The Continuous Trauma

By Donald Barthel, Esq
Bradford & Barthel, LLP

https://www.bradfordbarthel.com/webinars/

Email: twelty@bradfordbarthel.com to receive BLOG & Webinar info
CCWC Panel:

With Costly CT Claims on the Rise, Employers Must Consider Options

Workcompcentral, 7/14/16

• CT's "are on the rise in California."
• WCIRB says, % of CTS: doubled in past decade
  (nearly one out of every five indemnity claims)
CT Claims on the Rise

- 2005-2007 8% indemnity claims = CT
- 2014: 18% indemnity claims = CT
- Where?
- LA (of course)

7,000 CTs between 7/12 - 4/16

(7.5% of all claims)

Of LA county’s 336 claims exceeding $1,000,000

148 cases (44%)

= CTs

= $243,000,000.00+
The Continuous Trauma

Or, Why I Stopped Worrying…

…And Started Loving the CT

DEFINITIONS

3208.1 An injury may be either:

(a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or

(b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment…
What’s the “date of injury”?

Answer: it depends!

LC 5411 – **Specifics** – “The date of injury…is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed.”

Date of Injury for…

Specific?
It doesn’t take a…
Date of Specific Injury (con’t)

Huh?
It’s the day you…
...fell down
...bumped your head
...were hit by the car

AKA The day you got “boo boo”
Date of Injury…

Continuous Trauma?

Great Question

COMPARE

LC 5412 – Continuous Trauma - The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

“disability”...?
What’s “DISABILITY” (as used in LC5412?)

“[E]ither compensable temporary disability or permanent disability is required to satisfy section 5412.


What’s “DISABILITY” (as used in LC5412?)

“Modified work alone is not sufficient basis for compensable temporary disability, since actual wage loss is required for temporary disability, but it may indicate permanent impairment of earning capacity, especially if the work is never able to return to the original job duties.”

What’s “DISABILITY” (as used in LC5412?)

“[M]edical treatment alone is not **disability**, but it may be evidence of compensable **permanent disability**, as may a need for modified work.”


What’s “DISABILITY” (as used in LC5412?)

“These questions, which may require expert medical opinion, are for the trier of fact to determine.”

Trier of fact to determine?

What's an "occupational disease"?

not statutorily defined!

"continuous exposure to harmful substances in the course of employment"

[Fruehauf Corp. v WCAB (1968) 68 Cal.2d 569, 33 CCC 300]

"occupational disease" vs "continuous trauma"?

NO DIFFERENCE!

LC 5500.5 applies to both
We’ve all HEARD about LC 5500.5…

What does it really say?
BE CAREFUL WHAT YOU WISH FOR…

LC 5500.5 says…

5500.5. (a) Except as otherwise provided in Section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first.
And says...

Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after:

- January 1, 1979: three years
- January 1, 1980: two years
- January 1, 1981 and thereafter: one year

And says...

In the event that none of the employers during the above-referenced periods of occupational disease or cumulative injury are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof.

Any employer held liable for workers' compensation benefits as a result of another employer's failure to secure the payment of compensation as required by this division shall be entitled to reimbursement from the employers who were unlawfully uninsured during the last year of the employee's employment, and shall be subrogated to the rights granted to the employee against the unlawfully uninsured employers under the provisions of Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of Division 4.
And says...

If, based upon all the evidence presented, the appeals board or workers' compensation judge finds the existence of cumulative injury or occupational disease, liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

And says...

(b) Where a claim for compensation benefits is made on account of an occupational disease or cumulative injury which may have arisen out of more than one employment, the application shall state the names and addresses of all employers liable under subdivision (a), the places of employment, and the approximate periods of employment where the employee was exposed to the hazards of the occupational disease or cumulative injury. If the application is not so prepared or omits necessary and proper employers, any interested party, at or prior to the first hearing, may request the appeals board to join as defendant any necessary or proper party. If the request is made prior to the first hearing on the application, the appeals board shall forthwith join the employer as a party defendant and cause a copy of the application together with a notice of the time and place of hearing to be served upon the omitted employer; provided, the notice can be given within the time specified in this division.
And says...

(b) continued...
If the notice cannot be timely given or if the motion for joinder is made at the time of the first hearing, then the appeals board or the workers’ compensation judge before whom the hearing is held, if it is found that the omitted employer named is a necessary or proper party, may order a joinder of the party and continue the hearing so that proper notice may be given to the party or parties so joined. Only one continuance shall be allowed for the purpose of joining additional parties. Subsequent to the first hearing the appeals board shall join as a party defendant any additional employer when it appears that the employer is a proper party, but the liability of the employer shall not be determined until supplemental proceedings are instituted.

