Civil No: A146538

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT – DIVISION 4

TRAVELERS CASUALTY & SURETY CO. and ALLIANCE RESIDENTIAL, LLC

Petitioner,

vs.

MARK DREHER and WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ7050835

Amicus Curiae Brief Of CALIFORNIA WORKERS' COMPENSATION INSTITUTE

In Support Of Petitioner
TRAVELERS CASUALTY & SURETY CO. and ALLIANCE RESIDENTIAL, LLC
[Submitted Concurrently With Amicus Curiae Application]

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California Workers' Compensation Institute

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR	Court of Appeal Case Number: A146538
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Michael Marks, Esq. SBN 071817 Law Office of Saul Allweiss 18321 Ventura Blvd., Suite 500 Tarzana, CA 91356 TELEPHONE NO.: 818-343-7509 FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*: Amicus California Workers Compensation Institute	Superior Court Case Number: ADJ7050835 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: TRAVELERS CASUALTY & SURETY CO..et a; RESPONDENT/REAL PARTY IN INTEREST: Mark Dreher & WCAB	

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 15, 2016

Michael A. Marks, Esq.
(TYPE OR PRINT NAME)

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VERIFICATION AND WORD COUNT

I, Michael A. Marks, swear that I have read the within Amicus Curiae brief and know the contents thereof; that the within Argument & Authorities contains 3,129 words, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts and law stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of California Workers' Compensation Institute are absent from the County where my office is located and are unable to verify the petition, and because as their attorney I am more familiar with such facts and law than are the officers.

I declare the truth of the foregoing under penalty of perjury of the laws of the State of California, and that this verification was executed this 16th day of January 2016, at Essex, Vermont.

Michael A. Marks (SBN 071817)

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT – DIVISION 4

TRAVELERS CASUALTY & SURETY CO. and ALLIANCE RESIDENTIAL, LLC ***Petitioner*** VS. MARK DREHER and WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, ***Respondent(s)***	Civil No: A146538 WCAB Case No. ADJ7050835 **Declaration of Electronic Service**

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is Allweiss & McMurtry, 18321 Ventura Blvd, Suite 500, Tarzana, CA 91356

On January 16, 2016, I served a true copy of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief* AND *Amicus Curiae Brief of California Workers' Compensation Institute* via the Court of Appeal's TRUFILING electronic system.

Patricia A Strickland Susan T. Marks & Associates 215 Lennon Lane, Suite 200 Walnut Creek, CA 94598	Workers' Compensation Appeals Board : Respondent P.O. Box 429459 San Francisco, CA 94142-9459	John A. Bloom Law Offices of John A. Bloom 2101 Fourth Street Santa Rosa, CA 95404

I declare, under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct. Executed on January 16, 2016, in Essex Junction, Vermont.

Michael A. Marks, Esq. (SBN 071817)

A LIVE-IN APARTMENT MANAGER/MAINTENANCE WORKER'S SLIP AND FALL ON AN OBVIOUSLY RAIN-SOAKED EXTERIOR WALKWAY WAS CLEARLY FORESEEABLE AS WITHIN THE ORDINARY RISKS AND HAZARDS OF HIS OCCUPATION, AND THUS NOT THE RESULT OF AN "EXTRAORDINARY EMPLOYMENT CONDITION" WITHIN THE MEANING OF LABOR CODE SECTION 3208.3(d)

This case arises from a live-in multi-building apartment manager / maintenance worker's admitted slip and fall on a rain-soaked exterior walkway while carrying his toolbox. Because he alleges consequential psychiatric injury, it requires interpretation of the "extraordinary employment condition" language of Labor Code Section 3208.3, subdivision (d), which states that

> … no compensation shall be paid ... for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. ... This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.

