

Workers' Comp Legal Landscape in 2024



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Brenna Hampton is the managing partner of our San Diego office and a California State Bar certified workers' compensation legal specialist. She graduated from the University of California, San Diego with a degree in political science, theory, and debate.

In 2006, she was admitted to the California State Bar after obtaining her Juris Doctor from California Western School of Law in San Diego, where she earned special designation as a distinguished advocate on the client counseling and negotiation teams and where she served double-tenure as president of the law school's Women's Law Caucus.

She joined Hanna Brophy in 2006 and defends insurance carriers and self-insured employers in all areas of workers' compensation with an emphasis on creative problem-solving.



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The California Lawyer's Association deemed Bill Workers' Compensation Defense Attorney of the Year in 2019. He has been a practicing attorney for 30 years.

Bill started his legal career defending public entities in Federal civil rights actions and defending businesses in civil suits. He was also a corporate attorney and led an in-house Legal Department. He has been defending workers' compensation claims on behalf of self-insureds, insurance companies, public entities, and TPAs for 21 years. Bill successfully argued the City of Petaluma v. WCAB (Lindh) case before the Court of Appeal. He frequently lectures the workers' compensation state and national communities on a variety of cutting edge topics.

SERVICES

Workers' Compensation Defense

AWARDS & RANKINGS

California Lawyer's Association Workers
Compensation Defense Attorney of the Year for 2019.

DISCLAIMER



Facts and law change frequently. Please consult your attorney for the most recent laws affecting your decisions and claims handling strategies.

Roadmap

COVID-19 Presumptions, Where are we now?

2023 Legislative and case update

Cannabis on the horizon

Taking an employee “as is” with pre-existing conditions

Dealing with the final report:
PD, accommodating permanent work restrictions, SJDB

An aerial photograph of the Cliffs of Moher in Ireland, showing the rugged cliffs meeting the ocean. The image is partially obscured by a white and teal geometric overlay on the right side.

