive.

End comment.

(vi) Is the applicant required to prove that there is a link between the cancer and the carcinogen to which the applicant was exposed in order to trigger the presumption?

Applicants' comment

The answer is no. Distinguish between what the applicant must show in order to trigger the presumption in his or her favor and what the employer must show in order to rebut the presumption once it has arisen.

Section 31720.6 does not expressly require that there be a link between the type of cancer that incapacitates the applicant and the carcinogen to which the applicant was

exposed in order to trigger the presumption. The applicant is required to show only that there was an exposure to a known carcinogen. Section 31720.6 does not require the applicant to prove that the known carcinogen to which he or she was exposed causes the kind of cancer from which the applicant suffers. Requiring the applicant to prove such a link would require the applicant to establish the very fact Section 31720.6 presumes. This would negate the presumption and the benefit to public safety employees the Legislature intended.

If all pre-requisites to the presumption are satisfied, the burden shifts to the employer to prove (1) that the primary site of the cancer is known, and (2) that there is no reasonable link between the carcinogen to which the applicant was exposed and the incapacitating cancer with which the applicant suffers.

Section 3212.1, on the other hand, [editor's note: as opposed to the other presumptions under the Labor Code] requires the link be controverted only in a specific and limited way: by proof of the cancer's primary site and the absence of a reasonable link. (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*, *supra*, 126 Cal.App.4th, 315.)

Whether there is or is not a link between the carcinogen to which the applicant was exposed and the kind of cancer from which the applicant suffers is at issue only if the employer establishes the primary site of the cancer.

If all prerequisites to the presumption are present and the employer is unable to establish the primary site of the cancer, the presumption is conclusive. Under the express terms of Section 31720.6, if the applicant proves an exposure in the course of employment to a known carcinogen, and the primary site is not known, the presumption conclusively establishes the causal link between incapacity and the employment, even if the evidence would show that there is no reasonable link between the kind of carcinogen to which the applicant was exposed and the kind of cancer that incapacitates the applicant.

End comment

(vii) Time limit on presumption is not exceeded

The time limitation provided in Section 31720.6, subdivision (c), must not have been exceeded.

Section 31720.6, subdivision (c), provides in part as follows:

This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Government Code section 31722 provides a member the opportunity to file an application within any period during which the presumption is extended beyond his or her discontinuance of service.

Associations' comment

The extension is from termination, but not to exceed 60 months commencing with the last day actually worked in the specified capacity. Therefore, if the applicant last worked in the "specified capacity" 60 months or more before the termination of service, there would be no extension. The extension runs from the last day worked in the specified capacity, not from the date that service is discontinued. The two dates may be different. (*Cal. Highway Patrol v. Workers' Comp. Appeals Bd. (Clark)* (1986) 178 Cal.App.3d 1016, 1024 [224 Cal.Rptr. 94]: This is a case dealing with the heart presumption under Labor Code section 3212. Clark was employed for 14 years, and was therefore entitled to an extension of 42 months. Forty-two months added to the last date he actually worked extended the operation of the presumption that his heart trouble was work-related to a date 10 months short of the date the injury first manifested itself. Therefore, the presumption did not apply.)

End comment.

(a) The 60-month extension in the disability retirement law is an anomaly.

Associations' comment:

This provision is an anomaly of legislation. It was imported from the workers' compensation presumptions, apparently without regard to the differences between the two systems.

The 60-month "extension" provision was originally added to Labor Code section 3212 as part of an effort to limit the impact of a Court of Appeal decision in a workers' compensation case involving a firefighter who secured a workers' compensation award for a heart attack that occurred fifteen months after he stopped working, specifically, *Soby v. Workmen's Compensation Appeals Board* (1972) 26 Cal.App.3d 555 [102 Cal.Rptr. 727].

In *Soby*, the WCAB refused to apply the presumption of industrial causation to the post-retirement heart attack. The WCAB reasoned that the heart attack was the first symptom of heart trouble. Therefore, the manifestation did not occur while the employee was in service and the presumption did not arise.

But the reviewing court annulled the WCAB's decision. Relying on the fact that the Labor Code's presumption provisions use the terms "develops *or* manifests", rather than "develops *and* manifests," the court stated that if the underlying disease only "developed" during the employment, that was enough to qualify the applicant to the benefit the presumption. The case was remanded to the WCAB for further proceedings.

Workers' compensation law compensates injured workers for injuries that arise out of and occur in the course of employment. An injury from the cumulative effects of continuing trauma, however, does not necessarily occur in the legal sense at the time the employee has injury-producing events or exposures. In cases of cumulative trauma or occupational disease, "injury" in the legal sense does not occur until there is disability or a need for medical care. Therefore, under workers' compensation law, Soby's "injury," in the legal sense of the onset of disability or need for medical care, conceivably could have occurred decades after the injury-producing events and decades after he retired. No statute of limitations would begin to run against the filing an application for benefits until an injury, that is, disability or a need for medical care, occurred.

On remand, the WCAB found that Soby's underlying heart disease did in fact develop during employment, thus giving rise to the presumption under Labor Code section 3212. (*Soby v. Workmen's Comp. Appeals Bd.* (1974) (Writ Denied) 39 Cal.Comp.Cases 35.) While the employee secured a findings and award based on the presumption that the disability caused by his post-retirement heart attack was a work-related injury, his earnings were determined to have entitled him to only the minimal rates of compensation because he had no earnings after his retirement and no earnings at the time of the onset of disability and "injury" in the legal sense when his average earnings and compensation rate were measured. The WCAB rejected Soby's argument that his earnings should be based on his earnings while he was employed and was subjected to the stresses that presumably caused the development of heart trouble. Soby's attempt to reverse the WCAB in the Court of Appeal failed when his petition for writ of review was denied.

Public employers anticipated increased liability for post-retirement heart attacks suffered by public safety employees who could rely on the Labor Code's presumptions of work-causation and the Court of Appeal's decision in *Soby* to establish entitlement to workers' compensation benefits long after the employees retired. Public employers looked for a way out.

In 1976, in an example of legislative give and take, the 60-month post-service "extension" of the presumption was added to Labor Code section 3212. While the provision purports to *extend* the applicability of the presumption after service, the provision actually places an up to 60-month post-retirement *limitation* on the effect of *Soby*. At the same time, Labor Code section 4458 was added. It provided that when a retired safety employee sustained a delayed work-related injury after retirement, his or her earnings would be taken at the maximum, irrespective of the employee's actual rate of earnings at the time of injury, which often was minimal for retired employees, as it was for Soby. In order to secure passage of the "anti-Soby" legislation and put a limit on the availability of a post-service presumption of work-related injury to the heart, public employers did not oppose Section 4458's maximum earnings provision. See the Workers' Compensation Appeals Board's discussion of the legislative history of Sections 3212 and 4458 in *Lewis v. City and County of San Francisco, Clark v. City of Los Angeles* (Appeals Board En Banc) (1981) 46 Cal.Comp.Cases 206, 211–213.

The Court of Appeal's decision in *Soby* was followed by a decision of the WCAB in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Caffey)* (1982) (Writ Denied) 47 Cal.Comp.Cases 204. Caffey, a City of Pomona police officer, retired in 1967 and worked for other employers for over six years before his heart attack in 1974. He established that his underlying heart disease had developed during his period of service with the city and the WCAB held that Caffey's heart trouble was presumed to be work-related under Labor Code section 3212. This kind of post-employment delay before injury was the problem addressed in the "anti-Soby," 60-month limitation provisions added to certain presumptions in the Labor Code..

Public sector disability retirement laws have a purpose different from workers' compensation. They provide a safety net for public employees whose careers are abbreviated by injury or illness, allowing their removal for the betterment of the public service without hardship to the employees or their families. Government Code section 31451 states such a purpose for the County Employees Retirement Law of 1937. The public-service careers of those who have retired for years of service and age, or who have otherwise stopped working and deferred their retirements, are not abbreviated by injuries or illnesses that occur after their service has concluded. Unlike the design of workers' compensation benefits, the rights to which might not mature for years, even decades after the injury-producing employment has ended, the right to a public disability retirement allowance matures when an active employee becomes substantially incapacitated for his or her usual duties and leaves service. In this context, understanding the purpose of importing the 60-month anti-*Soby* provision from the workers' compensation law to the retirement law's cancer provision is a challenge.

One can argue that the Legislature intended that disability retirement pensions be granted to those who became incapacitated even years after they had retired voluntarily, that is, after they had retired without being forced to do so by injury and disability. But allowing a post-voluntary retirement re-retirement for disability is unprecedented. It was never before a feature of public pensions. There may or may not be legislative history that indicates that it was the Legislature's intent to create such a novel benefit.

Under the Public Employees Retirement Law, one who is already retired for years of service and age may be allowed to apply for a disability retirement and prove that the retirement was in fact compelled by disability, but such an application is allowed only where the original retirement was taken on a voluntary basis due to inadvertence or mistake, as opposed to on a disability basis. In *Button v. Board of Administration* (1981) 122 Cal.App.3d 730 [176 Cal.Rptr. 218], an investigator for the Santa Clara County District Attorney's Office took a regular retirement for years of service and age. He did not believe that he was disabled at the time, although he felt exhausted. After two years of self-employment as an investigator, he suffered a heart attack. The WCAB found that the heart attack was due to arteriosclerotic coronary artery disease which developed during his employment and he was granted workers' compensation benefits against the county. Button then asked the retirement board to convert his regular pension to a disability pension, claiming that the exhaustion he had felt and that had motivated him to take a regular retirement, was a symptom of his work-related injury

and caused him to be incapacitated at the time he retired, although neither he nor the board recognized it.

Both before and after an administrative hearing conducted by a hearing officer whose opinion the board adopted, the board found that, because he was retired, Button was no longer a “member” of the retirement system and was ineligible to apply for a disability retirement. Button’s petition for writ of mandate was denied by the superior court. On appeal by Button, the Court of Appeal reversed the trial court’s decision and remanded the case with instructions that the case was to be returned to the administrative level so that Button’s claim that he was incapacitated while still employed could be heard.

The Court of Appeal ruled that, while, as a general rule, Government Code section 21024 (repealed Stats 1995 ch. 379, § 1; see now Gov. Code, § 21154, added Stats 1995 ch. 379, § 2 (SB 541)) precluded a retiree from filing an application for disability retirement except in circumstances delineated in the section, none of which favored Button, another section, Government Code section 20180 (repealed Stats 1995 ch. 379 § 1 (SB 541); see now Gov. Code, § 20160, added Stats 1995 ch. 379 § 2 (SB 541)), provided that if, while an employee was employed by an agency contracting with PERS, or while the employee was a member of the system, any action that should have been performed, but was not performed at the time it should have been by the member/employee or the member/employee’s beneficiary, by the public employer or by the retirement system because of inadvertence, oversight, mistake of fact, mistake of law, or other cause, “. . . the board shall take or perform such action, or shall order it to be taken or performed by the person whose duty it was to perform it.” The Court of Appeal noted that there was no evidence that Button’s condition was amenable to diagnosis at the time he retired, and “. . . given the express language of section 20180, it is unreasonable to attribute to the Legislature an intention to preclude an otherwise eligible employee from receiving a disability pension on the sole ground that his disabling condition was not diagnosed as such at the time of retirement.” (*Button v. Board of Administration, supra*, 122 Cal.App.3d, 737-738.)

As noted above, Section 20180 was repealed and its provisions were included in Section 20160 which was enacted by Statutes of 1995, Chapter 379, SB 541, Section 5 of which states that, by the amendments to the Public Employees Retirement Act, the Legislature intended that there be no change in the substantive law.

The time limitations for filing an application for disability retirement under the CERL of 1937 are governed by Government Code section 31722, a statute similar to PERS’s former Section 21024, and current Section 21154. But the CERL of 1937 does not have a statute similar to PERS’s former Section 20180 or current Section 20160. The decision in *Button* is thus not transferable to the CERL of 1937.

End comment.

(c) What is the effect of the cancer presumption?

(i) Presumed causation

Cancer so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of employment. (Gov. Code, § 31720.6, subd. (b).)

If the presumption is not controverted, the board is bound to find in accordance with the presumption. (Gov. Code, § 31720.6, subd. (c).) See below for discussion on how the presumption can be rebutted.

(ii) There is no presumption that the member is incapacitated.

Section 31720.6 does not create a presumption that the member is incapacitated for duty. The member must still prove that he or she is incapacitated. Then, if the other prerequisites for triggering the presumption are established, the incapacity is presumed to be service-connected.

(iii) Service-connected disability retirement is required.

If the member is otherwise qualified and is permanently incapacitated for the performance of duty as a result of cancer, the member shall receive a service-connected disability retirement if the member demonstrates that he or she was exposed to a known carcinogen as a result of performance of job duties. (Gov. Code, § 31720.6, subd. (b).)

Associations' comment

Absent further evidence from the respondent, a service-connected disability retirement pension follows a demonstration of exposure to a known carcinogen as a result of performance of job duties and establishment of permanent incapacity due to cancer. The statute does not require the applicant to show that there is a link, be it actual, probable, possible, or reasonable, between the carcinogen and the kind of cancer that developed in the member. (See *Sameyah v. Los Angeles County Employees Retirement Association* (2010), *supra*, 190 Cal.App.4th 199, 214.) Whether or not there is a causal link between the exposure and the cancer becomes an issue only if the primary site of the cancer is established. If the primary site is established, that there is no reasonable link between the exposure(s) and the cancer then becomes a material fact and evidence that the cancer is not reasonably linked to the carcinogen is relevant. The burden, however, is on the respondent to establish the primary site of the cancer and that there is no reasonable link between the employment and the cancer. (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*, *supra*, 126 Cal.App.4th, 315, cited as authority by the appellate court in *Sameyah*, pp. 210-212.) If the respondent's burden is not met, a service-connected disability pension must be granted to the member.

End comment.

(d) What sort of evidence will rebut the presumption?

The presumption is "disputable" if the primary site of the cancer has been established. In such a case, the presumption may be controverted by evidence that any carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. (Section 31720.6, subdivision (c).)

In order to rebut the presumption of service-connection, the respondent has the burden of proving that (1) the primary site of the cancer is established and (2) that exposure to the recognized carcinogen is not reasonably linked to the disabling cancer. (See *Faust v. City of San Diego* (2003) (Appeals Board En Banc) 68 Cal.Comp.Cases 1822, 1827, a decision of the entire Workers' Compensation Appeals Board concerning the construction and application of Labor Code section 3212.1, the Workers' Compensation Act's cancer presumption, the provisions of which are similar to those of Government Code section 31720.6.)

If the primary site of the cancer is not established, the terms of the statute do not provide for any basis on which the presumption may be disputed. In such a case, that there is no reasonable link between any carcinogen to which the applicant has demonstrated an exposure and the incapacitating cancer is not a material fact and evidence that there is no reasonable link is not relevant. Where the primary site of the cancer is unknown, the presumption is conclusive, that is, it cannot be rebutted.

See the further discussion of rebuttal evidence, below at Section II, B, 6, b), (2), (d), [2].

(i) Nonattribution provisions

There are two provisions of Government Code section 31720.6 under which evidence that would otherwise establish that the known carcinogen is not reasonably linked to the disabling cancer cannot be used to support a finding of fact that there is no reasonable link and a conclusion of law that the presumption has been rebutted:

(a) Pre-existing disease is not a basis on which the presumption may be rebutted.

The cancer so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation. (Section 31720.6, subdivision (a).)

(b) Non-industrial predisposing or contributing factors are not bases on which the presumption may be rebutted

A service-connected disability retirement pension is to be granted "[n]otwithstanding the existence of nonindustrial predisposing or contributing factors" (Section 31720.6, subdivision (b).)

(ii) What is the effect of the cancer presumption on the burden of proof?

Associations' comment

See the Associations' comment regarding this issue in the discussion of the heart presumption, above. In short, the cancer presumption is one enacted to achieve a public policy objective and, therefore, it is one affecting the burden of proof, not merely the burden of producing evidence. This means that, to avoid liability for a service-connected disability pension or survivor's continuance, the Association must prove by the preponderance of substantial evidence that (1) the primary site of the cancer is established and (2) there is no "reasonable link" between work-related exposures to carcinogens and the cancer. (*City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*, *supra*, 126 Cal.App.4th, 315.)

One decision of the Workers' Compensation Appeals Board, *Faust, supra*, and two decisions of the Court of Appeal, *Garcia, supra*, and *Sameyah, supra*, address the impact of the presumption on the burden of proof. We discuss these opinions in chronological order, although *Sameyah*, which deals specifically with Government Code section 31720.6 while the other two opinions deal with Labor Code section 3212.1, would appear to be the most important authority for purposes of disability retirement and survivor's allowance claims.

End comment.

(a) *Faust v. City of San Diego.*

In *Faust v. City of San Diego* (2003) (Appeals Board En Banc) 68 Cal.Comp.Cases 1822, the Workers' Compensation Appeals Board construed provisions in Labor Code section 3212.1 that allow the rebuttal of the presumption that cancer in certain public safety employees is work-related for workers' compensation purposes if the primary site of the cancer is known. Labor Code section 3212.1's provisions are mirrored in Government Code section 31720.6. Therefore, for guidance, courts will look at how Labor Code section 3212.1's provisions have been construed. (See *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, fn. 4 [229 Cal.Rptr. 814, 724 P.2d 500].) It is appropriate to consider the WCAB's decision in *Faust*, wherein the WCAB stated,

We hold that under section 3212.1, as amended in 1999, when an applicant establishes both exposure to a known carcinogen and the manifestation or development of cancer as the section specifies, the cancer is presumed to be an industrial injury. The burden then shifts to the defendant to rebut the presumption (1) by evidence establishing the primary site of the cancer and (2) by evidence establishing that there is no reasonable link between the carcinogen and the cancer. The defendant must prove that no reasonable link exists; it does not rebut the presumption by merely proving that there is no evidence demonstrating a reasonable link. (*Faust*, p. 1823.)

Faust was a city firefighter for over 25 years. In April 1998, *Faust* was diagnosed with prostate cancer and stopped working due to the effects of the cancer. Following surgery in May 1998, *Faust* retired in July 1998.

In support of his application for workers' compensation benefits, Faust submitted the report of Prakash Jay, M.D. Dr. Jay summarized Faust's exposure to fires and carcinogens over the course of his career. He cited medical literature showing an increased incidence of cancer in those involved in occupations in which there was exposure to carcinogens to which Faust was exposed at certain fires and "medical studies" showing an increased incidence of prostate cancer in firefighters. He also cited literature that linked exposure to cadmium, a carcinogen to which Faust was exposed at a fire, to prostate cancer. Dr. Jay concluded that Faust's prostate cancer was industrially caused.

The city submitted a medical report from Frederick Fung, M.D. On the basis of a medical literature search that failed to disclose any association between the occupation of firefighter and prostate cancer, Dr. Fung concluded that Faust's prostate cancer was not work-related.

The workers' compensation judge held that the presumption under Labor Code section 3212.1 was raised, but that it had been rebutted by the opinion of Dr. Fung. The Workers' Compensation Appeals Board granted Faust's petition for reconsideration, rescinded the workers' compensation judge's findings, and remanded the case for further proceedings.

The WCAB explained the differences between the presumption under Labor Code section 3212.1 prior to and after the 1999 amendment.

Before the 1999 amendment, the Court of Appeal in *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)* (1994) 23 Cal.App.4th 1120 [28 Cal.Rptr.2d 601], 59 Cal. Comp. Cases 180, held that the term "reasonable link," as used in section 3212.1, had a plain meaning that is clear on its face. Two things are reasonably linked if there is a logical connection between them. Thus, firefighters were not required to show that industrial exposure to carcinogens proximately caused their cancer, but they were required to show something more than a mere coincidence of exposure and cancer, i.e., a logical connection between the two. The Court stated that the legislative history showed that the purpose of the workers' compensation presumption statutes is to ease the burden of proof for certain safety workers. If the Legislature had intended "reasonable link" to be the equivalent of "proximate cause," section 3212.1 would be mere surplusage and would not have been enacted. Accordingly, if the evidence supported a reasonable inference that the occupational exposure contributed to the worker's cancer, then a reasonable link was shown, and the disputable presumption of industrial causation could be invoked. However, in this case, the Court held that the applicant failed to establish a reasonable link because he did not demonstrate occupational exposure prior to the latency period. (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Smith)*, supra.) [Footnote omitted.] (*Faust v. City of San Diego*, supra, 68 Cal.Comp.Cases, 1828.)

....

The 1999 amendment requires that the applicant establish that he or she is a firefighter or peace officer who falls within the ambit of section 3212.1(a). The applicant must further demonstrate exposure to a known carcinogen as defined in published standards and that the cancer has developed or manifested itself during the period when the applicant was in active service or for a specified period, not to exceed 60 months from the last day of work in the specified capacity, if the applicant's service has terminated. (Lab. Code, § 3212.1(b) & (d).) Therefore, the applicant is no longer required to establish a reasonable link between the exposure and the cancer.

Accordingly, the presumption of compensability arises and the burden shifts to the defendant when the applicant has made this showing. The defendant may rebut the presumption (1) by evidence that the primary site of the cancer has been established and (2) by evidence that exposure to the recognized carcinogen is not reasonably linked to the disabling cancer. (*Faust*, p. 1830.)

The applicant's burden was described by the WCAB as follows:

The burden of proving these initial elements lies with the applicant. When the applicant has shown: (1) that he or she was employed in an included capacity; (2) that he or she has been exposed to a known carcinogen during the employment; and (3) that he or she has developed or manifested cancer within the statutory time frames, then he or she has made a prima facie showing that the cancer is presumptively compensable. (*Faust*, p. 1831.)

Associations' comment

The WCAB's statement that the applicant must prove the development or manifestation "within the statutory time frames" is, at best, imprecise. Labor Code section 3212.1 provides that the development or manifestation must occur "during a period in which any member described in subdivision (a) is in the service of the department or unit." In-service development or manifestation is a requirement.

What are the "statutory time frames," plural, to which the WCAB refers in *Faust*? The only other statutory time period defined in Section 3212.1 is the up-to-60 month limitation/extension period. Since in-service development or manifestation is a requirement, any construction that development or manifestation of the cancer solely during the 60-month limitations period alone would suffice, if this is what the WCAB meant, is clearly erroneous.

Note that Labor Code section 3212.1 was amended effective January 1, 2011 to lengthen the post-service period during which the cancer presumption is available from 60 months to 120 months.

As is the case for the heart presumption under Section 31720.5, the cancer presumption under the CERL of 1937's Government Code section 31720.6 does not have an express requirement that development or manifestation occur during service. See the discussion, above at Section II, B, 6, b), (1), (c), [1].

End comment.

In *Faust*, the WCAB described the defendant's burden as follows:

[Once the applicant has met his or her burden of proving the elements giving rise to the presumption,] [t]he burden of rebutting the presumption now shifts to the defendant. To rebut the presumption, the defendant must establish by evidence two elements: (1) that the primary site of the cancer has been identified; and (2) that the carcinogen is not reasonably linked to the disabling cancer. (*Faust*, p. 1830.)

Concerning the second element of the defendant's burden, the WCAB stated,

Second, the defendant has the burden of showing that the carcinogen to which the applicant has demonstrated exposure is not reasonably linked to the disabling cancer, i.e., the defendant must provide evidence to establish that there is no reasonable link. Medical or similar expert scientific evidence is necessary to show that there is no reasonable link between the exposure and the cancer.

A defendant may establish that there is no reasonable link between the applicant's exposure and his or her illness by establishing the absence of a link between the exposure and the cancer, including establishing that the latency period of the manifestation of the specific cancer excludes the exposure as the cause of the applicant's cancer. (*Law v. Workers' Comp. Appeals Bd.* (2003) 68 Cal. Comp. Cases 497, 499 (writ den.); *Leach v. West Stanislaus Cty. Fire Protection Dist.*, *supra* [(2001) 29 Cal. Workers' Comp. Rptr. 188, 189. The *Leach* reference is to an editorial summary of and comment on an Appeals Board Panel decision.])

The defendant's burden is to prove by medical probability that there is no reasonable link between the applicant's demonstrated exposure to known carcinogens during the employment and the development of cancer. (*City of Anaheim v. Workers' Comp. Appeals Bd. (Pettitt)* (2002) 67 Cal. Comp. Cases 1609 (writ den.)) It is not enough for the defendant to show that no evidence has established a reasonable link between the known carcinogen and the cancer. Instead, the defendant must establish by evidence of reasonable medical probability that a reasonable link does not exist.

Accordingly, evidence showing that no reasonable link has been demonstrated to exist between the carcinogen or carcinogens to which the firefighter has been exposed and the development of the cancer, is not adequate to rebut the presumption of industrial causation. To rebut the presumption, the evidence must explicitly demonstrate that medical or scientific research has shown that there is no reasonable inference that exposure to the specific known carcinogen or carcinogens is related to or causes the development of the cancer.

Expert evidence should include a review of studies or other evidence that justifies an opinion or conclusion that there is no reasonable link. The studies should be attached to the report as a foundation for the opinion.

Evidence, such as medical literature, that does not relate the exposure to the cancer is not evidence that no link exists. To find otherwise would improperly place the burden of showing industrial causation on the applicant. Therefore, the fact that there are no epidemiological studies showing an increased incidence in firefighters of the particular type of cancer suffered by the applicant does not rebut the presumption.

Evidence that may rebut the presumption may include evidence that there is no reasonable link between the primary site of the cancer and the carcinogen to which the applicant was exposed, because the period between the exposure and the manifestation is not within the cancer's latency period, as established by medical evidence. (*Leach v. West Stanislaus Cty. Fire Protection Dist.*, *supra* [Appeals Board panel decision]; see also *County of El Dorado v. Workers' Comp. Appeals Bd. (Klatt)*, *supra* [(2000) (Writ Denied) 65 Cal. Comp. Cases 1437, 1439].) In *Leach*, the applicant's colon cancer was diagnosed less than five years after his employment began. The defendant presented medical evidence that the latency period for colon cancer was at least ten years. The Appeals Board panel found that the defendant had successfully rebutted the presumption of industrial causation with this evidence.

If the defendant does not meet its burden of proving both requisite elements, i.e., the primary site of the cancer and the lack of a reasonable link between the exposure and the cancer, then the defendant has not rebutted the presumption of compensability and an industrial injury must be found. (Lab. Code, § 3212.1(d).) [Footnote omitted.] (*Faust*, pp. 1831-1832.)

Association's comment

The city did not seek appellate review.

End comment.

(b) City of Long Beach v. Workers' Comp. Appeals Board (Garcia)

In *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298 [23 Cal.Rptr.3d 782], the applicant was a 35-year-old police officer with just short of eleven years of service who filed an application for workers' compensation benefits after being diagnosed with kidney cancer. There was evidence that Garcia had exposures to asbestos while working in an old police station, as well as exposures to vehicle exhaust, fires, spills, drug laboratories, though he failed to establish to what substances he was exposed at those times. There was also evidence that Garcia was exposed to lead when he qualified with his weapon, and gasoline when he filled his patrol car. The agreed medical examiner concluded that none of Garcia's exposures was linked to

kidney cancer. He testified that the only carcinogens to which Garcia had been exposed were asbestos and the benzene that was in the gasoline he pumped into his patrol car. There was no dispute that Garcia's asbestos exposure was not a cause because Garcia did not have asbestosis. While benzene exposure had a strong relationship to leukemia, the medical literature did not establish positively that there was a link between benzene and kidney cancer. However, the agreed medical examiner admitted that while he could not conclude that there was a positive link between benzene and kidney cancer, he could not show medically that there was no link. There was always a possibility. (*Garcia*, p. 307.)

The presumptions of industrial causation found in section 3212 et seq. are rebuttable; and, because they reflect public policy, they are presumptions affecting the burden of proof. [Citations.] 'The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.' (Evid. Code, § 606.)" (*Reeves v. Workers' Comp. Appeals Bd.*, *supra*, (2000) 80 Cal.App.4th 22 at p. 30 [95 Cal.Rptr.2d 74]; *Gee v. Workers' Comp. Appeals Bd.*, *supra*, (2002) 96 Cal.App.4th 1418 at pp. 1425-1426, [118 Cal.Rptr.2d 105].) Here, the language of section 3212.1 unambiguously allocates the respective burdens of proof between the employee and employer. To invoke the presumption, the employee must demonstrate, by a preponderance of the evidence, that he or she was exposed, while in the service of the employer, to a known carcinogen. (§§ 3212.1, subd. (b), 3202.5; *LaTourette v. Workers' Comp. Appeals Bd.*, *supra*, [(1998)] 17 Cal.4th [644] at p. 650, 72 Cal.Rptr.2d 217, 951 P.2d 1184.) If the employee clears this hurdle, he or she is entitled to the presumption that the cancer arose out of and in the course of the employment. The presumption is "disputable." It may, however, be controverted only in a clearly specified and limited manner: by a preponderance of the evidence that (1) the primary site of the cancer has been established; and (2) that the carcinogen to which the employee has demonstrated exposure was "not reasonably linked" to the cancer. (§§ 3212.1, subd. (d), 3202.5.) A preponderance of the evidence means evidence, which when weighed with contrary evidence, has more convincing force and the greater probability of truth. (*Zipton v. Workers' Comp. Appeals Bd.* (1990), *supra*, 218 Cal.App.3d 980 at pp. 990-991, [267 Cal.Rptr. 431].) (*Garcia*, p. 314.)

The Court of Appeal interpreted the term "not reasonably linked."

The plain meaning of "not reasonably linked" is also readily discernable. Dictionary definitions of "reasonable" include "being in accordance with reason," "not extreme or excessive," "having the faculty of reason," "possessing sound judgment," not absurd, ridiculous, or extreme, and "sensible." (Merriam-Webster's Collegiate Dict. (10th ed.1996) p. 974; Webster's 3d New Internat. Dict. (1993) p. 1892.) "Link" is defined as, *inter alia*, "a connecting structure," "a connecting element or factor," "serving to connect," and "to couple or connect." (Merriam-Webster's Collegiate Dict. (10th ed.1996), *supra*, at p. 678; Webster's 3d New Internat. Dict., *supra*, at p. 1317.) When interpreting the earlier version

of section 3212.1, *Riverview Fire Protection District* concluded that “reasonably linked” refers to a logical connection between two things. (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.*, *supra*, 23 Cal.App.4th at p. 1127, 28 Cal.Rptr.2d 601.)

Thus, under the current version of section 3212.1, an employer demonstrates the absence of a reasonable link if it shows no connection exists between the carcinogenic exposure, or that any such possible connection is so unlikely as to be absurd or illogical. Contrary to the City's argument, the statute does not require the employer to prove “the absence of *any possible* link.” (Italics added.) The statute requires proof no *reasonable* link exists. A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link. The employer need not prove the absence of a link to a scientific certainty; instead, it must simply show no such connection is reasonable, i.e., can be logically inferred. (*Garcia*, pp. 315-316. Italics are the *Garcia* court's.)

The Court of Appeal held that proof that there is no medical literature concluding that there is a link between the exposure and the cancer does not rebut the presumption.

An employer does not meet its burden merely by showing that no studies exist showing a positive link between the exposure and the particular form of cancer. [Footnote omitted.] That no studies exist -- perhaps because they have not been undertaken or completed, or because their results were inconclusive -- does not prove or disprove anything. The *absence* of medical evidence linking a known carcinogen with a particular form of cancer simply represents a void of information, and cannot be considered proof a reasonable link does *not* exist. [Italics in the original.]

. . . .

. . . . If we were to hold that the employer met its burden under the amended section 3212.1 merely by showing the absence of medical studies or other evidence connecting a particular carcinogen with a particular cancer, the practical effect would be to shift the burden of proof back to the employee, in derogation of the 1999 amendments to the statute. In short, the statute's history suggests the Legislature has made a policy decision that, when it is not possible to determine whether the carcinogenic exposure caused the cancer, the employer, not the employee, should bear the burden of the ambiguity.

As noted, the City argues that this places an impossible burden upon employers. Because section 3212.1 describes the presumption as disputable, the City argues, the Legislature cannot have intended to make the presumption impossible to dispute. The City points to the AME's deposition testimony that medical professionals do not deal in the null hypothesis, implying employers will never be able to produce medical studies stating certain carcinogens do not cause certain cancers. We agree that the burden placed upon the employer is a difficult one. However, we disagree that the standard is impossible to meet. If

medical studies are available showing that particular cancers have been shown not to be caused by certain carcinogens, such evidence, if credited, would suffice. But, even assuming such studies are not readily available, the employer has other avenues of proof available to it. In some cases the employer will be able to demonstrate it is highly unlikely the cancer was industrially caused because the period between the exposure and the manifestation of the cancer is not within the cancer's latency period.⁶ (See, e.g., *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.*, *supra*, 23 Cal.App.4th at pp. 1129, 1131, 28 Cal.Rptr.2d 601.) Further, the nature of the manifestation, or other medical evidence, may be sufficient to show the lack of connection. For example, in the instant case, the AME and Dr. Villalobos were able to determine with certainty that the kidney cancer could not have resulted from asbestos exposure, because if asbestos exposure had caused the cancer, evidence of asbestos absorption would have first manifested in the lungs.⁷

⁶ A "latency period" is the period between the exposure to the carcinogen and the subsequent appearance of a clinically detectable disease. (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.*, *supra*, 23 Cal.App.4th at p. 1129, 28 Cal.Rptr.2d 601; see also *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1135, 95 Cal.Rptr.2d 701, 998 P.2d 403.)

⁷ The AME stated with certainty that asbestos had not caused the kidney cancer. "[T]he reason is that the current accepted relationship requires evidence of asbestos absorption in the body. And [Garcia] has already had CT [computed tomography] scans of his lungs which includes the pleura. Now, they were normal. So if the CT scan of the lung and the pleura is normal, there's no evidence that he has inhaled and deposited any asbestos in his body so as far as medically scientifically, he has no absorption of asbestos. So if he's never absorbed any asbestos that deposited in his body, it can't have migrated to any other part of his body so that I could say with no trouble."

Other methods of proof, not at issue before us here, may exist as well. For example, perhaps it would be possible for an employer to show that the quantity of the carcinogen to which the employee was exposed, or length of time of the exposure, was too small or too brief to have had any detrimental effect. (*Garcia*, pp. 316-318.)

(i) To sum up the *Garcia* opinion, the Court of Appeal defined the kind of evidence that would rebut the presumption as follows:

1. Generally, it is not necessary to prove to a medical certainty that no link exists, but the defendant/respondent must simply show that no connection between the exposure and the cancer is reasonable, i.e., the connection cannot be logically inferred. (*Garcia*, p. 315.)
2. Evidence that "shows no connection exists between the carcinogenic exposure, or that any such possible connection is so unlikely as to be absurd or illogical." (*Garcia*, p. 316.)
3. Medical studies that show that particular cancers are not caused by certain carcinogens. (*Garcia*, p. 317.)

4. Evidence that it is highly unlikely the cancer was industrially caused because the period between the exposure and the manifestation of the cancer is not within the cancer's latency period. (*Garcia*, p. 317.)
5. The nature of the manifestation, or other medical evidence, showing a lack of a connection, e.g., asbestos was shown not to be a cause of kidney cancer because if there had been exposure to asbestos sufficient to cause kidney cancer, the applicant would have evidence of asbestos absorption in the lungs. (*Garcia*, p. 317.)
6. Other evidence not before the Court of Appeal in *Garcia* shows that the quantity of the carcinogen to which the employee was exposed, or length of time of the exposure, was too small or too brief to have had any detrimental effect. (*Garcia*, p. 317.)

Associations' comment

With respect to the quantity or length of time of exposure, there may or may not be a difference between evidence of the exposure to the carcinogen that will trigger the presumption (there is no minimum quantity or length of time specified) and evidence of the insufficiency of quantity or length of time of exposure that will rebut the presumption. It may be that any exposure gives rise to the presumption, while the presumption may be rebutted if the quantity or length of time of exposure falls short of the threshold quantity or length of time medical experts demand to see in order to find a reasonable link. As indicated above, *Bowen* would seem to require more than a minimal, infinitesimal, or inconsequential exposure; but evidence of exposure that amounts to substantial evidence that an injurious exposure actually occurred would seem to be required.

End comment.

Applicants' comment

But if the primary site of the tumor is not known, the presumption cannot be rebutted, even by evidence that the exposure was insufficient to have caused the tumor.

End comment.

Associations' comment

Proof of exposure must be in the form of substantial evidence of a real and measurable exposure under the standard set by the Supreme Court in *Bowen and Hoffman* for what evidence is necessary to support a finding of fact. The applicant's prima facie burden is to show at least an exposure that is of consequence, not an infinitesimal, minimal or inconsequential exposure; otherwise, a finding of fact that there was an exposure would not be supported by substantial evidence. Therefore, even if the primary site of the cancer is not known, the applicant's proof of exposure must be more than just *any*

evidence of exposure, notwithstanding the WCAB's statement in *Faust* that "a minimal exposure is enough to satisfy the applicant's burden." (*Faust*, p. 1830.)

Associations' comment

With respect to the absence of medical literature addressing the issue of a link between a specific suspected carcinogen and a type of tumor, both *Faust* and *Garcia* stand for the proposition that the mere absence of medical literature supporting a reasonable link does not amount to positive proof that a reasonable link does not exist. The Agreed Medical Examiner in *Garcia* admitted that, while he could say that the medical literature did not support a conclusion that there was a reasonable link, he could not say that the medical literature supported a conclusion that there was no reasonable link. In the absence of any medical literature, all things were possible, he testified.

Apparently, the Agreed Medical Examiner in *Garcia* was not asked to state an opinion on why there was no medical literature; at least such a question is not mentioned in the *Garcia* opinion. It could be that there was no medical literature either way, not because studies simply have not yet been undertaken or, if undertaken, were not conclusive, but because the hypothesis of such a connection that would give rise to investigation by researchers is itself unreasonable, ridiculous, absurd, or unsupportable. If the employer produces evidence in the form of expert opinion as to why the hypothesis is unreasonable, and does not rely on the mere absence of medical literature on the subject in an attempt to show the lack of a reasonable link, the absence of medical literature on the subject may not be determinative of the respondent's rebuttal case. We submit that if such evidence is submitted, it would meet *Garcia*'s standard that proof that no link can logically be inferred is proper rebuttal evidence. (See *Garcia*, 126 Cal.App.4th, 315.)

Developing evidence showing the presence or lack of a reasonable link between the exposure and an otherwise presumably work-related tumor may require expert proof beyond that typically seen in disability retirement cases. While a referral to a consultant in oncology for an expert opinion might suffice in the case of a general member, the typical consultant in oncology may not have an expertise in the research end of his specialty. To obtain an opinion on why there is no medical literature on a presumably work-related carcinogen-tumor link, and an opinion on why the hypothesis of such a link is or is not reasonable, ridiculous, absurd, and/or unsupportable, it may be necessary to also refer the matter to a research oncologist, epidemiologist, or other research professional with the credentials to answer these issues with authority.

Developing evidence on the "reasonable link" issues is a task that can be expected to require a dialogue between the association's investigators and/or legal representatives and the expert. This would seem to exclude the use of an agreed medical examiner since, in practice, ex parte communications with an agreed medical examiner are prohibited and such a restriction would make the necessary dialogue cumbersome.

End comment.

(c) Sameyah v. Los Angeles County Employees Retirement Association.

In *Sameyah v. Los Angeles County Employees Retirement Association* (2010), *supra*, 190 Cal.App.4th 199, a deputy sheriff died as a result of a cancer called Burkitt's lymphoma. The deputy began working as a deputy in June 1996. In or about December 2002, he developed abdominal pain. Examination and testing indicated that he had a gastric ulcer and elevated levels of *Helicobacter pylori* bacteria. A biopsy of the ulcer performed in March 2003 indicated gastric lymphoma which was associated with the elevated *H. pylori* infection and he was found to have a large gastric mass. The cancer was determined to be Burkitt's lymphoma. He last worked in July 2003 and died in January 2004. His widow's application for a service-connected survivor's allowance was denied by the board of retirement. She appealed and an administrative hearing was held. The evidence included the following:

Mrs. Sameyah established that her husband had been exposed on the job to lead, benzene, diesel exhaust, gasoline, fuel oils, jet fuel and petroleum solvents and it was given that by that showing, the presumption that her husband's death was service-connected under Government Code section 31720.6 rose in her favor. The pivotal issues were whether the respondent had established the primary site of the cancer and, if so, whether the respondent had proven that there was no reasonable link between the known carcinogens to which the decedent had been exposed on the job and the cancer.

The respondent's consulting oncologist opined that there was no evidence that work-related exposures to carcinogens caused the cancer. In the first place, he explained, the decedent became symptomatic within five years [*sic*] of his first date of employment, whereas cancer causing agents usually require a relatively long latency period, usually "10-15 years or more" (*Sameyah*, p. 204.) In the opinion of another expert, the latency period would be a minimum of 12 years. (*Id.*, p. 214.)

"In fact, Burkitt's lymphoma has been shown to be associated with various and relatively specific gene changes that lead to the development of this type of lymphoma. Herpes viruses such as the Epstein-Barr virus have been shown to cause this type of lymphoma. *Helicobacter pylori* infection within the stomach has been shown to cause other types of stomach lymphomas. It is likely that in Mr. Sameyah's case, that one of these infectious agents contributed to the causation of the lymphoma that ultimately caused his death" (*Sameyah*, p. 204.)

The respondent's consultant also opined that the primary site was the stomach.

"... The primary lymphoma mass was initially symptomatic and detected in his stomach and, in fact, there is no doubt that the patient's initial diagnosis was Burkitt's type of lymphoma originating in his stomach." (*Sameyah*, p. 205.)

In a later report the respondent's consultant stated,

“Although later other sites clinically expressed the malignant lymphoma, the convention is to stage lymphoma as to the site presenting at the time of initial diagnosis. In this case, the primary site was extranodal and did not present as nodal or lymphatic sites but extranodal and, in this case the area was the stomach. Therefore it is correct to consider that the primary site of this patient’s lymphoma was the stomach. . . .” (*Sameyah*, p. 206.)

The widow’s expert, an internist, opined that the highest incidence of Burkitt’s lymphoma is in the children of Central Africa and the viral agent there is the Epstein-Barr virus. He opined that the decedent’s cancer was work-related because as a peace officer, the decedent had increased exposure to people with viruses and some of the carcinogens to which he was exposed on the job were contributing factors.

“As a sworn peace officer, the decedent had a far higher risk of exposure to biologic agents and microbes compared to individuals pursuing activities other than law enforcement. The decedent’s patrol career caused frequent close contact with several categories of individual[s] known to harbor infectious disease at a higher rate. These categories of individual[s] included incarcerated individuals with poor personal hygiene, IV drug users, patients with HIV, and the homeless populations.

“Additionally decedent had direct occupational exposures to substances linked to increased risk of lymphoma. Burkitt’s lymphoma is categorized more generally as a malignant B cell lymphoma (a type of non-Hodgkin’s lymphoma). As can be seen from the research abstracts appended to this report, benzene and other solvents increase the risk for lymphoma. Benzene is listed by the IARC (International Agency for Research on Cancer) as a known human carcinogen. Importantly, benzene exposure is heightened in those individuals exposed to diesel particulates. Mr. Sameyah suffered increased exposure to this carcinogenic solvent due to patrol duties with windows down, work in proximity to the 405 Freeway, and significant exposure to jet fuel.” Dr. Hirsch also noted Mr. Sameyah’s exposure to lead and possible exposure to asbestos and radio transmission equipment.
(*Sameyah*, p. 205.)

Mrs. Sameyah’s expert opined that there was no primary site, but that the lymphoma, while it manifested itself in the wall of the stomach, was a tumor “. . . present in the entire white blood cell system coursing through Mr. Sameyah’s body. The cancerous process then evolved most briskly in the wall of the stomach; however this is not the ‘primary site’ of the tumor. Rather, the lymphomatous process occurred throughout Mr. Sameyah’s body. Therefore, I do not believe there is a primary site of this cancer.” (*Sameyah*, p. 205.)

The board of retirement adopted the referee’s recommended decision that Mrs. Sameyah was not entitled to a service-connected survivor’s allowance. Mrs. Sameyah’s nonservice-connected allowance continued. She filed a petition for writ of mandate that was denied by the trial court.

The [trial] court explained: “The independent judgment of the court is that the presumption that the cancer arose out of or in the course of employment was rebutted by evidence that the cancer was caused by a virus and not by any of the carcinogens to which petitioner’s husband was exposed by his job duties, and that the primary site of the cancer was in the lining of the stomach. Evidence to the contrary is limited to speculation by petitioner’s expert that the carcinogens to which petitioner’s husband was exposed could possibly have also contributed to the cancer. Such speculation is entitled to little or no weight as compared with the direct evidence that the cancer was first observed in a stomach ulcer that was caused by a virus.” (*Sameyah*, p. 207.)

Mrs. Sameyah appealed and the court of appeal affirmed the trial court’s decision.

The court of appeal noted that the evidence demonstrated that the decedent had been exposed on the job to various chemicals as found by the trial court and there was no dispute that they were carcinogens.