In interpreting Labor Code Section 3208.3, cases from at least four different Appellate Districts (including this District) [1] all caution that with regard to psychiatric claims,

> We agree with *Pacific Gas & Electric Co.* that we must consider the public policy goals in determining whether an award of benefits is warranted. By enacting *section 3208.3* the "Legislature made quite clear that it intended to *limit* claims for psychiatric benefits due to their proliferation and their potential for fraud and abuse. Therefore, **any interpretation of the section that would lead to more or broader claims should be examined closely to avoid violating express legislative intent."** (*Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd., supra*, 114 Cal.App.4th at p. 1182.) (*emphasis added*)

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[1] *County of San Bernardino v. WCAB (McCoy)* 203 Cal. App. 4th 1469 (Fourth Appellate District), *San Francisco Unified School District v. WCAB (Cardozo)* 190 Cal. App. 4th 1 (First Appellate District), *Verga v. WCAB* (2008) 159 Cal. App. 4th 174 (Third Appellate District), *Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal.App.4th 1435 (*Sixth Appellate District)

The 6-month employment requirement for psychiatric injury claims under Labor Code Section 3208.3, and the "extraordinary employment condition" exception in that context, have been addressed by the Courts of Appeal in two conflicting published cases. *Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal.App.4th 1435, 1444 [51 Cal. Rptr. 3d 314]* involved a stack of 12-foot long four-by-four lumber falling off a wall rack and onto a Home Depot manager-trainee's left leg/ankle/foot while he was attempting to add another 12-foot long four-by-four to the stack. He suffered contusion and swelling but no fracture, was diagnosed with reflex sympathetic dystrophy, and alleged a consequential psychiatric injury. The Workers Compensation Appeals Board had denied the psychiatric claim, referring to his regular work around stacks of lumber which could fall. The Court of Appeal reversed the non-compensability finding, and instead found the psychiatric injury compensable. Despite noting that "the record is sparse and the facts are few" the Court concluded that the employee met his burden because the employer produced **no evidence that such occurrences of falling lumber were regular or routine** and thus the court assumed that they are uncommon, unusual and totally unexpected events.[2] By contrast, *State Compensation Insurance Company v. WCAB (Garcia)* 204 Cal. App. 4th 766, involved an avocado picker's fall from a 24' ladder while picking avocados from a 34'

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[2] As observed in an article published in the Pepperdine School of Business management, Graziado Business Review, [https://gbr.pepperdine.edu/2010/08/slips-trips-and-falls/] "Falling merchandise is a growing area of liability as more "big box" stores are created. Customers who attempt to retrieve merchandise from boxes stacked on shelves may either knock boxes off on themselves or leave them re-arranged so that boxes fall when another customer attempts to retrieve one. See Steven P. Garmisa, "Premises Liability Law Expands as Retail Outlets Grow into 'Big Boxes'," *Chicago Daily Law Bulletin*, (October 31, 2002)." A simple Google search of "falling merchandise" AND "home depot" reveals that in 2009 Home Depot received 200 such claims per month. http://wiki.legalexaminer.com/topic/superstore-liability-falling.aspx

tree. In reversing the psychiatric compensability finding below, the Court concluded that,

> Garcia's fall was sudden, but it was not extraordinary within the meaning of *section 3208.3, subdivision (d).* It was an occupational hazard of picking avocados while standing on a ladder, and thus was not uncommon, unusual or unexpected. We therefore annul the decision of the Workers' Compensation Appeals Board (WCAB) and remand with instructions to deny Garcia's claim for psychiatric injury.

While both *Garcia* and *Matea* agree that compensability of psychiatric claims by those employed less than 6 months require "something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly ..." the cases disagree with regard to applying the burden of proof whether there is an "extraordinary employment condition". The Court in *Garcia* expressly discussed the employee's burden, noting that

> SCIF did not introduce evidence that such falls are an industry hazard or that insurance costs reflect that risk, but that was not its burden. Garcia had the burden to prove that his psychiatric injury was caused by a sudden and extraordinary employment event. (*Matea, supra, 144 Cal.App.4th at p. 1449.*) He did not meet that burden. Garcia's observations during his brief employment at Cole Ranch and his prior unspecified fruit-picking experiences do not establish his injury was caused by an event that was uncommon, unusual and totally unexpected. There was no evidence the employer violated any safety regulations. **An event does not become presumptively extraordinary because the employer offers no evidence it is regular or routine**. As noted in the WCAB's dissent, "[S]uch a broad interpretation could place a greater risk of liability on those employers whose safety measures are better and more effective, i.e., those who manage to prevent accidents on the job from becoming routine or commonplace." In the absence of more persuasive evidence that Garcia's fall was extraordinary, his claim for psychiatric injury is barred under section 3208.3, subdivision (d).