(c) In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits.
And says...

(c) continued...

If, during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of the employer shall not be determined until supplemental proceedings are instituted. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board's final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his or her dependents such information as will enable the employer to determine the time, place, and duration of the alleged employment. On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.

And says...

(d) (1) In the event a self-insured employer which owns and operates a work location in the State of California, sells or has sold the ownership and operation of the work location pursuant to a sale of a business or all or part of the assets of a business to another self-insured person or entity after January 1, 1974, but before January 1, 1978, and all the requirements of subparagraphs (A) to (D), inclusive, exist, then the liability of the employer-seller and employer-buyer, respectively, for cumulative injuries suffered by employees employed at the work location immediately before the sale shall, until January 1, 1986, be governed by the provisions of this section which were in effect on the date of that sale.
And says…

A. The sale constitutes a material change in ownership of such work location.
B. The person or entity making the purchase continues the operation of the work location.
C. The person or entity becomes the employer of substantially all of the employees of the employer-seller.
D. The agreement of sale makes no special provision for the allocation of liabilities for workers' compensation between the buyer and the seller.

(2) For purposes of this subdivision:

(A) "Work location" shall mean any fixed place of business, office, or plant where employees regularly work in the trade or business of the employer.

(B) A "material change in ownership" shall mean a change in ownership whereby the employer-seller does not retain, directly or indirectly, through one or more corporate entities, associations, trusts, partnerships, joint ventures, or family members, a controlling interest in the work location.

(3) This subdivision shall have no force or effect on or after January 1, 1986, unless otherwise extended by the Legislature prior to that date, and it shall not have any force or effect as respects an employee who, subsequent to the sale described in paragraph (1) and prior to the date of his or her application for compensation benefits has been filed, is transferred to a different work location by the employer-buyer.
And says...

(4) If any provision of this subdivision or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of this subdivision which can be given effect without the invalid provision or application, and to this end the provisions of this subdivision are severable.

And says...

(e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. The proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his or her dependents, but shall be limited to a determination of the respective contribution rights, interest or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss the employer and amend its original award in such manner as may be required.
(f) If any proceeding before the appeals board for the purpose of determining an apportionment of liability or of a right of contribution where any employee incurred a disability or death resulting from silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows:

(1) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee’s employment in those operations shall be jointly and severally liable for the payment of compensation and of medical, surgical, legal and hospital expense which may be awarded to the employee or his or her estate or dependents as the result of disability or death resulting from or aggravated by the exposure.

(2) In making its determination in the supplemental proceeding for the purpose of determining an apportionment of liability or of a right of contribution of percentage liabilities of the various employers engaged in underground metal mining operations the appeals board shall consider as a rebuttal presumption that employment in underground work in any mine for a continuous period of more than three calendar months will result in a silicotic exposure for the employee so employed during the period of employment if the underground metal mine was driven or sunk in rock having a composition which will result in dissemination of silica or silicotic dust particles when drilled, blasted, or transported.
And says...

(g) Any employer shall be entitled to rebut the presumption by showing to the satisfaction of the appeals board, or the workers’ compensation judge, that the mining methods used by the employer in the employee's place of employment did not result during his or her employment in the creation of silica dust in sufficient amount or concentration to constitute a silicotic hazard. Dust counts, competently made, at intervals and in locations as meet the requirements of the Division of Occupational Safety and Health for safe working conditions may be received as evidence of the amount and concentration of silica dust in the workings where the counts have been made at the time when they were made. The appeals board may from time to time, as its experience may indicate proper, promulgate orders as to the frequency with which dust counts shall be taken in different types of workings in order to justify their acceptance as evidence of the existence or nonexistence of a silicotic hazard in the property where they have been taken.

And says...

(h) The amendments to this section adopted at the 1959 Regular Session of the Legislature shall operate retroactively, and shall apply retrospectively to any cases pending before the appeals board or courts. From and after the date this section becomes effective no payment shall be made out of the fund used for payment of the additional compensation provided for in Section 4751, or out of any other state funds, in satisfaction of any liability heretofore incurred or hereafter incurred, except awards which have become final without regard to the continuing jurisdiction of the appeals board on that effective date, and the state and its funds shall be without liability therefor. This subdivision shall not in any way effect a reduction in any benefit conferred or which may be conferred upon any injured employee or his dependents.
And says...