Helicobacter pylori bacterium also is a carcinogen. Dr. Padova, the Board's expert, stated that this bacterium "has been shown to cause other types of stomach lympho-mas." Although the evidence indicates that Mr. Sameyah was exposed to *Helicobacter pylori*, there is no indication that he was exposed to this bacterium as a result of performance of his job duties.

Epstein-Barr virus is another carcinogen. Both Dr. Padova and Sameyah's expert, Dr. Hirsch, stated that Epstein-Barr virus is a cause or risk factor for Burkitt's lymphoma. There is no evidence that Mr. Sameyah was exposed to this virus as a result of his job duties. The medical records do not indicate that he was ever diagnosed with Epstein-Barr virus.

Below Sameyah focused on her husband's chemical exposures. On appeal, she tries to make the case that he was exposed through his work to carcinogenic viral or bacterial agents. Evidence that Mr. Sameyah *might* have come into contact with an inmate or suspect who *might* have had a virus is not sufficient evidence of a carcinogenic exposure.

. . . Sameyah did not demonstrate that her husband was exposed through his work to any carcinogenic viral or bacterial agent. (*Sameyah*, p. 212.)

Given that Mrs. Sameyah had established exposure to known carcinogens on the job, the court of appeal stated that it was respondent’s burden to prove (1) that the primary site of the cancer was established and (2) that there was no reasonable link between the cancer and the exposures at work to the known carcinogens. (*Sameyah*, p. 213.)

The court of appeal ruled that substantial evidence in the form of the opinion of the respondent’s consulting oncologist supported the trial court’s finding that the primary site of the Burkitt’s lymphoma was the stomach. The court noted that Sameyah’s expert was an internist, not an oncologist. (*Sameyah*, p. 213.)

On the issue of whether the respondent had proven that there was no reasonable link between on-the-job exposures to known carcinogens and the cancer, the court of appeal ruled that substantial evidence supported the finding of the trial court that there was no reasonable link. (*Sameyah*, p. 213.)

The evidence shows that Burkitt's lymphoma is caused by a virus. Both experts agree on this. Sameyah's expert, Dr. Hirsch, asserts that the highest incidence of Burkitt's lymphoma occurs among children in Central Africa, and the known "risk factor" for the development of the disease in these children is Epstein-Barr virus. Epstein-Barr virus is a carcinogenic agent. As explained above, there is no evidence in the administrative record demonstrating that Mr. Sameyah's work as a deputy sheriff exposed him to a carcinogenic viral agent within the meaning of section 31720.6, subdivision (b). [Footnote omitted.]

Neither expert identified any other cause for Burkitt's lymphoma. Sameyah's expert, Dr. Hirsch, noted that benzene exposure has been linked to an increased risk of some lymphoma, but not Burkitt's lymphoma in particular. Mr. Sameyah was exposed to benzene "due to patrol duties with windows down, work in proximity to the 405 Freeway, and significant exposure to jet fuel." (*Sameyah*, p. 213-214.)

The court of appeal noted that Sameyah's expert did not comment on the significance of the latency period (*Sameyah*, p. 214.) and concluded,

There is substantial evidence in the record showing (1) that Burkitt's lymphoma is caused by a virus; (2) that chemical exposure is not a known cause of Burkitt's lymphoma; and (3) that the latency period between exposure to the chemicals at issue here and the development of a disabling cancer would be at least 10 years, but more likely longer. We agree with the trial court that this showing is sufficient to demonstrate that David Sameyah's work-related chemical exposures are not reasonably linked to the development of his Burkitt's lymphoma.

(d) Is the respondent's burden of proof made greater by the language in Section 31720.6 that requires the respondent to prove that the "carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. . . ."

Associations' comment

The Associations assert that if the respondent proves by the preponderance of the evidence that the link between the carcinogen and the cancer is not probable, the respondent has met its burden of proof and the presumption is rebutted. Reasonable people do not rely on the existence of a fact if the evidence shows that its existence is unlikely. If the evidence shows that the existence of a fact is only a possibility and not a probability, the evidence is too conjectural to support a finding that it exists. (*Jones v.*

Ortho Pharmaceutical Corporation (1985), *supra*, 163 Cal.App.3d 396, 402-403 [209 Cal.Rptr. 456]; *Travelers Ins. Co. v. Industrial Acc. Comm.* (1949) 33 Cal.2d 685, 687 [203 P.2d 747].)

The court in *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005), *supra*, 126 Cal.App.4th 298, 316, held as follows concerning the meaning of the term "not reasonably linked" in Labor Code section 3212.1:

. . . [An] employer demonstrates the absence of a reasonable link if it shows no connection exists between the carcinogenic exposure, or that any such possible connection is so unlikely as to be absurd or illogical. Contrary to the City's argument, the statute does not require the employer to prove "the absence of *any possible link*." (Italics added.) The statute requires proof no *reasonable link* exists. A link that is merely remote, hypothetical, statistically improbable, or the like, is not a reasonable link. The employer need not prove the absence of a link to a scientific certainty; instead, it must simply show no such connection is reasonable, i.e., can be logically inferred. (*Garcia*, pp. 315-316. Italics are the *Garcia* court's.)

Facts in disability retirement proceedings must be established by the preponderance, "or weight" of the evidence. Any fact at issue in these proceedings must be established by the preponderance of "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783 [199 Cal.Rptr. 720]; *Glover v. Board of Retirement, supra*, 214 Cal.App.3d 1327, 1337 [263 Cal.Rptr. 224]. Evidence is "substantial" if it is reliable, solid proof. "Substantial evidence" is evidence which ". . . is reasonable in nature, credible, and of solid value . . ." (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) ". . . [T]he term means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion." (*Ibid.*) Therefore, the Associations assert that when the Legislature used the words "not reasonably linked," it was referring to proof that the connection between the exposure and the cancer was not a probability. When the presumption has been triggered and the burden of proof has been shifted to the respondent, the respondent's burden to show that there is "no reasonable link" is met if it demonstrates to the trier of fact that the existence of a link between the job and the cancer is not a probability.

As stated in the commentary to Evidence Code section 600, a presumption is not evidence but a conclusion the law requires to be drawn when some other fact is established. It is not evidence but a device "to aid in determining the facts from the evidence presented."

Moreover, the [erroneous] doctrine that a presumption is evidence imposes on the party with the burden of proof a much higher burden of proof than is warranted. For example, if a party with the burden of proof has a presumption invoked against him and if the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional but unascertainable quantum of proof in order to dispel the effect of the presumption. [Citation.] The

doctrine that a presumption is evidence gives no guidance to the jury or to the parties as to the amount of this additional proof. The most that should be expected of a party in a civil case is that he prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is that it establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

Neither the Workers' Compensation Appeals Board in *Faust* nor the Court of Appeal in *Garcia* addressed these points.

End comment

Applicant's comment

If the Legislature had intended that the term "no reasonable link" was the equivalent of "no probable link" it could easily have said so. We submit that a "reasonable link" does not necessarily amount to a probability. Within the range of possibilities, there might be numerous "reasonable links." We submit that the Legislature's intent was, in a case in which the site of the primary tumor is established, to exclude unreasonable links that might be offered to explain away reliable proof offered in rebuttal to the presumption that there is a causal link.

In a criminal case, a jury might acquit a defendant because it has a reasonable doubt about the defendant's guilt, but this is not the same as saying that the jury believes that the defendant is not guilty beyond a reasonable doubt, nor even that the jury believes the defendant is probably not guilty. Short of the standard of "beyond a reasonable doubt" the level of the jury's belief may rest at any point along the range of the possibility-probability continuum, but where it rests has no relevance in the law. If the jury's belief falls short of "beyond a reasonable doubt," the prosecution's case fails.

So, too, if the trier of fact finds that there is one or more reasonably plausible links between on-the-job exposures to one or more carcinogens on the DIR or IARC lists and the tumor, not one of which is a probability, that is enough to support a finding that the respondent has not met its burden to prove that there is "no reasonable link."

End comment.

(e) Other issues raised by provisions in the cancer presumption law

Associations' comments

(i) What must occur within 60 months?

What must occur within the 60 months? The onset of cancer? A permanent incapacity related to the cancer? The filing of the application? The administrative hearing? The decision of the Board of Retirement?

There is no published appellate court opinion on this question and the plain language of the statute is anything but clear.

(ii) When does the 60-month extension/limitation period begin to run?

On the one hand, Section 31720.6 states the extension begins to run from the termination of service, but then throws in the language “commencing with the last day actually worked in the specified capacity.” One’s last day of actually working in a specified capacity that is favored by the presumption can be a day different from the day service is terminated. There is no published appellate court opinion on this question in a CERL of 1937 case. However, there is an opinion dealing with the same issue arising in a workers’ compensation case.

In *Cal. Highway Patrol v. Workers' Comp. Appeals Bd. (Clark)* (1986) 178 Cal.App.3d 1016, [224 Cal.Rptr. 94] a highway patrolman stopped working 17 months before he retired. Based on his 14 years of service, the period during which he could take advantage of Labor Code section 3212’s presumption for heart trouble was limited to 42-months. The issue: From what date is the 42-month period measured? Clark suffered a heart attack 10 months after the 42-month period lapsed if the period was measured from the last day he worked; but the heart attack occurred within the 42-month period if it was measured from the date he retired. Under workers’ compensation law, with exceptions, one’s rights to benefits are measured as of the date of injury. In Clark’s case, the date of injury was the date of his heart attack. The Workers’ Compensation Judge and the WCAB held that the period ran from the date of Clark’s retirement. The employer challenged the WCAB decision with a petition for writ of review. The Court of Appeal annulled the WCAB decision, holding that, while Clark’s entire career up to the time of his retirement was to be utilized in calculating the length of the extension, the time period during which the presumption was applicable began to run from the date Clark last actually worked.

Labor Code section 3212 provides, “This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity,” exactly the same extension provision contained in Government Code section 31720.6.

It is clear to us that the terms "last date actually worked" and "termination of service" simply do not describe the same event. To interpret those terms as describing the same event is contrary to their plain meaning. The plain meaning of a statute may be disregarded only when it would inevitably result in absurd consequences or frustrate a manifest purpose of the Legislature as a whole. [Citations.] Neither result occurs here. Accordingly, we construe Clark’s service

to include the entire period from the date of induction into the California Highway Patrol to the date of retirement and the term "last date actually worked" as the date he, in reality, actually performed service on the job.

From the foregoing we conclude that the only interpretation of the two phrases which gives effect to the different meaning of each phrase and harmonizes the two phrases without rendering either surplus is to give the employee credit for his months of service through the date of his retirement and compute the point from which this service credit extends the presumption from the last date he actually worked. (*Id.*, 178 Cal.App.3d, p. 1024.)

Associations' comment

The decision in *Clark* would appear to be dispositive except for the fact that, while the date of injury is the date on which the rights of an applicant for workers' compensation benefits is measured, the rights of a member of public retirement systems have been measured by when the member becomes incapacitated and is compelled to stop working. (See *Brooks v. Pension Board* (1938), *supra*, 30 Cal.App.2d 118 [85 P.2d 956].) The Legislature's wholesale transfer of the anti-*Soby* amendment in Labor Code section 3212 to Government Code section 31720.6 apparently without regard for this distinction between workers' compensation law and disability retirement law adds another layer of ambiguity. This relates to the section that immediately follows.

End comment.

(iii) Must the applicant establish that he or she was compelled to retire by the cancer?

Associations' comment

A question remains as to whether the applicant must be able to show that the cancer compelled the applicant to retire. The fact that the application is filed timely within the 60-month extension for applications does not necessarily mean that the applicant will be entitled to a disability pension. If the applicant retired on a years-of-service pension and then subsequently develops cancer that would incapacitate the applicant if the applicant was still on the job, the applicant may file a timely application under the provisions of Section 31722, but is the applicant entitled to a service-connected disability retirement pension where retirement on a regular pension for "years-of-service" and age preceded the disability?

In *Faust v. City of San Diego (Appeals Board En Banc)* (2003), *supra*, 68 Cal.Comp.Cases 1822, the WCAB in *dicta* construed the 60 month limitation on the presumption under Labor Code section 3212.1 in such a way that a retired firefighter whose cancer both developed and manifested after service would be entitled to the benefit of the presumption. The WCAB wrote,

The applicant must also show the development or manifestation of the cancer, during the statutory time period, by medical evidence that must include the date of development or manifestation.

While its opinion is not clear, the WCAB use of the term “during the statutory time period” appears to be a reference to the up-to sixty-month period commencing with the last date actually worked in the specified capacity. If this interpretation of the WCAB’s opinion is correct, the opinion is in conflict with the clear provisions of Labor Code section 3212.1, subdivision (b), which provides,

The term 'injury,' as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as de-fined by the director. [Italics added by Associations.]

We submit that the “statutory time period” during which the cancer must be established to have developed or manifested is the “period in which [the member] . . . is in the service of the department or unit. . . .”

The Appeals Board En Banc opinion in *Faust* addresses the workers’ compensation law, the nature of which allows that a cause of action for workers’ compensation benefits might not arise until decades after the industrial exposure that would eventually cause disability or the need for medical care.

The idea that one who took a regular retirement for years of service and age could later file an application for disability retirement regarding a disability that surfaced after retirement is unprecedented and raises a question as to whether the Legislature intended such a result. The purpose of the retirement provisions of the CERL of 1937 is to remove from service those who are superannuated or incapacitated for duty by injury or illness so that they can be, without prejudice or hardship, replaced by more capable public employees to the benefit of public service. (See Gov. Code, § 31451) Therefore, we submit, that in order for the applicant to be entitled to a disability retirement pension, the applicant must be able to show that his or her retirement was compelled by incapacity for duty.

Allowing a retiree who already voluntarily retired for years of service and age to receive a disability retirement, even though he or she was not compelled to retire by disability, is inconsistent with the stated purpose of the CERL of 1937 as expressed in Section 31451.

There is no published appellate court opinion on this question.

End comment.

(iv) What is the meaning of "actually working in the specified capacity"?

Associations' comment

Section 31720.6 does not specify a capacity. Is it actually performing the kind of activity the member was doing when the exposure to the known carcinogen occurred? Is "the specified capacity" the assignment the member had when the exposure occurred? Is "the specified capacity" a reference to safety member, firefighter, and members in active law enforcement or fire suppression?

AB 2176 would have clarified that "the specified capacity" is a reference to the occupation, be it safety member, firefighter or a member inactive law enforcement mentioned in subdivision (a), but the proposed language ("in this capacity") was amended out of AB 2176. The fact that these words were deleted might be interpreted to mean that "the specified capacity" is a reference to something other than the occupation. For instance, "in this capacity" may be a reference to the actual duties through which the exposure occurred. If that is so, the statutory limitation period might run against the member much sooner. However, the deleted words had been proposed to show the Legislature's intent that only service as a safety member, firefighter, or member in active law enforcement would qualify towards the 5 years of service requirement. It apparently was not contemplated that "the specified capacity" referred to actual duties during which exposure occurred so that even a member who is not a safety member, a firefighter member and is not involved in "active law enforcement" would be entitled to the presumption. Given the limited purpose of the proposed, rejected language, the fact that it was deleted from AB 2176 does not support an argument that "specified capacity" is a reference to something other than the generic occupations that fall under the rubric of "safety member, firefighter member or member in active law enforcement."

There is further reason to conclude that "specified capacity" is a reference to the occupation and not specific duties. During the same legislative session in which the cancer presumption was made a part of the County Employees Retirement Law of 1937, Labor Code section 3212.1, the workers' compensation law's cancer presumption for public safety employees, was amended to eliminate the requirement that the injured employee prove that there is a reasonable link between the carcinogen to which he or she was exposed and the cancer that developed. (SB 539, 1999-2000 Regular Session.) Section 3212.1 also contains a 60-month extension provision measured from "the last date actually worked in the specified capacity." Several Assembly staff communications show that the words "specified capacity" was assumed to mean "specified capacity of a firefighter or peace officer." (Staff analysis prepared for the March 24, 1999 hearing by Paul Donahue, Assembly Committee on Insurance; Staff analysis prepared for the June 23, 1999 hearing by Stephen Holloway, Senate Committee on Industrial Relations, page 2; Third Reading Analysis of Assembly Bill 539 prepared by the Office of Senate Floor Analyses, page 2.)

If Section 31720.6 is in *pari materia* with Section 3212.1, "specified capacity" would appear to refer to kinds of occupations (safety member, firefighter or a member in active law enforcement), rather than to an assignment to duties in which there was exposure to carcinogens or to a period of actual exposure.

There is no published appellate court opinion on this question.

End comment.

(3) Presumption that disability resulting from blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection is service-connected.

Government Code section § 31720.7 provides as follows:

(a) If a safety member, a firefighter, a county probation officer, or a member in active law enforcement develops a blood-borne infectious disease or a methicillin-resistant *Staphylococcus aureus* skin infection, the disease or skin infection so developing or manifesting itself in those cases shall be presumed to arise out of, and in the course of, employment. The blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection so developing or manifesting itself in those cases shall in no case be attributed to any disease or skin infection existing prior to that development or manifestation.

(b) Any safety member, firefighter, county probation officer, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of a blood-borne infectious disease or methicillin-resistant *Staphylococcus aureus* skin infection shall receive a service-connected disability retirement.

(c)

(1) The presumption described in subdivision (a) is rebuttable by other evidence. Unless so rebutted, the board is bound to find in accordance with the presumption.

(2) The blood-borne infectious disease presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(3) Notwithstanding paragraph (2), the methicillin-resistant *Staphylococcus aureus* skin infection presumption shall be extended to a member following termination of service for a period of 90 days commencing with the last day actually worked in the specified capacity.

(d) "Blood-borne infectious disease," for purposes of this section, means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

(e) "Member in active law enforcement," for purposes of this section, means members employed by a sheriff's office, by a police or fire department of a city, county, city and county, district, or by another public or municipal corporation or political subdivision or who are described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code or who are employed by any county forestry or firefighting department or unit, except any of those members whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers, and includes a member engaged in active law enforcement who is not classified as a safety member.

Associations' comment

Government Code section 31720.7 was enacted in 2000 to provide the presumption of service-connection with respect to blood-borne disease. By legislation enacted in 2008, effective January 1, 2009, a requirement that the employee/applicant have five years of service before becoming entitled to the presumption was deleted and the presumption with respect to methicillin-resistant *Staphylococcus aureus* skin infection was added.

End comment.

(a) What does "blood-borne" mean?

Subdivision (d) of Section 31720.7 provides,

"Blood-borne infectious disease," for purposes of this section, means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

(b) The term "blood-borne" as used in other provisions of the law

Labor Code section 3208.05 provides that "injury" includes an adverse reaction to preventative care provided by an employer to a healthcare worker in order to prevent certain blood-borne diseases, illnesses, syndromes, or conditions.

(a) "Injury" includes a reaction to or a side effect arising from health care provided by an employer to a health care worker, which health care is intended to prevent the development or manifestation of any bloodborne disease, illness,

syndrome, or condition recognized as occupationally incurred by Cal-OSHA, the Federal Centers for Disease Control, or other appropriate governmental entities. . . .

The preamble to Health and Safety Code section 105325 of Division 103, Disease Prevention and Health Promotion, Part 5, Environmental And Occupational Epidemiology, Chapter 6, Safer Medical Devices, states in part,

The Legislature hereby finds and declares all of the following:

In California, more than 700,000 health care workers and professionals, such as nurses, physicians and surgeons and housekeeping staff, are at risk of infection from bloodborne diseases, including Hepatitis B, Hepatitis C, and Human Immunodeficiency Virus, the causative agent of Acquired Immunodeficiency Syndrome.

Title 29, Code of Federal Regulations, part 1910.1030, relating to labor and occupational safety and health standards and toxic and hazardous substances, provides in part,

...Blood means human blood, human blood components, and products made from human blood.

Bloodborne Pathogens means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV). . . .

Similarly, Title 8, California Code of Regulations section 5193, subdivision (b), relating to the control of hazardous substances and processes, defines "bloodborne pathogens" as follows:

"Bloodborne Pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HCV) and human immunodeficiency virus (HIV).

(c) Comparison with infectious disease cases generally.

Associations' comment

Apart from the presumption enjoyed by certain public safety employees, in order for an injury to be considered service-connected, the injury must arise out of and in the course of employment. The "course of employment" refers to the time, place, and circumstances of employment. The "arise out of employment" element refers to whether the injury was related to a risk to which the employee was exposed by virtue of the employment. (See 1 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 4.04, Concurrence of

Conditions. The AOE-COE requirements for service connection are discussed above, beginning at Section II, B, and infectious disease cases in particular are discussed at Section II, B, 3, (a), (1).) The applicant bears the burden of proof on both the “course of employment” and “arise out of employment” elements of service-connection.

The critical issue when infectious disease is asserted as a work-related injury is whether the disease arose out of the employment.

Where the applicant can show that an infectious disease was contracted in the time, place and circumstances of employment, in order for the disease to be considered “service-connected” the applicant must also prove that her contracting the disease was a result of a risk, above that level of risk to which all members of the general community are exposed, to which the applicant was exposed by virtue of the employment.

End comment.

Bethlehem Steel Co. v. Industrial Acc. Comm. (George) (1943) 21 Cal.2d 742, 743-744 [135 P.2d 153]:

. . . . The commission asserts that although there were many cases of the disease [editor’s note: the contagious eye disease known as kerato conjunctivitis] among the public, there is nothing in the record to show that the same proportion as in the shipyards was affected; that if the disease was of epidemic proportions among the general public the burden of proof as to this fact lies with the employer, because it is an affirmative defense and the burden is upon the one asserting the affirmative of the issue, citing Labor Code section 5705. There is no merit to this last contention. That section provides that the burden of proof rests upon the party holding the affirmative of the issue. The section then lists certain affirmative defenses in which the burden of proof rests upon the employer. The contentions of the commission cannot be brought within any of those specific affirmative defenses.

In *Pattiani v. Industrial Acc. Com.*, 199 Cal. 596, 600-601 [250 P. 864, 49 A.L.R. 446], it was held, as it must be held here, that where an employee contracts a contagious or infectious disorder he must, in order to recover compensation, establish the fact that he was subjected to some special exposure in excess of that of the commonalty, and in the absence of such showing, the illness cannot be said to have been proximately caused from an injury arising out of his employment. To the same effect are *Pacific Employers Insurance Co. v. Industrial Acc. Com.* (Ehrhardt) (1942), 19 Cal.2d 622, 628 [122 P.2d 570, 141 A.L.R. 798], and *Children’s Hospital Society v. Industrial Acc. Com.* (1937) 22 Cal.App.2d 365 [71 P.2d 83].

It is well established in this state that compensation is not due merely for injury caused by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease, there must exist the relation of cause and effect between the employment and the

disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. [Citation.] It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment. [Citation.] The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general public, i.e., the injury must be a natural or a reasonably probable result of the employment or of the conditions thereof. [Citations.]"

Associations' comment

In a non-presumption infectious disease case, it is the applicant's burden to prove some special or greater exposure on the job that is in excess of the risk to the commonalty. It is not the employer's burden to prove that there is an epidemic in the community. Therefore, even if the applicant can establish a particular exposure to an individual or individuals that probably was the source of his or her contracting the infectious disease (this is the "course of employment" piece) a work relationship is not yet established. The applicant must also show that his or her exposure was greater than the risk to which all members of the community were exposed (the "arise out of employment" part of the AOE-COE equation).

End comment.

(d) Prerequisites to the blood borne infectious disease and MRSA presumption

(i) Designated occupation

(a) Safety members

Government Code section 31720.7, subdivision (a).

(b) Firefighters

Government Code section 31720.7, subdivision (a).

(c) County Probation Officers

Government Code section 31720.7, subdivision (a).

(d) Members in active law enforcement

Government Code section 31720.7, subdivisions (a) and (e).

(1) Members employed by a sheriff's office. (Gov. Code, § 31720.7, subd. (e).)

(2) Members employed by a police or fire department of a city, county, city and county, district, or by another public or municipal corporation or political subdivision. (Gov. Code, § 31720.7, subd. (e).)

(3) Members who are described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code. (Gov. Code, § 31720.7, subd. (e).) The cited Penal Code sections define "peace officers."

(4) Members who are employed by any county forestry or firefighting department or unit, excepting any of those members whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers. (Gov. Code, § 31720.7, subd. (e).)

(5) Members engaged in active law enforcement who are not classified as safety members. (Gov. Code, § 31720.7, subd. (e).)

Associations' comment

The Legislature folded members engaged in active firefighting who are not classified as safety members into the Subdivision (e)'s definition of "member in active law enforcement" instead of providing for members engaged in active firefighting separately as it has done in other statutes.

Previous pre-requisites that the member have five years of service and be a member of specified retirement systems were, effective January 1, 2009, deleted by the 2008 legislation that also added the presumption for methicillin-resistant *Staphylococcus aureus* skin infection. (Stats 2008 ch. 684, § 1 (AB 2754).)

End comment.

(ii) Develops blood borne infectious disease or MRSA skin infection

"Blood borne infectious disease" is defined in subdivision (d) of Section 31720.7 as "a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations."

Associations' comment

MRSA skin infection is not defined in Section 31720.7.

The Department of Industrial Relations has defined the following as blood borne pathogens: hepatitis B virus (HBV), hepatitis C virus (HCV), and human

immunodeficiency virus (HIV). (Cal. Code Regs., tit. 8, § 5193.) Subdivision (d) of Section 31720.7 does not limit the definition of "blood borne infectious disease" to the microorganisms defined by the Department of Industrial Relations.

End comment.

(iii) Permanent incapacity for duty

Government Code section 31720.7, subdivision (b). Unlike the heart presumption provided for in Section 31720.5, incapacity is expressly required in order for the blood-borne infectious disease and MRSA skin infection presumptions to apply.

(iv) Permanent incapacity must be a result of blood borne infectious disease or MRSA skin infection

Government Code section 31720.7, subdivision (b). There must be a cause and effect relationship between the blood borne infectious disease or MRSA skin infection and the incapacity for duty.

(v) Time extension on presumption is not exceeded

(a) Blood-borne disease – up to 60 months

The time extension provided in Section 31720.7, subdivision (c) for blood-borne infectious disease, is not exceeded. Section 31720.7, subdivision (c) [2], provides in part as follows:

This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Government Code section 31722 provides a member the opportunity to file an application within any period during which the presumption is extended beyond his or her discontinuance of service.

(b) MRSA – 90 days

In the case of a MRSA skin infection, Government Code section 31720.7, subdivision (c)[3], provides that "the presumption shall be extended to a member following termination of service for a period of 90 days commencing with the last day actually worked in the specified capacity."

Associations' comment

The same issues with respect to the 60-month extension in the cancer presumption (Gov. Code, § 31720.6) arise in the blood-borne infectious disease presumption's up to 60-month extension and the 90-day extension in the case of a MRSA skin infection:

What must occur within the 60 months or 90 days? Does one who retired without disability or for a non-service-connected disability based on some other injury or disease have a claim to a service-connected disability retirement pension if he or she later develops a medical condition from a blood borne infectious disease or MRSA skin infection that would render the member incapacitated for duty if he or she were still on the job? (See discussion above at Section II, B, 6, b) (2) (e).)

(e) Effect of the presumption

(i) Presumed causation

The blood borne disease or MRSA skin infection that develops or manifests itself in those cases is presumed to arise out of and in the course of employment. (Gov. Code, § 31720.7, subd. (a).)

(ii) Service-connected disability retirement pension is required

A member in a designated occupation who is permanently incapacitated as a result of a blood borne infectious disease or a MRSA skin infection "shall" receive a service-connected disability retirement pension.

(f) There is no presumption that the member is incapacitated for duty.

Section 31720.7, like the other presumptions in the CERL of 1937, does not presume incapacity, but, where the prerequisites are established, only service-connection of an incapacity that is established to exist.

(g) The presumption is rebuttable.

The presumption is rebuttable by other evidence, but unless so rebutted, the Board is required to find in accordance with the presumption. (Gov. Code, § 31720.7, subd. (b).)

(i) Nonattribution provision: the illness shall in no case be attributed to any illness existing prior to the development or manifestation.

Government Code section 31720.7, subdivision (a), last sentence.

(h) Proof of on-the-job exposure to a blood borne infectious disease is not required in order for the presumption to arise.

Associations' comment

An amendment to Section 31720.7 effective January 1, 2002 eliminated a requirement that the member establish exposure to an infectious disease on the job. However, even

before the amendment, there was no express requirement that a causal relationship be established between the disease to which the member was exposed on the job and the disease which caused the member to become incapacitated.

The presumption is rebuttable, but the infectious illness cannot be attributed to any disease existing prior to its development or manifestation. Does this mean that the Board of Retirement and the courts must isolate when the illness developed or became manifest and then may not attribute the illness to any nonindustrial disease or exposure prior to that development or manifestation? If this is so, then, as a practical matter, the infectious blood-borne disease presumption may not be rebuttable, but for all purposes may be conclusive.

End comment.

(i) Other infectious disease provisions in the law

These provisions are not benefits provided under the CERL of 1937.

(i) Prophylactic medical care for EMTs

If a public safety employee identified in Health and Safety Code sections 1797.170, 1797.171 and 1797.172 (those certified as Emergency Medical Technicians), 1797.182 (lifeguards and firefighters), and 1797.183 (peace officers) can show that she was exposed to an infectious disease listed in Title 17, California Code of Regulations, section 2500, (includes among many others, HIV and HBV), that employee is entitled to prophylactic medical treatment. (Health & Saf. Code, § 1797.186.)

(ii) Workers' Compensation Law:

(a) Hepatitis, blood-borne disease and meningitis presumptions

For purposes of workers' compensation law, blood-borne disease and, effective January 1, 2009 (Stats 2008 ch. 684, § 2 (AB 2754), Methicillin-resistant *Staphylococcus aureus* skin infection (Lab. Code, § 3212.8 [originally limited to hepatitis but broadened to include blood-borne infectious disease as defined, Stats 2001 ch. 833, § 4 (AB 196)], and meningitis (Lab. Code, § 3212.9) in certain public safety employees are presumed to be work-related when they develop or manifest during employment. These statutes do not apply to disability retirement under the CERL of 1937.

(b) Injury to health care workers from care intended to prevent infection from blood-borne disease

For workers' compensation purposes and in certain instances, "injury" includes a reaction or side effect of employer-provided medical care intended to prevent an infection from blood-borne disease in health care workers. (Lab. Code, § 3208.05.)

The statutory presumptions of compensability in the workers' compensation law are not applicable to claims under the County Employees Retirement Law of 1937. However, those dealing with the disability retirement law may be assisted by court interpretations of the workers compensation statutes.

(c) Health benefits for dependents of correctional officers who contracted blood-borne disease during service.

If a corrections officer for the State of California sustains injury in the form of an infection from blood-borne disease as defined in Labor Code section 3212.8 before January 1, 1984 and the officer's dependent or former dependent contracts the blood-borne disease from the corrections officer, the dependent or former dependent may elect to receive medical care for the condition paid by the state. (Gov. Code, § 22980.)

(iii) Possible blood-borne pathogen exposure by peace officers, firefighters, or emergency medical personnel who are exposed to an arrestee's blood or bodily fluids.

Health and Safety Code section 121060 sets out for peace officers, firefighters, emergency medical personnel or nonsworn employees of law enforcement agencies whose job descriptions entail the collection of fingerprints the procedure to follow if they are exposed to an arrestee's blood or bodily fluids so it can be determined whether they have been exposed to a blood-borne pathogen. Health and Safety Code section 121060.1, subdivision (a), defines the term "blood borne pathogen exposure" for purposes of Section 121060 as follows:

For purposes of Section 121060, "bloodborne pathogen exposure" means a percutaneous injury, including, but not limited to, a needle stick or cut with a sharp object, or the contact of nonintact skin or mucous membranes with any of the bodily fluids identified in subdivision (b), in accordance with the most current bloodborne pathogen exposure definition established by the federal Centers for Disease Control and Prevention.

Subdivision (b) of Section 121060.1 includes the following in "bodily fluids": blood, tissue, mucous containing visible blood, semen, and vaginal secretions.

(4) Presumption that illness due to exposure to biochemical substance is service-connected.

Government Code section 31720.9, effective January 1, 2003, provides as follows:

(a) If a peace officer member, as defined in Sections 830.1 to 830.5, inclusive, of the Penal Code, or firefighter member, with service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200), or both, or under this retirement system, under the Public Employees'

Retirement System, or under a retirement system established under this chapter in another county, becomes ill or dies due to exposure to a biochemical substance, the illness that develops or manifests itself in those cases shall be presumed to arise out of, and in the course of, employment. The illness that develops or manifests itself in those cases shall in no case be attributed to any illness existing prior to that development or manifestation.

(b) Any peace officer member or firefighter member, as described in subdivision (a), who becomes permanently incapacitated as a result of exposure to a biochemical substance shall receive a service-connected disability retirement.

(c) The presumption described in subdivision (a) is rebuttable by other evidence. Unless rebutted, the board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(d) For purposes of this section, a peace officer member or firefighter member, as described in subdivision (a), does not include a member whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers.

(e) "Biochemical substance" means any biological or chemical agent that may be used as a weapon of mass destruction, including, but not limited to, any chemical warfare agent, weaponized biological agent, or nuclear or radiological agent, as these terms are defined in Section 11417 of the Penal Code.

(a) Prerequisites for the biochemical substance presumption

(i) Designated Occupation

Those in the following occupations receive the benefit of the presumption:

(a) Peace officer member as defined in Penal Code sections 830.1 to 830.5

Penal Code sections 830.1 to 830.5 include references to employees who are not employed by counties or districts operating under the County Employees Retirement Law of 1937. The county employees that they do refer to are the following:

Penal Code section 830.1: sheriff, undersheriff, deputy sheriff of a county and any inspector or investigator employed in that capacity in the office of a district attorney; any deputy sheriff of the counties of Butte, Calaveras, Colusa, Glenn, Los Angeles, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Mariposa, Mendocino, Plumas, Riverside, San Benito, San Diego, San Luis Obispo, Santa Barbara, Santa Clara, Siskiyou, Sonoma, Stanislaus, Sutter, Shasta, Solano, Tehama, Tulare, and Tuolumne

who is employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, supervision, security, movement and transportation of inmates or performing other law enforcement duties directed by the employer.

Penal Code section 830.31: a safety police officer of the County of Los Angeles if the primary duty of the officer is the enforcement of the law; a regularly employed and paid park ranger if the primary duty of the officer is the protection of the park and other property of the agency and the preservation of peace therein; a housing authority patrol officer employed by the county if the primary duty of the officer is the enforcement of law.

Penal Code section 830.33: Among others, the following if their primary duty is law enforcement: harbor or port police, regularly employed and paid in that capacity by a county or district; transit police officers employed by a county, transit development board or district; airport law enforcement officers employed by a county or district or a joint powers agency created under Government Code section 6500, et seq.

Penal Code section 830.35: Among others, the following if their primary duty is law enforcement: a regularly employed and paid welfare fraud investigator; a child support investigator, regularly employed and paid by a district attorney's office; regularly employed and paid county coroners and deputy coroners if their duties are primarily set forth in Government Code sections 27469 and 27491 to 27491.4 inclusive.

Penal Code section 830.37: Among others, members of a arson-investigating team of a fire department or fire protection agency of a county or district if the primary duty is the detection and apprehension of persons who have violated any fire law or committed insurance fraud; members of a fire department other than an arson investigating unit whose primary duty is the enforcement of laws relating to fire prevention or fire suppression.

Penal Code section 830.5: Among others, a probation officer, assistant probation officer, or deputy probation officer. (Pursuant to Welf. & Inst. Code, § 283, County probation officers have the powers of a peace officer identified in Pen. Code § 830.5.)

(i) Meaning of "peace officer member."

Associations' comment

While the other presumption laws refer to "safety member," Section 31720.9 identifies one of the classes of employees to which it applies as "peace officer member." Not all peace officers are safety members. Therefore, the term "peace officer member" would appear to encompass more employee classifications than "safety member."

(b) Firefighter member.

(c) Excluded: one who is not engaged in active law

enforcement services or active firefighting services.

A member whose principal duties are clerical or otherwise do not *clearly* fall within the scope of active law enforcement services or active firefighting services is not included in the term "peace officer member or firefighter member." (Gov. Code, § 31720.9, subd. (d).) See the cases dealing with the meaning of active law enforcement and active firefighting discussed above in connection with the heart presumption at Section II, B, 6, b), (1), (b), [1].

(ii) Membership in an identified pension system, including "this retirement system," a reference to CERL of '37.

(iii) Exposure to a biochemical substance

Government Code section 31720.9, subdivision (a).

(a) Biochemical substance defined

Government Code section 31720.9, subdivision (e), defines "biochemical substance" as "any biological or chemical agent that may be used as a weapon of mass destruction, including but not limited to, any chemical warfare agent, weaponized biological agent, or nuclear or radiological agent, as these terms are defined in Section 11417 of the Penal Code."

Penal Code section 11417, subdivision (a), provides as follows:

(a) For the purposes of this article, the following terms have the following meanings:

(1) "Weapon of mass destruction" includes chemical warfare agents, weaponized biological or biologic warfare agents, restricted biological agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon, or an aircraft, vessel, or vehicle, as described in Section 34500 of the Vehicle Code, which is used as a destructive weapon.

(2) "Chemical Warfare Agents" includes, but is not limited to, the following weaponized agents, or any analog of these agents:

(A) Nerve agents, including Tabun (GA), Sarin (GB), Soman (GD), GF, and VX.

(B) Choking agents, including Phosgene (CG) and Diphosgene (DP).

(C) Blood agents, including Hydrogen Cyanide (AC), Cyanogen Chloride (CK), and Arsine (SA).

(D) Blister agents, including mustards (H, HD [sulfur mustard], HN-1, HN-2, HN-3 [nitrogen mustard]), arsenicals, such as Lewisite (L), urticants, such as CX; and incapacitating agents, such as BZ.

(3) "Weaponized biological or biologic warfare agents" include weaponized pathogens, such as bacteria, viruses, rickettsia, yeasts, fungi, or genetically engineered pathogens, toxins, vectors, and endogenous biological regulators (EBRs).

(4) "Nuclear or radiological agents" includes any improvised nuclear device (IND) which is any explosive device designed to cause a nuclear yield; any radiological dispersal device (RDD) which is any explosive device utilized to spread radioactive material; or a simple radiological dispersal device (SRDD) which is any act or container designed to release radiological material as a weapon without an explosion.

(5) "Vector" means a living organism or a molecule, including a recombinant molecule, or a biological product that may be engineered as a result of biotechnology, that is capable of carrying a biological agent or toxin to a host.

(6) "Weaponization" is the deliberate processing, preparation, packaging, or synthesis of any substance for use as a weapon or munition. "Weaponized agents" are those agents or substances prepared for dissemination through any explosive, thermal, pneumatic, or mechanical means.

(7) For purposes of this section, "used as a destructive weapon" means to use with the intent of causing widespread great bodily injury or death by causing a fire or explosion or the release of a chemical, biological, or radioactive agent.

(iv) Does the applicant have to demonstrate that the exposure to the biochemical substance was on the job?

The statute does not expressly provide that the applicant must have had the exposure to the biochemical substance that causes the illness or death while on the job in order to trigger the presumption. Rebuttal proof that the illness was contracted off the job may be proper rebuttal evidence.

(v) Illness or death

(vi) Causation: illness or death is demonstrated to be due to exposure to biochemical substance

Government Code section 31720.9, subdivision (a). The illness or death must be "due to exposure to a biochemical substance." There must be a cause and effect relationship between the biochemical exposure and the illness or death.

(vii) Permanent incapacity

Government Code section 31720.9, subdivision (b). Unlike the heart presumption, incapacity is expressly required in order for the biochemical substance presumption to apply.

(viii) Causation: permanent incapacity is demonstrated to be a result of exposure to a biochemical substance

Government Code section 31720.9, subdivision (b). There must be a cause and effect relationship between exposure to a biochemical substance and the permanent incapacity.

(ix) Time extension of the presumption is not exceeded

The time limitation provided in Section 31720.9, subdivision (c), is not exceeded. Section 31720.9, subdivision (c), provides in part as follows:

This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Government Code section 31722 provides a member the opportunity to file an application within any period during which the presumption is extended beyond his or her discontinuance of service.

Associations' comment

The same issues with respect to the 60 month extension arise in the biochemical substance presumption as for the cancer and blood borne infectious disease presumptions, e.g., what must occur within the 60 months and does one who retired without disability have a claim to a disability retirement pension if he or she later develops a medical condition that would render the member incapacitated for duty if he or she were still on the job? (See discussion above at Section II, B, 6, b) (2) (e).)

(x) 5 years of service is not a prerequisite for the biochemical substance presumption

Absent from the biochemical substance presumption is the requirement, present in the heart trouble and cancer presumptions, that the member have five years of service. A five-years-of-service requirement originally in the blood-borne disease presumption was removed.

(b) Effect of the presumption

(i) Presumed causation

The illness that develops or manifests itself in those cases is presumed to arise out of and in the course of employment. (Gov. Code, § 31720.9, subd. (a).)

(ii) Service-connected disability retirement pension is required

A member in a designated occupation who is permanently incapacitated as a result of a biochemical exposure "shall" receive a service-connected disability retirement pension. (Gov. Code, § 31720.9, subd. (b).)

(iii) There is no presumption that the member is incapacitated.

(c) The presumption is rebuttable

The presumption may be rebutted by other evidence, but if not rebutted, the Board must find in accordance with the presumption. (Gov. Code, § 31720.9, subd. (c).)

(i) Nonattribution provision: the illness shall in no case be attributed to any illness existing prior to the development or manifestation.

Government Code section 31720.9, subdivision (a), last sentence.

(d) Other "biochemical substance" presumption laws

In addition to enacting Section 31720.9, AB 1847 included Labor Code section 3212.85. That section, contained in the Workers' Compensation Act, provides a similar presumption that illness from biochemical exposure is work-related.

7. There may be tax consequences favorable to the member whose retirement is compelled by a service-connected permanent incapacity.

Associations' comment

Title 26, U.S.C., Internal Revenue Code, section 61, subdivision (a), provides that, except as otherwise provided, gross income means all income from whatever source derived, including compensation for services.

Title 26, U.S.C., Internal Revenue Code, section 104, subdivision (a), excludes from gross income amounts received under workmen's compensation acts as compensation for personal injuries or sickness. Title 26 Code of Federal Regulations, part 1.104-1, subdivision (b), excludes from gross income amounts that are received by an employee under a workmen's compensation act "or under a statute in the nature of a workmen's compensation act that provides compensation to employees for personal injuries or sickness incurred in the course of employment."

The Internal Revenue Service has taken the position that a statute providing for a service-connected disability retirement constitutes a statute in the nature of a workmen's compensation act if the benefits are (1) computed by a formula that does not refer to the employee's age, length of service, or prior contributions, and (2) provided to a class that is restricted to employees with service-incurred injuries, sickness, or death. (Rev. Rul. 80-80, 1980-1 C.B. 35; Rev. Rul. 83-77, 1983-1 C.B. 37.)

a) Where the permanently incapacitating injury is found to have in fact been caused by the employment.

The provisions of Government Code section 31720 relating to eligibility for a service-connected disability retirement satisfy all of the above requirements for a service-connected disability retirement allowance to be excluded from income. Section 31720, in part, requires that the member be "permanently incapacitated for the performance of duty ... regardless of age ... if [t]he member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity "

With regard to service-connected disability retirements, Section 31720 has no length of service requirement and the member's service-connected disability retirement allowance is at least 50% of compensation regardless of the amount of contributions to the system, or a service retirement allowance if it is greater than 50% of the member's final compensation. Government Code section 31727.4 provides,

Upon retirement of any member for service-connected disability, he shall receive an annual retirement allowance payable in monthly installments, equal to one-half of his final compensation. Notwithstanding any other provisions of this chapter, any member upon retirement for service-connected disability shall receive a current service pension or a current service pension combined with a prior service pension purchased by the contributions of the county or district sufficient which when added to the service retirement annuity will equal one-half of his final compensation, or, if qualified for a service retirement, he shall receive his service retirement allowance if such allowance is greater but in no event shall it exceed the limitation as set forth in Section 31676.1 [editor's note: regarding retirement for service] as it now reads or may hereafter be amended to read. The provisions of this section shall also apply to any employee who becomes disabled for service-connected causes prior to the first day of the calendar month when he would normally become a member.

Therefore, a service-connected disability retirement allowance awarded under Government Code section 31720, up to 50% of final compensation, would appear to be excluded from gross income for federal income tax purposes. (See *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 193-194 [109 Cal.Rptr.2d 308, 26 P.3d 1044] in which the California Supreme Court commented on the exclusion from gross income of service-connected disability retirement pension benefits paid pursuant to Public Employees Retirement Law provisions similar to those in the CERL of 1937.)