The Appeals Board's decision below seemingly ignores the fundamental disagreement between the aforementioned published appellate opinions of the Sixth and Second District Courts of Appeal, and effectively and improperly places the burden of proof upon defendant, while ignoring the obvious and commonsense fact that slipping and falling outdoors on rain-soaked walkway is a generally recognized risk and thus not "extraordinary". The decision below chose to rely on the Sixth District's decision in *Matea* to find herein that an "extraordinary employment condition" exists because of claimant's testimony that ***he*** did not expect the rain-soaked walkway to be slippery and that defendant did not submit evidence that a slip and fall on a rain-soaked sidewalk was a routine or ordinary employment condition. [3] Significantly, the Appeals Board's decision below doesn't analyze the contrary authority[4] in the Second District's *Garcia decision* wherein that Court discussed but rejected the *Matea* reliance on claimant's subjective awareness[5] and instead held that "An event does not become presumptively extraordinary because the employer offers no evidence it is regular or routine."[6]

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[3] *See,* OPINION AND DECISION AFTER RECONSIDERATION dated 6/15/15 [Petitioner's Exhibit H to Petition for Writ of Review],

[4] Labor Code section 5313 requires the Board to present its reasoning in arriving at its decision.

[5] As noted in Garcia, "SCIF did not introduce evidence that such falls are an industry hazard or that insurance costs [***14] reflect that risk, but that was not its burden. Garcia had the burden to prove that his psychiatric injury was caused by a sudden and extraordinary employment event. (*Matea, supra, 144 Cal.App.4th at p. 1449.*) He did not meet that burden. Garcia's observations during his brief employment at Cole Ranch and his prior unspecified fruit-picking experiences do not establish his injury was caused by an event that was [*775] uncommon, unusual and totally unexpected"

[6] As noted in Garcia, "SCIF did not introduce evidence that such falls are an industry hazard or that insurance costs [***14] reflect that risk, but that was not its burden. Garcia had the burden to prove that his psychiatric injury was caused by a sudden and extraordinary employment event. (*Matea, supra, 144 Cal.App.4th at p. 1449.*) He did not meet that burden. Garcia's observations during his brief employment at Cole Ranch and his prior unspecified

In addition to the two conflicting published cases referenced above, there are numerous Appeals Board panel decisions, writ denied cases and unpublished appellate decisions on the same topic as reported in the California Workers' Compensation Reporter and California Compensations Cases reporter systems.[7] Some examples are discussed below:

In *Bonilla* v. *WCAB (Cameo Cleaners)* (2011) 76 Cal. Comp. Cases 788 (writ den. – Second Appellate Districe) the injured worker was working as a dry cleaner when an ironing press she was using came down on her hand, resulting in a burn. Evidence indicated that that though there had not been previous accidents similar to the one suffered by Applicant, burns were quite common, due to the use of high pressure steam in the business. The Appeals Board in rejecting the psychiatric claim as not meeting the "sudden and extraordinary" requirement, specifically noted **that the fact that these particular witnesses had never seen this type of injury before is not dispositive**.