COVID-19 CLAIM MANAGEMENT

NO MORE COVID-19 PRESUMPTIONS: GENERAL

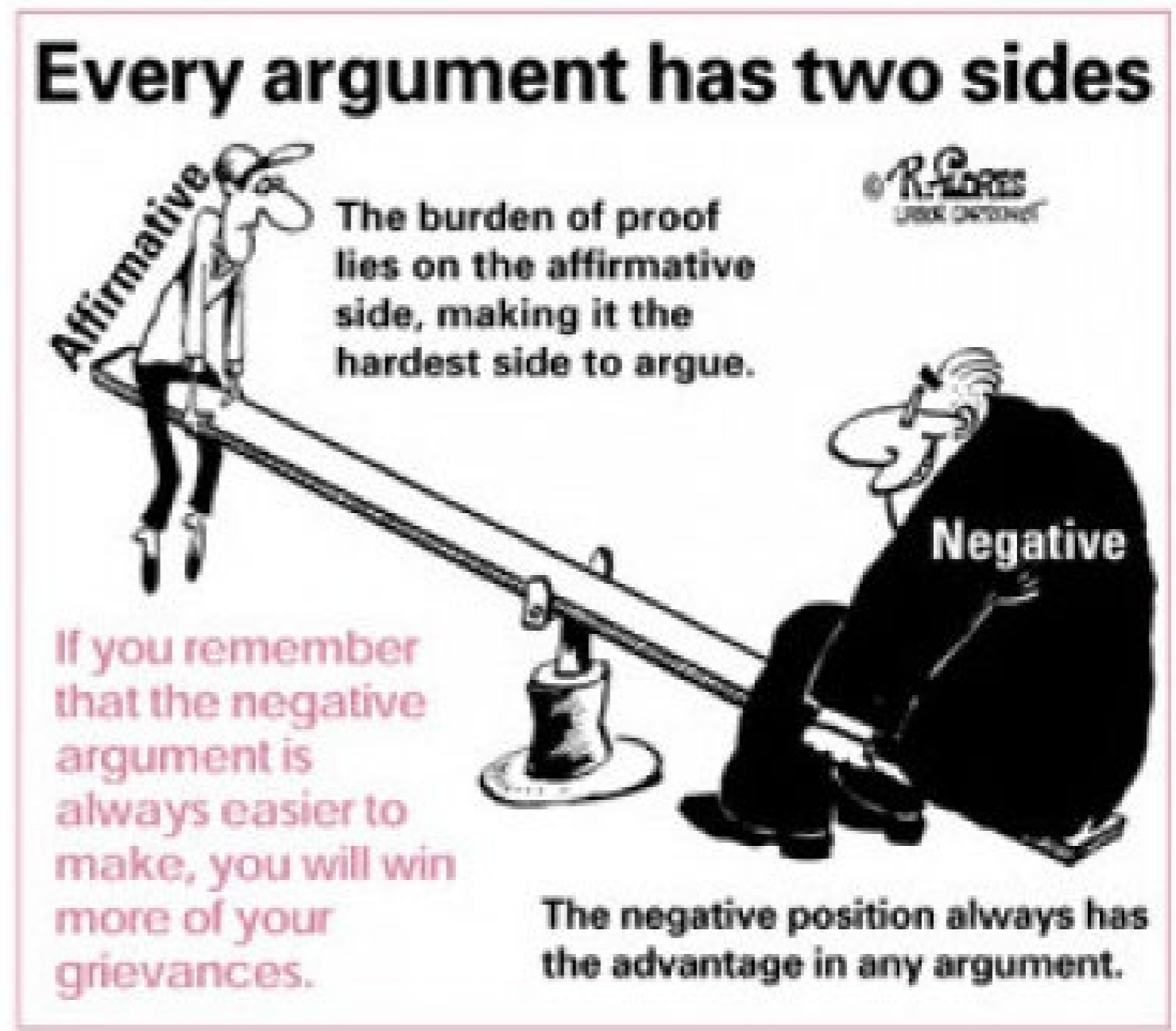
- COVID-19 Presumptions –
Repealed 1/01/2024
- SB 1159 & AB 1751
- LC 3212-86 – Executive Order
- LC 3212.87 – Specified Hospital Workers & Safety
- LC 3212.88 – Outbreak



EXPIRED

NO MORE COVID-19 PRESUMPTIONS: INJURY

- Injury – LC §3208.1 – Disability or medical treatment
- Burden of Proof – Applicant



INVESTIGATION

- Duty – CCR § 10109 - Reasonable and timely investigation
- Notice or Knowledge of Injury of Claim
- Investigation – Basis for decision; document