The exclusion from income applies only to the extent the retirement allowance is not determined by reference to age, length of service, or prior contributions. Many LACERA members retired for service-connected disability receive an allowance in excess of 50% of compensation because the years-of-service and age retirement allowance to which they would be entitled is at a higher percentage. (See, Gov. Code, § 31727.4.) Only that portion of the retirement allowance related to the retirement for permanent

incapacity, equal to 50% of compensation, appears qualified for exclusion from taxable income

b) Where the permanently incapacitating injury is presumed to have been caused by employment.

The next question is whether the recipient of a service-connected disability pension allowance for a disability that is *presumed* to be service-connected enjoys the same tax exemption. From an IRS private letter ruling directed to the Kern County Employees Retirement Association, the answer to this question, a matter of controversy for decades, appears to be favorable to members whose disability retirements were found to be service-connected on the basis of a presumption. A caveat is that this IRS private letter ruling that would appear to put the issue to rest in favor of members cannot be used or cited as precedent.

(1) Background

A statute is in the nature of a workmen's compensation act only if it allows disability payments solely for service-connected personal injury or sickness. (*Haar v. Commissioner* (1982) 78 T.C. 864, 867-868, *aff'd*. 709 F.2d 1206 (8th Cir. 1983); *Dyer v. Commissioner* (1979) 71 T.C. 560, 562; *Robinson v. Commissioner*, (1964) 42 T.C. 403, 407-408.) In *Take v. Commissioner of Internal Revenue Service* (9th Cir. 1986) 804 F.2d 553, the public employees' retirement plan for the City of Anchorage provided that ". . . heart, lung and respiratory illnesses shall be construed as occupational disabilities." The Ninth Circuit Court of Appeals held "that amounts received under [the] ordinance could not be excluded from income under I.R.C. Sec. 104(a)(1)." According to the Tax Court, the decision of which the Ninth Circuit affirmed, an ordinance that makes no distinction between occupational diseases and ordinary diseases of life is not "in the nature of a workmen's compensation act" as that term is used for the purposes of the exemption under Section 104(a)(1) of the Internal Revenue Code. The Tax Court did not rule that a statute containing an un rebuttable presumption establishing occupational causation could never qualify under Section 104(a)(1), but only required a "more definitive relationship between the occupation and the injury or sickness" than the connection drawn by Section 2 of the Anchorage ordinance. (*Take*, p. 555.)

See also *Doogan v. U.S.* (S.D. Ohio 1957) 154 F. Supp. 703: Firefighter's disability retirement pension was not subject to taxation and he was entitled to a refund of taxes he had erroneously paid because he was retired for disability incurred in the line of duty; *Smelley v. U.S.* (N.D. Ala. 1992) 806 F. Supp. 932, affirmed 3 F.3d 389: State trooper's disability retirement pension was taxable because his hypertension was presumptively work-related and the trooper did not have to prove that his hypertension was in fact work-related.

The Internal Revenue Service responded to a request for a private letter ruling on the tax exempt status of a disability pension found to be service-connected under the provisions of Government Code section 31720.5, concluding that such a pension was not tax exempt because the presumption was not in fact rebuttable. (July 5, 1990

private letter ruling directed to the Kern County Employees Retirement Association.) As noted, a problem with such private letter rulings is that they cannot be used or cited as precedent. Each association and applicants' and their attorneys had to rely on their own independent legal analysis of Section 31720.5's impact on the tax exempt status of service-connected disability pensions. The issue remained controversial.

LACERA's legal staff concluded that the IRS and the courts would likely find a service-connected disability pension granted after applying Section 31720.5's presumption to be fully taxable. (LACERA Legal Office memorandum dated October 30, 1996.) In order to help protect LACERA members in public safety occupations whose incapacitating heart troubles in fact arose out of and in the course of employment from the potential adverse tax consequences of the presumption, LACERA instituted procedures that required LACERA's consulting physicians, investigative staff, referees and the Board itself to first make a finding on whether heart trouble was in fact work-related. If the heart trouble was found to be work-related in fact, that ended the inquiry and, all other things being equal, the member would be awarded a service-connected disability retirement under the provisions of Section 31720. If it was concluded that incapacitating heart trouble did not in fact arise out of and in the course of employment, then the Board would determine if a service-connected disability retirement pension should be awarded under the provisions of Section 31720.5. If the Board on initial determination awarded a service-connected disability retirement pension under the provisions of Section 31720.5, the Board would grant the applicant's request for a hearing on the issue of whether the heart trouble in fact arose out of and in the course of employment under Section 31720. It was entirely up to the applicant as to whether such a hearing would be held. In either case, the applicant would have a service-connected disability retirement pension.

The Board's purpose in providing an administrative evidentiary hearing even though the applicant had been awarded a service-connected disability retirement pension was to provide members with the forum they needed to establish the facts. The concern was that if the final determination was that the service-connected disability retirement pension was granted because it was presumed that the heart trouble was work-related, the pension would be fully taxable even if the member could prove to the IRS and any court that the heart trouble was in fact work-related. (*Take v. Commissioner of Internal Revenue Service, supra*, 804 F.2d 55; *Haar v. Commissioner*, 78 T.C. *supra*, 868: The fact that an injury or illness is in fact work-related is irrelevant to the issue of tax exempt status where the statute provided the pension benefit regardless of its cause.) It was thought that the member would only be able to establish that the heart trouble was in fact work-related if the member had access to an administrative hearing. Some applicants took advantage of the availability of the administrative hearing; some did not.

(2) Pellerin

However, the Court of Appeal in *Pellerin v. Kern County Employees Retirement Association* (2006) 145 Cal.App.4th 1099, 1108 [52 Cal.Rptr.3d 201] ruled that Sections 31720 and 31720.5 do not operate as separate bases for finding a disability retirement to be service-connected, but ". . . are parts of a single scheme for making a single decision: whether an employee is entitled to a service-connected disability retirement."

(*Ibid.*) Once the member establishes that he or she is entitled to the benefit of Section 31720.5's presumption, the prerequisites for a service-connected disability retirement under Section 31720, that is, that the member's heart trouble both arose out of and occurred in the course of employment, are established as facts unless the respondent rebuts the presumption.

In *Pellerin*, the Board of Retirement granted the firefighter member a service-connected disability retirement under Government Code section 31720.5. Pellerin's attorney requested a hearing, asserting that the Board should find not only that Pellerin's heart-related disability was presumptively service connected under Section 31720.5, but also that incapacity from injuries to his back and his heart were in fact caused by the employment within the meaning of Section 31720. Pellerin's attorney's purpose was to avoid the adverse tax consequences for his client related to a service-connected disability pension awarded because of a presumptively work-related injury or illness. An attorney was appointed to serve as a hearing officer and ruled on two issues defined by Pellerin's attorney and the respondent: (1) whether Pellerin was entitled to a service-connected disability retirement under Section 31720.5 and, (2), whether Pellerin was entitled to a service-connected disability retirement under Section 31720. The hearing officer recommended that the Board grant a presumptively service-connected disability retirement pension under Section 31720.5, but deny a service-connected disability retirement pension under Section 31720. (Though the record was not clear that the Board adopted the hearing officer's recommendation, the appellate court presumed that the Board intended to do so.) Pellerin filed a petition for writ of mandate and asked for judicial review of the Board's decision. The petition was denied. Pellerin appealed. The Court of Appeal reversed the trial court, saying,

. . . . First, it is inconsistent to say an employee is both granted (under § 31720.5) and denied (under § 31720) a service-connected disability retirement. Sections 31720 and 31720.5 are parts of a single scheme for making a single decision: whether an employee is entitled to a service-connected disability retirement. Section 31720 sets forth the factual elements that must exist to qualify an employee for a service-connected disability retirement. Section 31720.5 sets up an evidentiary rule--the rebuttable presumption of industrial causation applicable to certain employees with heart conditions--to be used in establishing one of those factual elements. Where the presumption applies and is un rebutted, it is incorrect to say that the employee is still not entitled to a retirement "under section 31720" even though he is entitled to one "under section 31720.5" because the employee did not prove industrial causation. An employee to whom the presumption applies under section 31720.5 has established the industrial causation element of section 31720 unless the presumption is rebutted--which was not done here. (*Pellerin*, p. 1108.)

Associations' comment

The *Pellerin* court's construction of Sections 31720 and 31720.5 is hardly subject to dispute. The presumption in Section 31720.5 was intended to relieve certain members involved in public safety occupations of the burden to proving the causal connection

(arise out of and in the course of employment) between the incapacitating illness or injury and the employment. It would stretch reason to assert that the Legislature intended that a member would enjoy the benefits of the presumption under Section 31720.5, specifically not having to prove the causal connection, but still have to carry the burden of proving the existence of those very same facts under Section 31720. The burden falls on the employer to prove that the presumed fact of a causal connection between the employment and the incapacitating illness does not exist. In the absence of such proof, it is established that the heart trouble arose out of and in the course of employment.

In *dicta*, the *Pellerin* court (*Id.*, p. 1110) also suggested that the parties' position that a service-connected pension granted after applying Section 31720.5's presumption would be fully taxable was unfounded. The court cited Revenue Ruling 85-105, 1985-2 C.B. 53, quoting the ruling as follows:

"A pension received by a disabled fire fighter under a state statute that creates a rebuttable presumption the disability was service connected is excludable from gross income to the extent the pension is not attributable to length of service"; presumption merely shifts burden of proof and agency board must still make finding that disability was service connected when awarding benefits."

(3) KCERA's private letter ruling.

The Kern County Employees Retirement Association secured an IRS private letter ruling dated November 29, 2007 in which the IRS took the position that the presumption under Government Code section 31720.5 is a rebuttable presumption and, where a service-connected disability retirement pension is awarded because the employer is unable to rebut the presumption, the pension is tax exempt up to 50% of the member's final compensation. In the same letter, the IRS resolved its contradiction of its own July 5, 1990 private letter ruling that was predicated on its construction of Section 31720.5 as being a presumption that was not rebuttable. The IRS explained that that the recent *Pellerin* opinion was a state court opinion that construed the statute as containing a rebuttable presumption, a conclusion the IRS did not question.

See the discussion above at II, B, 6, a), (4), (e) concerning whether the *Pellerin* court was correct in concluding that Section 31720.5's presumption is rebuttable and not conclusive.

As noted above, the November 29, 2007 IRS private letter ruling that would appear to put the issue to rest in favor of members cannot be used or cited as precedent.

End comment.

8. Nonservice-connected disability retirement allowance.

Government Code section 31727.7 provides, in part,

Upon retirement for nonservice-connected disability, in lieu of any other allowance, a member who has five years or more credited service shall receive a disability allowance...

(See also Gov. Code, § 31720.)

If the member is incapacitated for duty as a result of an injury or illness which is not service-connected and the member has five years of service, the allowance is the amount of the years-of-service retirement or, with certain exceptions, an allowance equal to 1/3 of final compensation. (Gov. Code, §§ 31726, 31726.5, and 31727.) Upon the death of a member while receiving a nonservice-connected disability retirement allowance, 60% of the allowance continues to a surviving spouse who is designated as the decedent's beneficiary and was married to the member one year prior to retirement (or eligible children) unless the member elected an optional allowance. (Gov. Code, §§ 31760, 31760.1, and 31785.)

a) Disability resulting from a wrongful act: Does the wrongful act disqualify a member from a disability pension in whole or in part?

(1) Statutory provisions

(a) Overview

Associations' comment

For a general member (Gov. Code, § 31726) or a safety member (Gov. Code, § 31726.5) who is disabled for nonservice-connected reasons, the nonservice-connected disability allowance in certain circumstances may be restricted to an annuity based on the member's own contributions, and the member does not receive a pension from the employer, if the disability is due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law, or the disability is due to a conviction of a felony or criminal activity. The restriction comes into play when,

The member is a general member under 65 or a safety member under 55.

The member does not simultaneously retire as a member on deferred retirement of the Public Employees' Retirement System or a retirement system established under the CERL of 1937 in another county.

The incapacity is a result of the member's intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law or the incapacity is a cause of or results from a conviction of a felony or criminal activity.

The incapacitated person became a member of the association on or after January 1, 1988.

The member is not entitled to a service retirement that is greater than the payment of the lump sum.

Where the opinion of the board is that the member's disability is due to the member's conviction of a felony under state or federal law or if the board determines that the disability is due to criminal activity, the board may, but is not required to, pay the member the amount of the member's contributions in lieu of an annuity based on the member's contributions. (Gov. Code, § 31728.2.) The provisions of Section 31728.2 do not come into play if the member is entitled to a pension for years of service and age.

(b) General members

Government Code section 31726, applicable to members who retire for nonservice-connected disability, distinguishes between those who retire before age 65 and those who retire after age 65. It provides,

Upon retirement for nonservice-connected disability a member who has attained age 65 shall receive his or her service retirement allowance.

Every member under age 65 who is retired for nonservice-connected disability and who is not simultaneously retired as a member on deferred retirement of the State Employees' Retirement System or a retirement system established under this chapter in another county shall receive a disability retirement allowance which shall be the greater of the following:

- (a) The sum to which he or she would be entitled as service retirement.
- (b) A sum which shall consist of any of the following:
 - (1) An annuity which is the actuarial equivalent of his or her accumulated contributions at the time of his or her retirement.
 - (2) If, in the opinion of the board, his or her disability is not due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on his or her part, a disability retirement pension purchased by contributions of the county or district.
 - (3) If, in the opinion of the board, his or her disability is not due to conviction of a felony or criminal activity which caused or resulted in the member's disability, a disability retirement pension purchased by contributions of the county or district. This paragraph shall only apply to a person who becomes a member of the system on or after January 1, 1988.

(c) Safety members

Government Code section 31726.5, applicable to safety members, distinguishes between those who have attained 55 years of age and those who are under 55. It provides,

Upon retirement for nonservice-connected disability a safety member who has attained age 55 shall receive his or her service retirement allowance. Every

safety member under age 55 who is retired for nonservice-connected disability and who is not simultaneously retired as a member on deferred retirement of the Public Employees' Retirement System or a retirement system established under this chapter in another county shall receive a disability retirement allowance which shall be the greater of:

(a) The sum to which he or she would be entitled to as service retirement; or

(b) A sum which shall consist of:

(1) An annuity which is the actuarial equivalent of his or her accumulated contributions at the time of his or her retirement.

(2) If, in the opinion of the board, his or her disability is not due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on his or her part, a disability retirement pension purchased by contributions of the county or district.

(3) If, in the opinion of the board, his or her disability is not due to conviction of a felony or criminal activity which caused or resulted in the member's disability, a disability retirement pension purchased by contributions of the county or district.

Paragraph (3) shall only apply to a person who becomes a member of the association on or after January 1, 1988.

Government Code section 31728 provides,

If, in the opinion of the board, the disability is due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on the part of the member, and his annuity is less than two hundred forty dollars (\$240) a year, the board may pay the member his accumulated contributions in one lump sum in lieu of his annuity.

Associations' comment

Given the fact that Section 31728 is not applicable to any member whose annuity is over \$240 a year, it eventually had no practical impact. In 1987, the Legislature amended Government Code sections 31726 and 31726.5, and enacted Government Code section 31728.2 in an apparent attempt to make the law effective.

End comment.

Government Code section 31728.2 provides,

Notwithstanding Sections 31728 and 31728.1, if, in the opinion of the board, the disability is due to or results from the conviction of the member of a felony under state or federal law or if the board determines that the criminal activity caused or resulted in the member's disability, the board may pay the member a lump sum

which is equal to the sum of his or her accumulated contributions in lieu of the benefits to which the member would otherwise be entitled as set forth in this article and provided that nothing in this section shall be construed to divest a member of any vested right to a service retirement allowance.

This section shall apply only to a person who becomes a member of the system on or after January 1, 1988.

Associations' comment

The main difference between Section 31726 and Section 31726.5 is that the safety member is protected from the impact of the annuity-only rule at an earlier age, 55 years, while the general member does not enjoy the same protection until age 65. There are other differences.

Section 31726 retains a reference to the *State Employees Retirement System*, an anachronism corrected in Section 31726.5 but apparently overlooked when Section 31726 was amended.

Section 31726.5 provides that a safety member's nonservice-connected disability retirement allowance shall consist of the greater of the member's service retirement or a "sum which shall consist of" two elements that are described in three subdivisions.

The first element (Subd. (1)) is an annuity that is the actuarial equivalent of the member's accumulated contributions at the time of his or her retirement.

The second element is a disability retirement pension purchased by contributions of the county or district, assuming that, in the opinion of the board, the disability is not due to (Subd.(2)) intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law or (Subd. (3)) to conviction of a felony or criminal activity.

When it was amended in 1987, Section 31726 provided a formula for a nonservice-connected disability allowance for general members that was identical to the formula for safety members in Section 31726.5. However, in a 1988 "maintenance of the codes" bill [SB 2637], Section 31726 was amended to provide that the allowance consists of the greater of the member's service retirement or "a sum which shall consist of *any of the following*." Section 31726.5, applicable to safety members, was not amended in a similar fashion and retains the "shall consist of" language.

Rules of statutory construction guide the courts to interpret a statute so as to give meaning to all the words of a statute and not render any words meaningless. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753].) "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed." (*People v. Valentine* (1946) 28 Cal.2d 121, 142 [169 P.2d 1].)

However, what the Legislature intended by adding "any of the following" to Section 31726, subdivision (b), but not adding those words to Section 31726.5, is not apparent.

The following terms used in Sections 31726 and 31726.5 are defined elsewhere in the CERL of 1937:

"Retirement allowance" is defined in Government Code section 31473.

"Annuity is defined in Government Code section 31457.

"Pension" is defined in Government Code section 31471.

"Actuarial equivalent" is defined in Government Code section 31456.

End comment.

(d) A single episode of incapacity-producing intemperance is enough to disqualify a member from a disability retirement pension purchased with employer funds.

In *Keith v. San Bernardino County Retirement Bd.* (1990) 222 Cal.App.3d 411 [271 Cal.Rptr. 649], a county deputy marshal sustained permanently incapacitating injuries in an off-duty motorcycle accident. Keith admitted that he had been drinking beer for some period of time before the accident. The Board of Retirement found that the accident was due to Keith's intemperate use of alcoholic liquor.

The court related,

According to counsel for Retirement Board, a finding under subdivision (b), subsection (2) precludes the claimant from receiving the retirement pension purchased with county funds, but the claimant nevertheless receives the annuity under subsection (1) based on his or her own accumulated contributions. (*Keith*, p. 413, fn. 2.)

The facts recited by the court in the opinion do not describe how much alcohol Keith had in his blood or the factual basis for the Board's finding that the accident was related to Keith's beer drinking. Rather, it appears Keith conceded the causal link between his drinking and the accident, but argued that the Legislature, by use of the word "intemperate," meant habitual or repeated intemperance. The court rejected Keith's argument.

We conclude that the Legislature meant nothing more than what it said: an applicant, such as Keith, may receive a retirement pension paid for with county contributions "if, in the opinion of the board, his or her disability is not due to intemperate use of alcoholic liquor." The intemperate use of alcohol on even a single occasion is such an "intemperate use" if the words of the statute are given their "usual, ordinary import."

Our interpretation of the statutory language comports not only with the plain meaning of the words used, but also with the apparent policy objectives. The Legislature has determined that certain categories of public employees, because of the nature of their public employment and service, should receive disability pensions paid for with public funds even though the disability is not job related. Where, however, the disability is not only not job related, but also is exclusively the result of the public employee's own excessive, illegal or wilfully improper conduct, no public benefit is obtained by requiring the public to "pick up the tab." The fact that the intemperate conduct occurred only once is irrelevant, in light of the policy objective. It is illogical to suggest that policy objectives are promoted only where the disability is the result of habitual intemperance. The Legislature clearly did not intend such a limitation, and we will not now create one. (*Keith*, p. 417.)

Associations' comment

Sections 31726 and 31726.5 are applicable to nonservice-connected disability retirements. There are no similar provisions applicable to service-connected disability retirements. On the other hand, Section 31728.2 is not limited by its terms to nonservice-connected disabilities.

It can be argued that, since all three sections were amended or enacted at the same time, all three sections are in *pari materia* and should be interpreted as a unit.

The term "in *pari materia*" means "[o]n the same subject; relating to the same matter. It is a canon of statutory construction that statutes that are in *pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." (Black's Law Dictionary, Eighth Edition.)

The argument is that Sections 31726 and 31726.5 both refer to nonservice-connected disability pensions, Section 31728.2 is simply a corollary to Sections 31726 and 31726.5, providing the Board with an option with regard to the malfeasant member's contributions, and, therefore, the word "disability" in Section 31728.2 is a reference to the nonservice-connected disabilities addressed in Sections 31726 and 31726.5.

The counter argument is that Section 31728.2 can be understood as a singular statute. While the Legislature added the words "nonservice-connected" to describe the disabilities addressed in Sections 31726 and 31726.5 in AB 2399, it left the disability described in Section 31728.2 unrestricted and applicable to either nonservice-connected or service-connected disabilities. So interpreted, Section 31728.5 would apply to disabilities that would be considered service-connected under the rule of *Williams v. Workmen's Comp. Appeals Bd.*, *supra*, (1974) 41 Cal.App.3d 937 [116 Cal.Rptr. 607].

End comment.

- (e) Is the member limited to a pension based on an annuity purchased with his or her own contributions if the**

incapacity results from the intemperate use of drugs that were prescribed to cure or relieve the effects of a service-connected injury?

In *Ballard v. Workmen's Comp. Appeals Bd.* (1971) 3 Cal.3d 832 [92 Cal.Rptr. 1] a secretary sustained a back injury and secured a workers' compensation award of permanent disability and continuing medical care. Later, she reopened her case for new and further disability due to an addiction to drugs. There was evidence that Ballard's addiction was related to an underlying and pre-existing neurotic personality, her use of prescribed drugs, and her use of illegally obtained drugs. The referee, whose opinion on reconsideration was adopted by the Workmen's Compensation Appeals Board as its own decision, denied additional benefits on the basis of Ballard's pre-existing psychiatric condition and her use of illegally obtained drugs. The Supreme Court reversed, saying,

Although the referee was correct in limiting the employer's liability to the effects of the drugs furnished by prescription, such liability extends not only to situations where those drugs by themselves would cause addiction but also to situations where the prescribed drugs light up or aggravate a preexisting condition resulting in disability. In short, the fact that "the most likely cause" of the addiction is the preexisting "obvious life-long neurotic personality problems" does not serve to warrant denial of recovery if the addiction resulted in part from the prescribed drugs. The employer takes the employee as he finds him at the time of employment. Similarly, the finding that her problems would have culminated in addiction "even in the absence of this trauma and the treatment rendered thereafter" do *[sic]* not furnish a basis for denial for all recovery because even in cases where disability would follow from the normal progress of the preexisting disease apportionment is proper where the industrial injury has contributed to the disability. There is no finding that the prescribed drugs did not, along with the personality problems and the illegally obtained drugs, contribute to any part of the disability, and the findings do not support the denial of recovery.

Moreover, the referee's finding that the addiction would have occurred even in the absence of the injury and the prescribed medication is not sustained by the evidence. Dr. Malitz refers to her disability as a "manifestation of her pre-existing personality disorder," but does not state whether the industrial injury and its treatment may have also been a causative factor. It is apparent that his opinion is based upon the incorrect legal theory that petitioner cannot recover if her preexisting personality problem was a contributing cause. He states that petitioner "must accept full responsibility for any of her actions in illegally obtaining and using drugs." The decisive question is not whether her actions in illegally obtaining drugs were a causative factor or contributed to her disability; the question is not whether it was appropriate for the doctors to prescribe drugs for her or whether they were to "blame"; under the authorities discussed above, the question is whether the prescribed drugs were a causative factor in her present disability. (*Ballard*, pp. 838-839.)

Associations' comment

If a member becomes addicted to drugs prescribed to relieve the effects of a service-connected injury, the addiction is a product of the injury and is service-connected. If incapacity results from "intemperate" use of the drugs that in turn is caused by the addiction, *Ballard* instructs that the incapacity is service-connected. The provisions of Sections 31726 and 31726.5 do not come into play because those statutes address only nonservice-connected incapacities. Whether Section 31728 is applicable is controversial for the reasons discussed in the previous comment.

End comment.

C. Should the application be deemed to have been filed on the date following the day for which the applicant last received regular compensation?

1. Time to file application

Government Code section 31722 provides,

The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

Associations' comment

Section 31722 is straight forward enough. It governs when an application is timely filed. However, that the application is filed timely does not answer the question of whether the injury, illness, or disability occurred at a time when the member would be entitled to a disability retirement.

For example, in *Weissman v. Los Angeles County Employees Ret. Assoc.* (1989), *supra*, 211 Cal.App.3d 40 [259 Cal.Rptr. 124], a county employee took a regular retirement for years of service and age on March 30, 1984 and suffered a heart attack on April 26, 1984. He filed an application for a service-connected disability retirement on July 17, 1984, about three and a half months after his retirement. The retirement association rejected his application on the basis that he was already retired on a regular pension and was no longer a member of the association within the meaning of Government Code section 31720. The Court of Appeal rejected the association's argument, pointing out that the applicant had filed his application within the four-month period following termination of service allowed by Section 31722. We observe, however, that while Section 31722 governs the timeliness of the application, it does not govern whether the applicant, who had already retired on a regular pension for years of service and age, is entitled to a disability retirement related to an incapacity that did not arise until after the applicant left the service, voluntarily and not compelled by injury or illness.

For a discussion concerning the timeliness of the application, see the detailed discussion, above, at Section I, E.

End comment.

2. Date of application

Government Code section 31724 provides,

If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him effective on the expiration date of any leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation.

Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the member consents to his retirement at an earlier date.

When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

3. General Rule: A disability retirement allowance is effective on the date the application is filed. (Gov. Code, § 31724.)

a) Exceptions

There are three categories of exception to the general rule and one or more kinds of exception may come into play in a single case:

In the first and second types of exception, the date on which the pension will commence is delayed for a time after the date of the application because the member is receiving or, after the application was filed, received, or is entitled to receive a form of regular compensation from the employer.

The third type of exception deals with an alteration of the date an application is considered, or "deemed," filed from the date the application is actually filed. The application might be deemed filed on a day earlier than the date it was actually filed. This will occur when there is an excuse, recognized by the Legislature, that relieves the tardy applicant of the potential consequences of his or her delay in filing an application.

(1) The pension allowance commencement is delayed beyond the date of the application because the applicant continues to receive “regular compensation.”

Section 31724 provides that the disability retirement allowance is effective on the date the application is filed but not earlier than the day following the last day for which the applicant last received regular compensation. (Gov. Code, § 31724, first paragraph, second sentence.)

However, where the applicant took a lower-paying job pending the resolution of his application for disability retirement from his position as a fireman, he was entitled to the approved retirement allowance for the period his application was pending, rather than only from the date of approval of the application when the lower paying job, and his receipt of compensation for work performed in that job, came to an end. The pension payment obligation of the association was offset by the compensation the applicant received for the lower paying county position he took while his application was pending before the Board. (*Puckett v. Orange County Bd. of Retirement* (1988) 201 Cal.App.3d 1075 [247 Cal.Rptr. 672].)

In addition to salary and wages, the term “regular compensation” in Section 31724 has been held to include compensation received for sick leave and vacation when taken as time off, as opposed to a lump sum payment, or so-called “termination pay.” (*Katosh v. Sonoma County Employees’ Retirement Association* (2008) 163 Cal.App.4th 56, 78 [77 Cal.Rptr. 324].)

In *Astorga v. Retirement Bd. of Santa Barbara County Employees Retirement System* (2016) 245 Cal.App.4th 386, Astorga stopped working on November 18, 2011, and applied for a disability retirement on December 19, 2011. She received small increments of vacation, holiday, or sick leave in each pay period between November 17, 2011 and December 8, 2013. She also received donated time during this period and stipulated that the donated time was regular compensation under Section 31724. The Board of Retirement determined that her disability retirement effective date was December 9, 2013, the day following the last day she received her last incremental payment. Astorga argued that these small, incremental payments should be compressed to achieve an earlier effective date under Section 31724. The court, relying on *Katosh*, rejected this argument and specifically held that receipt of incremental payments postpones the effective date of disability retirement until the last day the employee utilizes sick leave or vacation time. (*Id.* at 391). The court found “it irrelevant that the amount received was intermittent and less than the full amount of compensation usually received for a single pay period.” (*Id.* at 391). The court concluded its decision with the following statement:

In sum, *Katosh* confirmed the bright-line rule that disability retirement benefits are not available until the day following the day paid leave was last received. (*Id.* at 392).

The court also determined, under the doctrine of invited error, that Astorga waived her right to argue the donated time was regular compensation because she had signed a stipulation with the retirement system that the donated time was regular compensation. (*Id.* at 390).

(2) When the member is granted or is entitled to compensated time off for illness, the pension commencement date may be delayed to a date after the application is actually filed.

Delays for the commencement date of the pension allowance beyond the date of the application are built into the statutory scheme for workers' compensation leave of absence with compensation (Gov. Code, § 31724, first paragraph, first sentence) and sick leave with compensation (*id.*, first paragraph, third sentence).

Given that the *Katosh* and *Astorga* courts ruled that “regular compensation” includes sick leave and vacation pay when taken as time off, if the application is “deemed filed” on a date earlier than the date it was actually filed, it will never be deemed filed on a day earlier than the day after the applicant last received any salary, wages, or sick leave or vacation pay when taken as time off.

End comment.

Applicants' comment

As indicated by the ruling in *Katosh*, if there are gaps in the payment of sick leave and vacation, at least in a county following the payroll practices that were followed by the County of Sonoma, that last payment of any type of compensation that is within the meaning of “regular compensation” will cut off prior periods that otherwise would be covered by the pension allowance. The Court of Appeal did not describe the payroll accounting practices involved, but it appears that either the day “for which” the member receives sick leave or vacation pay is the day the county says it is or the *Katosh* court construed the statutory term “for which” as synonymous with “on which.” The sick leave or vacation pay benefit does not refer back so that the accounting for the beginning date of the new period of sick leave or vacation follows the last day of the previous period for which the member received “regular compensation” or one of its “subsets”, i.e., sick leave or vacation pay.

Assume a member is off work for disability, runs out of sick leave and vacation, and remains temporarily disabled for a year; then the member receives a day's sick leave or vacation pay; thereafter the member is determined by her physician to be permanent and stationary and permanently incapacitated and files an application for disability retirement. Under *Katosh*, the member's application would not be deemed filed on a date earlier than the day following the date on which she received the one day of sick leave or vacation pay, cutting off a year of her pension allowance. We assert that this Draconian result from the construction of the statute in such a way that it creates a hardship-producing gap between the end of regular compensation and the commencement of the disability pension is simply not what the Legislature intended by

the various provisions of Government Code section 31724. See the Applicants' comment on the *Katosh* decision, below.

End comment.

(a) Full salary under Labor Code section 4850

Notwithstanding the actual date the application is filed, if the applicant receives a leave of absence with compensation under Division 4 of the Labor Code commencing with Section 3201 of the Labor Code (see Lab. Code, § 4850 which provides for a leave of absence while disabled without loss of salary), he or she is to be retired on the expiration of the leave of absence without loss of salary or on the employee's consent to retirement on an earlier date. (Gov. Code, § 31724, first paragraph, first sentence.)

(b) Sick leave with compensation

If the employee has been "granted or is entitled to sick leave," the retirement shall not become effective until the expiration of such sick leave "with compensation" unless the employee consents to an earlier retirement date. (Gov. Code, § 31724, first paragraph, third sentence.)

Applicant's comment

The third sentence in the first paragraph of Section 31724 states,

Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the member consents to his retirement at an earlier date.

The second sentence in the first paragraph of Section 31724 provides that the retirement allowance shall be effective on the date of the application "but not earlier than the day following the last day for which he received regular compensation." The *Katosh* court ruled that sick leave is a subset of "regular compensation. Under this construction, the third sentence, first paragraph of Section 31724 is surplusage, a result the rules of statutory construction require courts to avoid. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1397 [241 Cal.Rptr. 67, 743 P.2d 1323].) See our further comment on the *Katosh* decision, below.

End comment.

(c) Does the member's continuing receipt of workers' compensation temporary disability compensation delay the commencement date of the pension?

Associations' comment

There is apparently some divergence of opinion on this question. We submit that Section 31724's reference to a "leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation" is a reference to full salary under Labor Code section 4850. Section 4850 defines the full salary benefit enjoyed by certain public safety employees who become disabled, temporarily or permanently, as "a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5." It is true that the word "compensation" refers to all the benefits that are provided under the Workers' Compensation Act (Lab. Code, § 3207), but only the full salary provisions of Section 4800 (applicable to certain state public safety employees), Section 4800.5 (applicable to California Highway Patrol officers), Section 4804.1 (applicable to University of California firefighters), Section 4806 (applicable to University of California police officers) and Section 4850 are referred to as a "leave of absence."

On the other hand, Labor Code section 4853 provides that when the disability continues beyond one year, the officer or employee is entitled to disability indemnity under the provisions of the workers' compensation act other than Section 4850 and the "leave of absence shall continue." If by its reference in Government Code section 31724 to a leave of absence with compensation under the workers' compensation act the Legislature was referring only to the leave of absence without loss of salary under Labor Code section 4850, it could have easily cited the section.

This writer does not have access to Legislative history materials to establish that the "leave of absence with compensation" provision of Government Code section 31724 is or is not a reference only to Labor Code section 4850, but consider this:

In *Martinez v. Contra Costa County Fire Protection District, et al.* (1975) 44 Cal.App.3d 321 [118 Cal.Rptr. 614], a county firefighter sustained a back injury in August 1972, stopped working due to disability, and began receiving his full salary under Labor Code section 4850. In February 1973, the district filed an application for Martinez' retirement. Martinez protested that he did not want to retire. However, the Board went forward with the application and, on May 22, 1973, granted Martinez a service-connected disability retirement effective April 30, 1973, just over eight months into his otherwise full year of salary under Section 4850. The full salary stopped as of his retirement. Martinez challenged the district and the retirement association in the superior court and the court denied Martinez relief. On appeal, the Court of Appeal affirmed, construing Labor Code section 4850 as contemplating that a disability retirement occurring before the payment of one year of full salary could cut off the benefit.

During the time the *Martinez* case was being litigated, Government Code section 31724 did not provide that a disability pension was to be effective on the expiration date of any leave of absence with compensation under the Labor Code, unless the member consented. That provision was enacted in 1974 (AB 1131, Stats 1974, ch. 9, § 2, p. 16), effective January 1, 1975, and, based on the timing, appears to be a response to the superior court's ruling, and in anticipation of the Court of Appeal's ruling in *Martinez*

which was filed on January 6, 1975. The legislative history would hopefully verify or rebut this apparent connection.

Similarly, in *Gourley v. City of Napa* (1975) 48 Cal.App.3d 156 [121 Cal.Rptr. 290] a city fireman, a member of PERS and entitled to the Section 4850 full salary benefit, sustained a back injury and went off work. When his employer received evidence that the back injury had become permanent and stationary, it cut off his full salary and applied for his retirement to be effective six and a half months into his year of full salary. The application was granted, the effective date of the disability retirement being set in such a way that Gourley's full salary was continued for another month and a half beyond the city's original target date. Gourley challenged the city's action with a petition for writ of mandate.

Gourley relied on the provisions of Government Code section 21025.5 which at the time provided,

Notwithstanding any other provision of this article, the retirement for disability of a member who has been granted or is entitled to a leave of absence with compensation, shall not become effective prior to the expiration of such leave of absence with compensation, unless the member applies for or consents to his retirement as of an earlier date.

Note (1) that in the context of the Public Employees Retirement Law, a leave of absence with compensation refers not only to full salary under Labor Code section 4850, but leaves of absence with sick leave and other types of compensation; (2) Section 21025.5 applied to members of PERS generally, including those who were not entitled to full salary under Section 4850, not just to local safety members such as Gourley.

The city's action was upheld by the superior court. The Court of Appeal affirmed, ruling that Section 4850 did not make it the employee's option to retire or not retire on a disability pension, his consent was not required, and Gourley's retirement terminated his right to continued receipt of full salary under Section 4850. The court reasoned that, since Gourley's retirement terminated his right to the leave of absence with full salary, he did not meet Government Code section 21025.5's requirement that, in order for his retirement to be delayed by continued receipt of full salary under Labor Code section 4850, he must continue to be "granted or entitled to a leave of absence with compensation" (*Gourley*, p. 163.)

Government Code section 21025.4 was enacted by legislation in 1975 (Stats 1975, ch. 655, § 5, effective January 1, 1976; repealed Stats 1995, ch. 379, § 1 (SB 541); see now Gov. Code, § 21164, added by Stats 1995, ch. 379 § 2 (SB 541)), providing that a PERS local safety member cannot be retired without the member's consent prior to the expiration of the full one year of full salary under Labor Code section 4850 or the earlier date when his disability is found to be permanent and stationary by the WCAB. The same bill by which Section 21025.4 was enacted also amended Government Code section 21025.5, at issue in *Gourley*, to apply to a member other than a local safety

member. (Stats.1975, ch. 655, § 6; repealed Stats 1995 ch. 379, § 1 (SB 541); see now Gov. Code, § 21165, added Stats 1995, ch. 379, § 2 (SB 541).) For a further discussion of the PERS provisions by which the effective date of a disability retirement may be delayed, including the receipt of full salary under Labor Code section 4850, see *Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341 [148 Cal.Rptr. 679] and *City of Martinez v. Workers' Comp. Appeals Bd. (Bonito)* (2000) 85 Cal.App.4th 601 [102 Cal.Rptr.2d 588].)

Note that the CERL of 1937's Government Code section 31724 does not contain an "involuntary retirement provision" like that in Government Code section 21164, viz., that a member can be retired before the year of full salary has run its course if the member's disability has been found to be permanent and stationary by the WCAB.

LACERA's practice is that if the member is receiving full salary without loss of salary under Labor Code section 4850, the member continues to earn compensation from which contributions are made and service credit continues to be earned. The same is true if the member continues to receive sick leave compensation or vacation pay as time taken off, as opposed to a lump sum "termination pay." (See *Katosh v. Sonoma County Employees' Retirement Association* (2008), *supra*, 163 Cal.App.4th 56, 78 [77 Cal.Rptr. 324].) On the other hand, if the LACERA member is receiving only so called "state rate" workers' compensation temporary or permanent disability indemnity, contributions are not deducted and receipt of those benefits is not a basis for delaying the commencement of the pension allowance.

Another reason that payment of workers' compensation temporary disability indemnity would not be considered a leave of absence with compensation that would delay the commencement of a disability pension is that once a member of an association operating under the CERL of 1937 is retired, the member continues to be eligible to receive disability indemnity, both temporary and permanent as appropriate, while receiving a pension allowance. (See *Pennington v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 55 [97 Cal.Rptr.380] [Los Angeles County Deputy Sheriff was entitled to temporary and permanent disability indemnities after full salary under Labor Code section 4850 runs out, whereas the right of an officer covered by PERS to receipt of disability indemnity terminates when the period of disability ends or on the date of retirement. (Lab. Code, § 4853.)] This is inconsistent with the position that, under the CERL of 1937, the pension commencement date would be delayed by the payment of temporary disability indemnity or permanent disability indemnity. The retirement allowance and workers' compensation indemnity are not linked nor does one offset the other.

Contrary to the position described in the preceding paragraphs, however, the *Katosh* court stated, "Appellant [Katosh] acknowledges that the first sentence of *section 31724* refers to certain temporary disability benefits under workers' compensation law that are not at issue here. . ." (*Katosh*, p. 66. Italics in original.) There being no issue concerning the meaning of the first sentence of Section 31724, and presumably no briefing on the subject, the *Katosh* court's statement is at best only *dicta* and, perhaps not even *dicta* since the Court of Appeal was relating the appellant's acknowledgement

of the point and not a ruling by the court. In addition, the Court of Appeal's statement that Section 31724 refers to certain temporary disability benefits is inaccurate: (1) Labor Code section 4850's leave of absence without loss of salary is payable when the disability causing the absence from work is a permanent disability as well as when it is in the temporary disability stage. (*City of Palo Alto v. Industrial Acc. Comm.* (1965) 232 Cal.App.2d 305 [42 Cal.Rptr. 822]; *City of Vallejo v. Workers' Comp. Appeals Bd.* (Lehman) (1981) (Writ Denied) 46 Cal.Comp.Cases 67.) (2) In any case, the full salary benefit is, by its own terms, "in lieu" of temporary disability compensation, meaning that the leave of absence without loss of salary is something other than a temporary disability benefit.

End comment.

- (3) The pension commencement date may be set earlier than the actual date the application was filed if the delay in filing is excused.**

If the filing of the application was delayed by administrative oversight and/or inability to determine permanence of incapacity until after the date following the last day for which the applicant last received regular compensation, the application is deemed filed on the date following the day for which the applicant last received regular compensation. (Gov. Code, § 31724, second paragraph.)

(a) Effect of the "deemed filed" clause

Associations' comment

When the filing of an application is delayed by administrative oversight or inability to determine the permanence of the incapacity until after the last day for which the applicant received regular compensation, the application will be considered filed on the earlier date following the day for which the applicant last received a payment of his or her normal salary, wages, sick leave or vacation pay taken as time off. In counties following the same payroll accounting practices as Sonoma County, notwithstanding that the applicant had an even earlier period or periods during which the applicant was not receiving any regular compensation, to include normal salary, wages, sick leave or vacation time, the application will be deemed filed on the day after the applicant exhausts her sick leave and vacation pay. (*Katosh v. Sonoma County Employees' Retirement Association, supra*, (2008) 163 Cal.App.4th 56, 59, 61, [77 Cal.Rptr. 324].)

In the previous edition of the Resource, we interpreted the "deemed filed" clause to not directly establish the commencement date of the retirement allowance. It was thought to only establish when a late-filed application is to be considered to have been filed. The date for the commencement of the disability pension, on the other hand, might still be a date after the late application was deemed filed. This was based on the understanding that "regular compensation" was a member's normal salary or wages and sick leave was considered to be something other than regular compensation. Under this view, if the application was deemed filed on a date earlier than it was actually filed,

it would be deemed filed on the date following the last day for which the member received regular salary or wages; but in a case in which the applicant was granted or entitled to sick leave, the commencement date of the pension allowance would be delayed because the third sentence, first paragraph of Section 31724 provides that the “disability retirement *allowance*” is not effective until the expiration of sick leave to which the member is granted or is entitled to, unless the member consents to an earlier retirement. A distinction was thought to exist in Section 31724 between the date the application was deemed to be filed and the date the pension allowance was to be effective. The dates may or may not be the same. However, this view is inconsistent with the decision in *Katosh v. Sonoma County Employees Retirement Association, supra*.

The *Katosh* court held that sick leave, as well as vacation pay, taken as time off, *are* regular compensation. (*Katosh*, p. 65.) Therefore, the late-filed application will never be deemed filed earlier than the day following the last day, not only of regular salary or wages, but a later date that is the day for which the applicant last received sick leave or vacation pay as time off.

End comment.

Applicants’ comment

In *Katosh*, the board of retirement, upheld by the trial court, set the effective date of Katosh’s retirement on “October 28, 2004, the day after she exhausted her accrued sick leave.” (*Katosh*, p. 59.) The Court of Appeal affirmed the trial court’s judgment. But Government Code section 31724 does not provide that the effective date of the retirement is to be set on the day after the member exhausts his or her right to sick leave. It provides that the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the “expiration of such sick leave with compensation . . .” Further, if, as the *Katosh* court ruled (*Katosh*, p. 65), sick leave is “regular compensation,” then effect must be given to the mandate in Section 31724, first paragraph, second sentence that provides that the retirement allowance shall be effective on the date the application is filed but not earlier than the last day **for which** the applicant last received regular compensation. As we will explain below, the *Katosh* court erroneously applied Section 31724 as if it provided that the pension allowance would not be effective earlier than the date **on which** the applicant last received regular compensation. Since the application was filed over two and a half years before the date on which Katosh last received regular compensation in the form of sick leave and vacation pay that she had earned while still working, the court also erroneously ruled that the “deemed filed” provision in the second paragraph of Section 31724 did not apply to her circumstances.

We review the facts: Katosh stopped working on June 26, 2000. Her health insurance lapsed on March 28, 2001, apparently because she was not being paid any sort of compensation, although the opinion does not specify when Katosh went off “pay status.” She applied for a service-connected disability retirement on February 6, 2002. Katosh was placed in “pay status” for two weeks in December 2002 during which she received

40 hours of sick leave that she had previously accrued while she was working. The *Katosh* opinion does not disclose why, if Katosh was entitled to the 40 hours of sick leave, it had not been paid earlier or why she had gone off “pay status.” The board of retirement in an initial determination made on July 17, 2003 found that Katosh was not disabled and the matter went to an administrative hearing before a referee [date not provided]. On some unspecified date, the referee recommended that the Board grant Katosh a service-connected disability retirement, but the referee did not address the issue of what the effective date of the retirement should be.

The court’s opinion does not disclose why Katosh still had more hours remaining in her sick leave and vacation pay accounts that she was able to tap “beginning sometime around October 12, 2004 and ending October 27, 2004,” although the *Katosh* court explains that the payment of these benefits resulted in Katosh having active health insurance upon her retirement, thus making her eligible for post-retirement medical insurance.