(i) The amendments to this section adopted at the 1977 Regular Session of the Legislature shall apply to any claims for benefits under this division which are filed or asserted on or after January 1, 1978, unless otherwise specified in this section.
LC 5500.5 BIGGIES

5500.5. (a) *Except as otherwise provided in Section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:*

<table>
<thead>
<tr>
<th>Period</th>
<th>Liability Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 1979</td>
<td>Three years</td>
</tr>
<tr>
<td>January 1, 1980</td>
<td>Two years</td>
</tr>
<tr>
<td>January 1, 1981 and thereafter</td>
<td>One year</td>
</tr>
</tbody>
</table>

Liability for most CTs goes back only one (1) year

In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof.
No one has coverage/PSI for last year?

Go back in time for ER who does!

www.bradfordbarthel.com

5500.5

If, based upon all the evidence presented, the appeals board or workers’ compensation judge finds the existence of cumulative injury or occupational disease, **liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years**; however, in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

www.bradfordbarthel.com
Found a one year CT?

If that's the CT, DO NOT:

Apportion to earlier days/months/years

Apportion to later days/months/years

5500.5

In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers.

Two or more defendants in the CT?
IW can avoid being “gang tackled”
LC 5500.5:

Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of the employer shall not be determined until supplemental proceedings are instituted.

LC 5500.5 (con’t)

Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board’s final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his or her dependents such information as will enable the employer to determine the time, place, and duration of the alleged employment.
Co-def was elected against?

You may...

…and keep quiet till there’s a final decision!

On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.

Once the damage has been done (and the “final decision” issues), feel free to try to undo the damage

PRACTICE POINTER: There are significant advantages to being “elected against” (Remember Western Growers!?!?)
**Chanchavac v. LB Industries, Inc.**

2015 Cal. Wrk. Comp. P.D. LEXIS 516

(Panel)

Facts: 2 co-defs, 1 ct
IW does **not** elect

Issue: May each def get their QME?

Answer: yep!

---

**Let's think about this AA...**

Don't want to elect? Better get ready to face:
- team work against you
- multiple defenses
- multiple QMEs in each specialty
**Chanchavac**

An IW upside...?
- maybe (esp in denied cases)

IW fails to elect
- Allow each co-def to get QMEs
- Determine which reports are most favorable
- Elect def with best meds for IW

Question: after election, can elected against def use reports obtained by non-elected carrier?

STAY TUNED

---

**I WANT MY MONEY BACK!**

You’re the lead (or only) defendant.
You’ve settled the CT.
You’re only partially on risk for CT.

WHAT NOW?
I WANT MY MONEY BACK!

New Term: “Contribution”

“Dear Employer/Carrier/TPA,
I’ve done some math. You owe me $60,000. Please send now.

Love & Kisses,
Lead Defendant”

Nice letter!
Wait awhile!
Wait a little longer!
Wait long enough…

Contribution SOL

Clock starts ticking…

“after the appeals board has made an award for compensation benefits in connection with an occupational disease of cumulative injury, any employer or insurance carrier held liable under the award may institute proceedings before the board for the purpose of determining the apportionment of liability or right of contribution.”
STOP THE CLOCK!

But how?
File C&R/Order Approving?
   NOPE! (doesn’t “institute proceedings”)

Join co-def?
   NOPE! (still doesn’t “institute proceedings”)

Petition for Contribution…
What is an “award for compensation benefits” That Triggers The 1-Year SOL?

????"award for compensation benefits"????

PICK YOUR POISON!

Can be UNTIMELY, even if

* award not final award as to "all benefits"
  (Rex Club (OAKLEY-CLYBURN) 25 CWCR 71, 62 CCC 441)

* award finds NO TD/NO PD but need for medical care
  (Wines v SDA Security Systems) ADJ 6607637 (7/1/10)

* petition filed w/in 1 year of C&R, but not award
  (except as to "additional payments")
  (I.I. (ORIVIK) 25 CWCR 206, 62 CCC 887)
Petition filed!
Petition timely!

NOW WHAT?
SETTLE

or...

www.bradfordbarthel.com

ARBITRATION

5275. (a) Disputes involving the following issues shall be submitted for arbitration…

...(2) Right of contribution in accordance with Section 5500.5.

www.bradfordbarthel.com
Where DO you FIND an ARBITRATOR

5270.5. (a) The presiding workers' compensation judge at each office shall prepare a list of all eligible attorneys who district apply to be placed on the list of eligible arbitrators.