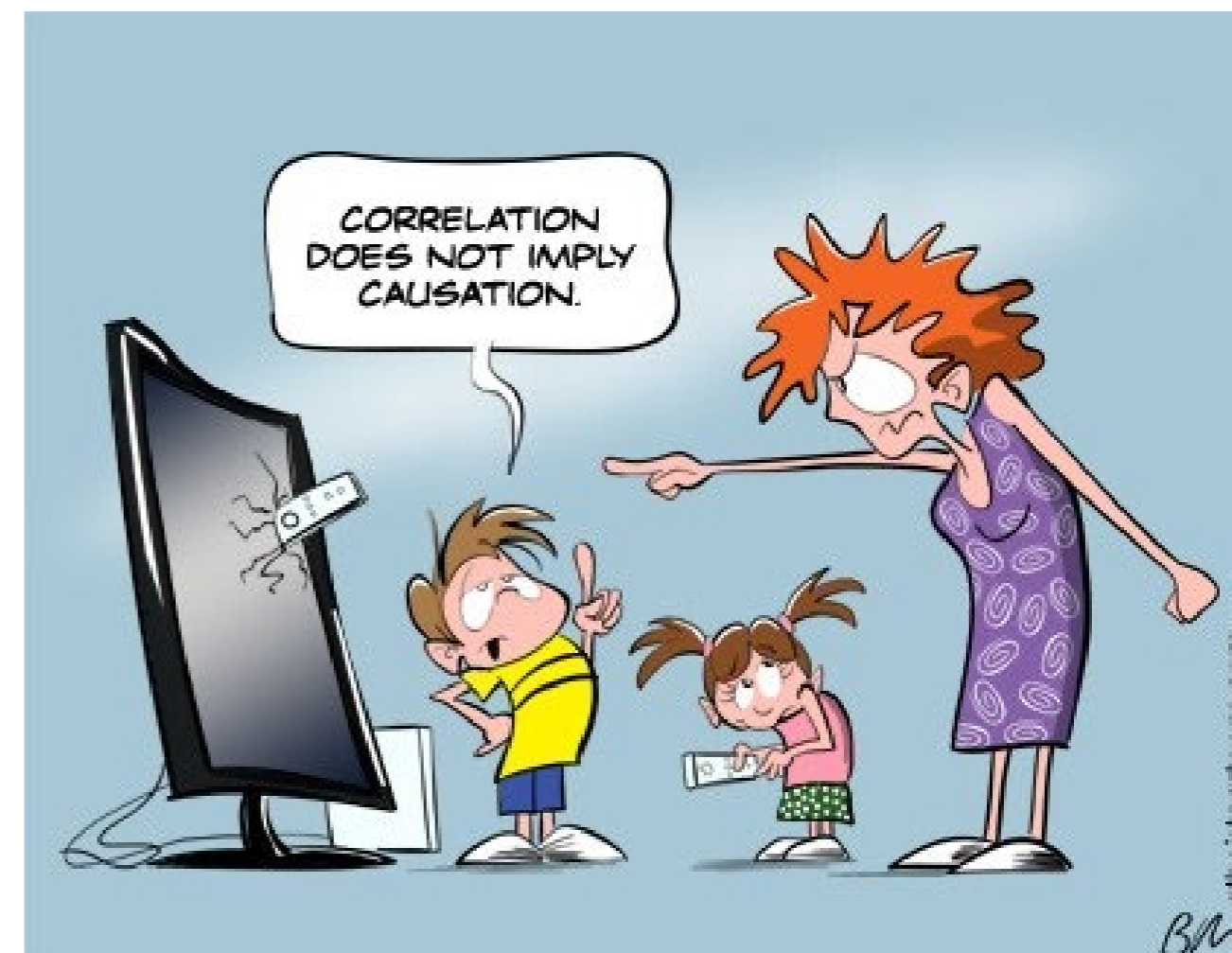
NO MORE COVID-19 PRESUMPTIONS

- Close Contact v. ~~Specified Place of Employment~~
- Three (3) Days v. ~~14 Days~~
- NO Exhaustion of Sick Leave Benefits
- Applicants Burden v. ~~Rebutting Presumption~~
- Decision Period – 90 days v. ~~30 or 45 days~~
- NO LC § 5414.3 Potential Penalties
- Death Benefits – No DIR Waiver

COVID-19 COVERED BY WORKERS' COMPENSATION?

COMMON TO OCCUPATION?

“[A]n ailment does not become an occupational disease simply because it is contracted on the employer’s premises. It must be one which is commonly regarded as natural to, inherent in, and incident and concomitant to the work in question.”
Marsh v. IAC (1933) 218 Cal. 338



COMMON TO OCCUPATION?

“[W]hen 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 commonality, 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.” Bethlehem Steel Company v. IAC (1943) 21 Cal.2d 742



INCREASED RISK EXCEPTION

Employment subjected them to an increased risk of exposure to COVID-19.

This was the argument made by first responders and medical personnel at the beginning of the pandemic.