The opinion also does not address why the sick leave paid in December 2002 and the combination of sick leave and vacation pay paid in October 2004, which Katosh earned before she stopped working in 2000, was not compensation covering days **for which** the applicant had not yet been compensated in either 2000 or 2001 when the county first stopped paying Katosh any sort of payroll benefit.

The retirement association warned Katosh that if she was paid the accrued sick leave and vacation pay in October 2004, though she would be eligible for post-retirement health insurance and a higher pension allowance, her retirement date would be in October 2004, and she would not receive any retroactive retirement benefits. Katosh accepted the October 2004 payment under protest and the board of retirement set the retirement effective date, and commencement of the allowance, on October 28, 2004, the day after date **on which** the sick leave and vacation payment was last paid. The litigation concerned whether Katosh should have been retired when she last was paid regular salary in 2000 or on October 28, 2004.

We submit that the *Katosh* court misconstrued Government Code section 31724. That misconception is encapsulated in the following quote from the opinion:

Appellant contends that “regular compensation” as used in the statute does not include sick leave or vacation pay and that her last day of receiving “regular compensation” was her last day of actual work, June 26, 2000. She argues that because her delay in filing her application was due to an inability to ascertain the permanency of her incapacity, her effective retirement date should be the date following her last day of actual work as so defined. However, it is conceded that neither the Board nor the court addressed appellant’s claim that she came within the second paragraph of the statute because the filing of her application was delayed by the inability to ascertain the permanency of her incapacity. It was unnecessary to do so, given the determination that “regular compensation” includes sick leave and vacation and **therefore, that the last day for which she received “regular compensation” was October 27, 2004.** Consequently, the

issue of inability to ascertain permanency does not come into play unless we determine that appellant has established that “regular compensation” does not include sick leave or vacation. If such were the case, remand for determination of the factual issue of whether appellant carried her burden of demonstrating the delay was caused by an inability to determine permanency would be required. We address only the issue of whether sick leave and vacation are included in the term “regular compensation” in this statute. (*Katosh*, p. 65. Bold added.)

We submit that the last day **on which** *Katosh* received regular compensation was October 27, 2004; but the last day **for which** *Katosh* received regular compensation in the form of sick leave and/or vacation pay was some earlier date, following the last date she was compensated by the county, apparently in 2000 or 2001.

The first paragraph, second sentence of Section 31724 provides that the member’s “disability retirement allowance shall be effective as of the date the application is filed, but not earlier than the day following the last **day for which** he received regular compensation.” The Legislature did not say that the pension allowance would not be effective earlier than the **day on which** he received regular compensation. We submit that by the use of the term “day for which” the Legislature was recognizing that payments of regular compensation are not always made when they should have been made and adjustments are made over the course of time.

We submit that the issue is this: In the context of a statute the purpose of which is, on the one hand, to avoid hardship to a member that might be caused by the creation of a gap between the receipt of salary or other regular compensation benefits and the commencement of the retirement allowance, all of which the member and the member’s family rely on for sustenance, while avoiding, on the other hand, the payment of overlapping and duplicate benefits, how are the terms “day for which” and “expiration of such sick leave with compensation” to be understood? Should the court look to the day on which the sick leave or vacation pay is actually last paid, thus allowing for the creation of hardship-producing gaps between regular compensation and the commencement of the pension allowance? Or should the court avoid causing the member hardship and look to the earliest day **for which** the sick leave is paid, thus closing potential benefit gaps between payments from various payroll accounts and the commencement of the pension allowance? The *Katosh* opinion does not show that the Court of Appeal considered that the sick leave and vacation pay were forms of compensation covering the earliest period after *Katosh* ran out of benefits years before – days **for which** the payments in December 2002 and October 2004 were made. Rather, as the above quoted portion of the opinion indicates, the court gave effect to the dates **on which** payment of sick leave or vacation pay was made. This, we submit, was clear error.

Neither can we be unmindful of the rule so firmly established in this state that pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity. In

order to confer the benefits intended, such legislation should be applied fairly and broadly. (*Cordell v. City of Los Angeles* (1944) 67 Cal.App.2d 257, 266 [154 P.2d 31], cited with approval by the Supreme Court in *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985), *supra*, 39 Cal. 3d 374, 390 [216 Cal.Rptr. 733, 703 P.2d 73] and *Bowen v. Board of Retirement* (1986), *supra*, 42 Cal.3d 572, 577 [229 Cal.Rptr. 814, 724 P.2d 500].)

One does not achieve the beneficent purposes of the CERL of 1937 by construing the law so as to leave a permanently incapacitated worker without income for two or three years. The *Katosh* decision allows for the very kind of harsh results that the Legislature intended to avoid when it framed the 1955 amendment to Government Code section 31724 in terms of the last day **for which** the member was paid and added the “deemed filed” provisions of the second paragraph in 1970 and 1972. The words the Legislature used evidence a clear intent to relate current payments of either regular compensation or the pension allowance back so as to avoid gaps in income. Consider a hypothetical that is perhaps more typical than the facts in *Katosh*. Assume an injured member remains off work for an extended period of time after the member’s sick leave benefits and vacation time have been exhausted. Assume that the member’s medical condition is such that treating physicians are unable to determine when or if the member will be able to return to work and the member remains off work, but in service, for another year. Assume that by virtue of remaining in service the member becomes entitled to and is paid sick leave, or perhaps the member has not claimed sick leave remaining in her account because she is trying to conserve her sick leave benefits and stretch them out over a longer period and, after a year without receiving any sick leave or other payroll benefit, makes a claim and is paid sick leave. Later, the member’s treating physicians conclude that the member’s condition is permanent and the member is unable to return to work. The member then files an application for disability retirement. *Katosh* would stand for the proposition that the commencement date of the pension could not be set earlier than the last day payment sick leave was actually made, even if it was only one day of sick leave, effectively cutting off the member’s right to a year of pension allowance.

Avoiding hardship that might be caused by a delay in filing the application that is essentially beyond the member’s control is precisely why the Legislature enacted the “deemed filed” provision; *Katosh* produces the hardship the Legislature sought to avoid.

Katosh does not address the significance of the statutory language “the date following the *day for which* the member last received regular compensation.” Even accepting that sick leave is “regular compensation,” when *Katosh* was paid sick leave, what was *the day for which* she received that sick leave? We submit that the court should have construed the late-paid sick leave and vacation pay to be compensation for the first days *Katosh* was off work, but received no compensation, following the last day she received regular salary, vacation pay, or sick leave, apparently some time in 2000 or 2001. Such a construction would be consistent with the *Katosh* court’s rationale that sick leave and vacation pay are types of compensation for services *Katosh* performed while she was working (*Katosh*, p. 70, quoting from *Ventura County Deputy Sheriffs’ Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 497 [66 Cal.Rptr.2d 304, 940 P.2d

891].) The benefits were paid to cover the earliest “days for which” she had not been paid. Such a construction would also be consistent with the beneficent purpose the Legislature had in the 1955 (“last day for which”) and 1970 and 1972 amendments (the “deemed filed” provision) to Government Code section 31724. And, because Katosh was actually paid the sick leave and vacation pay in October 2004, she would still qualify for reinstatement of her health insurance that, in turn, would make her eligible for post-retirement health insurance.

After all, board and courts should not be construing the provisions of the CERL of 1937 in ways that create hardship producing gaps between salary and pension allowance that have been earned by those in public service. It is the very purpose of the CERL of 1937 to avoid such constructions.

End comment.

- b) Deduction of advanced disability payments made pursuant to Labor Code sections 4850.3 or 4850.4 from accrued but unpaid disability pension allowance or, if the accrued and unpaid allowance is insufficient to pay off the advanced payments, deductions from ongoing pension allowance payments.**

Government Code section 31897.6 (Statutes of 2002, Chapter 877 [AB 2131], effective January 1, 2003) provides as follows:

The board shall deduct the amount of advanced disability pension payments made to a local safety member pursuant to Section 4850.3 or 4850.4 of the Labor Code from the member's retroactive disability pension payments. If the retroactive disability allowance is not sufficient to reimburse the total advanced disability pension payments, an amount no greater than 10 percent of the member's monthly disability allowance shall be deducted and reimbursed to the local agency until the total advanced disability pension payments have been repaid. The local safety member and this system may agree to any other arrangement or schedule for the member to repay the advanced disability pension payments.

Labor Code section 4850.3 provides as follows:

A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement System, may make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance. The payments shall be no less than 50 percent of the estimated highest average annual compensation earnable by the local safety officer during the three consecutive years of employment immediately preceding the effective date of his or her disability retirement, unless the local safety officer chooses an optional settlement in the permanent disability retirement application

process which would reduce the pension allowance below 50 percent. In the case where the local safety officer's choice lowers the disability pension allowance below 50 percent of average annual compensation as calculated, the advanced pension payments shall be set at an amount equal to the disability pension allowance. If a local agency has an adopted policy of paying for any accumulated sick leave after the safety officer is eligible for a disability allowance, the advanced disability pension payments under this section may only be made when the local safety officer has exhausted all sick leave payments. Advanced disability pension payments shall not be considered a salary under this or any other provision of law. All advanced disability pension payments made by a local agency with membership in the Public Employees' Retirement System shall be reimbursed by the Public Employees' Retirement System pursuant to Section 21293.1 of the Government Code.

Labor Code section 4850.4 (Statutes of 2002, Chapter 877 [AB 2131], effective January 1, 2003) provides,

(a) A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement Systems, shall make advanced disability pension payments in accordance with Section 4850.3 unless any of the following is applicable:

(1) After an examination of the employee by a physician, the physician determines that there is no discernable injury to, or illness of, the employee.

(2) The employee was incontrovertibly outside the course of his or her employment duties when the injury occurred.

(3) There is proof of fraud associated with the filing of the employee's claim.

(b) Any employer described in subdivision (a) who is required to make advanced disability pension payments, shall make the payments commencing no later than 30 days from the date of issuance of the last disbursed of the following:

(1) The employee's last regular payment of wages or salary.

(2) The employee's last payment of benefits under Section 4850.

(3) The employee's last payment for sick leave.

(c) The advanced disability payments shall continue until the claimant is approved or disapproved for a disability allowance pursuant to final adjudication as provided by law.

(d) An employer described in subdivision (a) shall be required to make advanced disability pension payments only if the employee does all of the following:

(1) Files an application for disability retirement at least 60 days prior to the payment of benefits pursuant to subdivision (a).

(2) Fully cooperates in providing the employer with medical information and in attending all statutorily required medical examinations and evaluations set by the employer.

(3) Fully cooperates with the evaluation process established by the retirement plan.

(e) The 30-day period for the commencement of payments pursuant to subdivision

(b) shall be tolled by whatever period of time is directly related to the employee's failure to comply with the provisions of subdivision (d).

(f) After final adjudication, if an employee's disability application is denied, the local agency and the employee shall arrange for the employee to repay any advanced disability pension payments received by the employee pursuant to this subdivision. The repayment plan shall take into account the employee's ability to repay the advanced disability payments received. Absent an agreement on repayment, the matter shall be submitted for a local agency administrative appeals remedy that includes an independent level of resolution to determine a reasonable repayment plan. If repayment is not made according to the repayment plan, the local agency may take reasonable steps, including litigation, to recover the payments advanced.

D. Is the applicant entitled to a Supplemental Disability Allowance? (For some counties)

Associations' comment

Some counties have implemented the provisions of Article 15.6 of the 1937 Act (commencing with section 31855), which provides both retirements and federal social security benefits to members on a nonintegrated basis.

Government Code section 31740 provides:

In any county which has implemented the provisions of Article 15.6 (commencing with Section 31855), any member who is thereafter retired for disability shall receive a supplemental disability retirement allowance in the sum of three hundred dollars (\$300) per month in addition to any other benefits due under this chapter, provided the member's disability is such that the member is incapable of gainful employment. The board [of retirement] may adopt regulations, including a requirement for periodic declarations of non-employment, to administer this supplemental allowance.

Associations' comment

The issue is how to define the term "incapable of gainful employment." Government Code section 31740 has left the task of determining the criteria for the supplemental disability allowance to the individual CERL of 1937 counties who have implemented the provisions of Article 15.6. Typically, the board of retirement has enacted regulations defining "incapable of gainful employment." One example of a local definition of "incapable of gainful employment" includes "not capable of performing any service for compensation with the exception of service as a juror or witness in a court proceeding, or service as an election official."

If this guideline is used, the board must determine whether the claimant is capable of gainful employment, that is, whether he or she is capable of any service for compensation, with exceptions not applicable here. An important note: the standard in these cases does not include the federal requirement that the employee be unable to engage in a "substantially gainful" occupation for which he or she is, or may reasonably become, qualified by reason of education, experience, or training. Rather, the standard only requires that the employee be incapable of any service for compensation. We note that being capable of any service for compensation also does not necessarily mean that claimant has to have a full-time job. Even a part-time job may qualify as service for compensation.

End comment.

Applicants' comment

We do not believe that the analysis given is an adequate discussion of this subject. Claiming that the state statute leaves up to individual boards the unfettered discretion to define "incapable of gainful employment" raises a number of perplexing issues, e.g., unlawful delegation of legislative authority. Furthermore, there has apparently been no attempt to resolve this issue by referring to the legislative history.

End comment.

III. BURDEN OF PROOF

A. Meaning of "burden of proof" in general

Tusher et al. v. Gabrielsen et al. (1998) 68 Cal.App.4th 131, 144-145 [80 Cal.Rptr.2d 126]:

. . . . Appellants misapprehend the evidentiary process. As provided by Evidence Code section 500: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Once this initial burden is met, the opposing party will be charged with producing its own evidence as to the matters established. "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. [P] (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." (Evid. Code, § 550.) 'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) Thus, if a plaintiff presents evidence to establish each element of its case, the defendant has the burden of going forward with its own evidence as to those issues. This does not alter the ultimate burden of proof, which rests with the plaintiff to prove each of the relevant facts supporting its cause of action. In the present case, both sides presented evidence on the easement issue. The court was left to weigh the evidence, and found for the Gabrielsens. There was no error in placing on the Tushers the burden of proving their causes of action.

B. In a disability retirement case, as in civil cases generally, proof to a moral certainty is not required to meet the burden of proof. It is sufficient if the evidence establishes the reasonable probability that a fact exists.

Spolter v. Four Wheel Brake Co. (1950) 99 Cal.App.2d 690, 693 [222 P.2d 307]:

It must not be forgotten that in civil cases the law does not require absolute demonstration but only reasonable probability to support the finding of the jury. Juries in civil cases are so instructed every day. [Citation.] This court recently had occasion to point out that "moral certainty is not required in civil cases; there 'reasonable probability' . . . is normally sufficient and is used as a counterpart to 'preponderance of the evidence.'" [Citation.] "In civil cases which are decided in favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability, and this is well recognized. Says Greenleaf: 'In civil cases . . . it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth.'" [Citations.]

McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 408, 416-417 [71 Cal.Rptr. 697, 445 P.2d 313]:

The board erroneously described Dr. Benioff's written opinion. Dr. Benioff stated that it was "probable" that the smoke inhaled contained carcinogens, and that it was "reasonable" that decedent's prolonged occupational exposure could lead to lung cancer. We have held "reasonable" or "probable" causal connection will suffice; it is to be distinguished from the merely "possible." (*Travelers Ins. Co. v. Industrial Acc. Com.* (1949) 33 Cal.2d 685, 687 [203 P.2d 747].) As we stated in *Travelers Ins. Co.*, intellectual candor may at times require expert testimony in terms of mere probability. [Citations.] For that reason alone we cannot demand that experts be more certain, particularly when industrial causation itself need not be certain, but only "reasonably probable." Similarly it would be a rare case in which further information would not be of value to the expert; to limit expert testimony to such unique situations would be virtually to abolish it.

Paneno v. Workers' Comp. Appeals Bd. (1992) 4 Cal.App.4th 136, 153 [5 Cal.Rptr.2d 461]:

The WCAB may not isolate part of a physician's opinion and disregard other parts that contradict or nullify the portion on which the WCAB relies. (See *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 255 [262 Cal.Rptr. 537].) "[A] physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability. [Citations [omitted by *Paneno* court].]" (*Ibid.*)

C. Burden of going forward and burden of persuasion by a preponderance of the evidence

Mathis et al. v. Morrissey (1992) 11 Cal.App.4th 332, 346 [13 Cal.Rptr.2d 819]:

Under our law the burden of going forward with evidence does not operate to shift the burden of proof. (See Evid. Code, § [sic] 110, 115, 604, 606.) The burden of producing or "going forward" with evidence means the obligation of a party to produce evidence sufficient to avoid a ruling against him on the issue. (Evid. Code, § 110; 1 Witkin, Cal. Evidence (3d ed. 1986) § 128, p. 114.) When a party with the burden of producing evidence has produced relevant evidence on the issue then the matter is to be determined without regard to the burden of going forward with evidence. (Evid. Code, § 604.) The burden of proof remains with the party who had the burden in the first instance. (*Ibid.*) In a civil case the plaintiff has the burden of proof with respect to all facts essential to his or her claim for relief. (Evid. Code, § 500.) . . .

McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, footnote 5 [228 Cal.Rptr. 567]:

As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.

See also *Glover v. Board of Retirement* (1989), *supra*, 214 Cal.App.3d 1327, 1337 [214 Cal.App.3d 1327]; *Harmon v. Board of Retirement* (1976), *supra*, 62 Cal.App.3d 689, 691 [133 Cal.Rptr. 154]; *Lindsay v. County of San Diego Retirement Board* (1964), *supra*, 231 Cal.App.2d 156, 161 [41 Cal.Rptr. 737]; *Rau v. Sacramento County Ret. Bd.* (1966), *supra*, 247 Cal.App.2d 234, 238 [55 Cal.Rptr. 296].

Lindsay v. County of San Diego Retirement Board, *supra*, 231 Cal.App.2d, at 162:

A party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for the agency to show the negative of the issue when the positive is not proved.

Glage v. Hawes Firearms Co. (1990) 226 Cal.App.3d 314, 324-325 [276 Cal.Rptr. 430]:

The sole focus of the legal definition of "preponderance" in the phrase "preponderance of the evidence" is on the quality of the evidence. The quantity of evidence presented by each side is irrelevant. Indeed, the court specifically instructed the jury not to decide the case in favor of the side that produced the most witnesses but rather on the basis of "the convincing force of the evidence." [Citation.]

D. What does not meet the burden of proof

1. The "liberal construction of the law" argument

Mansperger v. Public Employees' Retirement System (1970), *supra*, 6 Cal.App.3d 873, 877 [86 Cal.Rptr. 450]:

Petitioner argues that pension statutes are to be liberally construed. [Citations.] The object of the disability allowance is not solely to compensate a member with a pension. The disability retirement allowance has as its objective the effecting of efficiency and economy in public service by replacement of employees, without hardship or prejudice, who have become superannuated or otherwise incapacitated. (Gov. Code, § 20001.) Therefore, the primary test before us is whether petitioner is substantially incapacitated from the performance of duty, and the rule on liberality of construction does not change that test.

Reynolds v. City of San Carlos (1981), *supra*, 126 Cal.App.3d 208, 216 [178 Cal.Rptr. 636]:

Appellant argues that any doubt about application of the condition contained in Labor Code section 4850 must be resolved in his favor, since pension laws are to be liberally construed. We do not agree that the doctrine of liberal construction precludes the Commission from applying the common sense rule that appellant is not permanently disabled when he unreasonably refuses remedial surgery.

City of Oakland v. Public Employees' Retirement System (2002), *supra*, 95 Cal.App.4th 29, 39 [115 Cal.Rptr.2d 151]:

The PERS laws are to be interpreted in favor of the employee or beneficiary when a semantic ambiguity is presented by the statute at issue. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1488 [280 Cal.Rptr. 847]. See, e.g., *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044] [construing PERL to preclude application of Labor Code limit on psychiatric disabilities for PERS safety members].) ¶ The PERS Board's interpretation and application of the statutes is to be given great weight. (*City of Sacramento v. Public Employees Retirement System, supra*, 229 Cal.App.3d at p. 1478; see *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921 [156 P.2d 1].) Although pension legislation is to be construed liberally, this rule "should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended." (*Neeley v. Board of Retirement* (1974) 36 Cal-App-3d 815, 822 [111 Cal.Rptr. 841] (Neeley).)

Glover v. Board of Retirement (1989), *supra*, 214 Cal.App.3d 1327, 1332 [216 Cal.Rptr. 733]:

We agree that pension legislation must be liberally construed, resolving all ambiguities in favor of appellant (*Gorman v. Cranston* (1966) 64 Cal.2d 441, 444 [50 Cal.Rptr. 533, 413 P.2d 133]; *Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 822 [111 Cal.Rptr. 841]); however, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 787 [224 Cal.Rptr. 758]) or change the test on appeal. (See *Curtis v. Board of Retirement* (1986) 177 Cal.App.3d 293, 298 [223 Cal.Rptr. 123].)

Power v. Workers' Comp. Appeals Bd. (1986), *supra*, 179 Cal.App.3d 775, 787 [224 Cal.Rptr. 758]:

Applicant also contends that the Board erred in failing to resolve all reasonable doubts in his favor. However, in the light of the foregoing analysis, this contention is meritless, if not specious. The principle of resolving all reasonable doubts in favor of the employee applies "[when] there is no conflicting evidence and the inference [of industrial causation] is undisputed[.] [In such a case,] the board in furtherance of the legislative command of liberal construction in favor of the workingman must find industrial causation." (*Lundberg v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 436, 439 [71 Cal.Rptr. 684, 445 P.2d 300].) Here, however, the evidence as to both injury and industrial causation was conflicting. The WCJ did not properly address the conflict; the Board did.

Applicant seems to be arguing that whenever the evidence is in conflict, the principle of liberal construction must result in a finding in favor of the employee, irrespective of whether the evidence against him "has more convincing force and the greater probability of truth" (Lab. Code, § 3202.5, *supra*). Were this the case, however, the preponderance of the evidence standard in section 3202.5 would be meaningless, as would the review powers of the Board.

2. Proof that a fact is "possibly" true does not meet the burden of proof.

Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1700-1701 [20 Cal.Rptr.2d 778]:

The applicant in a workers' compensation proceeding has the burden of proving industrial causation by a "reasonable probability." (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [71 Cal.Rptr. 697, 445 P.2d 313].) That burden manifestly does not require the applicant to prove causation by scientific certainty. . . .

The *McAllister* court annulled the Board's decision denying benefits, holding the medical testimony that causation was "reasonable" or "probable," i.e., more than merely possible, was sufficient to meet the burden of proof. (69 Cal.2d at pp. 416, 419.) "Future scientific developments will tell us more about lung cancer. Ultimately it may be possible to pinpoint with certainty the cause of each case of the disease. But the Legislature did not contemplate years of *damnum absque injuria* [editor's note: "loss without injury"] pending such scientific certainty. Accordingly, we and the [Board] are bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or 'convincing.' We must do so even though the exact causal mechanism is unclear or even unknown." (*Id.* at p. 419.) The question in the instant case is whether "substantial evidence supports a finding that there is not a reasonable probability that decedent's illness arose out of his employment." (See *ibid.*)

Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal.App.3d 396, 402-403 [209 Cal.Rptr. 456]: Expert testimony of a "reasonable medical possibility" of causation, defined as less than a 50-50 chance, was held to be too conjectural.

The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical "probability" and a medical "possibility" needs little discussion. There can be many possible "causes," indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. . . .

Travelers Ins. Co. v. Industrial Acc. Comm. (1949), *supra*, 33 Cal.2d 685, 687 [203 P.2d 747]:

An award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained.

3. A "prima facie" case as sufficient proof

"Prima facie" means "at first sight" or "on the face of it." (Black's Law Dictionary, Fourth Ed.). "Prima facie case" means "[s]uch as will suffice until contradicted or overcome by other evidence." (*Ibid.*)

It has been argued that the member is entitled to a disability retirement and/or a service-connected disability retirement after merely presenting a "prima facie case" that he or she is incapacitated for work-related reasons.

Is a prima facie case enough to establish a right to a disability retirement pension even when there is contrary evidence of considerable weight?

Associations' comment

An applicant is not entitled to meet a lesser burden of proof based upon the theory that he or she has made a "prima facie" showing of evidence in her favor, unless the respondent offers no evidence and fails to contradict any of the facts that make up the applicant's prima facie case.

A "prima facie case" is established when the party with the burden of proof has proceeded upon sufficient proof to the stage where the evidence will support a finding in his or her favor if evidence to the contrary is not forthcoming or is disregarded. (Evid. Code, § 606; BAJI (7th ed.) appendix E., p. 336; 1 Witkin, California Evidence (4th ed. 2000-2011) Burden, § 4, Burden of Producing Evidence: "The burden of producing evidence will shift to the other party if the party with that initial burden (a) proves a fact giving rise to a presumption (reference omitted), or (b) produces evidence of such weight that a determination in his favor would necessarily be required in the absence of contradictory evidence. [Citations.]".)

Therefore, the applicant's burden is not met by merely establishing a prima facie case. The applicant may not shift the burden of proof to the respondent by establishing a prima facie case. With the exception of a case falling under one of the presumptions for service-connection, the applicant's burden of proof never shifts to the respondent. Rather, the applicant must establish by a preponderance of credible evidence that it is more likely true than not true that the claimant is incapacitated and that there is a causal nexus between the incapacity and the job.

End comment.

E. Determining the weight of the evidence

Associations' comment

The preponderance of the evidence is determined by following these steps (See generally, 2 Jefferson's California Evidence Benchbook (4th ed CJA-CEB 2011), Burdens of Proof and of Producing Evidence § 47.):

- 1. Determine whether the applicant met the burden of producing evidence. If so, the burden of producing evidence shifts to the respondent. If not, the applicant's claim fails.**

Determine if there is evidence that is reliable, "substantial" evidence in support of the applicant's claim. (Note that Government Code section 31720.3, effective January 1, 2009, requires that a medical opinion be competent. See further discussion of this section, below at Section IV, A.) The evidence which is not "substantial evidence" should be disregarded. Only substantial evidence may be placed on the scales that will determine the "preponderance" or "weight" of the evidence. This is not to say that the substantiality of an individual item of evidence is to be tested in a vacuum as if it was the only item of evidence. A deficiency in a single item of evidence can be explained and resolved by another item or items of evidence, no matter which party submitted them. But if there is no substantial, reliable evidence in support of the applicant's claim, the analysis stops there. The applicant has not met his or her burden of proof and the applicant's claim fails. The respondent is not required to disprove a fact that the applicant failed to establish. (*Lindsay v. County of San Diego Retirement Board* (1964), *supra*, 231 Cal.App.2d 156, 161 [41 Cal.Rptr. 737]; *Rau v. Sacramento County Ret. Bd.* (1966), *supra*, 247 Cal.App.2d 234, 238 [55 Cal.Rptr. 296].) At this point in the civil courts, the sufficiency of the applicant's or plaintiff's case would be tested by a motion for nonsuit, that is, before the respondent or defendant had to submit any evidence in defense.

If substantial evidence supports the applicant's claim, it is placed on the scales that measure the weight or preponderance of the evidence. If the applicant's evidence is sufficient to establish entitlement to the benefit the applicant is seeking, ignoring evidence to the contrary, the applicant has met the initial *burden of producing evidence* and the referee or Board now turns to the respondent's evidence. If the applicant has met the initial burden of producing evidence, the burden of producing evidence shifts to the respondent; except in the case of a presumption that is successfully triggered by the applicant proving the prerequisite facts, the burden of proof remains with the applicant. The rest of the analysis that determines the preponderance of the evidence is performed when the case is submitted to the trier of fact.

- 2. If the burden of producing evidence has shifted to the respondent, determine if the respondent has met that burden. If so, the evidence produced by the parties is compared and weighed. If not, the applicant prevails.**

If there is evidence that, in light of the entire record, is reliable, "substantial" evidence in support of the respondent's position, it is placed on the respondent's side of the scales.

The evidence that is not “substantial evidence” will not support a finding. Only substantial evidence may be placed on either side of the scales that will determine the "preponderance" or "weight" of the evidence. The preponderance of the evidence is not merely the preponderance of any, even weak evidence. In order to be subject to the weighing process, the evidence must be of sufficient quality. (*Ergo v. Merced Falls Gas & Electric* (1911) 161 Cal. 334, 339-340 [119 P. 101].)

It is obvious that the evidence tending to prove a fact might be so slight that it would fail to satisfy the jury of the existence of the fact, and yet it might be of greater weight than other evidence introduced which would tend to disprove the fact. In such case the fact could not be said to be proven either by a preponderance of the evidence or at all. (*Ibid.*)

If there is no substantial, reliable evidence that is both favorable to the respondent and contrary to the substantial evidence the applicant produced to establish a prima facie case, the respondent has failed to meet its burden of producing evidence. In this situation, the scales tip only in favor of the applicant. The facts at issue in the application, that is, incapacity for duty and/or service connection, should be found to exist because there is no evidence to the contrary. In this circumstance, the applicant's evidence does not really “preponderate” since there is no evidence on the respondent's side to weigh, but the effect of the uncontested evidence is the same – the applicant has met her burden of proof. (See 31 Cal.Jur.3d (2011) Evidence, § 95, Standard of proof-Preponderance of Evidence.)

3. The trier of fact weighs the substantial evidence that has been placed on the scales to determine if the weight or preponderance of the evidence favors the applicant. If the scales are in equipoise or tip in favor of the respondent, the applicant's claim fails. If the scales tip in the applicant's favor, the applicant prevails.

That there is substantial evidence in support of a finding in favor of one of the parties does not mean that there can be no substantial evidence in favor of the other party's position. There can be substantial evidence on both sides. (*Cf., Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021 [127 Cal.Rptr. 11]: Trial court found substantial evidence favored the board's decision, but the *preponderance* of the evidence favored the applicant. Judgment affirmed.) The bodies of substantial evidence supporting the applicant's position and the respondent's position are placed on the respective sides of the scales that determine the weight of the evidence. The trier of fact considers all of the evidence, no matter which party produced it. (*Cf., Judicial Council of California Civil Jury Instructions, CACI 200, et seq.*)

On which side the scales tip determines where the preponderance of the evidence lies. The referee and/or the Board consider the substantial evidence on both sides of the issues and, compare the strength of the evidence favorable to the applicant, including the credibility of witnesses and documentary evidence, against evidence favorable to the respondent, including the credibility of other witnesses and documentary evidence. The referee and/or the Board then determines whether the evidence on the applicant's

side is more convincing and outweighs the respondent's evidence. If the convincing value and persuasive force of the applicant's evidence does not outweigh or preponderate over that of the respondent, the applicant's case fails.

If the trier of fact, after going through the weighing process, is left unconvinced as to what is probably true, the party with the burden of proof loses. (See 31 Cal.Jur.3d (2011) Evidence, § 95, Standard of Proof-Preponderance of evidence.) For example, in the case of a general member attempting to prove that his or her incapacity is service-connected, if the trier of fact is unconvinced that the incapacitating injury occurred in the course of employment, the applicant's claim of service-connection fails. In the case of a safety member who has met his or her burden to establish the prerequisite facts that he or she is entitled to the presumption that incapacitating heart trouble is service connected (*cf.*, Evid. Code, §§ 550 and 600, *et seq.*), thus shifting the burden of proof on the issue of service connection to the respondent, if the trier of fact, after hearing all of the respondent's evidence, is unconvinced that the heart trouble is solely the result of a concurrent nonservice-connected event or is solely the result of a post-retirement nonservice-connected event, the respondent fails to meet its burden of proof and its defense fails.

End comment.

F. Service-connection as an "entitlement" or "vested right"

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal.App.4th 30, 47 [37 Cal.Rptr.2d 860] flatly rejected the argument that a service-connected disability was an entitlement or a vested right. The court stated,

Applicant fails to grasp the implication of her statement. The critical point is that a disability pension shall be awarded "*if the member qualifies.*" (Italics added [by the *Masters* court].) That is a big "if." Indeed, Government Code section 31720 provides that a member of the retirement association shall be retired for disability "if, *and only if*: [P] (a) The member's incapacity is a result of injury or disease arising out of and in the course of the member's employment and such employment contributes substantially to such incapacity." (Italics added [by the *Masters* court].) Thus, it clearly appears that no member is simply "entitled" to a disability pension upon application and submission of a favorable doctor's report; the award of the disability pension depends upon proof, which varies from case to case, of the requisite qualifying facts. It is the board's job to "determine" whether sufficient proof has been made (Gov. Code, § 31725 ["Permanent incapacity for the performance of duty shall in all cases be determined by the board"]), and it must do so "to [its] satisfaction." (Gov. Code, § 31724.) The fact that some cases are (or, in applicant's mind, ought to be) more obvious than others does not change the nature of the task, which calls for the kind of discernment and judgment in evaluating evidence and reaching a conclusion, that is designed to be protected by the immunity statute.

G. Issues on which the applicant has the burden of proof

The applicant has the burden to prove any fact that must be affirmatively established in order for the applicant to prevail on the application. The following list is not exhaustive. If one of the parties believes that there is doubt about who has the burden of proof on an issue, it is appropriate to request the board of retirement or the referee to make a preliminary determination on which party carries the burden of proof.

1. The applicant is substantially incapacitated for his or her usual duties. In *Rau v. Sacramento County Ret. Bd.* (1966), *supra*, 247 Cal.App.2d 234, 238 [55 Cal.Rptr. 296], the Court of Appeal stated,

It must be remembered that the burden of proving an incapacitating condition is on the applicant for a disability retirement, and it is not necessary for the agency to show the negative of the issues when the positive is not proved. (*Lindsay v. County of San Diego Retirement Board*, [(1968), *supra*,] 231 Cal.App.2d 156, 160-162 [41 Cal.Rptr. 737].)

2. The applicant's incapacity arose out of and in the course of employment. In *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 161-162 [41 Cal.Rptr. 737], the Court of Appeal stated,

A party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for the agency to show the negative of the issue when the positive is not proved. [Citation.] We conclude that the Board was justified in finding that the petitioner had not met the burden to establish the causal connection between his employment and his permanent incapacity.

3. In any case in which the applicant seeks the benefit of a presumption of service-connection, all the prerequisite facts that give rise to the presumption. (See the discussions of the various presumptions in Section II, B, 6, b.)

Associations' comment

While, unlike the Workers' Compensation Act (Lab. Code, § 3600), there is no statute in the CERL of 1937 defining the applicant's burden to prove that her incapacity is *not* due to an intentionally self-inflicted injury (see discussion above at Section II, B, 3, a), (3) (j)), *not* due to voluntary participation in off duty social, recreational, or athletic activities not constituting part of the applicant's work-related duties (see discussion above at Section II, B, 3, b), (3) (c), [5]), and *not* due to an altercation in which the applicant is the initial aggressor (see discussion above at Section II, B, 3, a) (3) (c), [3]), in the absence of a regulating statute, the applicant continues to carry the burden of proof on the issue of service connection. There is no basis to relieve the applicant of her burden to prove that an injury sustained in connection with any of those kinds of situations arises out of and in the course of employment.

H. Issues on which the respondent has the burden of proof

Given that the burden of proof is carried by the party asserting the affirmative of an issue, it would appear that the respondent has the burden to prove the facts concerning

the following facts into order to successfully defend against an application for a disability retirement. The list is not exhaustive:

1. Application is barred by the statute of limitations. (Gov. Code, § 31722. See discussion above at Section I, E.)
2. Application is barred by laches. (See discussion above at Section I, E, 2.)
3. Nonservice-connected disability is due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on the part of the member, or is due to or results from the conviction of the member of a felony under state or federal law. (Gov. Code, §§ 31726, 31726.5, 31728, 31728.1 and 31728.2. See discussion above at Section II, B, 8, a.)
4. Disability is the result of unreasonable refusal of medical treatment. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 216 [178 Cal.Rptr. 636]. See discussion above at Section II, A, 8.)
5. By clear and convincing evidence, that the member knowingly and intelligently waived a statutory right. (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 390 [216 Cal.Rptr. 733, 703 P.2d 73]. See discussion above at I, E, b.)
6. The beneficiary of a previously granted disability retirement pension is not incapacitated for the position he or she held when retired for disability and his employer has offered to reinstate the beneficiary. (Gov. Code, §§ 31729 31730. See discussion above at Section II, A, 15.)
7. Where the presumption that heart trouble is service-connected has been triggered, that the heart trouble is due to contemporaneous nonindustrial exertion or otherwise does not arise out of and in course of employment. (Gov. Code, § 31720.5. See discussion above at Section II, B, 6, b), (1), (d).)
8. Where the primary site of cancer suffered by one in a favored public safety occupation is known, that there is no reasonable link between the cancer and the member's exposure to a known carcinogen. (Gov. Code, § 31720.6. See the discussion above at Section II, B, 6, b), (2), (d).)
9. Where a presumption that disability caused by a blood borne disease or a MRSA skin infection is service-connected has been triggered, that the disease did not arise out of and occur in the course of employment. (Gov. Code, § 31720.7. See the discussion above at Section II, B, 6, b) (3) (g).)
10. Where the presumption that an illness due to exposure to biochemical substance is service-connected has been triggered, that the illness or death did not arise out of and in the course of employment. (Gov. Code, § 31720.9. See the discussion above at Section II, B, 6, b) (4) (c).)

11. That the claim of incapacity and/or service-connection is barred by the doctrine of res judicata or the collateral estoppel aspect of that doctrine, or that the applicant is judicially estopped claim the existence or nonexistence of a fact. (See the discussion below, at Section V, J, 1-3.)

I. Who has the burden of proof on the issue of whether a permanent, that is, indefinite duration, light duty position is or is not available for the member?

Associations' comment

Where the applicant has some level of permanent disability, that the permanent disability causes the applicant to be incapacitated is the applicant's burden to prove. (*Lindsay v. County of San Diego Retirement Board, supra*, 231 Cal.App.2d, 161-162.) Incapacity may be established by proving that there are no open positions the duties of which are compatible with the applicant's permanent disability. (*Barber v. Retirement Board* (1971) 18 Cal.App.3d 273, 278 [95 Cal.Rptr. 657].)

There are cases in which the courts have held that a city with an integrated retirement system, that is, a retirement system that is a department of the city itself, has the burden of showing that there is an available job if the retirement unit denies a request for disability retirement on the basis that such a job exists. That is because the city itself cannot say that an employee is too disabled to work while wearing its personnel or human resources hat, but then turn around and, while wearing its retirement system hat, say that the employee is not disabled for work. (*English v. Board of Administration of the Los Angeles City Employees Retirement System* (1983) 148 Cal.App.3d 839, 845 [196 Cal.Rptr. 277]: "While the city has many departments and subdepartments, . . . it is a single entity in its contractual obligation." [Citation.] Here the [city] Board, which found the appellant able-bodied, and the Department, which allegedly found him too disabled to return to work, are parts of a single entity, the City of Los Angeles. Their decisions must therefore be consistent."

If the integrated city retirement system says a partially disabled employee is not incapacitated, it must point to the job that the applicant will occupy that is compatible with the applicant's limitations.

A retirement system operating under the CERL of 1937 is not a retirement system that is integrated into the county government. It is a separate legal entity. (*Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 404 [18 Cal.Rptr. 256].) It is empowered to, and does, make decisions on the issue of incapacity for duty that are different and contrary to the decisions made by county officials, and the association and the county can have adverse positions. (E.g., *Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240, 1247 [21 Cal.Rptr.2d 896]: Marshal maintains a deputy who is restricted from carrying a gun due to a psychiatric disability is incapacitated for duty. Board of Retirement finds that the deputy is not incapacitated.)

The rationale of *English* does not apply where the retirement association operates under the County Employees Retirement Law of 1937 because the retirement

association is not a department of the county government. The association is not required to achieve consistency with the position of the employer. The association and the employer do not work hand in glove. Quite the contrary, where the employer and the respondent association disagree, the Legislature, "in essence, left the decision up to the retirement board." (*Raygoza v. County of Los Angeles, supra*, 17 Cal.App.4th, at 1247.)

Two court opinions in cases dealing with the County Employees Retirement Law of 1937 demonstrate that the respondent association does not have a burden to prove that a permanent light duty position is available to a member with physical limitations: *Harmon v. Board of Retirement of San Mateo County* (1976), *supra*, 62 Cal.App.3d 689 [133 Cal.Rptr. 154], and *Schrier v. San Mateo County Employees' Retirement Association* (1983), *supra*, 142 Cal.App.3d 957 [191 Cal.Rptr. 421].

1. *Harmon* demonstrates that the respondent does not carry the burden to prove that "a permanent light duty position is available."

In *Harmon*, a deputy sheriff claimed that, because of orthopedic injuries, he was permanently incapacitated because he could not perform a full range of duties to which a deputy might be assigned. He pointed to the class specification for his job that specifically stated that he must be capable of 100% of the duties to which deputies were assigned. The Assistant Sheriff testified that the department required all deputies to be 100% fit for duty, but also testified that there were less-than-arduous assignments that deputies performed:

Assistant Sheriff Craik testified that there are jobs in the department of lighter duty than patrol duty, within the job category of deputy sheriff, for example, bailiff, process serving, desk officer or jail front office duty. In these jobs, opportunity for physical contact is minimal, and the assumption is that the man would return to full duty within a reasonable time. Since July 1, 1973, the sheriff wanted men to be 100 percent fit before being allowed to return to any duty. Therefore, these jobs would no longer be available for a man to occupy for a long period of time as a transition to full duty. On cross-examination, he testified that he knew of no position in the department presently that would not involve significant risk of violence, although a man could be exempted from going on assignments such as riot-control. (*Id.*, 62 Cal.App.3d, at 694.)

After reviewing *Mansperger v. Public Employees' Retirement System* (1970), *supra*, 6 Cal.App.3d 873, [86 Cal.Rptr. 450] and its progeny, the *Harmon* court held at 62 Cal.App.3d, 695-697,

Here even accepting in full the facts and opinions in the doctor's reports, and disregarding the testimony of the investigator and the supporting motion pictures, the record supports the implied finding that the deputy was not incapacitated for the performance of the duties of bailiff or other duties set forth in the civil service classification which did not involve heavy lifting or frequent necessity, as on

patrol, for the use of considerable physical effort to subdue arrestees or prisoners.

The deputy seeks to avoid the foregoing conclusion by reference to testimony of the assistant sheriff that since July 1, 1973, it was the policy of the sheriff's office not to restore officers to duty unless they were 100 percent fit for any duty to which they might be assigned, and that at the time of the hearing before the referee in April 1974, some eight months after the deputy, not the sheriff, had terminated the employment relationship, there was no position available in the sheriff's office which would not involve a significant risk of violence. He relies upon *Barber v. Retirement Board, supra*, [(1971) 18 Cal.App.3d 273, 278 [95 Cal.Rptr. 657]] where the board, the trial court, and the Court of Appeal upheld the compulsory retirement of the fire lieutenant sought by the fire chief because there was no light duty available for one of the lieutenant's rank with his disability. [Citations.] In this case the sheriff is not a party seeking to force the deputy to retire. Under the provisions of the County Employees Retirement Law of 1937, the employer is entitled to secure judicial review of a decision denying an employee retirement because the retirement board, as here, is not satisfied from the medical examination and other evidence that the member is incapacitated for the performance of his duties. If no such action is taken by the employer and the denial becomes final the employer must reinstate the employee. [Footnote omitted.] (See *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, 398-400 [109 Cal.Rptr. 186].) Moreover, the assistant sheriff's testimony when taken as a whole *does not foreclose the possibility that there were positions in the sheriff's office which could be performed by one subject to the disabilities which the doctors reported that the deputy suffered.* (Italics added.)

In *Harmon*, the burden of proof was not placed on the respondent to prove that there was an available position for the applicant. The evidence showed that there were less-than-arduous assignments performed by others in the applicant's arduous job class. It was sufficient for the court to find that the applicant had not met his burden of proof, where the possibility that there are positions which could be performed by one with a disability had not been foreclosed. *Harmon* might have overcome the inference that there were available jobs by proving that there was in fact no such job available. The burden of producing evidence had shifted to him. He did not offer the evidence and he did not meet his burden of proof on the issue of incapacity.

2. Schrier demonstrates that the respondent does not carry the burden to prove that "a permanent light duty position is available."

In *Schrier*, a deputy sheriff had sustained an ocular injury that left him with a visual limitation that would impair his ability to engage in vehicle pursuit. The Assistant Sheriff in charge of administrative services testified that the sheriff's office has many assignments that do not involve pursuit driving. The Court of Appeal made the observation, "However, there are many permanent full-time positions in the sheriff's office which do not require vehicular pursuit." There was no evidence that the County of San Mateo had offered Schrier a specific job. It was enough of a showing that there

were permanent full-time positions with duties that Schrier could perform. The court addressed Schrier's claim that he was required to be capable of a full range of duties to which a deputy might be assigned. The court rejected the claim on the basis that applications for disability retirement under the County Employees Retirement Law of 1937 are not tested by a full-range-of-duties standard. (*Schrier v. San Mateo County Employees' Retirement Association* (1983), *supra*, 142 Cal.App.3d 957, 961-962 [191 Cal.Rptr. 421].)