ARBITRATOR

5270.5 (a)....Attorneys are eligible to become arbitrators if they are active members of the California State Bar Association and are one of the following:
(1) A certified specialist in workers' compensation, or eligible to become certified.
(2) A retired workers' compensation judge.
(3) A retired appeals board member.
(4) An attorney who has been certified to serve as a judge pro tempore.
5271(a) The parties to a dispute submitted for arbitration may select any eligible attorney from the list prepared by the presiding workers’ compensation judge to serve as arbitrator...

(b) If the parties cannot select an arbitrator by agreement, either party may request the presiding workers’ compensation judge to assign a panel of five arbitrators selected at random from the list of eligible attorneys...

(e) Each party or lien claimant shall strike two members from the panel, and the remaining attorney shall serve as arbitrator.

ARBITRATORS...

can do anything he can do...

...EXCEPT (a) order IW to undergo IME eval,
(b) issue contempt order
Who Pays Costs?

LC 5273

(b) ...the costs of the arbitration proceedings, including the arbitrator's compensation, shall be paid as follows:…

(2) By the parties equally in proceedings subject to Section 5500.5.

WHERE is the arbitration?

WHEN is the arbitration?

5276. (a) Arbitration proceedings may commence at any place and time agreed upon by all parties.
5276 (b) If the parties cannot agree on a time or place to commence arbitration proceedings, the arbitrator shall order the date, time and place for commencement of the proceeding. Unless all parties agree otherwise, arbitration proceedings shall commence not less than 30 days nor more than 60 days from the date an arbitrator is selected.

5276 (c) Ten days before the arbitration, each party shall submit to the arbitrator and serve on the opposing party reports, records and other documentary evidence on which that party intends to rely…
5277(a) The arbitrator's findings and award shall be served on all parties within 30 days of submission of the case for decision...

(e) Unless all parties agree to a longer period of time, the failure of the arbitrator to submit the decision within 30 days shall result in forfeiture of the arbitrator's fee and shall vacate the submission order and all stipulations.
DON'T LIKE THE RESULTS?

5277 (c) The findings of fact, award, order, or decision of the arbitrator shall have the same force and effect as an award, order, or decision of a workers' compensation judge.

aka "Can you say, "RECON"?"

Take Charge...

LEAD THE FIGHT!
Move the CT (Western Growers)
STRATEGY

You’re “in” the entire CT as pleaded
or
You’re sharing the CT with co-def(s)

Want to…

...increase co-def liability?
...increase the contribution $$$?
...totally eliminate your liability?
...decrease all defs’ liability?
(Benson/4663 CT of life)

OR there’s only a specific (and you’re “IT”)…
...want to share your liability with others?

WESTERN GROWERS

AKA Judge, You got the WRONG defendant!

AKA Dumping the liability on someone else!
Western Growers Ins. v. WCAB (Austin) (6/1/93, 16 Cal.App.4th 227)

Facts: IW employed by ER 25 years

CT causes “major recurrent depression”

1985 - symptoms (later dx’d major depression) first appear

Western Growers (con’t)

Facts: 6/85 - admitted to Mental Health (16 days) (FIRST SUFFERS “DISABILITY” – TD)

6/85 – IW testifies – at later trial – he first believed problems were aoe/coe in ‘85
**Western Growers (con’t)**

RTW – U&C (followed by doc; on meds)

3/87 – symptoms progress
- can’t work
- doc orders off-work
1988 – hospitalized
2/91 – P&S

---

**Western Growers (con’t)**

**TIME LINE**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td>HIRE</td>
</tr>
<tr>
<td>6/85</td>
<td></td>
</tr>
<tr>
<td>7/85</td>
<td></td>
</tr>
<tr>
<td>3/87</td>
<td>RTW Ordered</td>
</tr>
<tr>
<td>1988</td>
<td>Hospitalized</td>
</tr>
<tr>
<td>2/91</td>
<td>P&amp;S Off Work</td>
</tr>
<tr>
<td>IW believe aoe/coe</td>
<td></td>
</tr>
</tbody>
</table>
Western Growers (con’t)

Carriers:
1. WESTERN GROWERS
   on risk after 6/85 hospitalization to LDW

2. INDUSTRIAL INDEMNITY
   on risk DOH - 6/85 hospitalization

Western Growers (con’t)

WCJ finds:
   CT for “entire period of employment”
   Western Growers = tail end (starting after 6/85)

WG stuck with:
   *all PD

Industrial Indemnity - not tail end
(coverage ends after 6/85 hospitalization)
   Stuck with:
   *1985 hospitalization only
**Western Growers (con’t)**

DCA ISSUE:

Who is liable?