INCREASED RISK EXCEPTION

INCREASED RISK EXCEPTION: SUPREME COURT CASE

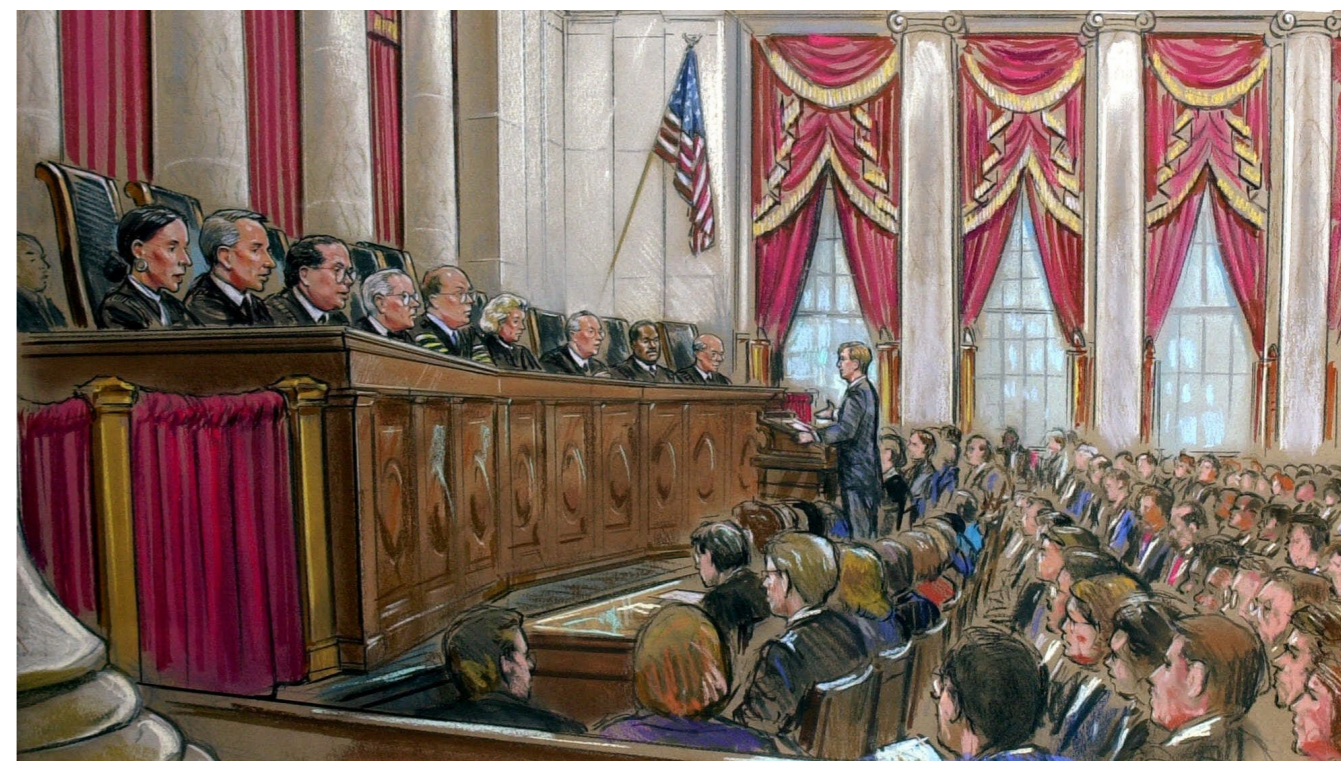
- Goes as far back as the Spanish Flu cases in 1920's.
- Supreme Court found awards of benefits were appropriate given increased exposure of these employees, even though the disease was rampant and nearly every member of the community was exposed to it.



City and County of San Francisco v. IAC (Slattery) (1920) 183 Cal. 273;
Engels Copper Mining Co. v. IAC (Rebstock) (1920) 183 Cal. 714

INCREASED RISK EXCEPTION: SUPREME COURT CASE

- If the employment subjects the employee to an increased risk compared with that of the general public; AND
- If the immediate cause of the injury is an intervening human agency or instrumentality of the employment.