End comment.

Applicants' comment

In a particular county, the functions of the county's personnel or human resources department may be so intertwined with the functions of retirement association officials (e.g., in return-to-work decisions) that the rule of *English v. Board of Administration of the Los Angeles City Employees Retirement System* (1983), *supra*, 148 Cal.App.3d 839 is a more reasonable and equitable fit than would be, for the particular county, the fiction of the "separate entity" basis of *Flaherty v. Board of Retirement* (1961), *supra*, 198 Cal.App.2d 397 [18 Cal.Rptr. 256], and *Raygoza v. County of Los Angeles* (1993), *supra*, 17 Cal.App.4th 1240 [21 Cal.Rptr.2d 896]. For example, note how the retirement association in *Katosh v. Sonoma County Retirement Association* (2008), *supra*, 163 Cal.App.4th 56 [77 Cal.Rptr. 324] conveyed to the applicant what the county itself was offering the member with respect to payment of additional sick leave and vacation pay, and post-retirement health insurance and how the retirement association would treat the payment of the additional sick leave and vacation pay in setting the commencement date of the member's disability retirement pension. In the circumstances, where are the boundaries of the retirement association's functions and the county's? If the retirement association has the greater ease in producing the evidence because it is essentially the county de facto if not the county de jure, the burden of proof should be allocated to the retirement association. (See, 1 Witkin, *Cal. Evidence*, (4th ed. 2000-2011) Burden, (Allocation of Burdens in Civil Cases) § 12, Availability of Evidence.)

End comment.

IV. MEDICAL EXPERTS AND THEIR REPORTS

A. Statutory requirement of “competent” medical evidence

Government Code section 31720.3 (Stats 2008 ch. 370, § 4 (AB 2023), effective January 1, 2009) provides,

In determining whether a member is eligible to retire for disability, the board shall not consider medical opinion unless it is deemed competent and shall not use disability retirement as a substitute for the employer's disciplinary process.

Associations' comment

Since the requirement that a medical opinion be competent is subsumed in the requirement that the opinion amount to substantial evidence, as discussed further below, and the principle that a public entity should not use a disability retirement as a means of pensioning off under-performing employees have been established in case law (see *Haywood v. American River Fire Protection District* (1998), *supra*, 67 Cal.App.4th 1292 [79 Cal.Rptr.2d 749], and *Smith v. City of Napa* (2004), *supra*, 120 Cal.App.4th 194 [14 Cal.Rptr.3d 908]), Section 31720.3 appears to be a codification of existing law. Boards of retirement were held to these standards in litigated cases before the enactment of Section 31720.3.

Section 31720.3 may create a tool to restrict actions a board of retirement might take unilaterally and otherwise without litigation. An applicant has the right to challenge the board's action in administrative proceedings and in the courts. An employer has statutory right to challenge the board's action denying an application for disability retirement (Gov. Code, § 31724) and a right recognized by the appellate court to challenge the board's grant of a disability retirement. (*County of Alameda v. Board of Retirement (Carnes)* (1988), *supra*, 46 Cal.3d 902 [251 Cal.Rptr. 267], interpreting Code Civ. Proc., § 1094.5.) The question is this: Does Section 31720.3 create a right to challenge a board's action in someone other than the applicant and employer, such as a taxpayer, perhaps in a petition for traditional mandate under Code of Civil Procedure section 1085?

In an example of the issue of “competence” of evidence, the Court of Appeal held in *Gromeeko v. Gromeeko* (1952) 110 Cal.App.2d 117, 127 [242 P.2d 41], that a patient's testimony as to her doctor's statement to her concerning her mental condition was hearsay and incompetent evidence.

End comment.

B. The burden of proof is only met with reliable, "substantial" evidence.

The applicant must meet her burden of proof by establishing facts by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989), *supra*, 214 Cal.App.3d 1327, 1332 [216 Cal.Rptr. 733]:

We agree that pension legislation must be liberally construed, resolving all ambiguities in favor of appellant [citations]; however, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence [citation] or change the test on appeal. [Citation.]

The evidence that is deemed to preponderate must amount to "substantial evidence." *Weiser v. Board of Retirement* (1984), *supra*, 152 Cal.App.3d 775, 783 [199 Cal.Rptr. 720]:

The trial court determines the truth of the fact in dispute based on the record before it and not merely the sheer volume of evidence presented. Appellant's argument that there was no substantial evidence is without merit. As stated in *Smith v. Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 588, 592 [78 Cal.Rptr. 718, 455 P.2d 822], "[we] recognize at the outset these two well-settled principles: (1) factual determinations of the board must be upheld if there is substantial evidence in their support and the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence [citations]; . . . "

After the trial court has exercised its independent judgment in weighing the evidence, our task is to review the record to determine whether the trial court's findings are supported by substantial evidence. (See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10 [93 Cal.Rptr. 234, 481 P.2d 242].) The trial court's decision should be sustained if it is supported by credible and competent evidence. (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 71 [64 Cal.Rptr. 785, 435 P.2d 553].) Further, "[the] trier of fact may accept the evidence of any one expert" (*Liberty Mut. Ins. Co. v. Industrial Acc. Com.* (1948) 33 Cal.2d 89, 94 [199 P.2d 302].)

C. "Substantial evidence" defined:

Hosford v. State Personnel Bd. (1977) 74 Cal.App.3d 302, 307 [141 Cal.Rptr. 354]:

Substantial evidence has been defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, . . ."

Kuhn v. Dept. of General Service (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d 191]:

. . . . "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value" (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the whole record. (*People v. Johnson* (1980) 26 Cal.3d 557, 577-578 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255].) While substantial evidence may consist of inferences, such

inferences must be "a product of logic and reason" and "must rest on the evidence" (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584 [234 Cal.Rptr. 889]); inferences that are the result of mere speculation or conjecture cannot support a finding (*Id. [sic]* at p. 1585; *Marshall v. Parkes* (1960) 181 Cal.App.2d 650, 655 [5 Cal.Rptr. 657]).

Evidence is "substantial" if it is reliable, solid proof. "Substantial evidence" is evidence that ". . . is reasonable in nature, credible, and of solid value . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) The *Estate of Teed* court stated,

Webster's International Dictionary defines the word as follows: "Consisting of, pertaining to, of the nature of or being, substance, existing as a substance; material." Its meaning is further defined as "not seeming or imaginary, not illusive, real, true; important, essential, material, having good substance; strong, stout, solid, firm." The word means "considerable in amount, value or the like; firmly established, solidly based." Synonyms are "tangible, bodily, corporeal, actual, sturdy, stable."

"Substantial evidence," according to Words and Phrases, Fifth Series, page 564, where many definitions are collected, is evidence "which, if true, has probative force on the issues." It is more than "a mere scintilla," and the term means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion," citing *Consolidated Edison Co. v. National Labor Relations Board*, (1938) 305 U.S. 197 [59 S.Ct. 206, 83 L.Ed 126]. To preclude a reviewing court from disturbing a verdict, it is essential that the supporting evidence be "such as will convince reasonable men who will not reasonably differ as to whether evidence establishes plaintiff's case," quoting from *Morton v. Mooney*, (1934) 97 Mont. 1 [33 P.2d 262]. And as said in *Missouri Pac. R. Co. v. Hancock*, (1938) 195 Ark. 414 [113 S.W.2d 489], "improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not be sustained where testimony is at variance with physical facts and repugnance is material and self-evident."

The sum total of the above definitions is that, if the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case. (*Estate of Teed*, p. 644.)

Therefore, an expert medical opinion is normally required when a medical issue is involved since the opinion of a layman on a medical issue will not be reliable. (*Peter Kiewit Sons v. Industrial Acc. Comm.* (1965), *supra*, 234 Cal.App.2d 831, 838 [44 Cal.Rptr. 813] (back injury)):

Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in

support of such a finding does not measure up to the standard of substantial evidence. [Citations.] Expert testimony is necessary "where the truth is occult and can be found only by resorting to the sciences." [Citation.] In some cases the issue, while of a medical nature, is sufficiently within the grasp of lay experience and understanding to permit a finding without expert medical evidence. [Citation.]

Peter Kiewit Sons v. Industrial Acc. Comm., supra, 234 Cal.App.2d, 839 -840:

None of these cases involved the issue of industrial causation. That issue may run a gamut from the blatantly obvious to the scientifically obscure. If a painter falls to the ground as the result of a scaffold collapse, breaking his leg, common sense dispenses with medical evidence of causation. Other sources of disability are less available to lay discernment. In *City & County of San Francisco v. Industrial Acc. Com.*, supra, [(1953)]117 Cal.App.2d 455, [256 P.2d 81] the court annulled a finding of industrial causation of a fatal heart attack, asserting the necessity of medical evidence. *Guarantee Ins. Co. v. Industrial Acc. Com.*, supra, (1948) 88 Cal.App.2d 410, [199 P.2d 12] held that lay evidence was not adequate to establish impairment of vision by arc welding flashes. In *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Collins)* (1941), supra, 47 Cal.App.2d 494 [118 P.2d 334], the connection between an industrial leg trauma and varicose ulcers was held to be outside the competence of lay witnesses.

Examples might be multiplied. They condense into the general proposition that the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters. (See 2 Wigmore on Evidence (3d ed.) §§ 558-568, pp. 638-665; 20 Am.Jur., Evidence, § 867, pp. 730-732.)

Back disabilities in particular shout loudly for expert advice. No human ailment has produced more medicolegal headaches than the aching back. This delicately articulated structure of nodulated bones, cushioned by cartilaginous bodies and gelatinous material, interlaced by the complex and sensitive fibers of the cerebrospinal nervous system and held in array by strands and cords of muscular and ligamentous tissue, is vulnerable to a vast and bewildering variety of traumatic, pathological, deteriorative ailments and neurotic manifestations, singly and in diverse combinations. Precise diagnosis often baffles neurologists and orthopedists. In assessing the respective roles of trauma and predisposing conditions and of objective and subjective complaints, subtle value judgments may be unavoidable. (Footnote 2 omitted.) In the face of this anatomical, physiological and psychological intricacy, semantically dubious, pseudomedical jargon infiltrates the conflux of medicine and jurisprudence. Whiplash, traumatic arthritis, traumatic neurasthenia and railroad spine are solecisms in current or past fashion. These verbal conveniences tempt the medically untrained into complacent substitution of simplicity for complexity. In a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation.

D. Examples of the requirement for expert medical opinion in specific cases:

Expert medical opinion, based on facts lay evidence has established to be true, is required to prove a claim based on psychiatric disability. *Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981), *supra*, 122 Cal.App.3d 905, 911-912 [176 Cal.Rptr. 365]:

Whether applicant sustained a compensable psychiatric injury as the result of her employment at Volt requires both lay and medical evidence for support. Lay testimony must support the occurrence of injurious incidents which are employment related. Lay testimony alone, however, cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition. [Citations.] "[W]here the truth is occult and can be found only by resorting to the sciences," the Workers' Comp. Appeals Bd. must utilize expert medical opinion. [Citation.] "The difficulty is that the problem was not one of lay theory, but one of diagnosis, prognosis and treatment in an occult branch of medicine." [Citation.]

Expert medical opinion is required to prove the causal connection between an act and a heart attack. *City and County of San Francisco v. Industrial Acc. Comm. (Murdock)* (1953), *supra*, 117 Cal.App.2d 455 [256 P.2d 81]:

To make out a prima facie case it is necessary to prove more than the fact that decedent died while performing a task required by his employment which he had performed on various occasions throughout the years apparently without incident. The present record is wholly devoid of evidence of the cause of death. It is true that the employee died immediately after performing a task that was the most arduous of any required by his employment. However, it is not a matter of common knowledge, that operating a cross-cut saw with a partner on the other end is labor of such a strenuous type as to bring on a fatal heart attack. (*San Francisco*, p. 458.)

...

Where the subject matter is within the exclusive knowledge of experts trained in a scientific subject, expert evidence is essential. (*Id.*, p. 459.)

Expert medical opinion is required to prove the causal connection between an exposure and cancer.

Jones v. Ortho Pharmaceutical Corp. (1985), *supra*, 163 Cal.App.3d 396, 403 [209 Cal.Rptr. 456]:

Although juries are normally permitted to decide issues of causation without guidance from experts, "the unknown and mysterious etiology of cancer" is beyond the experience of laymen and can only be explained through expert testimony. [Citation.] Such testimony, however, can enable a plaintiff's action to go to the jury only if it establishes a reasonably probable causal connection between an act and a present injury.

Associations' comment:

The rule requiring that the applicant prove the existence of a connection between exposure and injury in the form of cancer is not applicable to the presumption for public safety personnel under Government Code section 31720.6.

End comment.

E. One physician's considered opinion may constitute substantial evidence though it is in conflict with the opinions expressed by other physicians.

Where medical opinions are in conflict, the relevant and considered opinion of one physician arrived at after adequate examination and investigation, though in conflict with the opinions of other physicians, may constitute substantial evidence.

Insurance Co. of North America v. Workers' Comp. Appeals Bd. (1981), *supra*, 122 Cal.App.3d 905, 917 [176 Cal.Rptr. 365]:

While it is true that the "relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence" (*Market Basket v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137, 144 [149 Cal.Rptr. 872]), [Title 8, California Code of Regulations] section 10606 recognizes that not all medical reports may be relied upon by the WCAB. "[N]ot all medical opinion constitutes substantial evidence upon which the board may rest its decision. Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, or inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 169 [93 Cal.Rptr. 15, 480 P.2d 967].) Further, as "A report which offers a [mere] conclusion as to whether or not the case is 'compensable' intrudes upon a matter which is not a medical question, but one for ultimate determination by [a workers' compensation judge] and Appeals Board" [citation], such a conclusionary report also does not support a decision awarding or denying benefits.

Nash v. Workers' Comp. Appeals Bd. (1994) 24 Cal.App.4th 1793, 1810 [30 Cal.Rptr.2d 454]:

. . . . It has long been established that the relevant and considered opinion of one physician, arrived at after adequate examination and investigation, may constitute substantial evidence in support of a factual determination by a WCJ [workers' compensation judge] or the Board, even when it conflicts with other medical opinion. (*Smith v. Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 588, 592 [78 Cal.Rptr. 718, 455 P.2d 822].) . . .

F. Medical reports are not substantial evidence if they are based on erroneous information, inadequate medical histories, incorrect legal theories, or

speculation.

Zemke v. Workmen's Comp. Appeals Bd. (1968) 68 Cal.2d 794, 798 [69 Cal.Rptr. 88]:

Although the board must rely on expert medical opinion in resolving the issue of apportionment, an expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence upon which the board may base an apportionment finding. (*Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692-693 [192 P.2d 1]; *West v. Industrial Acc. Com.* (1947) 79 Cal.App.2d 711, 716-720 [180 P.2d 972]; cf. *Jones v. Workmen's Comp. App. Bd.* (1968) *ante*, [68 Cal.2d 476] pp. 476, 479-480 [67 Cal.Rptr. 544, 439 P.2d 648].)

Ryan v. Workmen's Comp. Appeals Bd. (1968) 265 Cal.App.2d 654, 659 [72 Cal.Rptr. 140]:

An expert opinion is worth no more than the reasons on which it is based.

Place v. Workmen's Comp. Appeals Bd. (1970), *supra*, 3 Cal.3d 372, 378-379 [90 Cal.Rptr. 424]:

Expert medical opinion, however, does not always constitute substantial evidence on which the board may rest its decision. Courts have held that the board may not rely on medical reports which it knows to be erroneous (*McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 92 [48 Cal.Rptr. 858, 410 P.2d 362]), upon reports which are no longer germane. [*sic*] (*Jones v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 476, 480 [67 Cal.Rptr. 544, 439 P.2d 648]), or upon reports based upon inadequate medical history or examinations (*West v. Industrial Acc. Com.* (1947) 79 Cal.App.2d 711, 716 [180 P.2d 972]; *Blankenfeld v. Industrial Acc. Com.* (1940) 36 Cal.App.2d 690, 698 [98 P.2d 584]). In *Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798 [69 Cal.Rptr. 88, 441 P.2d 928], we held that "an expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence. . . ."

An expert opinion is also insufficient to support a board determination when that opinion is based on surmise, speculation, conjecture, or guess. (*Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692 [192 P.2d 1]; *Spillane v. Workmen's Comp. App. Bd.* (1969) 269 Cal.App.2d 346, 351 [74 Cal.Rptr. 671]; *Industrial Indem. Co. v. Industrial Acc. Com.* [(*Gabbert*)] (1949) 90 Cal.App.2d 262, 265-266 [202 P.2d 585]; *Brown v. Industrial [sic] Acc. Com.* (1941) 44 Cal.App.2d 6, 12 [111 P.2d 931]; *Hendricks v. Industrial Acc. Com.* (1938) 25 Cal.App.2d 534, 537 [78 P.2d 189]; see *Garza v. Workmen's Comp. App. Bd.* (1970) *ante*, pp. 312, 318, fn. 3 [90 Cal.Rptr. 355, 475 P.2d 451].) Thus in *Hendricks* the board relied on a medical report which attributed the petitioner's fracture not to his fall but to an uncertain and unexplained "pathological condition"; the Court of Appeal reversed. In *Brown* the board granted a petition

to terminate liability based upon medical reports which stated that the petitioner still suffered pain but that the doctors could not determine the cause of the pain, and they therefore suspected him of malingering; the court reversed the board's decision, stating that "where the finding purporting to support an award is necessarily based on mere surmise, speculation, conjecture or guess, the award will be annulled." (44 Cal.App.2d 6, 12.) In *Owings* a doctor "guessed" that the blow to petitioner's head might have caused his diabetes; we reversed the award, observing that "[an] opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value." (31 Cal.2d 689, 692.)

Heggin v. Workmen's Comp. Appeals Bd. (1971), *supra*, 4 Cal.3d 162, 169 [93 Cal.Rptr. 15, 480 P.2d 967]:

Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based upon surmise, speculation, conjecture, or guess.

Baker v. Workmen's Comp. Appeals Bd. (1971), *supra*, 18 Cal.App.3d 852, 861 [96 Cal.Rptr. 279]:

An expert's opinion which rests on "surmise, speculation, conjecture, guess" or assumes an incorrect legal theory cannot constitute substantial evidence to support an order or decision. [Citations.]

Rosas v. Workers' Comp. Appeals Bd. (1993), *supra*, 16 Cal.App.4th 1692, 1701 [20 Cal.Rptr.2d 778]:

". . . . Medical reports and opinions are not, however, substantial evidence if . . . they are known to be erroneous or based on inadequate medical histories and examinations." [Citations.] [Citation.]

"[A] physician's opinion based upon a misunderstanding of legal standards or the relevant facts cannot constitute substantial evidence to support the Board's determination. [Citations.]. . . ."

In *Jennings v. Palomar Pomerado Health Systems, Inc., et al.* (2003) 114 Cal.App.4th 1108, 1120 [8 Cal.Rptr.3d 363] a retractor was left in the peritoneum of a surgical patient. An expert testified that the retractor could have caused a subsequent infection and that the infection was caused by the presence of the retractor, but the expert failed to supply "a reasoned explanation supporting his opinion" beyond, "[i]t just sort of makes sense. We have that ribbon retractor and [its] contaminated, he's infected."

. . . . It is undisputed that qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation.

However, even when the witness qualifies as an expert, he or she does not possess a *carte blanche* to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because [it is] unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests." [Citation.] (*Jennings*, p. 1117.)

For a discussion of the role of a family physician in preparing certifications of or reports concerning disability, and what the physician should have in mind when preparing reports, see Bruce A. Barron, M.D., M.S., *Disability Certifications in Adult Workers: A Practical Approach*, *American Family Physician*, November 1, 2001; Vol. 64, No. 9. , quoted above at Section II, A, 4, b).

G. A medical opinion based on a false, inaccurate, or incomplete history is not substantial evidence and cannot support a finding of fact.

The value of a medical opinion is not found simply in the physician's conclusion, but it lies in the facts on which the opinion is based and the reasoning by which the physician progresses from the facts to the conclusion.

People v. Bassett (1968) 69 Cal.2d 122, 141 [70 Cal.Rptr. 193, 443 P.2d 777]:

. . . . To make a reasonable inference concerning the relationship between a disease and a certain act, the trier of the facts must be informed with some particularity. This must be done by testimony. Unexplained medical labels-schizophrenia, paranoia, psychosis, neurosis, psychopathy-are not enough. Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion." (Italics added [by the *Bassett* court].) (*Carter v. United States* (D.C.Cir. 1957) 252 F.2d 608, 617 [102 App.D.C. 227].) In short, "Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." [Citations.]

In *Owings v. Industrial Acc. Comm.* (1948), *supra*, 31 Cal.2d 689, 692 [192 P.2d 1], an expert, Dr. Shepardson, testified that, based on the absence of other precipitating causes and the timing of the onset of disease in relation to the injury, his "guesses"

would be that the applicant's head injury and subsequent disability were causative factors in the development of the applicant's diabetes. The Supreme Court held,

In this state of the record, we cannot say that the commission was required to accept the "guesses" of Dr. Shepardson as conclusively establishing that the disease was of industrial origin. A "Guess, in current best usage, implies a hitting upon (or attempt to hit upon), either at random or from insufficient, uncertain or ambiguous evidence." (Webster's Dictionary of Synonyms [1942 ed.], p. 188.) An opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value (*Brant v. Retirement Board of S. F.*, [(1943)] 57 Cal.App.2d 721 [135 P.2d 396]; see *Estate of Stone*, (1943) 59 Cal.App.2d 263 [138 P.2d 710]). Although it may be possible that the witness did not intend to indicate that his statement was merely surmise or conjecture, the commission nevertheless could properly give the word its usual meaning and conclude that the doctor did not profess to give an expert opinion on the matter.

In any event, the value of an expert's opinion is dependent upon its factual basis [citations], and where, as here, the evidence is conflicting as to whether the possible contributing factors indicated by Dr. Shepardson were in fact present in petitioner's case, we cannot hold as a matter of law that the evidence necessarily compelled the conclusion that the diabetes was of industrial origin.

Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135-1136 [234 Cal.Rptr. 630]:

The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. (*People v. Coogler* (1969) 71 Cal.2d 153, 166 [77 Cal.Rptr. 790, 454 P.2d 686]; *People v. Bassett* (1968) 69 Cal.2d 122, 141 [70 Cal.Rptr. 193, 443 P.2d 777].) Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [Citation.] When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence. [Citations.] For example, in *In re Marriage of Hewitson, supra.*, (1983) 142 Cal.App.3d 874 [191 Cal.Rptr. 392] the expert attempted to determine the value of a closely held corporation by using the selling price/book value ratio of publicly traded corporations. Due to the differences in the two types of companies the analogy was improper and the judgment based upon the expert's testimony was not supported by substantial evidence. [Citations.] Likewise, in *In re Marriage of Rives, supra.*, (1982) 130 Cal.App.3d 138 at pages 149-151 [181 Cal.Rptr. 572], this court reversed a determination of the value of a queen bee business because the court accepted the testimony of an expert who had relied

upon false assumptions and improper factors, and who had failed to consider all of the relevant factors which established value.

Turner v. Workmen's Comp Appeals Bd. (1974), *supra*, 42 Cal.App.3d 1036, 1043-1044 [117 Cal.Rptr. 358]:

While the opinion of a single physician can constitute substantial evidence upon which the board may base a decision (*LeVesque v. Workmen's Comp. App. Bd.*, *supra*, [(1970)] 1 Cal.3d 627, 639 [83 Cal.Rptr. 208, 463 P.2d 432]; *Smith v. Workmen's Comp. App. Bd.*, (1969) 71 Cal.2d 588, 592 [78 Cal.Rptr. 718, 455 P.2d 822]), the opinion of a doctor based on mere surmise does not constitute substantial evidence. (*Place v. Workmen's Comp. App. Bd.*, [(1970)] 3 Cal.3d 372, 377-378 [90 Cal.Rptr. 424, 475 P.2d 656].) And a medical report devoid of a relevant factual basis "cannot rise to a higher level than its own inadequate premises. Such reports do not constitute [sufficient] evidence to support a denial" of benefits. (*Zemke v. Workmen's Comp. App. Bd.*, [(1968)] 68 Cal.2d 794, 801 [69 Cal.Rptr. 88, 441 P.2d 928].) Hence, an appellate court must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence (*Redner v. Workmen's Comp. Appeals Bd.*, (1971) 5 Cal.3d 83, 96-97 [95 Cal.Rptr. 447, 485 P.2d 799]; *Hegglin v. Workmen's Comp. App. Bd.*, [(1971)] 4 Cal.3d 162, 170 [93 Cal.Rptr. 15, 480 P.2d 967]), bearing in mind that the board is not at liberty to completely ignore those parts of a doctor's report and testimony which do not support its conclusion. (*Greenberg v. Workmen's Comp. Appeals Bd.* (1974), *supra*, 37 Cal.App.3d 792, 799 [112 Cal.Rptr. 626].) In other words, an expert's opinion is no better than the facts upon which it is based.

H. A medical opinion based on a history of job stress that the applicant gave to the physician that is at variance with the applicant's testimony at trial, or otherwise is not supported by facts established to be true, is not substantial evidence and is insufficient to support a finding.

Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp) (1981), *supra*, 122 Cal.App.3d 905, 911-912 [176 Cal.Rptr. 365]:

Whether applicant sustained a compensable psychiatric injury as the result of her employment at Volt requires both lay and medical evidence for support. Lay testimony must support the occurrence of injurious incidents which are employment related. Lay testimony alone, however, cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition. [Citations.]"

Georgia-Pacific Corp. v. Workers' Comp. Appeals Bd. (Byrne) (1983) 144 Cal.App.3d 72 [192 Cal.Rptr. 643], overruled on other grounds in *Schoemaker v. Myers* (1990) 52 Cal.3d 1, 18 [276 Cal.Rptr. 303]:

The Amstadter report contains information concerning the circumstances of Byrne's leaving his employment which is contrary to Byrne's testimony at trial and to that in another medical report. *The doctor's broad conclusion that Byrne's condition was work-related is not sufficient as no specific connections were described.* (*Georgia-Pacific*, p. 77. Italics in original.)

...

We are, of course, precluded from substituting our choice of the most convincing evidence, medical or otherwise, for that of the compensation judge or the Board. However, in the instant case, in view of the speculative nature of the medical reports upon which the Board relied, and the reports' failure to either provide a history consistent with Byrne's testimony or to make specific conclusions demonstrating that the employment was an active factor in the development of Byrne's condition, we decline to find that these reports constituted adequate medical, or substantial evidence. (*Georgia-Pacific*, p. 79.)

Twentieth Century Fox Film Corp. v. Workers' Comp. Appeals Bd. (Conway) (1983) 141 Cal.App.3d 778 [190 Cal.Rptr. 560]:

Dr. Bloch admits that his "commentary on this case is limited by inadequate information," which suggests that Dr. Bloch's conclusions are speculative, and therefore, do not provide substantial evidence. The opinion of Dr. Bloch does not adequately distinguish whether the applicant's employment, the nonindustrial incident involving the rejection of his [applicant's] screenplay, or a combination of the two was the cause of the applicant's psychiatric disease. Dr. Bloch's explanation of the cause of applicant's breakdown implies that applicant's anxiety was due to his hope that Fox would accept his screenplay, a totally nonindustrial matter. Then, Dr. Bloch opines, "With the initial rejection of the screenplay, his efforts at binding anxiety collapsed, as did his efforts to maintain impulse control." Dr. Bloch concludes that the applicant then "misinterpreted what might have been a minor crisis in his department" and applicant's "reality perception was blurred," resulting in applicant's leaving work.

Based only on the evidence contained in Dr. Bloch's report, we do not believe that the Board on remand could make the necessary findings on the issue of whether the applicant's employment was a positive factor, or played an active role in the development of the psychological disease. (*Twentieth Century Fox Film Corp.*, p. 785.)

The principle that a medical opinion's value is dependent on the accuracy of the data on which the opinion is based has equal application to the question of whether an applicant is substantially incapacitated for disability retirement purposes. Where the diagnosis and prognosis stated by a physician are dependent on the truth of subjective symptoms and the claimant's testimony is contradicted and his or her credibility is impeached, the trier of fact is entitled to reject the claim of incapacity for duty.

Harmon v. Board of Retirement (1976), *supra*, 62 Cal.App.3d 689, 697 [133 Cal.Rptr. 154]:

In the second place neither the referee, the board, nor the trial court were required to disregard the evidence concerning the deputy's actual physical activities. Motion picture evidence is recognized as competent evidence in determining the extent of disability. (See *Redner v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 83, 94 [95 Cal.Rptr. 447, 485 P.2d 799]; and *Cansdale v. Board of Administration, supra*, [(1976)] 59 Cal.App.3d 656, 665 [130 Cal.Rptr. 880].) A review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms. His credibility was impeached by the contradictions in his testimony concerning his ability to play, and his actually engaging in playing, golf. On such a record the fact finders were entitled to consider what was observed by the witness, and what they, and we, could observe on the motion pictures. We cannot say as a matter of law that the finding of the trial court that the deputy is not permanently incapacitated for the performance of duty is erroneous as a matter of law.

I. Treating physician v. examining physician

Associations' comment

In the Social Security system, a treating physician's opinion on the issue of the applicant's capacity to work is given more weight if the consulting physician's findings are no more than the same as the treating physician's and the two physicians differ only as to their conclusions. This judicially created rule was codified in regulations adopted by the Commissioner of Social Security in 1991. (20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2).) Applicants argue that the same rule should be followed in disability retirement cases. On the other hand, even in social security disability matters, there may be a reason for giving the opinion of a consulting physician more weight than the opinion of a treating physician. In that case, deference is not given to the opinion of the treating physician.

There is no authority for importing the "treating physician rule" from the federal, Social Security arena to a disability retirement matter under California's CERL of 1937.

Even in disability matters regulated by federal law outside of the social security system, there is no obligation to accord special deference to the opinions of treating physicians absent a statutory or regulatory requirement.

Black & Decker Disability Plan v. Nord (2003) 538 U.S. 822, 831-832 [123 S.Ct. 1965, 1970-1971, 155 L.Ed.2d 1034, 1042-1044]:

. . . . Nothing in the Act [Employee Retirement Income Security Act of 1974] itself, however, suggests that plan administrators must accord special deference to the

opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion."

ERISA empowers the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out" the statutory provisions securing employee benefit rights. [Citations.] The Secretary's regulations do not instruct plan administrators to accord extra respect to treating physicians' opinions. [Citations; bracketed insert added.] . . .

. . . .

The question whether a treating physician rule would "increas[e] the accuracy of disability determinations" under ERISA plans, as the Ninth Circuit believed it would, *Regula v. Delta Family-Care Disability Survivorship Plan* (9th Cir. 2001) 266 F.3d 1130, at 1139, moreover, seems to us one the Legislature or superintending administrative agency is best positioned to address. As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, "ha[ve] a greater opportunity to know and observe the patient as an individual." *Ibid.* (internal quotation marks and citation omitted [by the Supreme Court]). Nor do we question the Court of Appeals' concern that physicians repeatedly retained by benefits plans may have an "incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements." *Id.*, at 1143. But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. And if a consultant engaged by a plan may have an "incentive" to make a finding of "not disabled," so a treating physician, in a close case, may favor a finding of "disabled." Intelligent resolution of the question whether routine deference to the opinion of a claimant's treating physician would yield more accurate disability determinations, it thus appears, might be aided by empirical investigation of the kind courts are ill equipped to conduct.

Even in social security disability matters, the treating physician rule has limitations.

Perez v. Secretary of Health, Education and Welfare (1980) 622 F.2d 1, 2:

First of all, [one-time examining physician consultant] Dr. Acosta's findings were substantiated. His finding that there was "(n)o clinical evidence of classical angina pectoris or heart failure" was made on the basis of a physical examination and an electrocardiogram; he also noted the results of a Master's test taken at the Veterans Administration Hospital. His comment that Perez's hernia was correctible [*sic*] by surgery apparently followed from his judgment that Perez had no serious heart condition that would preclude surgery. (Fn. omitted.) His conclusion that, even with chronic paravertebral lumbar fibromyositis, Perez had a full although painful range of motion in his back, was premised on the results of

a physical examination during which he noted no muscle spasm, swelling, tenderness, or deformity of the back, and no atrophy, swelling, tenderness, or deformity of the extremities, and on x-ray results showing only mild osteoarthritis of the lumbar spine. Second, unlike the conclusory statements of disability made by the two Dr. Susoni Hospital doctors, Dr. Acosta's evaluation of Perez's residual functional capacity was detailed and accompanied by specific clinical and laboratory findings. See 20 C.F.R. § 404.1526 (1979). Although Dr. Acosta's evaluation strikes us as a bit sanguine, considering his acknowledgement that Perez's back condition is painful, we cannot say that the evaluation was baseless and that the Secretary was obliged to disregard it. Finally, Dr. Acosta's opinion is consistent with some of the other evidence of record, e. g., electrocardiograms that were taken at the Veterans Hospital and appear to have been read there as "within normal limits," and observations by agency interviewers that Perez appeared to be in no distress although he looked older than his years. (Fn. omitted; bracketed inserts added.)

Murray v. Heckler (9th Cir. 1983) 722 F.2d 499, 501-502:

We note that the First Circuit's holding in *Perez* is not so absolute as the district court suggests. A careful review of that case shows that the non-treating physician's findings were substantiated by other evidence in the record, were much more detailed than those of the treating physicians and were accompanied by specific clinical and laboratory findings. See *Perez*, [(1980)] 622 F.2d [1] at 2. The *Perez* court expressly distinguished other cases in which a single doctor's report was in conflict with considerable other evidence. See *Perez*, 622 F.2d at 3, distinguishing *Hayes v. Gardner*, 376 F.2d 517, 520-21 (4th Cir. 1967); *Miracle v. Celebrezze*, 351 F.2d 361, 372-73 (6th Cir. 1965); *Sebby v. Flemming*, 183 F.Supp. 450, 454 (W. D.Ark. 1960).

Murray's case stands in stark contrast to *Perez*. In this case, as the ALJ recognized, the *findings* of the non-treating physician were the same as those of the treating physician. It was his *conclusions* that differed. [Italics in original.] The "diagnosis" upon which the Secretary relies to base her decision consists of check marks in boxes on a form supplied by the Secretary. This "opinion" is in sharp contrast to the detailed analysis of the doctor relied on by the ALJ in *Perez* and also to the opinions of *Murray's* [*sic: italics in original*] three doctors, one of whom had been treating *Murray* for over five years.

We note also that the Fifth Circuit has joined the Second and Sixth Circuits in giving greater weight to the opinions of treating physicians. See *Bowman v. Heckler*, 706 F.2d 564, 568 & n. 3 (5th Cir. 1983). In *Bowman*, as in this case, "[t]he ALJ did not attempt to resolve the conflict in the testimony of the two [doctors]. See 706 F.2d at 568. [Brackets in original.] The Fifth Circuit gave greater weight to the testimony of the treating physician because of the purpose for which he or she was employed: "Our reliance on the opinion of the treating physician is based not only on the fact that he is employed to cure but also on his greater opportunity to observe and know the patient as an individual." *Id.* We

agree. If the ALJ wishes to disregard the opinion of the treating physician, he or she must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record. *Cf. McLaughlin v. Secretary of Health, Education and Welfare* (2d, Cir. 1980), 612 F.2d 701 at 705 (opinion of treating physician binding unless substantial evidence to the contrary). No such evidence exists in this case.

Sandgathe v. Chater (1997) 108 F.3d 978, 980:

Although "more weight is given to a treating physician's opinion than to the opinion of a nontreating physician," the ALJ may reject controverted testimony of a treating physician if he has specific and legitimate reasons supported by substantial evidence. *Andrews v. Shalala* (9th Cir. 1995) 53 F.3d 1035 at 1040-41 (citing *Magallanes v. Bowen* (9th Cir. 1989) 881 F.2d 747, 751, 755). "Reports of consultative physicians called in by the [Commissioner] may serve as substantial evidence." *Id.*

Dr. Moser testified that "certain of [Sandgathe's] limitations identified in Dr. Hayes' report were attributable to unspecified physical problems." Dr. Hayes' report rested on Sandgathe's self-reporting of the extent of his physical ailments. Inasmuch as the ALJ found that Sandgathe's self-reports were exaggerated, the ALJ determined that Dr. Hayes' report was unreliable as well. Thus, the ALJ concluded that Dr. Moser's testimony was more reliable. This conclusion is supported by the record, which indicates that Sandgathe's psychological problems may have been volitional or affected by his physical impairments. Thus, the ALJ's reliance on Dr. Moser's testimony was based on substantial evidence. [Brackets in *Sandgathe* original.]

Andrews v. Shalala (9th Circuit, 1995), *supra*, 53 F.3d 1035, 1042:

Our review of the record persuades us that the ALJ met the appropriate burden for discrediting [Dr.] McConochie's diagnosis and rejecting his opinion that Andrews was severely handicapped by chronic drug abuse, depression and paranoid ideation such that he was a poor occupational candidate. Andrews consulted McConochie only because he had to in order to obtain benefits; McConochie himself observed that Andrews had no interest in pursuing treatment for his self-reported psychological symptoms. [Fn. omitted.] Andrews admitted that he manipulated situations to his advantage, and that he self-treated his anxiety by smoking marijuana. Green, the nonexamining psychologist, testified as well. Because she was subject to cross-examination, the ALJ could legitimately credit her testimony. See *Torres v. Secretary of H.H.S.* (1st Cir. 1989) 870 F.2d 742, 744 (greater weight may be given to opinion of nonexamining physician who testifies at hearing subject to cross-examination); see also *Ramirez v. Shalala* (9th Cir. 1993) 8 F.3d 1449 at 1453 (noting that nonexamining physician testified at the hearing as a medical expert). [Brackets added; parentheticals in original.]

Associations' comment

A "treating" physician may not have been in any better position than a consulting physician to observe the applicant in relation to the facts of the claim and there may be other reasons for finding the opinion of the consulting physician to be more reliable.

Bowman v. Heckler (1983) 706 F.2d 564, 568:

The ALJ did not attempt to resolve the conflict in the testimony of the two psychiatrists nor did he give his reasons for accepting the consultant's opinion rather than the one reached by the psychiatrist consulted by Ms. Bowman. Ordinarily the opinion of a treating physician is entitled to more weight than that of a non-treating physician.³

³ We have recognized that the treating physician's opinion is entitled to more weight than that of a consulting physician who has never examined the applicant. *Oldham v. Schweiker*, 660 F.2d 1078, 1084 (5th Cir. 1981); *Warncke v. Harris*, 619 F.2d 412, 416 (5th Cir. 1980); *Strickland v. Harris*, 615 F.2d 1103, 1109-1110 (5th Cir. 1980). We have also deferred to the treating physician when the consulting physician examined the applicant only on a "one-shot" basis. See *Smith v. Schweiker*, 646 F.2d 1075, 1081 (5th Cir. 1981); *Williams v. Finch*, 440 F.2d 613, 616-17 & n. 6 (5th Cir. 1971).

However, the ALJ's report at least inferentially gives the rationale for rejecting the conclusion of the "treating" psychiatrist. The ALJ took into account the report of the internist who had treated Ms. Bowman for years. On the whole, the ALJ apparently found the consultative report more reliable. At the time of the hearing, Ms. Bowman had not been under treatment by the psychiatrist whom she calls her "treating" psychiatrist but had merely consulted him at her lawyer's suggestion. He apparently had little, if any, more opportunity to observe her than had the consultant. The main differentiation between the two was the expressed reason for their employment. Our reliance on the opinion of the treating physician is based not only on the fact that he is employed to cure but also on his greater opportunity to observe and know the patient as an individual. Neither reason existed here.

Associations' comments

Murray v. Heckler is a decision of a federal court in a social security case. It has never been applied as authority by a California court. It was referred to by one California court as a source of information on the policy of the Social Security Administration in requiring its hearing officers to make specific findings: *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1070 [1 Cal.Rptr.2d 195].

The referee's and the Board's task is to analyze the information in the record and determine what makes sense--what is the truth--in each case. That should be done, not by looking at the name on the letterhead, or how many times a physician has examined the patient, or who hired the physician. In a case involving an issue of alleged psychiatric impairment, the California Supreme Court has provided instruction on how an expert's opinion is to be analyzed:

. . . . Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion.' (Italics added [by the *Bassett* court.] (*Carter v. United States* (D.C.Cir. 1957) 252 F.2d 608, 617 [102 App.D.C. 227].) In short, 'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions.' (Italics added [by the *Bassett* court].) (*People v. Martin* (1948) 87 Cal.App.2d 581, 584 [197 P.2d 379]; [further citation omitted].) (*People v. Bassett* (1968), *supra*, 69 Cal.2d 122, 141 [70 Cal.Rptr. 193, 443 P.2d 777].)

Note that, a presumption of correctness of the report of a treating physician or chiropractor that was applicable in workers compensation proceedings (Lab. Code, § 4062.9) was repealed effective January 1, 2005 as to all dates of injury.

J. Consideration of one or more medical reports

Ortzman v. Van Der Waal (1952) 114 Cal.App.2d 167, 170 [249 P.2d 846]:

. . . . Even if several competent experts concur in their opinions and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment assisted by the statements of the experts. [Citation.] Nor does the presence of expert testimony exclude consideration of other facts which are pertinent to the issue involved. . . .

. . . .

. . . .The trier of the facts is the exclusive judge of the credibility of the witnesses. (Code Civ. Proc., § 1847 [repealed Stats 1965, ch 299, §§ 40 et seq., and Stats 1965, ch 1151, § 2. See now Evid. Code, §§ 310, 312, 351, 600, 780, and 786].) While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony ... or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (See cases collected 27 Cal.Jur. 180, § 154.) Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. (*Ortzman*, pp. 170-171.)

Kelley v. Trunk (1998) 66 Cal.App.4th 519, 523-524 [78 Cal.Rptr.2d 122]:

Expert witnesses normally testify concerning the *bases* for their opinions, and the court may *require* the expert to state the bases before giving his opinion. [Italics in original.] (See Evid. Code, 802.) Standard instructions give juries the

common sense directive that "[a]n opinion is only as good as the facts and reasons on which it is based." (BAJI No. 2.40.) An expert's opinion, even if uncontradicted, may be rejected if the reasons given for it are unsound. (*Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58 [45 Cal.Rptr. 129, 403 P.2d 385]; *Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847 [73 Cal.Rptr. 773] [expert opinions, though uncontradicted, are worth no more than the reasons and factual data upon which they are based]; BAJI No. 2.40 ["[Y]ou may not arbitrarily or unreasonably disregard the opinion testimony . . . which was not contradicted . . . unless you find that it is not believable . . .".])

Baker v. Workmen's Comp. Appeals Bd. (1971), *supra*, 18 Cal.App.3d 852, 858 [96 Cal.Rptr. 279]:

A competent opinion of a single physician is sufficient evidence to support a finding of industrial injury.

Turner v. Workmen's Comp. Appeals Bd. (1974), *supra*, 42 Cal.App.3d, 1043-1044 [117 Cal.Rptr. 358]:

While the opinion of a single physician can constitute substantial evidence on which the [WCAB] may base a decision. . . , the opinion of a doctor based on mere surmise does not constitute substantial evidence.

Glover v. Board of Retirement (1989), *supra*, 214 Cal.App.3d 1327, 1338 [263 Cal.Rptr. 224]:

The trial court may accept the relevant and considered opinion of one medical expert over the other medical opinions even though inconsistent with them.

Nash v. Workers' Comp. Appeals Bd. (1994), *supra*, 24 Cal.App.4th 1793, 1810 [30 Cal.Rptr.2d 454]:

[T]he relevant and considered opinion of one physician, arrived at after adequate examination and investigation, may constitute substantial evidence in support of a factual determination by a WCJ [workers' compensation judge], even when it conflicts with other medial opinions.

K. Role of the Board's Medical Advisor

Government Code section 31530 provides,

The county health officer shall advise the board on medical matters and, if requested by the board, shall attend its meetings.

Rau v. Sacramento County Retirement Bd. (1966), *supra*, 247 Cal.App.2d 234, 237-38:

. . . . [I]n 31530, . . . it is stated: "The county health officer shall advise the board on medical matters and, if requested by the board, shall attend its meetings" ¶...[The health officer] was present at the board hearings . . . and heard all of the testimony, both medical and other, pertaining to the application of appellant Rau for a service-connected disability retirement. By giving his advice to the retirement board, he was merely discharging his obligation under the above cited Government Code section. His letter and advice appear to have been based solely upon his review and analysis of the medical evidence which had been presented to the retirement board. His views did not represent new evidence, nor is there anything which shows that it was considered as new evidence by the board.

Associations' comment

The opinion and advice of the county health officer who is an ex-officio medical advisor to the retirement board and who hears all the testimony pertaining to an application for service-connected disability retirement, may properly be received and considered after the case has been submitted to the board for decision, but the county health officer's views do not represent new evidence. Such an opinion is based solely upon a review and analysis of other medical evidence that has already been presented to the board.