AKA

What is the “date of injury”?  

AKA

Who provided coverage during the year preceding the date of injury or the date of last exposure, whichever occurred first (LC 5500.5)

Held: WCJ got it WRONG!

---

**Western Growers (con’t)**

REASONING:

Crucial date per 5500.5 is either:

a. date of injury (defined by LC 5412), or
b. last date of exposure...

…whichever occurs first.
Western Growers (con’t)

What’s DOI in this case?

Answer: June, 1985

Why is 6/85 the DOI?

a. Hospitalized ( = “disability”)
b. IW testified he – at that pt – believed aoe/coe

LC 5412: DOI = “date upon which the employee first suffered disability therefrom and either knew, or..should have known, that such disability was caused by his present or prior employment”
Western Growers (con’t)

What happens to Western Growers’ liability?

It

Industrial = carrier in 6/1985 and the year proceeding

Industrial: You Lose

WCAB will not generally impute knowledge w/out medical evidence

unless IW’s

"training, intelligence, and qualifications are such that the applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability."

City of Fresno v. WCAB (Johnson), 50 CCC 53
Upshot? Reality?

WCAB virtually NEVER finds knowledge WITHOUT medical opinion articulating industrial causation

Johnson

no imputed "knowledge" even though IW previously developed a “belief”

condition = aoe/coe
**City of Chico v. WCAB (Scholar)**  
77 CCC 440 (2012)

**FACTS:**  
four year history of treatment for a lump (carcinoma) on neck

**HOLDING:** no knowledge

**REASON:**  
not told by doctor carcinoma = aoe/coe

---

**City of LA v. WCAB (Darling) 70 CCC 1147 (2005)**

**FACTS:**  
• police officer worked '69 thru '90 (6DW)  
• noticed swelling in neck in '94  
• diagnosed with Hodgkin's disease in '95.  
• filed claim in '01 but not told aoe/coe until '03

**HOLDING:** CT thru '03  
– 13 yrs after stopped working!  
– 2 years after filed claim!!
Western Growers Pointer -

Do NOT believe the Application!

Just b/c you’ve got some/all coverage for last year listed on App means NOTHING!

www.bradfordbarthel.com

Still good law?

Traditionally:
respective ER liability = period of exposure (NOT degree of causation)

SCIF v. WCAB (Busch) (1977) 42 CCC 919 (writ denied);
SCIF v. WCAB (House) (1976) 41 CCC 706]
Basis? **Former** LC 5500.5(d):

"The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage."

eliminated in 1978

---

**STRATEGY?**

Every specific **needs** a CT

FILE ONE!
Why celebrate a CT?
Show me a CT
AND
I’ll Show You
APPORTIONMENT OPPORTUNITIES!

Anderson v. WCAB
Ct. of Appeals (2nd Dist)
(4/19/07)
Cert. for Pub.
AME apportions away via 4663:
30% of Upper Extremity PD

Apportionment

PD (CTS, etc) due to:

70% AOE/COE: grasp/manip/push/pull

30% Non-AOE/COE: “regular activities of life”
  * driving
  * occ. moving furniture
AME depo

• Admittedly “speculative” (Isn’t all apportionment?)

• Based on “best medical judgment” to a “reasonable medical probability”

Issue:

apportionment = “substantial evidence?”

Holding: yes!
The AME’s “apportionment of PD to [ADLs], referring to such things as driving and moving furniture once in a while, appears vague and speculative; indeed, should this become the accepted standard, it would be difficult to obtain an award without apportionment in almost every case, unless the worker lived a totally immobile life whenever not at work.”

“It appears that so long as the appropriate magic words are used, such as ‘best medical judgment,’ ‘reasonable medical probability,’ and ‘medical expertise,’ … virtually anything can be a permissible basis for apportionment.”
Donald Barthel, Esq.
Bradford & Barthel, LLP
2518 River Plaza Drive
Sacramento, CA 95833
(916) 569-0790
dbarthel@bradfordbarthel.com