LaTourette v. Workers' Comp. Appeals Bd. (1998) 17 Cal. 4th 644, 654

BURDEN OF PROOF – ON EMPLOYEE

- Employee Burden
- Risk of contracting disease due to employment was materially greater than that of the general public
- Liberal Construction – LC § 3202



OVERVIEW – MAIN POINTS

- COVID-19 Presumptions Repealed 1/01/2024
- “Regular” Workers’ Comp Rules
- Employee Burden of Proof
- 90-day Decision Period
- Duty to Investigate – CCR § 10109
- No LC § 5414.3 Penalties for COVID





2023 LEGISLATIVE AND CASE UPDATE

2023 LEGISLATIVE UPDATE

- AB 336 - Requires contractors to certify workers' comp insurance policy class codes when renewing their contractor licenses and requires the Contractors State License Board to post licensee codes and insurer on its website.
- SB 743 - Added a fraud statement requirement for employers securing workers' comp coverage.

2023 IMPORTANT CASES

Zurich American Insurance v. WCAB (CIGA)

Under Labor Code 5909 the WCAB loses jurisdiction to consider a petition for reconsideration and after 60 days have passed and a petitioner has 45 days to seek a writ of review with the appellate courts.

2023 IMPORTANT CASES

Kuciemba v. Victory Woodworks

California Supreme Court answered two questions of CA law :

“The questions are:

1. If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (WCA; Lab. Code, § 3200 et seq.) bar the spouse's negligence claim against the employer?
2. Does an employer owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members?”

2023 IMPORTANT CASES

Kuciemba v. Victory Woodworks

California workers' compensation does not bar such an action, the employer does not have a duty of care given the circumstances of the COVID pandemic.

"...a duty of care to nonemployees in this context would impose an intolerable burden on employers and society in contravention of public policy. These and other policy considerations lead us to conclude that employers do not owe a tort-based duty to nonemployees to prevent the spread of COVID-19."

2023 IMPORTANT CASES

Rose Jones v. The Regents of UC

UC Irvine worker's bike injury on campus bike path was covered by workers' comp under the premises line rule and the exclusive remedy barred her civil tort claim against the UC.

2023 IMPORTANT CASES

Abraham v. Wells Fargo

Where a worker on an out of state business trip died in car accident while socializing after hours, her parents were barred from pursuing wrongful death claim against her employer since the decedent was a commercial traveler at time of death and therefore the workers' compensation exclusive remedy applied.

CANNABIS ON THE HORIZON



CANNABIS FOR INDUSTRIAL INJURIES

Can an injured worker get cannabis for treatment in a workers' compensation claim?

Possibly

Treatment requests are evaluated for approval using the “evidence-based” medical (EBM) approach in Labor Code section 5307.27(a).

EBM approach in mind, is a request for cannabis reasonably required to cure or relieve an injured worker's injury under LC 4600?

Cm19-0016741, 84 Cal. Comp. Cases 465, 2019 Cal. Wrk. Comp. LEXIS 23

The request for authorization was for a referral to a pain physician who specializes in prescribing cannabis for pain control. UR non-certified the request.

CANNABIS FOR INDUSTRIAL INJURIES

Can the employer be made to pay for cannabis?


The employer argument is that it is a violation of the Controlled Substances Act to reimburse or pay for cannabis for the treatment of an injured worker and that state laws are preempted by this Act.

Musta v. Mendota Heights Dental Ctr., 2022 U.S. LEXIS 1036.

That case involves the state of Minnesota, in which the state supreme court ruled that the Controlled Substances Act preempted a state order requiring reimbursement for medical cannabis.

U.S. Supreme Court declined to review.

CA Health and Safety Code section 11362.785(d):

This section does **not** require a governmental, private, or any other health insurance provider or health care service plan to be liable for a claim for reimbursement for the medicinal use of cannabis.  HANNA BROPHY

CANNABIS FOR INDUSTRIAL INJURIES

AB 2188, CA Gov Code sec 12954, effective 1/1/24

Amends the FEHA and makes **it unlawful to discriminate** against an applicant or employee who has engaged in the **lawful** use of marijuana **outside** of work.

This would presumably include use of cannabis as treatment for an industrial injury.