End comment.

Applicants' comment

If the county health officer's views are not new evidence, then what are they? Even assuming that the views, letters, and advice are based solely on the record that comes before the Board and not his own examination of the applicant, still views, letters and advice will contain conclusions that are opinions – expert opinions – to which members of the board may defer. Due process requires that if the board receives such a post-hearing opinion, that the parties should have an opportunity to test the opinion with cross-examination and rebuttal evidence. Even if the county health officer participates only as a sort of human medical dictionary or encyclopedia to assist the members of the board in understanding the medical record, due process requires that a party be allowed to test the accuracy of the information the county health officer provides to the board.

End comment.

L. Expert medical opinion is required to prove psychiatric injury and incapacity.

Insurance Co. of North America v. Workers' Comp. Appeals Bd. (1981), *supra*, 122 Cal.App.3d 905, 912, [176 Cal.Rptr. 365]:

Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition.

See also *Georgia-Pacific Corp. v. Workers' Comp. Appeals Bd. (Byrne)* (1983), *supra*, 144 Cal.App.3d 72, 76, [192 Cal.Rptr. 643], overruled on other grounds in *Schoemaker v. Myers* (1990) 52 Cal.3d 1, 18 [276 Cal.Rptr. 303]:

This requirement, of substantial medical evidence, was reiterated in *Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 912, as follows: "Lay testimony cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition." And, "it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence." (*Market Basket v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137, 144 [149 Cal.Rptr. 872].

M. Is it permissible for the Board to pick and choose portions of various medical opinions for support for a finding of fact?

Turner v. Workmen's Comp. Appeals Bd. (1974), *supra*, 42 Cal.App.3d 1036, 1044 [117 Cal.Rptr. 358]:

Hence, an appellate court must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence (*Redner v. Workmen's Comp. Appeals Bd.*, [(1971)] 5 Cal.3d 83, 96-97 [485 P.2d 799; 95 Cal.Rptr. 447]; *Hegglin v Workmen's Comp. App. Bd.*, 4 Cal.3d 162, 170 [93 Cal.Rptr. 15, 480 P.2d 967]), bearing in mind that the board is not at liberty to completely ignore those parts of a doctor's report and testimony which do not support its conclusion. (*Greenberg v. Workmen's Comp. Appeals Bd.*, *supra*, [(1974)] 37 Cal.App.3d 792, 799 [112 Cal.Rptr. 626].) In other words, an expert's opinion is no better than the facts upon which it is based.

Rosas v. Workers' comp. Appeals Bd. (1993), *supra*, 16 Cal.App.4th 1692, 1701 [20 Cal.Rptr.2d 778]:

When the Board relies upon the opinion of a particular physician in making its determination, it may not isolate a fragmentary portion of his report or testimony and disregard other portions that contradict or nullify the portion relied on; it must give fair consideration to all the physician's findings.

Bracken v. Workers' Comp. Appeals. Bd. (1989), *supra*, 214 Cal.App.3d 246, 255 [262 Cal.Rptr. 537]:

Unlike the court, the Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record; nevertheless, any award, order or decision of the Board must be supported by substantial evidence in the light of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [113 Cal.Rptr. 162, 520 P.2d 978]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312,

317 [90 Cal.Rptr. 355, 475 P.2d 451]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [83 Cal.Rptr. 208, 463 P.2d 432].)

The foregoing standard is not met by simply isolating evidence which supports the Board and ignoring other relevant facts of record which rebut or explain the evidence. (*Lamb v. Workmen's Comp. Appeals Bd.*, *supra*, 11 Cal.3d at p. 281; see *Garza v. Workmen's Comp. App. Bd.*, *supra*, 3 Cal.3d at p. 317; *City of Santa Ana v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 212, 219 [180 Cal.Rptr. 125]; *Western Electric Co. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal.App.3d 629, 645 [160 Cal.Rptr. 436].)

Thus, in relying on the opinion of a particular physician in making its determination, the Board may not isolate a fragmentary portion of the physician's report or testimony and disregard other portions that contradict or nullify the portion relied on; the Board must give fair consideration to all of that physician's findings. (*City of Santa Ana v. Workers' Comp. Appeals Bd.*, *supra*, 128 Cal.App.3d at p. 219.) As stated in *Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [158 Cal.Rptr. 137], in evaluating the evidentiary value of medical evidence, a physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability. (See *Lamb v. Workmen's Comp. Appeals Bd.*, *supra*, 11 Cal.3d at p. 281; *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 416-417 [71 Cal.Rptr. 697, 445 P.2d 313].) Hence, the Board may not blindly accept a medical opinion that lacks a solid underlying basis and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd.*, *supra*, 121 Cal.App.3d at p. 426.)

Gay v. Workers' Comp. Appeals Bd. (1979), *supra*, 96 Cal.App.3d 555, 564 [158 Cal.Rptr. 137]:

In evaluating a medical report, isolated statements may be misleading. Intellectual candor of a physician may lead to single statements which, when isolated, may be misunderstood. In evaluating the evidentiary value of medical evidence, a physician's report and testimony must be considered as a whole rather than in segregated parts. [Citations.]

Paneno v. Workers' Comp. Appeals Bd. (1992), *supra*, 4 Cal.App.4th 136, 153 [5 Cal.Rptr.2d 461]:

The WCAB may not isolate part of a physician's opinion and disregard other parts that contradict or nullify the portion on which the WCAB relies. (See *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 255 [262 Cal.Rptr. 537].) "[A] physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability. [Citations.]" (*Ibid.*)

City of Santa Ana v. Workers' Comp. Appeals Bd. (1982), *supra*, 128 Cal.App.3d 212, 219 [180 Cal.Rptr. 125]:

When the Board or the trial court exercising its independent judgment "relies upon the opinion of a particular physician in making its determination, it may not isolate a fragmentary portion of his report or testimony and disregard other portions that contradict or nullify the portion relied on; it must give fair consideration to all of his findings."

Associations' comment

But, there is some authority for the opposite proposition:

In re Frederick G. (1979) 96 Cal.App.3d 353, 366, [157 Cal.Rptr. 769]: testimony of a single witness may support judgment despite being contradicted or inconsistent in part. The Court of Appeal ruled,

The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. (Evid. Code, § 411;² [citations]).

² Evidence Code section 411 provides: "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. "

V. OTHER LEGAL ISSUES

A. Misrepresentation in the employment application

Associations' comment

If the member was hired by the county and became a member of the retirement association as a result of misrepresentation in the employment application, the member may be precluded from applying for a disability retirement based on principles of contract law. While we are aware of cases in which trial courts have ruled against applicants on this point, we have found no reported appellate court opinion in a disability retirement case that is on point.

The right of a member of the association to a disability retirement is an element of compensation that is a contract right. Pension rights and obligations, as opposed to a civil servant's right to tenure, are regulated by contract law. (See, e.g., *Olson v. Cory* (1980) reprinted as modified at 27 Cal.3d 532, 540-541 [178 Cal.Rptr. 568]: pension benefits are contractual rights; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 [148 Cal.Rptr. 158]; *Miller v. State of California* (1977) 18 Cal.3d 808, 814 [135 Cal.Rptr. 386, 557 P.2d 970]; *Stork v. State of California* (1976) 62 Cal.App.3d 465, 468 [133 Cal.Rptr. 207].)

City of Oakland v. Public Employees Retirement System (2002) 95 Cal.App.4th 29, 38-39 [115 Cal.Rptr.2d 151]:

"A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 [148 Cal.Rptr. 158, 582 P.2d 614].) "The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute." (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662 [6 Cal.Rptr.2d 77]; see *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1131-1133 [61 Cal.Rptr.2d 207].)

The mutual consent that is required for the formation of a contract may be negated by "fraud," whether the misrepresentation of fact is intentional or negligent. Where a party is induced to enter into a contract by misrepresentation, the resulting contract is void, or there may be grounds for rescission or reformation. (See 1 Witkin, Summary of California Law (10th ed. 2005-2011) Contracts (Concealment) § 286 Elements: Traditional Listing, *et seq.*)

The elements of actual fraud, whether as the basis of the remedy in contract or tort, have been stated as follows: There must be (1) a *false representation* or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with *knowledge* of its falsity or, without sufficient knowledge to warrant a representation, (3) with *intent* to induce the person to whom it is made to act upon it; and this person must (4) act in *reliance* upon the

representation (5) to his or her damage. [Citations.] (1 Witkin, Summary of California Law (10th ed. 2005-2011) Contracts (Concealment), *supra*, at § 286.)

...

The representation must be made "with intent to deceive" another party to the contract. (C.C. 1572; see 5 *Summary* (10th), *Torts*, §779.)

The Restatement sets forth three ways in which this requirement of "scienter" may be satisfied: (1) The maker knows or believes that the assertion is untrue; (2) he does not have the confidence that he states or implies the truth; (3) he knows that he does not have the basis that he states or implies for the assertion. [Citation.] (1 Witkin, Summary of California Law (10th ed. 2005-2011) Contracts (Concealment), *supra*, at § 290 Fraudulent Representation.)

"The suppression of that which is true, by one having knowledge or belief of the fact" is actual fraud. [Citations.] . . . [¶] The Restatement (§160, *supra*) points out that concealment is an affirmative act, equivalent to a misrepresentation (Comment a); and that it usually consists either in actively hiding something from the other party, or preventing him or her from making an investigation that would have disclosed the true facts (Comment b). (1 Witkin, Summary of California Law (10th ed. 2005-2011) Contracts (Concealment) *supra*, at § 291 In General.)

B. Use of false statements with intent to obtain or deny pension benefits

Government Code section 31455.5, relating to unlawful acts affecting the administration of pension benefits under the CERL of 1937, the definitions of violations of the Section, and applicable penalties, provides as follows:

(a) It is unlawful for a person to do any of the following:

(1) Make, or cause to be made, any knowingly false material statement or material representation, to knowingly fail to disclose a material fact, or to otherwise provide false information with the intent to use it, or allow it to be used, to obtain, receive, continue, increase, deny, or reduce any benefit accrued or accruing to a person under this chapter.

(2) Present, or cause to be presented, any knowingly false material statement or material representation for the purpose of supporting or opposing an application for any benefit accrued or accruing to a person under this chapter.

(3) Knowingly accept or obtain payment from a retirement system with knowledge that the recipient is not entitled to the payment under the provisions of this chapter and with the intent to retain the payment for personal use or benefit.

(4) Knowingly aid, abet, solicit, or conspire with any person to do an act prohibited by this section.

(b) For purposes of this section, "statement" includes, but is not limited to, any oral or written application for benefits, report of family relationship, report of injury or physical or mental limitation, hospital records, test results, physician reports, or other medical records, employment records, duty statements, reports of compensation, or any other evidence material to the determination of a person's initial or continued eligibility for a benefit or the amount of a benefit accrued or accruing to a person under this chapter.

(c) A person who violates any provision of this section is punishable by imprisonment in a county jail not to exceed one year, or by a fine of not more than five thousand dollars (\$5,000), or by both that imprisonment and fine.

(d) A person violating any provision of this section may be required by the court in a criminal action to make restitution to the retirement system, or to any other person determined by the court, for the amount of the benefit unlawfully obtained, unless the court finds that restitution, or a portion of it, is not in the interests of justice. Any restitution order imposed pursuant to this section shall be satisfied before any criminal fine imposed under this section may be collected.

(e) The provisions provided by this section are cumulative and shall not be construed as restricting the application of any other law.

Associations' comment

For similar provisions applicable to false statements made in connection with claims for workers' compensation benefits, see Insurance Code sections 11760 and 11880, and Penal Code section 549.

C. Previously Litigated Issues

- 1. Once the Board has granted a disability retirement or survivor's allowance and its decision has become final, it may not reopen or reconsider its decision, even if it determines that its original decision was incorrect.**

While the objective of all Boards is to reach the correct result, the Board's decision in a particular case, like the decision of any tribunal, may be incorrect. Where the Board has jurisdiction in the fundamental sense of jurisdiction over the subject matter and the parties, its powers include jurisdiction to make an erroneous decision. (12 Cal.Jur.3d (2008) Certiorari, § 18. Excess and error in the exercise of jurisdiction distinguished.) An administrative agency's quasi-judicial decision, even an incorrect one, stands unless it is overturned in accordance with an administrative hearing process or by a reviewing court, or is reopened or reconsidered pursuant to express statutory authorization. Otherwise, once the Board's decision is final, the Board has no jurisdiction to reconsider or reopen its decisions, even though they are erroneous. (*Gutierrez v. Board of Retirement* (1998), *supra*, 62 Cal.App.4th 745, 749 fn 3 [72 Cal.Rptr. 837] citing *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407 [57 P.2d 1323]; *Olive Proration Program Committee for Olive Proration Zone No. 1, et al. v. Agricultural Prorate Commission, et*

al. (1941) 17 Cal.2d 204, 209-210 [109 P.2d 918]. *Cf. Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864 [5 Cal.Rptr.3d 634]: Board had the power to correct a mistaken classification from safety to general membership and was not estopped to exercise that power where such an estoppel would contravene statutory limitations. Note: In *Medina*, the Board's action was administrative, not quasi-judicial.)

a) Exception: The Board has statutory authority to determine if a disability retirement pension beneficiary under the age of 55 remains incapacitated.

Government Code section 31729 authorizes the Board to require a disability pension beneficiary under the age of 55 to undergo a medical examination to determine if the beneficiary remains physically or mentally incapacitated for duty. There is no other statutory authority in the CERL that authorizes the Board to reopen or reconsider its decisions once they become final.

b) The Board may reopen or reconsider its own decision if it was obtained by extrinsic fraud or mistake, or was procured by duress.

A party can obtain equitable relief from a judgment where the judgment was obtained by extrinsic fraud. “[Extrinsic fraud’s] essential characteristic is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting that party’s claim or defense. [Citations.]” (8 Witkin, Cal. Procedure (5th ed. 2008-2011) Attack on Judgment in Trial Court (Judgment Obtained by Extrinsic Fraud) § 225, In General.)

Examples of extrinsic fraud:

- A party is fraudulently kept in ignorance of the proceeding or, based on false representations that his interests will be protected, is induced into not appearing.
- A party’s claim or defense is fraudulently concealed by one holding a fiduciary relationship with the party, as where an attorney regularly employed corruptly sells out his client’s interest to the other side. (8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court (Judgment Obtained by Extrinsic Fraud) § 225, In General.)

Equitable relief from a judgment may also be available for extrinsic mistake where the excusable neglect of the party to appear and present a claim or defense results in an unjust judgment without a fair adversary hearing. (8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court (Judgment Obtained by Extrinsic Mistake) § 230, In General.)

Examples of extrinsic mistake:

- The aggrieved party relies on an attorney who becomes incapacitated to act and the party fails to attend the hearing.

- The aggrieved party becomes incapacitated and fails to attend the hearing. (8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 231, Incapacity of Attorney or Party.)

The Board may also reopen a previous decision where the facts show that its decision was procured through duress.

. . . . Under the modern rule, "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion [citation]" [Citation.] It is shown where a party "intentionally used threats or pressure to induce action or nonaction to the other party's detriment. [Citation.]" (*In re Marriage of Stevenot* (1984), *supra*, 154 Cal.App.3d 1051 at p. 1073, fn. 6 [202 Cal.Rptr. 116]; see Rest.2d Contracts (1981) §§ 175, 176.) [Fn. omitted.] The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing. [Citation.] (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 [260 Cal.Rptr. 403].)

Extrinsic fraud or mistake is to be contrasted with *intrinsic* fraud or mistake, that is, fraud or mistake that occurs during the course of the proceedings for which relief will be denied in favor of the stability of judgments. (See *Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1 [156 Cal.Rptr. 805]: Unsuccessful plaintiff denied relief from judgment in favor of the defendant although the judgment resulted from defendant failing to produce all of the documents it was required to produce during discovery.)

If the aggrieved party had a reasonable opportunity to appear and litigate that party's claim or defense, fraud occurring in the course of the proceeding is not a ground for equitable relief. The theory is that these matters will ordinarily be exposed during the trial by diligence of the party and his or her counsel, and that the occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability of final judgments. (8 Witkin, Cal. Procedure (5th ed. 2008-2011) Attack on Judgment In Trial Court (No Relief for Intrinsic Fraud or Mistake) § 241, Rule Denying Relief.

The California Supreme Court explained the justification for denying relief even where the judgment was procured with perjury:

The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once, it could be done again and again *ad infinitum*. . . . (*Pico v. Cohn* (1891) 91 Cal. 129, 134 [25 Pac. 970].)

2. Once the Board has denied a disability retirement and its decision

becomes final, the applicant is barred by the doctrine of res judicata from relitigating the case, unless there is a change in the circumstances.

Preciado v. County of Ventura, et al. (1982) 143 Cal.App.3d 783, 787, footnote 2 [192 Cal.Rptr. 253]:

The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment. A prior judgment for the defendant on the same cause of action is a complete bar to the new action. (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, §§ 147-148, pp. 3292-3293.) Collateral estoppel is a distinct aspect of res judicata. It involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. (*Id.*, § 197, at p. 3335.) In this case we are dealing with a claim of collateral estoppel rather than res judicata.

Winn v. Board of Pension Commissioners (1983) 149 Cal.App.3d 532, 537 [197 Cal.Rptr. 111]:

Where the subsequent action is on the same cause of action, a prior judgment is a complete bar. But where the subsequent action is on a different cause of action, the former judgment is not a complete merger or bar, but is effective as a collateral estoppel, i.e., it is conclusive on issues actually litigated between the parties in the former action.

Associations' comment

Sometimes, an applicant applies for disability retirement more than once. In that case, the board of retirement has usually made a determination as to one or more of the applicant's bases for disability in the prior application. There are no appellate court opinions in CERL of 1937 cases that directly speak to the issue of how to treat these prior litigated issues between the applicant and the pension system. However, the two cases cited above may be used as some guidance on the matter.

End comment.

Associations' comment

If an applicant can establish that his/her condition has deteriorated over time, or that a new injury has occurred subsequent to denial of the first application for disability retirement, her second application may not be barred by the doctrine of res judicata. A former judgment may not operate as res judicata if the second action concerns changed circumstances or new facts. (See 7 Witkin, Cal. Proc. (5th ed. 2008-2011) Judgment (When Judgment Is Not Conclusive) § 434, New Property or Other New Facts.) However, "[n]ewly discovered facts that do not establish a previously undiscovered

theory of liability or a change in the parties' legal rights, but instead merely go to the weight of the evidence, do not preclude collateral estoppel. (See *Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 747, 238 C.R. 259, infra, §460 [evidence of lung biopsy from deceased, whose personal injury action resulted in judgment for defendant, was insufficient to preclude application of collateral estoppel to wrongful death action].)" (7 Witkin, Cal. Proc., *supra*, § 434.)

For a discussion of the collateral estoppel aspect of res judicata and judicial estoppel where the applicant litigated identical issues in another forum or asserted a position before another forum that is inconsistent with the position the applicant has taken in the disability retirement case, see Section V, J, below.

End comment.

Applicant's comment

It has been held that the fact that a physician's opinion about the applicant's level of disability does not change between the time the Board made its decision on the first application and the time the applicant attempts to file a second application does not mean that the second application should be rejected on the basis that there has been no change in the applicant's condition. If the board rejected a physician's opinion that the applicant was incapacitated at the first hearing, the board may not rely on the opinion of that same physician that there has been no change in the applicant's condition when it considers second application filed later. (*Bowman v. Board of Pension Commissioners* (1984) 155 Cal.App.3d 937 [202 Cal.Rptr. 505].)

End comment.

The only evidence which the Board could have relied upon to negate a change in petitioner's condition was the report prepared by Dr. Handelman for the initial hearing. In his report, Dr. Handelman concluded that petitioner should be restricted from heavy work and normal firefighting duties. The Board refused to accept Dr. Handelman's report as indicative of a change in petitioner's condition only because there had been no change in Dr. Handelman's opinion. The Board's reasoning is specious, however, inasmuch as petitioner's condition at the time his initial petition was denied was defined by the Board's conclusion, rather than by any one of the various medical opinions presented as evidence, for the opinions presented at that time ranged from a recommendation that petitioner be relegated to sedentary work to a conclusion that petitioner's complaints were not justified. The characterization of petitioner's present condition and the determination of whether a "substantial deterioration" had occurred following the denial of his initial petition, however, requires the comparison of medical data obtained subsequent to the original hearing with the conclusion reached by the Board after its assessment of evidence presented at the original hearing, rather than a comparison of evidence presented at both hearings.

In actuality, the Board's pronouncement at the close of the first hearing directly negated the content of Dr. Handelman's report, for the Board concluded at that time that petitioner could return to his previous position and full duty. Inasmuch as the Board chose not to rely on Dr. Handelman's opinion at the original hearing, its reliance thereon at the present hearing for the purpose of negating a deterioration in petitioner's condition can only be characterized as inequitable, for "One must not change his purpose to the injury of another." (Civ. Code, § 3512.) (*Bowman v. Board of Pension Commissioners, supra*, 155 Cal.App.3d, 944-945.)

Associations' comment

Applicants comment above misconstrues *Bowman*. A close reading of *Bowman* shows that Dr. Handelman did not examine and report on Bowman's condition at both the first and second hearings. The City of Los Angeles pension commission denied Bowman's first application for a disability. A retirement plan rule permitted a reapplication if there was a "substantial deterioration" of the applicant's condition. The reports of physicians who examined Bowman around the time of the second application were uniform in finding Bowman to be limited in his physical abilities. The opinion in *Bowman* is not clear, but it appears that the Commission rejected Bowman's reapplication on the basis that his proof of incapacity had already been rejected, the Commission comparing the medical evidence offered at both hearings and arriving at a conclusion that there had been no deterioration. The Court of Appeal, looking for any basis for the rejection, ruled that Dr. Handelman's opinion offered at the initial hearing could not be a basis for a finding that Bowman's condition had not deteriorated. As the *Bowman* court concluded, whether there had been a deterioration depended on "the comparison of medical data obtained subsequent to the original hearing with the conclusion reached by the Board after its assessment of evidence presented at the original hearing, rather than a comparison of evidence presented at both hearings." (*Bowman v. Board of Pension Commissioners, supra*, 155 Cal.App.3d, 944-945.) We submit, however, that if a physician's opinion supports a first, unsuccessful application for disability retirement, the opinion of that same physician, arrived at after re-examination of the applicant, standing for the proposition that the applicant's condition and level of impairment has not changed, may be reliable evidence supporting a finding that there has been no change in the circumstances and a conclusion that the second application is barred by the doctrine of res judicata. *Bowman* does not create a legal fiction that evidence concerning the applicant's condition at the time of the first application ceases to exist when the board or commission decides the case.

End comment.

D. Credibility of Claimant and Witness Testimony

Ortzman v. Van Der Waal (1952), *supra*, 114 Cal.App.2d 167, 171 [249 P.2d 846]:

Provided the trier of facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontroverted.

Baker v. Workmen's Comp. Appeals Bd. (1971), *supra*, 18 Cal.App.3d 852, 859 [96 Cal.Rptr. 279]:

In the absence of evidence to the contrary, the referee and the board must assume the truth of petitioner's uncontradicted and unimpeached testimony respecting the genuineness of his complaints. (See *Place v. Workmen's Comp. App. Bd.*, 3 Cal.3d 372, 379 [90 Cal.Rptr. 424, 475 P.2d 656].) Given the truth of petitioner's testimony, the board's finding that petitioner did not sustain an industrial injury cannot be reached by simply ruling out heart disease. The only reasonable inference which can be drawn from the evidence is that petitioner suffers from a form of psychoneurotic injury which doctors termed "cardiac neurosis."

But see *Snell v. Telehala* (1969) 274 Cal.App.2d 61, 67-68, [78 Cal.Rptr. 780] cited by the court in *Hosford v. Board of Administration* (1978), *supra*, 77 Cal.App.3d 854, 863-864 [143 Cal.Rptr. 760]:

Our Supreme Court, in *Davis v. Judson* (1910) 159 Cal. 121, 128 [113 P. 147], laid down the respective provinces of the trial court and the appellate court in a situation such as we have in the instant case, as follows: "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." (P. 128. See also: *Hunter v. Schultz* (1966) 240 Cal.App.2d 24, 33-34 [49 Cal.Rptr. 315]; *Camp v. Ortega* (1962) 209 Cal.App.2d 275, 281-283 [25 Cal.Rptr. 837]; *Kurtz v. Kurtz* (1961) 189 Cal.App.2d 320, 324-325 [11 Cal.Rptr. 230]; *La Jolla Casa de Manana v. Hopkins* (1950) 98 Cal.App.2d 339, 345-346 [219 P.2d 871]; *Barham v. Khoury* (1947) 78 Cal.App.2d 204, 215 [177 P.2d 579].)

In *Hunter v. Schultz*, *supra*, appellant claimed that the trial court was required to accept the undisputed testimony of her husband that between four to five thousand dollars had been expended for improvements on the real property involved. The appellate court said: "The trial judge was justified in considering that Melvin, as a one-fourth owner and as the spouse of another one-fourth owner, had an obvious interest in the amount to be allowed for improvements. The credibility of Melvin's testimony could also properly be weighed in the light of the circumstance that he could produce receipts for only \$1,862.10 of the claimed expenditures but could not produce any kind of corroborative evidence in verification of the claimed balance. The trial judge observed the witness on the stand, was in a far better position that we are to evaluate the trustworthiness of his

'best estimate,' and in the final result was the arbiter of his credibility." (240 Cal.App.2d at p. 34.)

In *Kurtz v. Kurtz*, *supra*, appellant wife complained about the amount of support money allowed to her and contended that, since her testimony that she is ill and unable to work is uncontradicted, the findings of the trial court must be in accordance with her uncontradicted testimony. This contention was rejected, the court commenting: "By her own testimony, she had worked steadily for many years, despite the same condition which she now claims prevents her from working. No medical corroboration was offered as to her physical or mental condition or to support her statement that she is unable to work. No excuse was offered for the failure to produce her doctor." (189 Cal.App.2d, at p. 325.)

In the *La Jolla* case, *supra*, the court stated the rule which has been consistently adhered to by the appellate courts: "An appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced." (98 Cal.App.2d, at pp. 345-346.)

E. De Novo Hearing

In some retirement associations, the Board of Retirement makes an initial determination on an application based on a staff investigation and recommendation that will usually include the findings and opinion of an expert medical consultant. If the application is denied, the member then may request that an administrative hearing be held. The propriety of the Board's initial determination is not at issue at the administrative hearing. Rather, the applicant has the burden to prove that he or she is incapacitated and that the incapacity is service-connected. The fact that in its initial determination the Board found the applicant to be disabled, though not service-connected, does not insure that, after the administrative hearing, the applicant will again be found to be permanently incapacitated. That issue will be determined anew based on the record developed at the administrative hearing.

Weiser v. Board of Retirement (1984) 152 Cal.App.3d 775, 781-782 [199 Cal.Rptr. 720]:

The Board's procedures for disability retirement hearings specify that when a hearing is requested by an applicant, it shall be referred for a hearing "de novo before a Board-appointed referee." In *REA Enterprises v. California Coastal Zone Conservation Com.* (1975) 52 Cal.App.3d 596, 612 [125 Cal.Rptr. 201], Division Five of this district had occasion to address the interpretation of the term "de novo." The court stated: "The leading case in California on this point is *Buchwald v. Katz*, [(1972)] 8 Cal.3d 493 [105 Cal.Rptr. 368, 503 P.2d 1376]. In

Buchwald, the Supreme Court affirmed its earlier decision of *Collier & Wallis, Ltd. v. Astor*, (1937) 9 Cal.2d 202 [70 P.2d 171], where it had construed the language of section 19 of the Private Employment Agency Law (later codified in Lab. Code, § 1700.44). [Fn. omitted.] In the *Collier & Wallis* case, the court discussed the term 'de novo' as follows (at p. 205): 'A hearing de novo literally means a new hearing, or a hearing the second time. (18 Cor. Jur. 486.) Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard. It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held. It differs, therefore, from an ordinary appeal from an inferior to an appellate body where the proceedings of the hearing in the inferior court are reviewed and their validity determined by the reviewing court. A hearing de novo therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held. The decision therein is binding upon the parties thereto and takes the place of and completely nullifies the former determination of the matter [The] section simply gives to the party dissatisfied with the determination of the labor commissioner a hearing of the matter . . . before the superior court. The court hears the matter, not as an appellate court, but as a court of original jurisdiction, with full power to hear and determine it as if it had never been before the labor commissioner. The act does not, therefore, in fact or in law confer appellate jurisdiction upon the superior court, but does provide a legal forum where either party to the controversy, in case he is dissatisfied with the determination of the labor commissioner, may have his rights adjudicated.'

REA, supra, 52 Cal.App.3d 596, dealt with the question of the scope of a hearing de novo by a state commission after a hearing by a regional commission. However, we believe the *REA* analysis to be equally applicable to the situation at hand, where the de novo hearing was conducted by the same tribunal (albeit after a referee had conducted a detailed hearing on the issues), especially since the initial award of disability was made without the benefit of a hearing.

F. Hearsay

Walker v. City of San Gabriel (1942) 20 Cal.2d 879, 881 [129 P.2d 349]:

It is well settled that a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence establishing just cause for revocation, and that hearsay evidence alone is insufficient to support the revocation of such a license. . . . 'Mere uncorroborated hearsay or rumor does not constitute substantial evidence.'

Associations' comment

Rules of administrative hearing procedures typically contain provisions that hearsay is admissible, but that hearsay will not support a finding of fact unless the hearsay would be admissible over objection under the Evidence Code. (See, for example, Gov. Code,

§ 11513, concerning evidence in administrative hearings of a state agency, and LACERA's Procedures for Disability Retirement Hearings, rule 23, subd. (d).)

G. Rules of Evidence

McCoy v. Board of Retirement (1986), *supra*, 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567]:

An administrative agency is not required to observe the strict rules of evidence enforced in the courts, and the admission or rejection of evidence is not ground for reversal unless there has been a denial of justice. (*Kunimori Ohara v. Berkshire* (9th Cir. 1935) 76 F.2d 204, 207.) "A verdict or finding cannot be set aside on the basis of erroneous admission of evidence if the error did not result in a miscarriage of justice. (Evid. Code, § 353; see Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) Such error is not prejudicial if the evidence 'was merely cumulative or corroborative of other evidence properly in the record,' or if the evidence 'was not necessary, the judgment being supported by other evidence.' (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 303, at p. 4286.)" (*Rue-El Enterprises, Inc. v. City of Berkeley*, *supra*, (1983) 147 Cal.App.3d 81 at p. 91 [194 Cal.Rptr. 919].)

H. Application of Employee Retirement Income Security Act of 1974 (ERISA)

ERISA (29 U.S.C. § 1001, et seq.) is not applicable to a governmental plan established or maintained for its employees by a subdivision of a state. Counties are subdivisions of the state (Gov. Code, § 460) and, therefore, ERISA is not applicable to retirement associations operating under the County Employees Retirement Law of 1937.

[Title 29, U.S.C.] § 1003, Coverage

(a) In general. Except as provided in subsection (b) or (c) and in sections 201, 301, and 401 [29 USCS §§ 1051, 1081, and 1101], this title shall apply to any employee benefit plan if it is established or maintained--

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) Exceptions for certain plans. The provisions of this title shall not apply to any employee benefit plan if--

(1) such plan is a governmental plan (as defined in section 3(32) [29 U.S.C. § 1002(32)]);

[Title 29 U.S.C.] § 1002, Definitions

For purposes of this title,

. . . .

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof,

I. Application of Workers' Compensation Law

Bowen v. Board of Retirement (1986), *supra*, 42 Cal.3d 572, 578, footnote 4 [229 Cal.Rptr. 814, 724 P.2d 500]:

. . . . Generally, courts have found that the County Employees Retirement Act [*sic*] of 1937 (here at issue) and the Workers' Compensation Act "are related in subject matter and harmonious in purpose." (*Kuntz v. Kern County Employees' Retirement Assn.* (1976) 64 Cal.App.3d 414, 421 [134 Cal.Rptr. 501]; accord, *Minor v. Sonoma County Employees Retirement Bd.* (1975) 53 Cal.App.3d 540, 544 [126 Cal.Rptr. 16].) In fact, courts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law. [Citations.]

Kuntz v. Kern County Employees' Retirement Assn. (1976) 64 Cal.App.3d 414, 421-422 [134 Cal.Rptr. 501]:

Furthermore, the decisions interpreting the workers' compensation law of this state (Lab. Code, div. 4), which adhere to the proposition that an employer takes his employee as he finds him, and that a disability from a preexisting injury or disease, or a death resulting therefrom, is compensable if the employee's work aggravates or accelerates the injury or disease, are authoritative. (See *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 282-283 [113 Cal.Rptr. 162, 520 P.2d 978]; *Ballard v. Workmen's Comp. App. Bd.* (1971) 3 Cal.3d 832, 837 [92 Cal.Rptr. 1, 478 P.2d 937]; *Smith v. Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 588, 592 [78 Cal.Rptr. 718, 455 P.2d 822]; [further citations omitted.] While the County Employees Retirement Act [*sic*] of 1937 and the workers' compensation law serve different functions, they are related in subject matter and harmonious in purpose. (*Minor v. Sonoma County Employees Retirement Bd.* (1975) 53 Cal.App.3d 540, 544 [126 Cal.Rptr. 16]; *Pathe v. City of Bakersfield* (1967) 255 Cal.App.2d 409, 414-415, 416 [63 Cal.Rptr. 220].) Both laws are designed for the comfort, health, safety and general welfare of employees; [fn. omitted] as to the payment of death and disability benefits, each contains essentially similar language; [fn. omitted] both must be construed liberally. [Fn. omitted.]

It is the rule that when words used in a statute have acquired a settled meaning through judicial interpretation, the words should be given the same meaning

when used in another statute dealing with an analogous subject matter; this is particularly true, where, as here, both statutes were enacted for the welfare of employees and are in harmony with each other. (See 73 Am.Jur.2d (1974) Statutes, § 165, p. 369; cf. *Union Iron Wks. v. Industrial Acc. Com.* (1922) 190 Cal. 33, 43-44 [210 P. 410].)

Pearl v. Workers Comp. Appeals Bd. (2001) 26 Cal.4th 189, 197 [109 Cal.Rptr.2d 308, 26 P.3d 1044]:

. . . . Although both the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. We may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]; cf. *People v. Goodloe* (1995) 37 Cal.App.4th 485, 491 [44 Cal.Rptr.2d 15] ["When a particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion . . . is that a different legislative intent existed"].)

Application of workers' compensation case law: Going and Coming Rule and its exceptions:

Singh v. Board of Retirement (1996), *supra*, 41 Cal.App.4th 1180, 1186-1187, footnote 6 [49 Cal.Rptr.2d 220]:

Case Law⁶

⁶ Board argues we should not consider workers' compensation cases in determining an employee's retirement matter. Board is incorrect, as "the County Employees Retirement Act . . . and the Workers' Compensation Act 'are related in subject [matter] and harmonious in purpose.' [Citations.] In fact, courts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law. [Citations.]" (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, fn. 4 [229 Cal.Rptr. 814, 724 P.2d 500].) There is no reason the going-and-coming rule should be interpreted in one way in one context, and differently in another.

In *Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365], our Supreme Court reiterated the principle that "[u]nder the well established going and coming rule, an employee does not pursue the course of his employment when he is on his way to or from work." The court noted, however, that "[i]n a number of cases we have established exceptions to this rule" (*id.* at p. 816), and went on to consider whether "we should recognize another exception to the rule . . . : that at the time of the accident [the employee] was engaged in the course of his employment inasmuch as he was bringing his car to work as required by his employer." (*Ibid.*, fn. omitted [by the court].)

Associations' comment

Singh answers the question of whether the "going and coming rule" is applicable to cases arising under the CERL of 1937. (Compare *Minor v. Sonoma County Employees*

Retirement Board (1975) 53 Cal.App.3d 540 [126 Cal.Rptr. 16]: The Court of Appeal in *dicta* stated that the going and coming rule would not render police officer's injury nonwork-related. After reporting to his employer that he had been involved in an automobile accident on the way to work, an accident in which he was not injured, and while returning to the accident scene to render first aid to accident victims, direct traffic, and secure the scene pending the arrival of the Highway Patrol, Minor attempted to vault a fence and broke his ankle. The Court of Appeal reasoned that, when Minor was injured, he was performing the duties expected of him as a law enforcement officer. He was not merely on his way to work, so the going and coming rule did not apply.)

For a more detailed discussion of the going and coming rule and course of employment issues generally, see Section II, B, 3, b), above.

1. Applicability of Labor Code section 4056's rule on the unreasonable refusal of medical care and the common law rule with respect to avoidable consequences.

See the discussion at II, A, 12, above.

J. Use of WCAB Decisions and Orders

1. In general: Res Judicata, Collateral Estoppel and Judicial Estoppel.

Preciado v. County of Ventura, et al. (1982) 143 Cal.App.3d 783, 787, footnote 2 [192 Cal.Rptr. 253]:

The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment. A prior judgment for the defendant on the same cause of action is a complete bar to the new action. (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, §§ 147-148, pp. 3292-3293.) Collateral estoppel is a distinct aspect of res judicata. It involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. (*Id.*, § 197, at p. 3335.) In this case we are dealing with a claim of collateral estoppel rather than res judicata.

Associations' comment

Most frequently, the issue of whether collateral estoppel is applicable comes into play in public employee retirement cases when there has been a prior determination made in a workers' compensation case that involves some of the same issues of fact that are present in the retirement case. The claimant may try to use a favorable decision of the Workers' Compensation Appeals Board against the respondent in the disability retirement case. The respondent in the disability retirement may attempt to use against

the applicant a Workers' Compensation Appeals Board decision that was not favorable to the applicant.

Whether the applicant can use a decision of the Workers' Compensation Appeals Board against the board of retirement depends on the type of retirement system involved.

If the system is an "integrated system," as is seen in most, but not all, city pension programs, the retirement system and its board or commission is simply an arm of the employer/city. When the city loses a litigated workers' compensation case or stipulates to certain facts in the workers' compensation case, the retirement system and its governing board or commission, as part of the city entity, is bound under the principle of collateral estoppel by the Workers' Compensation Appeals Board's findings of fact and the city's stipulations of fact to the extent those identical issues present themselves in the retirement case. The issue of service-connection under the CERL of 1937 (Gov. Code, § 31720, *et seq.*) will often be identical to the issue of compensability (work-relatedness) under the Workers' Compensation Act (Lab. Code, § 3600, *et seq.*), whereas the workers' compensation issue of the extent of permanent disability is not identical to the issue of whether the claimant is substantially incapacitated for duty of his or her usual duties. (*Cf.*, Lab. Code, § 3208.3: In workers' compensation psychiatric injury claims, a greater showing of work-connection has been required since workers' compensation reforms were enacted in 1989 and in subsequent years than is required under the CERL of 1937. There are a number of facts that must be established under Labor Code section 3208.3 for a psychiatric injury to be considered work-related that are not required under the CERL of 1937. The standards of work-relatedness of psychiatric claims under the workers' compensation law are not applicable to psychiatric disability claims arising under the CERL of 1937. See *Pearl v. Workers Comp. Appeals Bd.* (2001), *supra*, 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044] [workers' compensation standards for psychiatric claims inapplicable to a disability retirement sought under PERS].)

In *Barber v. Retirement Board* (1971), *supra*, 18 Cal.App.3d 273, 278-279 [95 Cal.Rptr. 657] a firefighter successfully challenged before the civil service commission the department's refusal to promote him to lieutenant on the basis that one of his legs had been amputated below the knee. Twelve days after Barber began his assignment at the department's Training Division, the fire chief petitioned the city and county's retirement board to retire Barber due to disability. Barber contested the employer's petition. The Court of Appeal ruled that the retirement board, as an agent of the city and county, was bound by the decision of the civil service commission on the issue of Barber's medical qualification for the duties of a lieutenant. Ultimately, Barber was unsuccessful in his attempt to continue his employment because there was no open lieutenant position to which he could be assigned.

Barber next contends that the finding of fact of the civil service commission with respect to his medical condition is *res judicata* and cannot be contradicted by the Board. He relies on *French v. Rishell*, (1953) 40 Cal.2d 477 [254 P.2d 26], which held that a finding of fact made by the Industrial Accident Commission that the death of a captain of the Oakland Fire Department proximately resulted from an

injury occurring in the course of and arising out of his employment was res judicata with respect to his widow's claim of a right to receive a pension. There, as here, it was admitted that the city had failed to seek any review of the Commission's award which had become final.

The Supreme Court said at page 479: "The doctrine of res judicata is applicable where the identical issue was decided in a prior case by a final judgment on the merits and the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication," and at page 482: "It is immaterial that the pension board was not a party to the Industrial Accident Commission proceeding. The city, which is not only a party herein but the real party in interest, was also a party to and appeared in the prior proceeding. Under the city charter, the pension board acts as an agent of the city, and, in this representative capacity, it is bound by the commission's decision if the city is bound." The identical reasoning applies here, as the city was a party to the proceeding before the Commission (cf. *Flaherty v. Board of Retirement*, [(1961)] 198 Cal.App.2d 397, 402 [18 Cal.Rptr. 256]).

Accordingly, the Board was bound by the Commission's final determination that Barber was medically fit to be a lieutenant in the fire department. . . . (*Barber*, pp. 278-279.

Winn v. Board Of Pension Commissioners (1983) 149 Cal.App.3d 532, 537 [197 Cal.Rptr. 111]:

Appellant urges that *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374 [184 Cal.Rptr. 576] is controlling on the issue of res judicata and collateral estoppel. In *Dakins*, a policeman had applied for a service-connected disability pension. The Board of Pension Commissioners found that the disability was not service connected. Prior to the pension board's finding, the policeman had filed a workers' compensation claim for the same disability. The Workers' Compensation Appeals Board found, prior to the Pension Board's finding, that the disability was service connected. On appeal, the appellate court held that the pension board was collaterally estopped to deny that the disability was service related. The court found that although the workers' compensation claim and the pension claim were not the same cause of action, the identical issue of whether or not the disability was service connected was litigated before the pension board and the Workers' Compensation Appeals Board. The court also found that the workers' compensation finding was part of a final judgment, and that the parties (in both cases an entity or agent of the City of Los Angeles) were identical. (*Id.*, at p. 387.)

Associations' comment

A retirement system under the CERL of 1937 is a "nonintegrated system." It is not an administrative subdivision of the county or any district. It is a separate legal entity. It is not bound by the factual determinations made against the county in the workers'

compensation case. (*Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 402-403 [18 Cal.Rptr. 256].)

End comment.

In *Preciado v. County of Ventura* (1982) 143 Cal.App.3d 783 [192 Cal.Rptr. 253], an applicant for a disability retirement argued that the decision in his workers' compensation case was binding in the retirement case. The court rejected the argument:

Claimant does not contend that the retirement board was represented before the WCAB or that the retirement board is in privity with the county.³ Instead he claims that the retirement board was not a party to the disability retirement proceedings. He contends that he and the county were the only parties to the retirement proceedings and that the association's retirement board was not, and could not, be a party because it was the forum before whom the matter was tried. Claimant goes on to argue that since the retirement board could not be a party to the retirement proceeding, its absence as a party before the WCAB is of no legal consequence. He asserts that the county is the real party in interest and since it appeared in both proceedings, the decision of the WCAB is binding in the retirement matter.

³ It is clear that the retirement board was not represented before the WCAB. While the county did appear and participate, it has been held that the retirement board and the county are separate, distinct entities which are not in privity. (*Summerford v. Board of Retirement, supra.*, (1977) 72 Cal.App.3d 128 [139 Cal.Rptr. 814] at p. 132.)

In making this argument, claimant overlooks the nature of administrative agencies. An administrative agency may have executive, administrative, investigative, legislative or adjudicative powers. They normally have and exercise some combination or all of these powers. (2 Cal.Jur.3d, Administrative Law, § 41, p. 260.) [Now 2 Cal.Jur.3d (2007) Administrative Law, § 165. Types of power agency may exercise.]

The association's board of retirement is an excellent example of the hybrid character of administrative agencies. The board exercises executive, administrative, investigative, legislative and adjudicatory powers. It administers the retirement system, promulgates rules and regulations, determines member contributions, investigates claims and makes determinations concerning the eligibility of members for retirement benefits. It is both the "forum" and a "party" in proceedings for disability retirement which it conducts. (*Preciado*, pp. 788-789.)

Associations' comment

While a nonintegrated retirement system will not be bound by the decision made against the employer, the collateral estoppel aspect of *res judicata* will operate to estop the applicant from relitigating against the Board of Retirement an issue identical and

common to both the workers' compensation case and the retirement case, following a decision by the workers' compensation appeals board that is adverse to the applicant.

The principle of "judicial estoppel" may also operate to bind the applicant to facts the applicant claimed, established, or agreed to in the workers' compensation case. (See generally 7 Witkin, Cal. Procedure (5th ed. 2008-2011) Judgment, § 339, Nature of Doctrine [of Judicial Estoppel].) For instance, if the employee agrees that his or her permanent disability is as described by a particular physician in a medical report, the employee may be "judicially estopped" from asserting in a disability retirement case that the disability is more severe.

As explained by the court in *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171 [70 Cal.Rptr.2d 96]:

“Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.” [Citation.] “This obviously contemplates something other than the permissible practice . . . of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached.” [Citations.] Consequently, judicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings. [Citation omitted.]

“ ‘The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . . ‘The policies underlying preclusion of inconsistent positions are ‘general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.’ ” Judicial estoppel is “intended to protect against a litigant playing ‘fast and loose with the courts.’ ” ” [Citation.] “It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.” [Citation.]” (*Jackson*, p. 181.)

. . . .

In accordance with the purpose of judicial estoppel, we conclude that the doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.] (*Jackson*., p. 184.)

Where an employee stipulates in a workers' compensation case that he or she is precluded from work involving emotional distress, the employee may be *judicially estopped* from asserting in a claim filed under the Americans with Disabilities Act that he or she is able to perform the essential duties of a position that inherently involves emotional stress. (*Jackson v. County of Los Angeles*, *supra*; see the discussion in 2 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 35.102. Cf. *Thomas v. Gordon* (2000) 85 Cal.App.4th 113 [102 Cal.Rptr. 28] [plaintiff judicially estopped in spite of the fact that there was no proof of third requirement of success in prior litigation where conduct in prior action was an egregious manipulation of the legal system – failure to disclose interest in corporations during bankruptcy proceeding]; *New Hampshire v. Maine* (2001) 532 U.S. 742 [149 L.Ed.2d 968] [“success” in the prior action means “the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled[.]’” (*Id.*, at 750.)

When collateral estoppel is used as a defense, as opposed to an element of a claim, it is the respondent’s burden to prove that the estoppel applies, though it is not necessary to plead the affirmative defense. (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 88-89 [38 Cal.Rptr.3d 528].)

End comment.

2. A city with an integrated retirement program may be bound in the retirement case by determinations of fact made in the workers' compensation case.

Dakins v. Board of Pension Commissioners (1982) 134 Cal.App.3d 374, 386-387 [184 Cal.Rptr. 576]:

Thirdly, the parties to the WCAB proceedings and the Board proceedings were identical. The City was a party to the WCAB proceedings. The Board administers the City's department of pensions and thus acts as the agent for the City. As the City was bound by the WCAB proceedings, the Board in its representative capacity was similarly bound. The facts of the instant case are distinguishable from *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128 [139 Cal.Rptr. 814]. In *Summerford*, the Santa Barbara County Employees' Retirement Association (retirement board) was formed pursuant to the 1937 County Employees' Retirement Law, Government Code section 31450[et seq.]. The county employees' retirement associations created under the 1937 act are organizations totally distinct from the county. (*Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397 [18 Cal.Rptr. 256].) Thus, in *Summerford*, while the county was represented in WCAB proceedings, the retirement board was not. Therefore, the findings of the WCAB regarding the claimant's injury were not binding on the retirement board.

Associations' comment:

The Court of Appeal in *Dakins* distinguished the integrated City of Los Angeles pension system from the County of Santa Barbara's nonintegrated system formed under the County Employees Retirement Law of 1937. In *Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54 [154 Cal.Rptr. 37], the City of San Diego retirement system was treated as the city itself and found to be bound by a stipulation the city made in the member's workers' compensation case. (*Id.*, pp. 57-58.) The court relied on the Supreme Court's decision in a City of Oakland case, *French v. Rishell* (1953) 40 Cal.2d 477 [254 P.2d 26]. But in *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563 [262 Cal.Rptr. 566], the appellate court ruled that the City's pension system was a separate entity, similar to the treatment given to pension plans formed under the County Employees Retirement Law of 1937. The court found the factors identified by the Supreme Court in *Traub v. Board of Retirement* (1983), *supra*, 34 Cal.3d 793, at 797-799 [195 Cal.Rptr. 681, 670 P.2d 335] that distinguish a county retirement association from the county itself to also distinguish the city pension system from the city itself. On that basis, among others, the court ruled that the city pension system was not collaterally estopped by a WCAB decision against the City.

Bianchi v. City of San Diego, supra, 214 Cal.App.3d, 566-567:

Under limited circumstances, a WCAB award to an employee may collaterally estop the employee's retirement board from relitigating issues previously decided in the WCAB proceeding. [Citation.] However, the courts have more frequently declined to give WCAB ruling collateral estoppel effect in subsequent retirement board proceedings, either because of a lack of identity of parties [citation] or because of differences between the nature of the issues considered during a workers' compensation proceeding and the nature of issues considered by a retirement board proceeding. [Citation.]

In *Geoghegan v. Retirement Board* (1990) 222 Cal.App.3d 1525, 1531-1534 [272 Cal.Rptr. 419], the Board of Retirement of the City and County of San Francisco was found to hold a similar independent standing and was not collaterally estopped to contest a stipulation in the workers' compensation proceeding that a firefighter's heart trouble was work-related. Among the factors that distinguished the retirement board from the city and county itself was the fact that the membership of the retirement association was made up of employees of entities other than the city and county, including a school district, a community college district, a parking authority, and the superior court.

3. In the case of a nonintegrated system, such as one operating under the CERL of 1937, a board of retirement is not bound by determinations of fact made by the Worker' Compensation Appeals Board against the county or by stipulations of fact made by the county in that case.

a) Stipulations With Request For Award

Where a self-insured county or its workers' compensation carrier enters into stipulations of fact with a request that the WCAB issue an award based on those stipulations:

(1) Disability

Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 697 [133 Cal.Rptr. 154]:

The fact that the county through its compensation carrier stipulated to a 33 percent disability rating before the Workmen's Compensation Appeals Board does not bind the retirement board in these proceedings with respect to the issue of the deputy's capacity to perform his duties. (See *Grant v. Board of Retirement* (1967) 253 Cal.App.2d 1020, 1021 [61 Cal.Rptr. 791]; and *Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 402-406 [18 Cal.Rptr. 256].)

(2) Service-connection

McCoy v. Board of Retirement (1986), *supra*, 183 Cal.App.3d 1044, 1048, footnote 2 [228 Cal.Rptr. 567]:

[S]tipulations and orders in . . . WCAB action[s] have no collateral estoppel or res judicata effect [in the retirement hearing] because the requisite privity between the County, against which the workers' compensation award is made, and the Retirement Board, is lacking.

See also *Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 797-799 [670 P.2d 335; 195 Cal.Rptr. 681].

McCoy v. Board of Retirement (1986), *supra*, 183 Cal.App.3d 1044, 1055 [228 Cal.Rptr. 567]:

We conclude that the County's stipulations as to industrial causation constituted relevant evidence of the sort on which responsible persons are accustomed to rely in the conduct of serious affairs. ([LACERA's *Procedures for Disability Retirement Hearings*,] Rule 10(c); [Gov. Code] § 11513, subd. (c).) The stipulations were properly subject to the trial court's independent review of the evidence. While the stipulations were not binding against the Board herein (*Traub v. Board of Retirement, supra.*, 34 Cal.3d at pp. 798-799), and while they may not be entitled to great weight given that the County's reasons for conceding industrial causation remain a mystery, they nevertheless possess a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see rule 10(c); § 11513, subd. (c).)

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 736 [110 Cal.Rptr.2d 565]:

Nor is the Board obligated to accept a stipulation between employer and employee that a disability is service connected. The Board is responsible for administering the retirement fund. The Board must, therefore, make its own determination on the factual question of whether a disability is service connected.

(§§31725.7, 31725.8; *Masters v. San Bernardino County Employees Retirement Assn.*, *supra*, [(1995)] 32 Cal.App.4th 30, 45 [37 Cal.Rptr.2d 860].)

b) Findings and Award

Where the county or its insurance carrier litigate the issues before the Workers' Compensation Appeals Board and the Appeals Board issues its decision:

Flaherty v. Board of Retirement, *supra*, 198 Cal.App.2d, 405-406:

The association had no standing to appear in the proceeding before the Industrial Accident Commission and there contest the claim that there was a causal relation between Captain Flaherty's participation in the volleyball game and his permanent disability. In rejecting a similar contention that the doctrine of res judicata was applicable with respect to an award in a proceeding to obtain workmen's compensation, it was said in *Mutual Benefit Health & Accident Assn. v. Neale*, (1937) 43 Ariz. 532 [33 P.2d 604], at page 610 [33 P.2d]: "As a matter of common law, it has long been the rule that a judgment in personam against any person who is a stranger to the cause, is evidence only of the fact of its own rendition, and may not be introduced to establish the facts upon which it has been rendered. [Citations.] And the test of whether a person is a stranger is whether he was interested in the subject-matter of the proceeding, with the right to make defense, to adduce testimony, to cross-examine the witness on the opposite side, to control in some degree the proceeding, and to appeal from the judgment. [Citations.]" No basis exists in the present case for a claim that the findings of fact of the commission are binding upon the association under the doctrine of res judicata. (See *Bernhard v. Bank of America*, (1942) 19 Cal.2d 807, 811 [122 P.2d 892]; cf. *Dillard v. McKnight*, (1949) 34 Cal.2d 209, 214-215 [209 P.2d 387, 11 A.L.R.2d 835].

Summerford v. Board of Retirement (1977) 72 Cal.App.3d 128, 132 [139 Cal.Rptr. 814]:

While the county was represented in the WCAB proceeding, the Retirement Board was not. Therefore, findings of the WCAB regarding the claimant's injury are not binding upon the Retirement Board. The Retirement Board has a 'valid, independent right to determine whether petitioner suffered injury in the course and within the scope of his employment.' [Citations.]

Preciado v. County of Ventura, et al. (1982) 143 Cal.App.3d 783 [192 Cal.Rptr. 253]:

Three requirements must be met before collateral estoppel will be applied: (1) the issue decided in the prior adjudication must be identical with the one presented in the action in question; (2) a final judgment on the merits must have been reached in the prior proceeding; (3) the party against whom the plea is now asserted must have been a party or in privity with a party to the earlier action. [Citations.] (*Preciado*, p. 787.)

....

An association formed under the County Employees' Retirement Act of 1937 is separate and distinct from the county." [Citations.] *Preciado*, p. 788.)

....

The retirement board was a party to the retirement proceedings but was not represented in the WCAB proceeding. Accordingly, the requirement of identity of parties has not been met and the doctrine of collateral estoppel does not apply. (*Preciado*, p. 789.)

c) Findings and Order

Where the county or its insurance carrier litigate the issues and the Workers' Compensation Appeals Board issues a decision or decisions on issues of fact adverse to the applicant:

Bernhard v. Bank of America (1942) 19 Cal.2d 807, 811-812 [122 P.2d 892]:

The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. (*Coca Cola Co. v. Pepsi Cola Co.*, *supra* [(1934) 36 Del. 124 [172 Atl. 260]]. See cases cited in 24 Am. & Eng. Encyc. (2d ed) 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. (*Ibid.*) There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

d) Compromise and Release

The county or its insurance carrier and the applicant settle the applicant's claim for compensation for a certain sum of money going to the applicant and, in exchange, the applicant releases the county and/or its carrier from liability for certain identified benefits. Such a settlement may or may not contain admissions of, or stipulations to, facts that might bind the applicant by judicial estoppel or collateral estoppel.

Until the adoption of Optical Character Recognition (OCR) forms compatible with the Division of Workers' Compensation's Electronic Adjudication Management System (EAMS), on a transitional basis between August 25, 2008 and December 12, 2008, and on a mandatory basis thereafter, the usual settlement agreement was formulated on one of three approved forms [DIA Form 15 (Compromise and Release), DIA Form 16 (Compromise and Release (Dependency Claim)), DIA Form 17 (Third Party Compromise and Release)] which set forth what the applicant claimed occurred rather than an agreement as to what did occur. Regulations requiring the use of OCR forms became effective November 17, 2008. (Cal. Code Regs., tit. 8, §§ 10215-10236.) The three OCR forms used for compromise and releases are DWC-CA form 10214(c)

(Compromise and Release (Rev. 11/17/08)); DWC-CA form 10214(d) (Compromise and Release (Dependency Claim) (Rev. 11/24/08)); DWC-CA form 10214(e) (Compromise and Release (Third Party) (Rev. 11/17/2008)). The forms may be accessed at www.dir.ca.gov/dwc/forms.html [remove all spaces from address line]. See discussions in the following treatises: 2 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) Chapter 29, Compromise and Release Agreements; 2 Herlick, California Workers' Compensation Law, 6th Ed. (December 2010, Release No. 10) Chapter 18, Settlements and Case Evaluation.

Labor Code section 5001:

Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee.

Title 8, California Code of Regulations section 10870, Rules of Practice and Procedure of the Workers Compensation Appeals Board:

Approval of Compromise and Release

Agreements that provide for the payment of less than the full amount of compensation due or to become due and undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interest of the parties. No agreement shall relieve an employer of liability for vocational rehabilitation benefits unless the Workers' Compensation Appeals Board makes a finding that there is a good faith issue which, if resolved against the injured employee, would defeat the employee's right to all workers' compensation benefits.

2 Herlick, California Workers' Compensation Law, *supra*, § 18.7:

Compensation is the measure of the responsibility of the employer or insurance carrier, therefore, a settlement will not be approved unless it is deemed adequate under the circumstances.

Associations' comment

Whether the issue to be settled is the extent of benefits involved or whether there is a legal issue involving liability, the starting point in determining adequacy is an estimation of the benefits which might be awarded. Because of a conflict in medical evidence, a case may present a range of benefit possibilities. These factors are then measured according to the strength of the record on liability to determine if the settlement is adequate. The statements by the parties supporting approval of the compromise and release may be pertinent to issues in the disability retirement case.

End comment.

K. Interpretation of Medical Reports Prepared for WCAB Proceedings

Written medical reports prepared by physicians evaluating applicants for permanent disability in the workers' compensation arena are focused on the determination of whether there is a work-related injury and, if so, establishing whether or not a permanent disability caused by the injury exists. If there is a work-related permanent disability, an evaluating physician will describe disability in terms that will be translated into a percentage of disability. That percentage, in turn, is translated into an amount of permanent disability indemnity. Medical reports prepared for workers' compensation cases will also address a number of other issues, such as the need for continuing medical care, whether the injured worker's medical condition has reached a stage of maximum medical improvement, whether the disability is permanent and stationary, and the roll of contributing factors other than the work-related injury.

Medical reports from the workers' compensation system may be valuable sources of information in disability retirement cases on the issues of service-connection, the relationship between injury or illness and whether the member is substantially incapacitated for his or her usual duties, even though the reports do not directly target those issues.

As this edition of the Resource is being prepared, the workers' compensation system is very focused on technical mechanics of the way permanent disability is evaluated and how that evaluation produces a monetary award. Those technical issues have virtually no relevance to the task of the boards of retirement and the associations' staff in the assessment of the capacity of the member applicant to substantially perform his or her usual duties. However, since medical reports from the workers' compensation arena and the testimony of medical experts who examined the member for workers' compensation purposes find their way into the pool of data that is considered in disability retirement matters, understanding what physicians mean when they use workers' compensation terminology is important for those dealing with disability retirement issues. Therefore, here we discuss the terminology that is used in workers' compensation medical reports and, to a limited extent, we discuss the workers' compensation permanent disability rating mechanism so that the information trustees and staff members see in documents prepared for workers' compensation purposes has a context.

As a result of legislation enacted in 2004, the protocols for the evaluation of permanent disability in workers' compensation cases have undergone substantial changes and the language used to describe disability in workers' compensation matters has changed. Much of the terminology that was applicable to injuries sustained prior to January 1, 2005, and which we will continue to see for some time, has been abandoned, and the permanent disability assessment protocols for injuries sustained on or after January 1, 2005 have their own terminology.

1. For injuries prior to January 1, 2005

The following rules apply to injuries sustained prior to January 1, 2005 when, before January 1, 2005 there was a comprehensive medical-legal report prepared, a report from a treating physician indicating the existence of permanent disability, or when the employer was required to provide the notice required by Labor Code section 4061 to the injured worker (notice of employer's position on the existence or non-existence of permanent disability). (Lab. Code, § 4660, subd. (d).)

a) Methods of Measurement

Physicians reporting in workers' compensation proceedings dealing with injuries sustained before January 1, 2005 were directed to describe physical impairment and psychiatric disability in accordance protocols established by the Department of Industrial Relations, Division of Workers' Compensation.

Title 8, California Code of Regulations, Chapter 4.5, Division of Workers' Compensation, Subchapter 1, Administrative Director - Administrative Rules:

Section 9725. Method of Measurement.

The method of measuring physical elements of a disability should follow the Report of the Joint Committee of the California Medical Association and Industrial Accident Commission, as contained in "Evaluation of Industrial Disability" edited by Packard Thurber, Second Edition, Oxford University Press, New York, 1960. This section shall not apply to any permanent disability evaluations performed pursuant to the permanent disability rating schedule adopted on or after January 1, 2005.

Section 9726. Method of Measurement (Psychiatric).

The method of measuring the psychiatric elements of a disability shall follow the Report of the Subcommittee on Permanent Psychiatric Disability to the Medical Advisory Committee of the California Division of Industrial Accidents, entitled "The Evaluation of Permanent Psychiatric Disability," (hereinafter referred to as the "Psychiatric Protocols") as adopted, forwarded for adoption on July 10, 1987, and subsequent amendments and/or revisions thereto adopted after a public hearing. This section shall not apply to any permanent disability evaluations performed pursuant to the permanent disability rating schedule adopted on or after January 1, 2005.

Note: The Report (which contains these Protocols) of the Subcommittee on Permanent Psychiatric Disability, as adopted, does not appear as a printed part of the Administrative Director's Regulations (8 California Code of Regulations, Section 9726); copies will be available through the Medical Director of the Division of Industrial Accidents.

Section 9726 is somewhat duplicative of Title 8, California Code of Regulations section 43, subdivision (a), quoted below. The two sections seem to accomplish the same thing, one regulating the "method of measurement" and the other regulating the method

of evaluation. Each relies on the Psychiatric Protocols. For a copy of the most recent revision of the Psychiatric Protocols, go to www.dir.ca.gov/dwc/medicalunit/Psychiatric.pdf [delete spaces in the address line]. In accordance with Labor Code section 3208.3 by which the Legislature adopted for workers' compensation psychiatric claims the use of the American Psychiatric Association's Diagnostic and Statistical Manual, Third Edition, Revised (DSM-III-R) and other diagnostic manuals generally approved and accepted nationally by psychiatrists, the Protocols require that the applicant be diagnosed according the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) including all subsequent revisions and/or editions, which would refer to the text revision, DSM-IV-TR, which is currently in use. (See also Lab. Code, §§ 139.2, subd. (j)(4), requiring the Administrative Director of the Division of Workers' Compensation to adopt regulations for psychiatric evaluations, including a requirement that diagnosis be expressed in terms of the Diagnostic and Statistical Manual or other manual generally approved and accepted nationally by psychiatrists.

b) Industrial Medical Council evaluation methodology for certain medical conditions

The Industrial Medical Council examined and appointed physicians to be qualified medical evaluators in workers' compensation claims and regulated the evaluation process.

The Industrial Medical Council, in Title 8, California Code of Regulations sections 43 through 47, provided "guidelines . . . to serve as standards to be used by evaluating physician(s) when performing medical-legal evaluations for specific types of injuries. Those guidelines deal with the following kinds of disability: psychiatric, pulmonary, cardiac (including hypertension), foot and ankle, neuromusculoskeletal, and immunologic. The guidelines may be accessed at www.dir.ca.gov/IMC/guidelines.html [delete spaces in address line]. The Industrial Medical Council has been eliminated and its functions transferred to the Administrative Director of the Division of Workers' Compensation, Department of Industrial Relations.

Title 8, California Code of Regulations section 43, Method of Evaluation of Psychiatric Disability, Provides as follows:

(a) For all claims arising before January 1, 2005, not subject to section 43(b), the method of measuring the psychiatric elements of a disability shall be as set forth below in the "Psychiatric Protocols" as adopted by the Industrial Medical Council on July 16, 1992, and amended on March 18 and October 25, 1993. The full text of this document is available at no charge on the web at www.dir.ca.gov/IMC/guidelines.html [delete spaces in address line] or by calling the Medical Unit at 1-800-794-6900.

(b) For all claims having dates of injury on or after January 1, 2005, and for those compensable claims arising before January 1, 2005, where there has been either no comprehensive medical-legal report or no report by a treating physician

indicating the existence of permanent disability, or when the claims administrator, or if none the employer, is not required to provide the notice required by section 4061 to the injured worker, the method of evaluating the psychiatric elements of impairment shall include describing the employee's symptoms, social, occupational and, if relevant, school functioning, and describing the rationale for the evaluator's assignment to a level of impairment as published in the Permanent Disability Rating Schedule adopted by the Administrative Director on or after January 2005 pursuant to section 9805 of Title 8 of the California Code of Regulations.

c) Definitions of Terms Used to Describe Subjective Complaints

With regard to injuries sustained prior to January 1, 2005, with certain exceptions, physicians reporting in workers compensation proceedings described subjective disability in accordance with a certain protocol established by the Department of Industrial Relations, Division of Workers' Compensation in Title 8, California Code of Regulations section 9727, quoted below. The injuries excepted from this rule are those sustained prior to January 1, 2005 when there was by January 1, 2005 either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer was not required to provide the notice required by Labor Code section 4061 to the injured worker. (Lab. Code, § 4660.)

Title 8, California Code of Regulations section 9727, Subjective Disability, provides,.

Subjective Disability should be identified by:

A description of the activity which produces the disability.

The duration of the disability.

The activities which are precluded and those which can be performed with the disability.

The means necessary for relief.

The terms shown below are presumed to mean the following:

A severe pain would preclude the activity precipitating the pain.

A moderate pain could be tolerated, but would cause marked handicap in the performance of the activity precipitating the pain.

A slight pain could be tolerated, but would cause some handicap in the performance of the activity precipitating the pain.

A minimal (mild) pain would constitute an annoyance, but causing no handicap in the performance of the particular activity, would be considered as nonratable permanent disability.

This section shall not apply to any permanent disability evaluations performed pursuant to the permanent disability rating schedule adopted on or after January 1, 2005.

Associations' comment

Irrespective of the fact that Section 9727 does not apply to workers' compensation evaluations performed after January 1, 2005, with narrow exceptions, and never applied to disability retirement cases arising under the CERL of 1937, it provides an excellent map for questions, on direct or cross-examination, designed to explore the nature of the applicant's subjective complaints so that those other than the applicant can gain an understanding of what the applicant is experiencing and what impact pain has on the applicant's activity level.

End comment.

d) Guidelines for Work Capacity (Work Restriction Categories)

The descriptive categories typically used for work restrictions applicable to disabilities of the pulmonary system, heart, abdomen, spine and lower extremities were set forth in the Guidelines for Work Capacity listed and defined in former DIA Form 302, the Schedule For Rating Permanent Disabilities (July 1978), amendments to pages 5 and 13.

The next schedule, applicable to injuries sustained on or after April 1, 1997 and through December 2004, the Schedule for Rating Permanent Disabilities (April 1997), e.g., p. 2-14, , preserved the substance of the former guidelines. The new guidelines described levels of disability that were assigned standard percentage ratings which then may be adjusted up or down depending on the age and occupation of the injured employee. Physicians who described disabilities could use the descriptive categories when they were applicable.

CERL of 1937 staff, trustees, and referees will see the categories used frequently in written reports prepared for workers' compensation proceedings dealing with pre-January 1, 2005 injuries and will hear or see the terms used in the testimony of a physician who is familiar with the workers' compensation system. The Guidelines for Work Capacity from the April 1997 Schedule are as follows:

Disability Precluding Very Heavy Lifting 10%

contemplates the individual has lost approximately one-quarter of his pre-injury capacity for lifting.

(A statement 'inability to lift 50 pounds' is not meaningful. The total lifting effort, including weight, distance, endurance, frequency, body position and similar factors should be considered with reference to the particular individual.)

Disability Precluding Very Heavy Work 15%

contemplates the individual has lost approximately one-quarter of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling and climbing or other activities involving comparable physical effort.

Disability Precluding Heavy Lifting 20%

contemplates the individual has lost approximately half of his pre-injury capacity for lifting.

(See statement regarding lifting under "Very Heavy Lifting" above.)

Disability Precluding Heavy Lifting, Repeated Bending 25%

and Stooping

contemplates the individual has lost approximately half of his pre-injury capacity for lifting, bending and stooping.

Disability Precluding Heavy Work 30%

contemplates the individual has lost approximately half of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, and climbing or other activities involving comparable physical effort.

Disability Precluding Substantial Work 40%

contemplates the individual has lost approximately 75% of pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, and climbing or other activities involving comparable physical effort. [This guideline applies to injuries sustained on or after 4/1/97.]

Disability Resulting in Limitation to Light Work 50%

contemplates the individual can do work in a standing or walking position, with a minimum of demand for physical effort.

Disability Resulting in Limitation to Semi-Sedentary Work 60%

contemplates the individual can do work approximately one half the time in a sitting position, and approximately one half the time in a standing or walking position, with a minimum of demands for physical effort whether standing, walking or sitting.

Disability Resulting in Limitation to Sedentary Work 70%

contemplates the individual can do work predominantly in a sitting position at a bench, desk or table with a minimum of demands for physical effort and with some degree of walking and standing being permitted.

2. Injuries on or after January 1, 2005

The protocol for determining permanent disability under the workers' compensation law was substantially amended for injuries sustained on or after January 1, 2005 and for certain injuries sustained before that date. Terminology used by physicians who write reports for workers' compensation purposes also has changed.

Whether AMA Guides-compliant reports will provide more or less valuable information for those involved in the assessment of a member's capacity to substantially perform his or her usual duties under the CERL of 1937 remains to be seen. Since the focus is on activities of daily living and not on work duties themselves, it does not look good.

The new protocols apply to injuries sustained on or after January 1, 2005 and to those sustained prior to January 1, 2005 when there was by January 1, 2005 either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer was not required to provide the injured worker with the notice of the employer's position on the existence of non-existence of permanent disability pursuant to Labor Code Section 4061. (Lab. Code, § 4660.)

Title 8, California Code of Regulations, section 9805, providing for the Schedule for Rating Permanent Disabilities, Adoption, Amendment, provides,

The method for the determination of percentages of permanent disability is set forth in the Schedule for Rating Permanent Disabilities, which has been adopted by the Administrative Director effective January 1, 2005, and which is hereby incorporated by reference in its entirety as though it were set forth below. The schedule adopts and incorporates the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment 5th Edition. The schedule shall be effective for dates of injury on or after January 1, 2005 and for dates of injury prior to January 1, 2005, in accordance with subdivision (d) of Labor Code section 4660, and it shall be amended at least once every five years.

The schedule may be downloaded from the Division of Workers' Compensation website at <http://www.dir.ca.gov/dwc/dwcrep.htm> [delete spaces from address line].

Labor Code section 4660, subdivision (b)(1) provides that the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." While the AMA has published a sixth edition of the Guides, the fifth edition must continue to be used until the Legislature amends Section 4660.

a) The new focus in the determination of the extent of permanent impairment under the workers' compensation law – diminished future earning capacity.

Prior to April 19, 2004 Labor Code section 4660, subdivision (a), provided,

In determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.

Specific percentage ratings were assigned to physical and mental disabilities, including the loss of body parts or reduced function of body parts, subjective complaints, and activity restrictions. The impact of the disabilities on the injured worker's ability to compete in the open labor market was further refined by adjustments for the worker's occupation and age at the time of injury. (See 2 Hanna, California Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed. (April 2011, Release No. 73) § 32.01[3] (California Rating System) [a] (Schedule for Rating Permanent Disabilities) [i] (Background); Rassp, The Lawyer's Guide to AMA Guides and California Workers' Compensation, § 2.02.)

Effective April 19, 2004, Labor Code section 4660 was amended so as to provide, in pertinent part, as follows:

(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

(b)

(1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies. . . .

Thus, the focus of the assessment of permanent disability has been shifted from the diminished capacity of the injured worker to compete in the open labor market to the worker's diminished future earning capacity. The adjustment for future earning capacity is supposed to be refined by "empirical data and findings" of the true impact of each type of injury on an injured worker's capacity to earn. (Cal. Code Regs., tit. 8, § 9805.1.)

In addition, the foundation of the permanent disability determination has been changed from the Schedule for Rating Permanent Disabilities that had been used, with various amendments over the years, since 1914, to a combination of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("Guides"), from which a whole person impairment rating is derived, and a new Schedule for Rating Permanent Disabilities (January 2005) applicable to injuries sustained on or after January 1, 2005. The January 1, 2005 Schedule governs the adjustments of the whole person impairment rating for the DFEC (diminished future earning capacity) and the injured worker's occupation and age on the date of injury.

b) The extent of permanent impairment is initially determined in accordance with the AMA's Guides to the Evaluation of Permanent Impairment and then is further adjusted in accordance with California's Schedule for Rating Permanent Disabilities

The Guides, with some notable exceptions, attempts to assess "the whole person impairment" (WPI) on the basis of objective measures of organ dysfunction and the impact of the impairment on activities of daily living (ADL), excluding work activities. (Guides, ch. 1, pp. 4 and 13; ch. 18, pp. 565, *et seq.*)

The term "activities of daily living" includes the following:

Activity	Example
Self-care, personal hygiene	Urinating, defecating, brushing teeth combing hair, bathing, dressing oneself, eating
Communication	Writing, typing, seeing, hearing, speaking
Physical activity	Standing, sitting, reclining, walking, climbing stairs
Sensory function	Hearing, seeing, tactile feeling, tasting, smelling
Nonspecialized hand activities	Grasping, lifting, tactile discrimination
Travel	Riding, driving, flying
Sexual function	Orgasm, ejaculation, lubrication, erection
Sleep	Restful, nocturnal sleep pattern

(Guides, p. 4, Table 1-2; Glossary, p. 599, Table 1-2. The table on page 599 has a patent typographical error regarding brushing teeth. The reproduction of the table, above is as corrected.)

The whole person impairment rating determined in accordance with the Guides is then adjusted in accordance with the Schedule for Rating Permanent Disabilities (January 2005) which accounts for what the Guides' ADL and whole person impairment does not -- work activities. The whole person impairment rating is first adjusted for the FEC [also referred to as "DFEC" (diminished future earning capacity)], a factor which will increase the whole person impairment rating by between 10% and 40%, depending on the empirical data and findings that aggregate the average percentage of long-term loss of

income resulting from each type of injury for similarly situated employees. The resulting percentage is then adjusted, up or down, for the injured worker's occupation and age at the time of injury to account for the impact of those factors on the injured worker's future earning capacity.

The Guides address 14 bodily systems in 14 separate chapters, one chapter is devoted to mental and behavioral disorders, disorders that are sometimes referred to collectively in the Guides as the "conventional" rating systems or the "body and organ rating systems," and one chapter is devoted to the assessment of impairment due to pain. Each chapter states the principles of assessment applicable to the body part or organ and discusses various subsystems of each body or organ system. For example, in the chapter devoted to the endocrine system, various subsystems including the thyroid, adrenal cortex and pancreas, among others, are discussed. A physician evaluating an injured worker is guided on what diagnostic tests and examination methods are required for the part of the body being assessed and various instructions and tables guide the physician in developing a whole person impairment rating. The physician supports his assessment of the WPI, in part, by describing the impact of the employee's impairment on the activities of daily living, excluding employment.

The validity of the physician's conclusions as to the level of the injured worker's whole person impairment, whether the physician's opinion constitutes substantial evidence, and, perhaps, whether the physician's report is admissible at all, will depend on whether the physician adheres to the protocols set forth in the Guides. (Lab. Code, §§ 4660, subd. (b)(1) and 4628) and Title 8, California Code of Regulations section 10606, which lists the elements that each medical report assessing permanent disability must contain. See Rassp, *The Lawyer's Guide to AMA Guides and California Workers' Compensation*, §§ 4.03-4.04; Babitsky and Mangraviti, *Understanding the AMA Guides in Workers' Compensation*, chpt. 1, Historical Development, Failure to Follow the AMA Guides.) Therefore, for one to determine whether the conclusions expressed by a physician are supported by findings in compliance with the Guides requires familiarity with the Guides as well as the requirements for medical reports contained in California's Labor Code and Code of Regulations.

The physician's opinions on the nature and extent of disability and work limitations, if any, continue to be requirements of any written evaluation of permanent disability. (Cal. Code Regs., tit. 8, § 10606.) Section 10606 provides as follows:

§ 10606. Physicians' Reports as Evidence

The Workers' Compensation Appeals Board favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a trial except upon a showing of good cause. A continuance may be granted for rebuttal testimony subject to Labor Code Section 5502.5.

These reports should include where applicable:

- (a) the date of the examination;
- (b) the history of the injury;
- (c) the patient's complaints;
- (d) a listing of all information received from the parties reviewed in preparation of the report or relied upon for the formulation of the physician's opinion;
- (e) the patient's medical history, including injuries and conditions, and residuals thereof, if any;
- (f) findings on examination;
- (g) a diagnosis;
- (h) opinion as to the nature, extent, and duration of disability and work limitations, if any;
- (i) cause of the disability;
- (j) treatment indicated;
- (k) opinion as to whether or not permanent disability has resulted from the injury and whether or not it is stationary. If stationary, a description of the disability with a complete evaluation;
- (l) apportionment of disability, if any;
- (m) a determination of the percent of the total causation resulting from actual events of employment, if the injury is alleged to be a psychiatric injury;
- (n) the reasons for the opinion; and,
- (o) the signature of the physician.

Failure to comply with (a) through (o) will be considered in weighing the evidence.

In death cases, the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony.

All medical-legal reports shall comply with the provisions of Labor Code section 4628. Except as otherwise provided by the Labor Code, including Labor Code Sections 4628 and 5703, and the rules of practice and procedure of the Appeals Board, failure to comply with the requirements of this section will not make the report inadmissible but will be considered in weighing the evidence.

The AMA Guides' WPI is subject to rebuttal evidence showing that the injured worker's impairment is greater than represented by the impairment of ADL.

For example, an injured worker with an arm injury who can brush his or her teeth (a listed ADL function in the *Guides*) may have permanent and significant impairment of function in performing keyboarding for six or more hours a day, five days a week. Similarly[,] a construction worker who has severe post[-]traumatic osteoarthritis of the knee joint may not have any impairment of ADL function[,] but permanently cannot work on a construction site that requires prolonged standing, walking and heavy lifting. (Rassp, How Does Almaraz-Guzman II Affect the Up to 3% Add-on for Pain?, State Bar Workers' Compensation Section February (2010) E-News.)

In *Almaraz v. Environmental Recovery Services (aka Enviroserve), State Compensation Insurance Fund, and Guzman v. Milpitas Unified School District, PSI (2009) (Appeals Board En Banc) 74 Cal.Comp.Cases 1084* (referred to as "Almaraz-Guzman II"), the Workers' Compensation Appeals Board clarified and modified its previous en banc decisions in same cases (74 Cal.Comp.Cases 201 (Appeals Board En Banc) (February 3, 2009); 74 Cal.Comp.Cases 470 (Appeals Board En Banc Orders Granting Reconsideration and setting briefing schedule) (April 6, 2009)). In its final opinion, the WCAB ruled as follows:

- (1) The AMA Guides portion of the 2005 Schedule for Rating Permanent Disabilities was rebuttable;
- (2) The AMA Guides portion of 2005 Schedule could be rebutted by showing that the WPI rating based on AMA Guides would result in permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of employee's permanent disability;
- (3) When the WPI rating based on AMA Guides had been rebutted, the WCAB could make impairment determination that considered medical opinions that were not based, or were only partially based, on the AMA Guides;
- (4) The language of Labor Code section 4660, subdivision (c), which provides that "the schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by 2005 Schedule is rebuttable;
- (5) The burden of rebutting the scheduled permanent disability rating rests with party disputing that rating;
- (6) One method of rebutting a scheduled permanent disability rating is to successfully challenge one of component elements of that rating, such as the injured employee's whole person impairment under AMA Guides;
- (7) When determining injured employee's whole person impairment, it is not permissible to go outside four corners of the AMA Guides, but the physician may utilize any chapter,

table, or method in AMA Guides that most accurately reflects the injured employee's impairment;

(8) The WCAB rejects any "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability";

(9) It is impermissible for a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve desired result, e.g., whole person impairment that would result in permanent disability rating based directly or indirectly on any Schedule in effect prior to 2005;

(10) A physician's opinion regarding an injured employee's whole person impairment under Guides must constitute substantial evidence, the physician must set forth facts and reasoning that justify the opinion, and a physician's whole person impairment opinion that is not based on AMA Guides does not constitute substantial evidence.

Associations' comment

The *Almaraz-Guzman II* decision may or may not be an indicator of some WCAB resistance to the Legislature's intent that awards of permanent disability compensation be based on the AMA Guides' protocols. However, by the WCAB's invitation to the parties to rebut the Guides conventional ratings, there is benefit to those involved in the determination of a member's capacity to substantially perform the usual duties of his or her occupation: there should be more information that has practical value to the assessment of the member's capacity—more of a threshing out of the permanent disability issues than there would be if there was strict reliance on the AMA's WPI ratings alone.

c) AMA Guides' description of subjective complaints.

Subjective complaints under the AMA's Guides are, in the usual case, considered in the setting of the whole person impairment for the particular body part pursuant to the "conventional" or "body part and organ" rating system, and the impairment rating will not be raised simply because of the presence of pain.

. . . . The *Guides* impairment ratings currently include allowances for the pain that individuals typically experience when they suffer from various injuries or diseases as articulated in Chapter 1 of the *Guides*: "Physicians recognize the local and distant pain that commonly accompanies many disorders. Impairment ratings in the *Guides* already have accounted for pain. For example, when a cervical spine disorder produces radiating pain down the arm, the arm pain, which is commonly seen, has been accounted for in the cervical spine impairment rating (p. 10). Thus, if an examining physician determines that an individual has pain-related impairment, he or she will have the additional task of deciding whether or not that impairment has already been adequately incorporated into the rating the person received on the basis of other chapters of the *Guides*. (*Guides*, p. 570.)

As pointed out by Mr. Rassp,

The problem with the AMA *Guides* is that everyone assumes that the strict WPI ratings from each chapter, table and method described in the AMA *Guides* includes pain as a component of that rating. However, nowhere in the AMA *Guides* is there any description, measurement or indication of what pain levels exist for each WPI rating and how any *[sic]* scientifically based assumptions of pain levels exist for each WPI rating. (Rassp, How Does Almaraz-Guzman II Affect the Up to 3% Add-on for Pain?, *supra*, State Bar Workers' Compensation Section February (2010) E-News.)

A whole person impairment rating based on the standards used for conventional, body or organ ratings may be increased by up to 3% if the injured worker's pain burden has been increased beyond the pain-related component already incorporated in the conventional whole person impairment rating. (*Guides*, ch. 18, sec. 18.3d, p. 573; Schedule for Rating Permanent Disabilities (January 2005), p. 1-12.) The examining physician may exercise his or her own judgment in increasing the WPI by up to 3% without a formal pain-related impairment assessment, but, according to the *Guides*, before increasing the WPI by up to 3%, the physician is required to perform a formal pain-related impairment assessment in the following situations:

(1) The pain-related impairment is substantially in excess of the conventional whole person impairment rating.

(2) The individual has a well-recognized medical condition characterized by pain in the absence of measurable dysfunction of an organ or body part.

(3) The individual has a syndrome with the following characteristics:

(a) the syndrome is associated with identifiable organ dysfunction that is ratable using the conventional rating system;

(b) the syndrome may be associated with a well-established pain syndrome, but the occurrence or nonoccurrence of the pain syndrome is not predictable so that,

(c) the impairment ratings provided through the conventional rating system do not capture the added burden of illness borne by the individual because of the pain syndrome.

If a formal pain-related impairment assessment is performed, the conventional rating may be increased by up to 3% and the physician must classify the pain as "mild, moderate, moderately severe, or severe. In addition, the examiner should determine whether the pain-related impairment is *ratable* or *unratable*." (*Guides*, p. 573. Italics in the original.)

. . . . An individual's pain-related impairment is considered unratable if (a) his or her behavior during the evaluation raises significant issues of credibility, (b) he or she has clinical findings atypical of a well-accepted medical condition, or (c) he or she is diagnosed with a condition that is vague or controversial. (*Ibid.*)

[Editorial note: That a physician concludes that a complaint of pain is “unratable” does not necessarily mean that the Board of Retirement cannot find that the pain exists and impacts the member’s functioning in the way the member claims. The Guides itself requires the physician to describe the factors of pain, even though the physician concludes that the pain is “unratable.” In this way, the Guides gives proper deference to the fact that a person other than the physician will be making the final determination of the credibility of the complaint of pain. The tier of fact will have the physician’s opinion on the severity of the pain, and give the pain the credence the trier of fact deems that it deserves, notwithstanding its designation as “unratable.” Likewise, that a physician describes the pain and concludes that the pain is “ratable” does not mean that the trier of fact must give the pain credence. The trier of fact may reach a conclusion contrary to the physician’s opinion, although the trier of fact should be able to support the contrary finding by referring to substantial evidence, or articulate the reasons why the physician’s opinion does not amount to substantial evidence.

The pain classifications are described as follows:

[Editorial note: The Guides does not provide a definition of “mild”, “moderate”, “moderate to severe”, or “severe.” The Guides, unfortunately, uses the each term to describe what that term itself means. For those interested in what the terms mean for disability retirement purposes, the Guides description of each of the different classes of subjective complaints is not as precise as the definitions provided in Cal. Code Regs., tit. 8, § 9727, quoted above. By law, Section 9727 is not applicable to injuries sustained on or after January 1, 2005. Therefore, the definitions in that section cannot even be used as fall-back definitions. Interestingly, Dorland’s Medical Dictionary does not contain a medical definition of any of the terms either, though they are often used by physicians.]

Class 1 - Mild

Pain severity, based on a combination of intensity and frequency is mild

Individual’s pain is mildly aggravated by performing ADL [editor’s note: “Activities of Daily Living”]; is able to perform them with few modifications

Individual demonstrates no or only minimal emotional distress in response to his or her pain

Individual is not receiving treatment for pain on a regular basis

Pain-related limitations during physical examination are mild and appear appropriate; few pain behaviors (overt expressions of pain, distress, and suffering, such as moaning, limping, moving in a guarded fashion, facial grimacing) are observed during examination (Guides, p. 575, Table 18-3.)

Class 2 – Moderate

Pain severity, based on a combination of intensity and frequency is moderate

Individual has moderate difficulty managing ADL; must make significant modifications in order to perform them (eg *[sic]*, move to a ground floor apartment, buy a car with an automatic transmission)

Individual demonstrates mild to moderate affective distress in relation to his or her pain

Individual requires ongoing medical monitoring and is taking medication much of the time

Individual demonstrates significant pain-related limitations on physical examination; relatively few pain behaviors appear during the examination, and they are of indeterminate appropriateness (*Ibid.*)

Class 3 – Moderately Severe

Pain is present most of the time and may reach an intensity level of 9-10//10

Individual can perform ADL only with substantial modifications; unable to perform many routine activities (eg *[sic]*, driving a car)

Individual demonstrates moderate to severe affective distress in relation to his or her pain

Individual receives medication to control pain on a maintenance basis

On physical examination, individual demonstrates severe pain-related limitations that may make the examination difficult to perform and results difficult to interpret

A number of pain behaviors are observed during the examination, and they appear to be congruent with organ dysfunction

Class 4 – Severe

Pain is essentially continuous, with intensity reaching 9-10/10 at its worst

Individual must either get help from others for many ADL (eg *[sic]*, preparing food, dressing), modify them drastically (eg *[sic]*, stop bathing) or spend an inordinate amount of time accomplishing them (eg *[sic]*, 2 hours to get out of bed and dressed)

Individual demonstrates severe affective distress in relation to his or her pain and communicates the perception that the pain is completely out of control

Individual is receiving maximal support for his or her pain on an ongoing basis

Physical examination is virtually impossible to perform because individual is intolerant of many examination maneuvers (eg *[sic]*, refuses to ambulate or allow examiner to

palpate symptomatic area); a significant number of pain behaviors are observed during the examination and they appear to be congruent with organ dysfunction (*Ibid.*)

The Guides provides that in cases in which a formal pain-related impairment assessment is performed, if the pain is determined to be Class 1 – mild, the applicable whole person impairment rating is that determined by the conventional method without any additional percentage for pain. If the pain is determined to be in a class from Class 2 through 4, the physician is to determine whether it is ratable. (See the rules for determining if pain is ratable, above.) If the pain is unratable, the whole person impairment rating is the rating determined by the conventional method without any addition for pain, but the physician is to indicate that the individual also has an unratable pain-related impairment. If the pain is ratable, the physician is to indicate the class of the pain and that the pain-related impairment is ratable. (Guides, p. 574, Table 18.1.) Irrespective of the percentage assigned specifically to a member's complaints of pain, the examining physician will hopefully provide a sufficient description that will be meaningful in the assessment of the member's capacity to substantially perform his or her usual duties.