What it says...

“[I]t is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

- A. The person's use of cannabis off the job and away from the workplace...
- B. An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

CANNABIS FOR INDUSTRIAL INJURIES

Intoxication Defense

LC 3600(a)(4), an injury is not compensable when it is "caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee."

LC 5705 specifically provides that intoxication of the employee causing injury is an affirmative defense that places the burden of proof on the employer.

CANNABIS FOR INDUSTRIAL INJURIES

Three-part burden of proof for the Intoxication defense:

- 1) the employer must demonstrate that the employee imbibed or ingested one or more intoxicants;
- 2) the employer must prove that the employee was intoxicated, and
- 3) the employer must establish a cause-and-effect relationship between the employee's intoxication and a resulting injury.

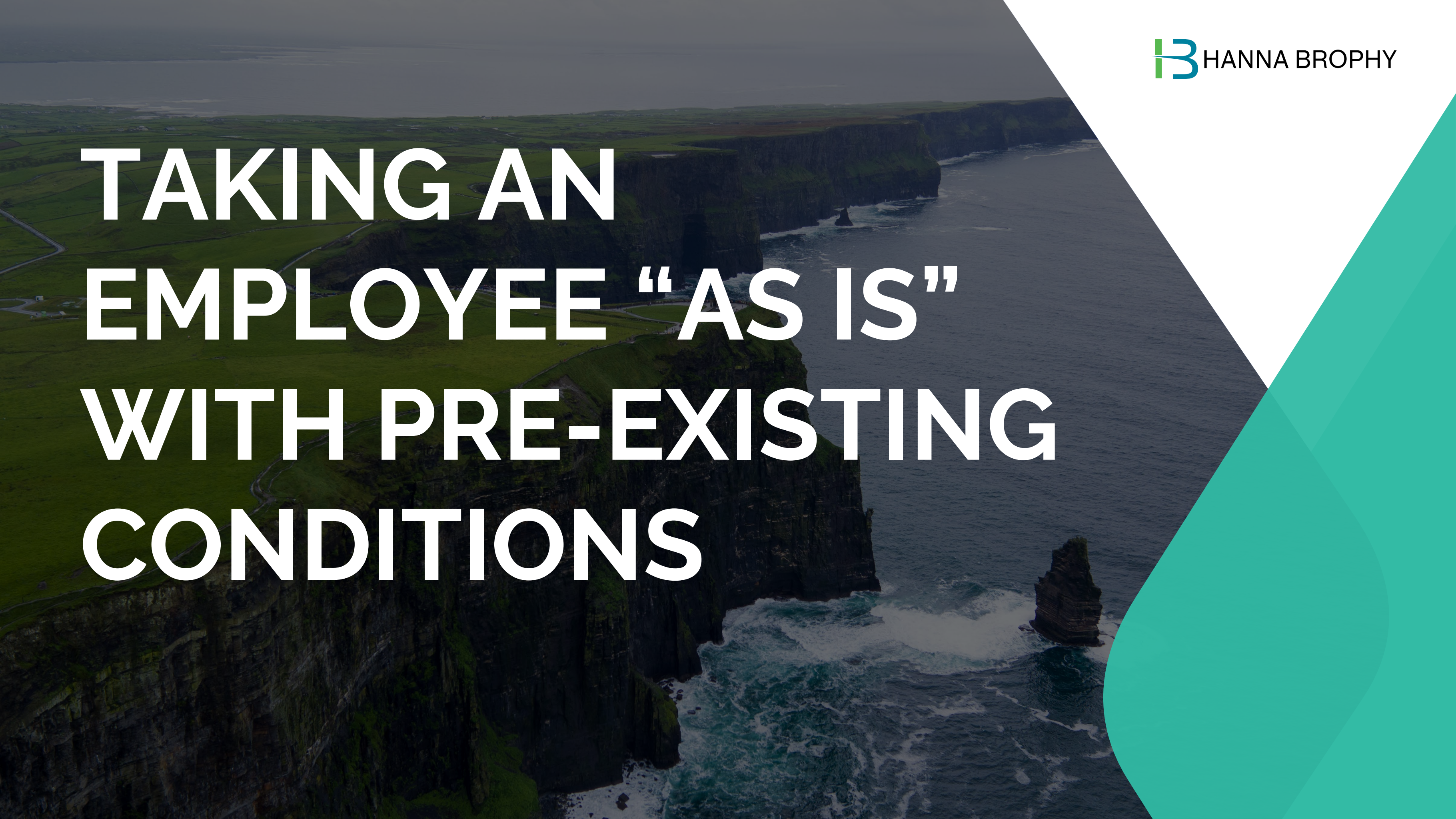
The intoxication must be shown to be a proximate cause or substantial factor in causing the injury. It does not necessarily need to be the sole cause.

CANNABIS FOR INDUSTRIAL INJURIES

The intoxication defense is still valid, but will be difficult to prove related to cannabis use.

There is still no prohibition in considering cannabis use inside of work.

Does not affect employers right to maintain an alcohol and drug free workplace.



TAKING AN EMPLOYEE “AS IS” WITH PRE-EXISTING CONDITIONS

LET'S START WITH AN EXAMPLE

You run a small business with 10 employees. You have an insurance policy in place for workers' compensation. Your dad's old college buddy, Sam, needs a job. You hire him, even though you know he has a history of some kind of back issues and underwent significant treatment for lung cancer last year having been a lifelong smoker. Three months into working for you, Sam injures his back while lifting a heavy box in the office. While he's sitting down in the break room waiting for a ride to the clinic, Sam has a stroke. Luckily, during the stroke, he does not fall or hit his head.

Sam recovers decently well from the stroke after being briefly hospitalized. Doctors indicate the stroke was partly caused by his history of smoking, high cholesterol, and also partly caused by lifting the heavy box. Doctors report that Sam's back problems were mostly pre-existing, but worsened by lifting the box at your office. In fact, you find out Sam had two previous workers' compensation claims with different employers for his back. He received disability awards for both of those claims.

What part of Sam's claim is Defendant's responsibility? Any available ways to reduce exposure?

- Medical treatment?
- Time off work / Temporary disability?
- Permanent disability?

REDUCING P.D. EXPOSURE – APPORTIONMENT

1. Apportionment shall be based on causation.
2. Defendant's burden to prove – may take time/ additional reporting
3. Medical Evidence is key!
4. Judges and vocational experts must take medical apportionment into consideration if substantial evidence establishes that factors other than the industrial injury have caused any portion of the employee's permanent disability.
5. Prior Awards – LC 4664
6. "Other Factors" – LC 4663

CA LABOR CODE §4664 – PRIOR AWARDS

- “the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.”
- If the applicant has received a **prior award of permanent disability**, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
- Court of Appeal in *Kopping v. WCAB* held that the Defendant had a dual burden:
 - Prove the existence of a prior award;
 - Prove the overlapping of factors of disability between the prior award and the current award. (eg: Left arm now and prior award to Right arm)
- Apples to Apples comparison
- Easier if both Awards are under the same rating schedule.

CA LABOR CODE §4663 – ALL OTHER FACTORS INCLUDING RISK FACTORS

Proper consideration of risk factors:

- A doctor must find that the risk factor actually caused some part of the increased permanent disability.

Jensen v. County of Santa Barbara (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 185 Apportionment to **family history and obesity** upheld where these risk factors were shown to be causative of current disability.

Foxworthy v. Dept. of Parks and Rec. (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 634 Apportionment to **obesity and sleep apnea** upheld where AME explained how and why these risk factors had contributed to applicant's disability.

CA LABOR CODE §4663

The percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

What about the thin skulled or eggshell skulled Applicant? Doesn't the employer take the employee as they find them?

The prior rule that the employer takes the employee as it finds them, with no apportionment for asymptomatic, preexisting, or non-disabling conditions, has been replaced by the new apportionment rules in SB 899.