L. Confidentiality

Government Code section 31532 provides as follows:

Sworn statements and individual records of members shall be confidential and shall not be disclosed to anyone except insofar as may be necessary for the administration of this chapter or upon order of a court of competent jurisdiction, or upon written authorization by the member.

M. Interest

Weber v. Board of Retirement (1998) 62 Cal.App.4th 1440, 1442 [73 Cal.Rptr.2d 769]:

We hold CERL does not authorize the board, either implicitly or explicitly, to award interest under [Civil Code] section 3287 [, subdivision] (a), and so based on *AFL-CIO [American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017 [56 Cal.Rptr.2d 109, 920 P.2d 1314]] and CERL, judgment was properly entered on the pleadings.

Associations' comment

Distinguish between the lack of authorization to award interest at the administrative level (*ibid.*) and the right the applicant has to prejudgment interest where the applicant secures a writ of mandate that reverses a board's denial of a retirement benefit. (See *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528 [258 Cal.Rptr. 106]: The court of appeal held that, following the issuance of writ of mandate compelling the Board of Retirement to grant a retirement benefit it had previously denied, the calculation of interest begins on the date each disability retirement pension payment became due.)

N. Motion picture films and video tape

Baker v. Workmen's Comp. Appeals Bd. (1971), *supra*, 18 Cal.App.3d 852, 859 [96 Cal.Rptr. 279]:

The record suggests only three possible alternatives: (1) petitioner is malingering, or (2) he has cardiovascular disease, or (3) he sustained a psychoneurotic injury.

There was no evidence that petitioner's complaints were feigned. The board did not so find. Petitioner's testimony concerning his complaints was uncontradicted and unimpeached. None of the many doctors who examined petitioner suggested that his complaints were not genuinely felt. While performing a treadmill exercise test at the White Memorial Hospital, petitioner lost consciousness and had to be administered oxygen and was given nitroglycerin. Dr. Madlem who made the psychiatric evaluation did not suggest that petitioner's complaints were contrived. Although respondents introduced motion pictures taken by its investigators showing petitioner doing light work in his yard, the referee noted that the episodes filmed were too brief to be of any significance and the activities depicted were entirely consistent with petitioner's testimony. The motion picture evidence thus would not have constituted substantial evidence to support a finding that petitioner had not incurred a permanent disability. (See *Redner v. Workmen's Comp. Appeals Bd.*, 5 Cal.3d 83, 96-97.)"

Redner v. Workmen's Comp. Appeals Bd. (1971), *supra*, 5 Cal.3d 83 [95 Cal.Rptr. 447, 485 P.2d 799]:

In early July 1968 a person who told applicant that his name was Robert Hendry befriended applicant and invited him to his ranch for the following weekend; applicant accepted. Hendry drove applicant to this ranch; there Hendry gave a small party, serving very little food but a great number of mixed drinks. The guests became inebriated. Hendry suggested that the party go horseback riding, and applicant joined the others in doing so.

During the riding and saddling of the horses, Chavez concealed himself in Hendry's barn and took about 350 feet of film. The motion picture shows applicant saddling, riding, walking, and unsaddling a horse. Thereafter, on the next day applicant rode again. Unobserved by the riding party, Chavez took more motion pictures of applicant's activities. [Fn. omitted.] On the basis of the film the insurance carrier ceased payment of temporary disability compensation on August 6, 1968, and refused to provide further medical care for applicant.

After the riding episode, applicant, upon arriving home and sleeping that night, could not arise the next day because of severe pain in his back. Recuperating at home, applicant remained largely in bed for three weeks. . . . (*Id.*, 5 Cal.3d, 87.)

. . .

Even if the motion picture evidence had been offered in a timely fashion at the referee's hearing, the referee should have refused to rely upon it because the

carrier obtained it by fraudulent inducement. The record contains uncontradicted testimony by applicant that the private investigator induced applicant's intoxication and subsequent horseback ride in order to obtain a film of this activity. The carrier thereafter attempted to profit by this questionable conduct: it sought to introduce the film in evidence at the compensation proceeding.

We recognize that motion picture evidence is now quite commonly utilized in personal injury and workmen's compensation litigation. [Citations.] Ordinarily, of course, motion pictures are obtained without fraudulent inducement. [Fn. omitted.] Under such circumstances the film may constitute competent evidence to be considered in determining the extent of disability. On rare occasions, however, the insurance carrier or its private investigators have deceitfully induced applicants to perform acts for the hidden camera which they would not otherwise have committed. [Citation.] [Fn. omitted.]

In the present proceeding, the carrier should not profit from its own deceitful conduct. The investigators feigned friendship and concealed their employer's identity in bringing about applicant's inebriation and effectuating his horseback ride. . . . (*Id.*, 5 Cal.3d, 93-94.)

Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 697, [133 Cal.Rptr. 154]:

A review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms. His credibility was impeached by the contradictions in his testimony concerning his ability to play, and his actually engaging in playing, golf. On such a record the fact finders were entitled to consider what was observed by the witness, and what they, and we, could observe on the motion pictures. We cannot say as a matter of law that the finding of the trial court that the deputy is not permanently incapacitated for the performance of duty is erroneous as a matter of law.

Associations' comment

In *Sully-Miller Contracting Company v. Workers' Comp. Appeals Bd. (Sommer)* (1980) 107 Cal.App.3d 916 [166 Cal.Rptr. 111], an employee was found to have a disability caused by subjective complaints of pain that resulted in a work limitation between no heavy work and light work only. The employer later secured surveillance film that showed the employee engaged in activities that were inconsistent with such a limitation. An examining physician on review of the film opined that the film confirmed his earlier stated opinion that the employee did not need to restrict his physical activities. The employer petitioned to reopen the case for a reduction in the award. At a hearing, the investigator, who took 30 minutes of film, testified that he observed the applicant over the course of six hours and the films were a cross-section of the employee's activities. The employee did not contradict the testimony of the investigator, the films, or the reports of the defendant's consulting physician. The workers' compensation judge

denied the employer's petition to reopen and the WCAB denied the employer's petition for reconsideration. The judge, whose decision the WCAB adopted, found that (1) the activities depicted in the film were not inconsistent with the disability previously found; (2) only 30 minutes of the employee's activities over six hours of surveillance were filmed; (3) the defendant's physician consultant was biased in an attempt to defend his previous opinion. The employer sought judicial review by filing a petition for writ of review in the Court of Appeal. The court annulled the WCAB's decision.

The Court of Appeal reviewed the films and found the inferences drawn by the workers' compensation judge and the WCAB to be unsupported.

. . . . The film reveals Sommer engaged in construction work, repeatedly lifting, pushing, climbing a short ladder, picking up a power saw and working with it, and working overhead. At the baseball field Sommer is seen running, throwing, catching and batting. At no time during these activities was Sommer seen to be in any way restricted or in discomfort. These activities are especially significant since Sommer here was restricted on the basis of subjective complaints, which Sommer claims limit his work activities. (Fn. omitted.) (*Id.*, 107 Cal.App.3d, 924-925.)

With respect to the workers' compensation judge's rejection of the investigator's testimony that the filmed activities were a representative cross-section of the applicant's activities over the six hours observed, the Court of Appeal stated that the employee did not contradict the investigator's testimony and the employee's attorney's argument that the films were not a representative cross-section was not evidence. Likewise, the employee offered no medical evidence in rebuttal to the conclusions of the defendant's consulting physician. While the law enjoins the court to be liberal in factual and statutory construction in favor of extending benefits to injured workers, the rule of liberal construction, "however, authorizes neither the creation of nonexistent evidence nor the creation of a conflict in the evidence which does not otherwise exist." (*Id.*, 107 Cal.App.3d, 926.)

End comment.

National Convenience Stores v. Workers' Comp. Appeals Bd. (1981) 121 Cal.App.3d 420 [175 Cal.Rptr. 378]:

At the hearing before the workers' compensation judge, applicant presented a picture of a gravely disabled person. He told the judge that he lacked the strength to pick up a glass of liquid, and that in pouring milk from a one-half gallon container, he needed two hands to accomplish the task. Applicant testified variously as follows: "I can't lift anything of any weight. I can't grasp. I tried lifting a bowling ball I can't lift a bowling ball When I walk or stand, I still have pain [in the knees] Medium to severe The more I stand or walk, the worse it gets. "

Employer then produced surveillance motion picture films taken of applicant just a few days prior to the hearing. In that film, applicant is shown playing a round of golf carrying his clubs unassisted by a cart or caddy. This activity obviously involved considerable walking, lifting and grasping. (*National Convenience Stores*, pp. 425-426.)

...

Thus we are given the picture of a relatively normal appearing individual who exhibits hostility toward his employer and who exaggerates his symptoms. The doctor concludes that this exaggeration and hostility, because of its intensity and because the doctor determined that there was no previous psychiatric or physical disability, is the product of a mental disorder rather than a simple conscious attempt to increase his recovery. Many of the doctor's conclusions are based upon the fact that the applicant apparently told the doctor that he was physically unable to do anything. The statement is of course disproved by the surveillance film.

The doctor's own statements that applicant had a character pathology and that his physical injury was minimal as compared to his subjective complaints, appears to us to be inconsistent with the statement that applicant's problem was related to the injury. In short, we find no solid basis in the report for the doctor's ultimate opinion. . .

...

The WCAB's finding that applicant sustained injury to his psyche as the result of his industrial accident of March 15, 1978, is annulled. (*National Convenience Stores*, p. 430.)

M/A Com-Phi v. Workers' Comp. Appeals Bd. (1998) 65 Cal.App.4th 1020, 1024-1025 [76 Cal.Rptr.2d 907]:

Although evidence should be considered in light of the entire record, medical reports and opinions are not substantial evidence sufficient to support a decision if they are based on incorrect or inadequate histories, examinations, legal theories, speculation, or are no longer germane. (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal.Rptr. 537] and *Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372 [90 Cal.Rptr. 424, 475 P.2d 656].)

Dr. Stalberg reported very slight disability and a need for vocational rehabilitation, if Sevadjian's alleged fear of electrical shock was reasonable and honest, as it appeared. Dr. Ruffman, in finding some disability, stated he was not sure whether Sevadjian was exaggerating or malingering. Although both doctors may have discounted Sevadjian's subjective complaints as the WCJ concluded, this does not rule out that the false history, also found by the WCJ, influenced their

opinions to some extent. In addition, without addressing the surveillance films the doctors' reports were no longer germane.

See also *County of Alameda v. Board of Retirement (Carnes)* (1988), *supra*, 46 Cal.3d 902 [760 P.2d 464, 251 Cal.Rptr. 267] in which the county petitioned the superior court for a writ of mandate to compel the board of retirement to reverse its grant of a service-connected disability retirement to a deputy sheriff and deny the application for disability retirement. The trial court granted the petition in light of medical opinion, supported by surveillance film, that the applicant was not incapacitated for his duties.

O. Systemic Prejudice and Due Process:

1. Does the Board's fiduciary duty require that it remain neutral on the question of whether the applicant is entitled to benefits and leave to the employer the decision to oppose the application?

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 734-735 [110 Cal.Rptr.2d 565]:

Appellant correctly notes that the Board owes fiduciary duties of good faith and loyalty to the county employees who are members of the retirement system. (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 392-393 [216 Cal.Rptr. 733, 703 P.2d 73].) He contends this duty of loyalty requires the Board to avoid taking a position adverse to any employee. Thus, appellant contends, the Board breaches its duty of loyalty whenever it "actively" opposes an application by retaining counsel, hiring a doctor who opines that an employee is not eligible for benefits, or permits staff members to testify against an applicant at a hearing. Appellant appears to contend that the Board's fiduciary duties require it uncritically to approve every application for benefits, or at the very least to remain neutral on the question of whether a particular applicant is entitled to benefits. We are not persuaded.

Board members "are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty (Gov. Code, § 31725) and whether the disability is service connected (cf. Gov. Code, §§ 31725.7, 31725.8)." (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 45 [37 Cal.Rptr.2d 860].) The Board is therefore required to administer the retirement system "in a manner to best provide benefits to the participants of the plan." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1493 [280 Cal.Rptr. 847]; see also Cal. Const., art. XVI, § 17.) It cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. (*City of Sacramento v. Public Employees Retirement System, supra*, 229 Cal.App.3d at p. 1494; see also Gov. Code, § 31723 [board may require such proof as it deems necessary to determine the existence of a disability]; *Masters v. San Bernardino County Employees Retirement Assn., supra*, 32 Cal.App.4th at p. 46.) Thus, the Board fulfills, rather than breaches its

fiduciary duties when it retains staff, lawyers and doctors to represent it at benefit hearings.

For the same reasons, we reject appellant's contention that to fulfill its fiduciary duty to remain neutral at the hearing, the Board must rely only upon the employer to oppose applications that lack merit. The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant. It is not required to rely upon third parties, even interested third parties, to make those determinations on its behalf.

2. Does the retirement association's hiring of staff to investigate the applicant's claims, physicians to examine the applicant and offer opinions, and attorneys to oppose the application in a hearing violate the due process and/or statutory rights of applicants for disability retirement benefits?

a) Right to due process:

McIntyre v. Santa Barbara Count Employees' Retirement System, Board of Retirement (2001), supra, 91 Cal.App.4th 730, 735-736 [110 Cal.Rptr.2d 565]:

Appellant contends the Board violates his due process rights by unilaterally selecting a hearing officer to decide his application and by actively opposing the application. Appellant presents no evidence that any person involved with his application is actually biased against him. Instead, his argument assumes that that all hearing officers and staff members are biased against all applicants because they are paid by the Board, which is itself biased against all applicants. The claims are without merit. First, the claims fail because they are unsupported by any evidence of actual bias and bias may not be presumed. “[D]ue process demands impartiality on the part of those who function in judicial or quasi judicial capacities. [Citation.] We must start, however, from the presumption that the hearing officers ... are unbiased. [Citations.] This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. [Citations.] But the burden of establishing a disqualifying interest rests on the party making the assertion.” (*Schweiker v. McClure* (1982) 456 U.S. 188, 195-196 [102 S.Ct. 1665, 1670, 72 L.Ed.2d 1, 8], fn. omitted; accord, *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590, 623 P.2d 151] [“A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. ‘Bias and prejudice are never implied and must be established by clear averments.’”].)

b) Statutory rights:

McIntyre v. Santa Barbara Count Employees' Retirement System, Board of Retirement, supra, 91 Cal.App.4th 730, 735-736 [110 Cal.Rptr.2d 565]:

Neither CERL nor article XVI, § 17 of our state Constitution prohibits staff members from participating in benefit hearings. To the contrary, both require the Board to administer the retirement fund for the benefit of its members and to manage the fund with care, prudence and skill. The Board cannot fulfill these functions unless it investigates applications and pays benefits only to applicants who are eligible for them. (*City of Sacramento v. Public Employees Retirement System, supra*, [(1991)] 229 Cal.App.3d [1470] at p. 1494 [280 Cal.Rptr. 847].)

Moreover, CERL permits the Board to "require such proof" of disability "as it deems necessary" before determining that an applicant is eligible for benefits. ([Gov. Code,] § 31723.) To that end, the statute permits the Board to retain counsel, appoint staff, obtain medical reports and hold hearings on applications. ([Gov. Code,] §§ 31522.1, 31529, 31533, 31723.) Nothing in the statute or the Constitution requires the Board to remain neutral throughout the application process. Accordingly, the Board does not violate CERL when it participates in *[sic]* as a party in benefit hearings.

Associations' comment

This does not mean that boards of retirement need not be mindful of the requirement that it proceed with due process. If a board's fact finding process involves an adversary model, the board's legal advisor should not act as an advocate before it. The chance that the board will show preference toward the advocate if the advocate is also the board's advisor is present and unacceptable. "The attorney may occupy only one position at a time and must not switch roles from one meeting to the next." (*Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817 [7 Cal.Rptr.3d 896]; *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587 [5 Cal.Rptr.2d 196]: An attorney from the County Counsel's office may advise the county employment appeals board while another attorney from the same office acts as an advocate before the board provided that the attorney providing the advisory function is properly screened from the advocacy functions of the office. If there is no proper screen, there is a violation of due process.)

Also, consider the opinion in *Chevron Stations, Inc., v. Alcoholic Beverage Control Appeals Board, Department of Alcoholic Beverage Control* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6]: The Administrative Procedures Act's prohibitions against ex parte contacts between an agency's advocate and the agency's decision-maker (Gov. Code, §§ 11430.10-11430.80) were violated when the advocate sent a report of hearing to the decision-maker, whether the decision maker adopted the recommended decision of the hearing officer as in *Chevron Stations, Inc.*, or rejected it, as in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.(Quintanar)* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585, 145 P.3d 462]. The constitutional due process issue was not reached in either *Chevron Stations, Inc.* or *Quintanar* because the issue was disposed of on statutory grounds. However, the procedural protections in the APA may eventually be accepted as definitions of what is considered fair, and, therefore, what is "due" process, even as to agencies that are not subject to the APA.

End comment.

Government Code section 31732 provides,

The board shall secure such medical, investigatory and other service and advice as is necessary to carry out the purpose of this article. Notwithstanding Section 31529, the board may contract with an attorney in private practice for the legal services and advice necessary to carry out the purpose of this article. It shall pay for such services and advice such compensation as it deems reasonable.

3. Does the selection of referees by a CERL of 1937 Retirement Association violate the due process rights of applicants for disability retirement benefits?

Some, but not all, Boards of Retirement under the CERL of 1937 utilize referees to conduct administrative hearings and make proposed findings of fact and recommended decisions that the Boards may or may not adopt as their decisions. (Gov. Code, §§ 31533-31534) Some applicants' attorneys raise the issue of "systemic prejudice" at the administrative hearing, challenging the procedure followed by some boards of hiring attorneys to perform the functions of referees.

Applicant's comment

Where one party to a dispute has the unrestricted right to select a decision-maker from a list of hearing officers, and pays that hearing officer, the due process rights of the other party have been violated. (*Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292 [106 Sup.Ct. 1066].) The California Supreme Court in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 [119 Cal.Rptr.2d 341, 45 P.3d 280], without citing *Chicago Teachers*, concluded that, in connection with an administrative hearing on the county's revocation of a massage parlor license, due process requires disqualification of a hearing officer who is chosen on an ad hoc basis and paid unilaterally by the attorney representing the county.

End comment.

Haas v. County of San Bernardino, supra, 27 Cal.4th, 1024-1025:

The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes. To summarize the governing principles, due process requires fair adjudicators in courts and administrative tribunals alike. [Fn. omitted.] While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, [fn. omitted] the rules are not more flexible on the subject of financial interest. [Fn. omitted] Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends

on the number of cases handled. [Fn. omitted] No persuasive reason exists to treat administrative hearing officers differently. We consider each of these points in more detail below.

Haas v. County of San Bernardino, supra, 27 Cal.4th, 1029-1030:

The compensation system at issue in the case before us is functionally similar to the system condemned in *Brown [v. Vance]*, *supra*, [(5th Cir. 1981)] 637 F.2d 272, and the other fee system cases [citations]. Here, as there, the prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law for at least five years. (Gov. Code, § 27724.) [Fn. omitted.] Here, as there, while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. Finally, adjudicators selected and paid in this manner, for the same reason here as there, have a "possible temptation . . . not to hold the balance nice, clear and true." [Citations.]

Haas v. County of San Bernardino, supra, 27 Cal.4th, 1037:

The problem we address in this case arises only when counties forgo these options (establishing an office of the county hearing officer or contracting with the State Office of Administrative Hearings) and, instead, hire temporary hearing officers under Government Code section 27724. Because that section imposes only the requirement that a person selected as hearing officer have been licensed to practice law for at least five years, counties by default have much freedom to experiment and to adopt selection procedures adapted to their individual needs.²² To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county. The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on the good will of frequent litigants who pay the adjudicator's fee.

²² While we do not require any particular set of rules, or pass judgment on rules not before us, to suggest some procedures that might suffice to eliminate the risk of bias may be helpful. For example, a county that wished to continue appointing temporary hearing officers on an ad hoc basis might adopt the rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time long enough to eliminate any temptation to favor the county. Under such a rule, an attorney might be appointed to hear all cases arising during the designated period. A county that needed more hearing officers might, under similar rules, appoint a panel of attorneys to hear cases under a preestablished system of rotation. None of these options would likely entail significant additional costs. Finally, it bears repeating that counties may use their existing statutory authority to contract with the state for the services of an administrative law judge (Gov. Code, § 27727) or to establish and staff the office of county hearing examiner (*id.*, § 27720).

Associations' comment

The primary distinction between the facts of *Haas* and the typical procedure used by retirement associations operating under the CERL of 1937 is that the attorney who represents the respondent does not hire referees. Referees are appointed by the boards of retirement.

The *Haas* court's footnote 22 shows that a system of rotation can avoid the appearance of impropriety. Note the following excerpt from an unpublished opinion of the Court of Appeal in a Santa Barbara County Employees Retirement Association case. This opinion cannot be cited to any court, and it is not legal authority. (Cal. Rules of Ct, rule 977.) But the opinion, for your information, shows how the court handled a post-*Haas* attack on the use of a panel of attorneys who act as referees and we violate our rule of not citing unpublished opinions in the Resource because the opinion is instructive.

Herzog v. Board of Retirement (2003) (Not Officially Published; Cal. Rules of Court, Rules 976, 977; 2003 WL 21054796 (Cal.App. 2 Dist.)

. . . . Furthermore, [applicant/appellant's] counsel acknowledges in his opening brief that the instant referee was appointed from an approved panel under a neutral system of rotating appointments. (*Haas v. County of San Bernardino, supra*, 27 Cal.4th at p. 1037, fn. 22, 119 Cal.Rptr.2d 341, 45 P.3d 280 [approving this method].) Due process only requires the use of a reasonably impartial, noninvolved reviewer. Picking a hearing officer from a rotating panel of attorneys satisfies due process. (See *Haas*, at p. 1037, fn. 22, 119 Cal.Rptr.2d 341, 45 P.3d 280.)

End comment.

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement, *supra*, 91 Cal.App.4th, 735-736:

We also reject the contention that the Board violates due process by unilaterally selecting hearing officers. "Due process does not require a perfectly impartial hearing officer for, indeed, there is no such thing. [Citation.] Rather . . . due process in these circumstances requires only a 'reasonably impartial, noninvolved reviewer'" (*Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770-771 [49 Cal.Rptr.2d 813].) The fact that hearing officers are selected and compensated by the Board does not demonstrate their anti-applicant bias. Due process does not compel applicants' participation in the selection of hearing officers. (*Id.* at p. 777.) Nor is the Board prohibited from both investigating and adjudicating applications for retirement benefits. As the Supreme Court explained in *Withrow v. Larkin* (1975) 421 U.S. 35 [95 S.Ct. 1456, 43 L.Ed.2d 712], "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation. . . ." (*Id.* at p. 58 [95 S.Ct. at p. 1470, 43 L.Ed.2d at p. 730]; see also *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1809 [20 Cal.Rptr.2d 903] [due process permits city manager

to terminate police chief, select and pay hearing officer to review termination, and disregard or veto recommendation of hearing officer]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 579 [257 Cal.Rptr. 427].)

Associations' comment

A referee in a CERL of 1937 case does not make a decision. The referee *proposes* findings of fact and *recommends* a decision to the Board of Retirement. (Gov. Code, § 31533.) The applicant has the opportunity to object to the proposed decision and bring any defect in the referee's recommendation to the Board's attention. (Gov. Code, § 31534.) The decision-maker is not the referee. The decision is made by the Board of Retirement, whether it adopts the referee's proposed decision or makes its own decision on the record made before the referee, or on the evidence received in a subsequent hearing before the Board itself. (Gov. Code, § 31534.)

The facts of the *Chicago Teachers* case differ markedly from the administrative hearings held under the CERL of 1937. That opinion does not support the claim that a retirement association's selection of a referee violates due process. In *Chicago Teachers*, the teachers' union and the Board of Education entered into an agreement whereby an "agency fee" would be deducted from nonmembers' paychecks for a proportionate share of the union's costs representing the cost of the nonmembers' enjoyment of the benefits of the collective bargaining process. The agency fee was set by the union at 95% of the amount of dues paid by members of the union.

The union attempted to install a process by which nonmembers' objections to the fees could be heard and if, after initial review of the objections by the union's Executive Committee, the nonmember still persisted, the union's Executive Board would consider the objections. If the nonmember still complained, the union would select an arbitrator from a list of arbitrators maintained by the State Board of Education.

The Supreme Court of the United States found that the arbitrator-selection process violated principles of due process. The Court reasoned that a "union shop" was "a significant impingement on First Amendment rights" (*id.*, 475 U.S., 302), the potential of a rebate after forced exaction of dues does not protect the individual's freedoms of expression and association against temporary violation (*id.*, 475 U.S., 305 - 306) and the burden is placed on the individual nonmember to raise an objection.

"The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." (*Id.* 475 U.S., 307)

The Union's procedure does not meet this requirement. As the Seventh Circuit observed, the "most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees." [*Hudson v. Chicago Teachers Union Local No. 1* (1984)] 743 F.2d, at 1194-1195. The initial

consideration of the agency fee is made by Union officials, and the first two steps of the review procedure (the Union Executive Committee and Executive Board) consist of Union officials. The third step--review by a Union-selected arbitrator--is also inadequate because the selection represents the Union's unrestricted choice from the state list. [Fn. omitted.] (*Id.*, 475 U.S., 308)

There are factors that distinguish the typical CERL of 1937 hearing officer selection process from *Chicago Teachers* and *Haas*. Exactly how many such factors are applicable to a particular retirement association will depend on the facts and circumstances attendant to the referee selection process used by the individual retirement association.

Gai v. City of Selma (1998) 68 Cal.App.4th 213, 233 [79 Cal.Rptr.2d 910]:

Third, in *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590, 623 P.2d 151] the Supreme Court stated that ". . . the appearance of bias standard may be particularly untenable in certain administrative settings. For example, in an unfair labor practice proceeding the Board is the ultimate factfinder, not the [administrative law officer]." (*Andrews v. Agricultural Labor Relations Bd.*, *supra*, 28 Cal.3d at p. 794.) That comment applies to the instant case as well. The Commission's findings and recommendation were submitted to the Council, which was required to review them and either affirm, revoke or modify the action taken. The Commission served only as an advisory body to the Council which had ultimate authority in the matter.

Unlike the union personnel in *Chicago Teachers* who were obviously in a position contrary to that of the nonunion employee-plaintiffs, the Board of Retirement making the selection of referees is not made up of persons with interests opposed to applicants. The Board of Retirement consists of retired members, members elected by employees, those appointed by the Board of Supervisors, as well as the County's Treasurer. (Gov. Code, §§ 31520 (five member board) and 31520.1 (nine member board, plus one or two alternates. (See Gov. Code, §§ 31520.3 and 31520.5 providing for a second alternate to back up the retired member.) Thus, applicants for disability retirement pensions have representation on the very board that selects the referees. Depending on the kind of referee selection process utilized by a Board of Retirement (e.g., a blind rotation procedure is followed in selecting a referee), the same sort distinction can be made between, on the one hand, the Deputy County Counsel in *Haas* who was acting in the role of a prosecutor while at the same time unilaterally selecting a hearing officer on an ad hoc basis and compensating the hearing officer, and, on the other hand, the Board of Retirement.

Unlike the union personnel in *Chicago Teachers* who would select the hearing officer to hear the protest lodged by an employee who was not a member of the union, the Board of Retirement is not an antagonist, but has a fiduciary relationship with its members.

Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 392 [216 Cal.Rptr. 733, 703 P.2d 73]:

As a result, "[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits ... and the trustees must exercise their fiduciary trust in good faith and must deal fairly with the pensioners-beneficiaries. [Citations.]"

The Board of Retirement is authorized by statute to have the administrative hearing held before itself. (Gov. Code, §§ 31533 and 31534.)

The Board of Retirement is authorized by statute to appoint a member of the State Bar, or one of the Board's own members, to preside at an administrative hearing. (Gov. Code, § 31534.)

The member applicant, applicants' attorney law firms, and groups representing employees may have opportunities to present their views, including objections, to the appointment of an attorney to a panel of referees maintained by the retirement association.

Various Boards of Retirement have rules of procedure that permit peremptory disqualification of a referee and will hear claims that a referee should be disqualified for actual bias.

Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, et al. (1998) 62 Cal.App.4th 1123, 1142 [73 Cal.Rptr.2d 695]: Petitioner, a physician, asserted that he was denied a fair hearing because the final determination regarding the physician's removal would be made by the hospital which had a pecuniary interest in the matter. The Court of Appeal stated,

However, bias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient.

Andrews v. Agricultural Labor Relations Board (1981), *supra*, 28 Cal.3d 781, 790-791 [171 Cal.Rptr. 590, 623 P.2d 151]:

The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him. As stated in *Evans v. Superior Court*, (1930) *supra*, 107 Cal.App. 372, 380, [290 P. 662] the word bias refers "to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved." In an administrative context, Professor Davis has written that "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." (2 Davis, *Administrative Law Treatise* (1st ed. 1958) p. 131; also see *United States v. Morgan* (1941) 313 U.S. 409, 420-421 [85 L.Ed. 1429, 1434-1435, 61 S.Ct. 999]; *Trade Comm'n. v. Cement Institute* (1948) 333 U.S. 683, 700-703 [92 L.Ed. 1010, 1034-1036, 68 S.Ct. 793].) This long established, practical rule is merely a

recognition of the fact that anyone acting in a judicial role will have attitudes and preconceptions toward some of the legal and social issues that may come before him.

Petitioners revive the same discarded stereotype of bias relative to disqualifying a judicial officer that Judge Jerome Frank addressed many years ago: "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. . . . Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. " [Citation.]

Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568, 582 [257 Cal.Rptr. 427]:

Rather, as in the federal courts, our Supreme Court requires a party seeking to show bias or prejudice on the part of an administrative decisionmaker [*sic*] to prove the same with concrete facts: "Bias and prejudice are never implied and must be established by clear averments." [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." [Citations.]

Linney v. Turpen, et al., (1996) 42 Cal.App.4th 763, 770-771 [49 Cal.Rptr.2d 813]: After an administrative hearing, an employee was suspended for six months. He challenged the administrative hearing on due process grounds including (1) that the selection of the hearing officer by the employer city was an unfair "unrestricted" selection; (2) payment by the city created a bias on the part of the hearing officer in his effort to encourage more case referrals. The hearing officer list was developed according to a civil service commission rule providing for the method of recruitment, qualifications of the candidates, notice to employer and employee groups, and a means of submitting challenges to names on the list.

Appellant also argues that payment of the hearing officer by respondent renders the hearing officer biased, because the more cases he decides favorably to respondent, the more cases respondent will give him. While this is an interesting theory, appellant's failure to raise the issue below precluded the creation of a meaningful record on the point. (Footnote omitted)

In any event, we do not find the theory compelling as a matter of law. Due process does not require a perfectly impartial hearing officer for, indeed, there is

no such thing. (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 790-791 [171 Cal.Rptr. 590, 623 P.2d 151] (hereafter *Andrews*.) Rather, and as the foregoing quotation from *Titus* [*Titus v. Civil Service Com.* (1982), *supra*, 130 Cal.App.3d 357, 362 [181 Cal.Rptr. 699]] suggests, the principle our Supreme Court has established is that due process in these circumstances requires only a "reasonably impartial, noninvolved reviewer." (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 737 [150 Cal.Rptr. 475, 586 P.2d 956], italics added (hereafter *Williams*.) This formulation of the rule has been quoted and followed not only in *Andrews* and *Titus* but in several other cases as well. (See, e.g., *Coleman v. Regents of University of California* (1979) 93 Cal.App.3d 521, 526 [155 Cal.Rptr. 589]; www.dir.ca.gov/IMC/*Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1227 [213 Cal.Rptr. 1]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581 [257 Cal.Rptr. 427].)

Gai v. City of Selma, supra, 68 Cal.App.4th, 228:

Of course, the above analysis in *Linney* is dicta. However, it is consistent with the holding in *Central* [below] that something more than speculation as to a financial interest in the outcome of the proceeding is needed to find "probability or likelihood of actual bias" of the decision maker.

Central and West Basin Water Replenishment District, et al. v. Wong (1976) 55 Cal.App.3d 191, 194 [127 Cal.Rptr. 448] [construing former Code of Civil Procedure section 170, subdivision 1, providing for the disqualification of a judge where the judge or his or her spouse or child has a financial interest in the outcome of the proceedings; see now Code Civ. Proc., § 170.1, subd. (a)(3)]:

The word "interested" has been said to embrace "only an interest that is direct, proximate, substantial, and certain, and does not embrace a remote, indirect, contingent, uncertain, and shadowy interest. . . ."

End of Text

APPENDIX

Some Workers' Compensation Vernacular

ADL	Activities of Daily Living. A term used in the AMA Guides to include, in addition to physical activities such as standing, sitting, reclining, walking, climbing stairs, self-care of teeth and general hygiene, communicating, sensory functions of hearing, seeing, tactile feeling, nonspecialized hand activities, such as grasping, lifting, tactile discrimination, travel, sexual functions, and sleep to include, restful sleep and the nocturnal sleep pattern. (Guides to the Evaluation of Permanent Impairment (AMA, 5th Ed.) p. 599.)
AWL	actual wage loss
AME	Agreed Medical Examiner – a physician chosen by parties to an action to act in a neutral capacity as an independent medical examiner appointed by the WCAB would.
AOE-COE	Arising out of employment and (occurring) in the course of employment.
Comp	Compensation. Used variously to refer to the workers' compensation law, compensation benefits generally or compensation payments.
C&R	“compromise and release” agreement; settlement; used both as a noun and as a verb.
C.T.	cumulative trauma; used to designate cumulative trauma cause of action" as in "This is a CT from 1980 through 1990, not a specific injury.”
DBE	Diagnostic based estimates – used in the evaluation of spinal impairment as an alternative to the ROM (Range of Motion) method
F & A	“Findings and award” of workers' compensation judge, referee or Appeals Board

F & O	findings and order; usually in connection with a "take nothing" decision against applicant.
FEC	Future earning capacity – a factor that adjusts a WPI (whole person impairment) rating to reflect the WPI's impact on a disabled individual's earning capacity.
GAF	global assessment of functioning (indicated in DSM IV - TR Axis V diagnosis) (See also Schedule for Rating Permanent Disabilities (January 2005), pp. 1-12 through 1-16)
Group rating, as in "Group 1 is high for backs.	occupational group for adjustment, up or down, of standard permanent disability rating.
medical-legal	medical-legal costs for medical reports, tests, X-rays, testimony; to be distinguished from cost of medical treatment.
MMI	Maximum Medical Improvement: "A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated." AMA Guides for the Evaluation of Permanent Impairments.
new and further	new and further disability, as in "He petitioned for new and further." A basis for reopening a case because permanent disability has increased.
P.D.	permanent disability; used variously, as "P.D. compensation rate"; "P.D. rating"; "He has P.D."
P & S	"permanent and stationary"; to determine when temporary disability ceases and permanent disability is ratable, as in "His condition became P&S on June 1, 1982."
Q.I.W.	"qualified injured worker," an injured employee who qualifies for vocational rehabilitation benefits.
Q.R.R.	"qualified rehabilitation representative"; one qualified to prepare vocational rehabilitation plan.
Rehab	vocational rehabilitation.

ROM	Range of Motion: With regard to spinal injuries. The DRE (Diagnosis Related Estimate) is an alternative method for determining impairment.
self-procured	medical treatment obtained by applicant without authorization from the employer or the employer's insurance company for which reimbursement is sought.
Standard	P.D. rating before adjustment for age or occupation, as in "The rating was a 30 percent standard," or "We settled for the standard P.D."
T. D.	used variously to mean temporary disability or temporary disability compensation, as in "T.D. rate"; "T.D. period"; "He was T.D."; "T.D. was paid."
VRTD	"vocational rehabilitation temporary disability indemnity", i.e., rehabilitation temporary compensation.
V.R.M.A.	vocational rehabilitation maintenance allowance.
Q.M.E.	"Qualified medical evaluator", physician appointed to list of approved medical evaluators by the former Industrial Medical Council and, currently, the Division of Workers' Compensation. Note: A "QME" is not necessarily an "AME". A "QME" may be a medical advocate for either the employer or the employee.
Recon	A petition for reconsideration; an appeal to the Workers' Compensation Appeals Board to reverse the decision of its trial referee after an adverse decision by a workers' compensation referee.
WPI	whole person impairment
Writ	writ of review; also the petition for a writ of review, the means to seek appellate review of a WCAB decision.
"W.C.A.B."	Workers' Compensation Appeals Board.
"W.C.J."	Workers' Compensation Judge.

County Retirement Associations operating under the County Employees Retirement Law of 1937

County Employees Retirement Associations	Address and telephone number	Web address
Alameda	ACERA 475 14th Street, Suite 1000 Oakland, CA 94612-1900 Voice: (510) 628-3000 FAX: (510) 268-9574	www.acera.org
	County web site	www.acgov.org
Contra Costa	CCCERA 1355 Willow Way, Suite 221 Concord, CA 94520 V: (925) 521-3960 F: (925) 646-5747	www.CCCERA.org
	County web site	www.co.contra-costa.ca.us
Fresno	FCERA 1111 H. St. Fresno, CA 93721 V: (559) 457-0681 F: (559) 457-0318	www.fcera.org
	County web site	www.co.fresno.ca.gov
Imperial	ICERS 1221 State Street El Centro, CA 92243 V: (760) 336-3132, 3134 F: (760) 336-3923	www.icers.info
	County web site	www.co.imperial.ca.us
Kern	1115 Truxtun Avenue Bakersfield, CA 93301-4639 V: (661) 868-3790 F: (661) 868-3779 Toll free (800) 548-0738	www.kcera.org
	County web site	www.co.kern.ca.us

Los Angeles	LACERA	www.lacera.com
	300 North Lake Avenue, Suite 820	
	Pasadena, CA 91101-4199	
	V: (626) 564-6000	
	F: (626) 564-6190 (Executive Office)	
	County web site	www.lacounty.gov
Marin	MCERA	www.co.marin.ca.us/retire
	One McInnis Parkway	
	San Rafael, CA 94903	
	V: (415) 499-6147	
	F: (415) 499-3612	
	County web site	www.co.marin.ca.us
Mendocino	MCERA	www.mendolibrary.org/retirement
	625-B Kings Court	
	Ukiah, CA 95482	
	V: (707) 463-4328	s.
	F: (707) 463-6472	
	County web site	www.co.mendocino.ca.us/library
Merced		
	3199 "M" Street	
	Merced, CA 95348	www.co.merced.ca.us/index.aspx?NID=1347
	V: (209) 725-3636	
	F: (209) 725-3637	
	County web site	www.co.merced.ca.us
Orange	OCERS	www.ocers.org
	2223 East Wellington Avenue, Suite 100	
	Santa Ana, CA 92701	
	V: (714) 558-6200	
	F: (714) 558-6236	
	Toll free: (888) 570-6277	
	County web site	www.ocgov.com
Sacramento	SCERS	www.scers.org

	980 9th Street, Suite 1800	
	Sacramento, CA 95814-2738	
	P.O. Box 627	
	Sacramento, CA 95812-0627	
	V: (916) 874-9119	
	F: (916) 874-6060	
	Toll Free: (800) 336-1711	
	County web site	www.saccounty.net
San Bernardino	SBCERA	www.sbcera.org
	348 West Hospitality Lane, Third Floor	.
	San Bernardino, CA 92415-0014	
	V: (909) 885-7980	
	F: (909) 885-7446	
	Toll Free: (877) 722-3721	
	County web site	www.co.san-bernardino.ca.us
San Diego	SDCERA	www.sdcera.org
	2275 Rio Bonito Way, Suite 200	
	San Diego, CA 92108-1685	
	V: (619) 515-6800	
	Toll Free: (888) 473-2372	
	County web site	www.sdcounty.ca.gov
San Joaquin	SJCERA	www.sjcera.org
	6 South El Dorado Street	
	Suite 400	
	Stockton, CA 95202	
	V: (209) 468-2163	
	F: (209) 468-0480	
	County web site	www.sjgov.org
San Mateo	SAMCERA	www.samcera.org
	100 Marine Parkway, Suit 125	
	Redwood Shores, CA 94065-5208	
	V: (650) 599-1234	
	F: (650) 591-1488	
	County web site	www.co.sanmateo.ca.us
Santa Barbara	SBCERS	www.countyofsb.org/sbcers
	3916 State Street, Suite 210	

	Santa Barbara, CA 93105	
	V: (805) 568-2940	
	F: (805) 560-1086	
	County web site	www.countyofsb.org
Sonoma	SCERA	www.scretire.com
	433 Aviation Boulevard, Suite 100	
	Santa Rosa, CA 95403	
	V: (707) 565-8100	
	F: (707) 565-8102	
	County web site	www.sonoma-county.org
Stanislaus	STANCERA	www.stancera.org
	832 12th Street, Suite 600	
	Modesto, CA 95353-3150	
	Mail: P.O. Box 3150	
	Modesto, CA 95353-3150	
	V: (209) 525-6393	
	F: (209) 525-4334	
	County web site	www.co.stanislaus.ca.us
Tulare	TCERA	www.tcera.org
	136 N. Akers Street	
	Visalia, CA 93291	
	V: (559) 713-2900	
	F: (559) 730-2631	
	County web site	www.co.tulare.ca.us
Ventura	VCERA	www.ventura.org/vcera
	1190 Victoria Avenue, Suite 200	
	Ventura, CA 93003	
	V: (805) 339-4250	
	F: (805) 339-4269	
	County web site	www.countyofventura.org
SACRS	Strategic Local Government Services	www.SLGS.org
	1415 L Street, Suite 200	
	Sacramento, CA 95814	
	V: (916) 441-1850	
	F: (916) 441-6178	

County Safety Occupations' Presumptions Chronology

Year	Section	Occupation	Provision
1937	LC § 3212	Firemen	Hernia
1939	LC § 3212	Firemen	Heart trouble & Pneumonia
1951	GC § 31720.5	Safety member with 15 years of service	Heart trouble presumed service-connected in absence of evidence to the contrary.
1955	LC § 3212	Sheriff	Hernia
	LC § 3212.5	Sheriff	Heart trouble and Pneumonia
1957	GC § 31720.5	(Safety member) From 15 to 5 years, includes other '37 law county or PERS service	Heart trouble
1959	LC § 3212, 3212.5	Sheriff	Nonattribution provision added
1961	GC § 31720.5	Add fireman member	Heart trouble
1965	LC § 3212	Excludes those without public safety duties	
1967	GC § 31720.5	Add member in active law enforcement	Heart trouble
1971	LC § 3212	DA Investigators	Hernia
	LC § 3212.5	DA Investigators	Heart trouble and Pneumonia
	LC § 3212.6	DA Investigators	Tuberculosis
1974	GC § 31720.5		Heart trouble. Changed language to developing or manifesting itself presumed to be AOE-COE, conform-ing section to workers' comp provisions. Deleted "in the absence of evidence to the

			contrary. Added nonattribution sentence.
1975	LC § 3212.6	Sheriff	Tuberculosis
1976	LC § 3212 series		Adds 60 month limitation to presumption law.
1982	LC § 3212.1	Firefighters	Cancer requires reasonable link
1989	LC § 3212.1	Sheriff, DA Investigators	Cancer requires reasonable link
1996	LC § 3212.6	Add prison or jail guard or correctional officer of a county	Tuberculosis
1999	GC § 31720.6	Safety, firefighter, member in active law enforcement	Cancer; requires association prove no reasonable link where primary site is known. Where primary site is not known, conclusive.
1999	LC § 3212.1	Safety, firefighter, member in active law enforcement	Cancer requires association prove no reasonable link where primary site is known. If not known, conclusive.
2000	GC § 31720.7	Safety, firefighter, probation officer, member in active law enforcement	Blood-borne infectious disease
2000	LC § 3212.8	Sheriff, firefighter and peace officers under 830 of Penal Code	Hepatitis
2000	LC § 3212.9	Sheriff, firefighter, DA investigator	Meningitis
2001	GC § 31720.9 LC § 3212.85	Peace officer members Sheriff, fireman, park rangers, Deputy Probation Officers 5 years not required	Illness from biochemical substance exposure

2002	LC § 3213.2	Member of Sheriff's office and others with 5 years of service.	Lower back impairments where required to wear duty belt
2002	LC § 3212.8	Sheriff, firefighter and peace officers under § 830 of Penal Code	Amended to change hepatitis to "blood borne infectious disease"
2008	LC § 3212.1	Expanded the safety occupations covered by the cancer presumption	
2009	GC § 31720.7 LC § 3212.8		Add MRSA skin infection. Drop requirement of 5 years of service re GC § 31720.7
2011	LC § 3212.1		Changed presumption extension/limitation from 60 months to 120 months

VI. Heading One

A. Heading two

1. Heading three

a) Heading four

(1) Heading five

(a) Heading six

(i) Seven

(a) Eight

(i) Nine

Ten

i. Eleven