The "thin skulled" Applicant no longer rules in regards to apportionment.

DEALING WITH THE FINAL REPORT

WHO ISSUES THE FINAL REPORT?

WHAT MAKES IT FINAL?

8 CCR 9785: Reporting Duties of the PTP: at least every forty-five days from the last report of any type and within 20 days of the examination.

AME/QME: within 30 days of evaluation or within 60 days of request for supplemental.

“An impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning **it is well stabilized and unlikely to change substantially in the next year with or without medical treatment**. The term impairment in the Guides refers to permanent impairment, which is the focus of the [AMA] *Guides*.” (AMA Guides 5th Ed. P. 2)

MMI determination (or any report identifying permanent work restrictions) triggers need to run IP / Accommodations process if not already started AND on WC side, we review for permanent impairment and its dollar value.

RETURN TO WORK

Coordination of accommodations process with employment/labor attorney or general counsel advisable. The interactive process is essential.

If an Injured Worker has new temporary or permanent work restrictions, consider whether modified or alternative work is currently available. Remember:

Modified Work – the Injured Worker's pre-injury job with different job duties.

Alternative Work – a different job for the same employer.

If work is not available because of a mass RIF or location closure, confirm whether they would have been able to be accommodated if the RIF or closure had not happened. Document that process diligently and with as much specificity as possible (i.e. what opportunities would have been available, who confirmed the same, and why are they not available now).

SUPPLEMENTAL JOB DISPLACEMENT BENEFITS (AKA “VOUCHER”)

If the Injured Worker (1) has lost time from work, (2) has not returned to his or her pre-injury job, and (3) has permanent disability, the Employer must make an offer of regular, modified, or alternative work within 60 days of receipt of a medical report addressing permanent work restrictions. Otherwise, the Injured Worker is due a Supplemental Job Displacement Voucher. labor Code § 4658.7(B)

NOTE: The WCAB has confirmed that Employer may not delay making a return to work offer pending receipt of a Physician's Return to Work & Voucher Report if the body of the medical report is sufficient to make a determination as to availability of work. (Fndkyan v. Opus One Labs, 2019 Cal. Wrk. Comp. P.D. LEXIS).

WATCH: 8 CCR 10133.31(c): No voucher where Employee lost no time or was returned to same job.

QUESTIONS??

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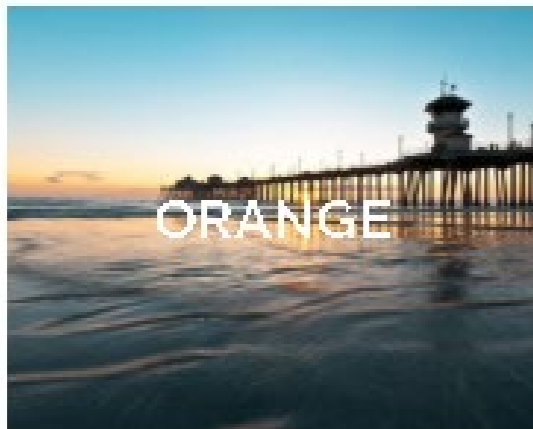
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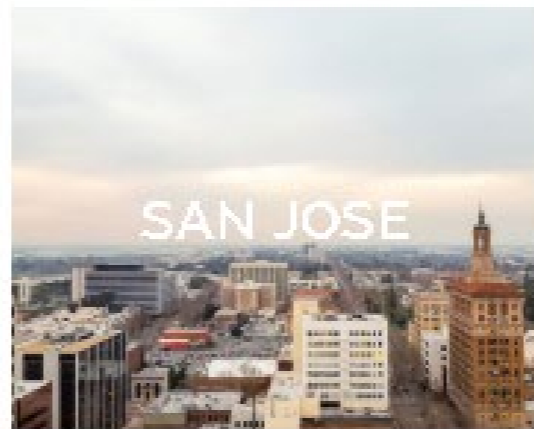
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