In *Alves v. State Compensation Insurance Fund* 79 Cal. Comp. Cases 430 (writ den. – Fourth Appellate District) the employee was a construction worker injured when he caught his tool belt on a truss which then fell on his left side. Applicant contended defendant failed to present any evidence that the incident was a regular or routine event. In reversing the trial judge, the Appeals Board nonetheless found that

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fruit-picking experiences do not establish his injury was caused by an event that was [*775] uncommon, unusual and totally unexpected"

[7] "Board panel decisions and denials of petitions for writ of review reported in the California Compensation Cases and in the California Workers' Compensation Reporter (Cal. Workers' Comp. Rptr.), along with Board denials of petitions for reconsideration also reported periodically in the latter publication, are properly citable authority but only to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board." (*Smith v. Workers' Comp. Appeals Bd., supra, 79 Cal.App.4th at p. 537, fn. 2.)*

trusses were delivered throughout the worksite, and that this type of injury is **not out of the ordinary for applicant's type of employment**.

In *Bayanjargal v. WCAB* (2006) 71 Cal. Comp. Cas 1829 *(writ den.)* a roofer slipped and fell from a roof. In reversing the trial judge's finding of compensability, the Appeals Board considered both the mechanism of the injury and the nature of the injury claimed, and concluded that,

> While we agree that the applicant's injury caused by his unfortunate slip and fall from the roof was a *sudden* event, it cannot be characterized as an *extraordinary* event. Clearly, [**4] it is the very risk of such falls that makes the type of employment in which applicant was engaged a very expensive occupation to insure in workers' compensation. **It is not objectively reasonable to conclude that the risk of such injury was outside the ordinary risks and hazards of his occupation** as a roofer. Neither do we find it extraordinary that applicant would sustain some form of psychiatric injury as a consequence of such a serious orthopedic injury.
>
> This case is similar to situations in which an injury occurred due to an accident that is the type which would be expected to arise from the occupation, such as *Diaz v. Workers' Comp. Appeals. Bd. (2004) 69 Cal.Comp.Cases 218* [*sic*] [writ denied], where an automobile accident was found not to be a sudden and extraordinary employment condition where the applicant was a limousine driver. Similarly, in *Romero v. California Insurance Guarantee Association* (2005) 33 CWCR 75 *[2005 Cal. Wrk. Comp. P.D. LEXIS7],* an electrician's fall from a 12 foot ladder was held not to be a sudden and extraordinary employment condition as it was not highly unusual or out [**5] of the ordinary." (emphasis added)

Using the criteria derived from these cases, a slip & fall injury at work is a routine and regular occurrence, and not an extraordinary occurrence. The injury statistics show that it is a common mechanism of injury, if not one of the most common occurrence. According to the US Department of Labor, "Slips, trips, and falls constitute the majority of general industry accidents. They cause 15% of all

accidental deaths, and are second only to motor vehicles as a cause of fatalities."[8] Similarly, the Bureau of Labor Statistics reports "about slips and falls, they are one of the three events that result in most workplace incidents. Slips, trips, and falls accounted for about 27 percent of cases involving days away from work in 2014. Overexertion (such as straining to lift) accounted for 33 percent of cases; contact (such as being hit by a piece of equipment) accounted for 22 percent."[9] Specifically relevant to this case, the California Department of Industrial Relations published non-fatal industrial accident statistics for private industry, state and local governments, describing slip and fall at the same level such as involved here, as the third most common mechanism among all California industrial injuries in 2009.[10] Therefore, by any objective standard, an injury resulting from "slip and fall" should be considered commonplace and NOT "extraordinary". We urge this Court to heed the warning of *Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd., supra 114 Cal.App.4th at p. 1182* that "any interpretation of the section that would lead to more or broader claims should be examined closely to avoid violating express legislative intent." To find an event "extraordinary employment condition" merely because the condition was

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[8] https://www.osha.gov/SLTC/walkingworkingsurfaces

[9] http://beta.bls.gov/labs/blogs/2015/12/11/why-this-counts-slips-trips-and-falls-in-the-workplace

[10] Non-fatal occupational injury information for 2009 is available on the Division of Workers' Compensation website at http://www.dir.ca.gov/oprl/Injuries/Demographics/2009/Menu.htm. The two most frequent injury mechanisms were "contact with object/equipment" and "overexertion in lifting. By comparison, slip and fall injuries were more frequent than any of the other reported categories, including fall from heights, trip/slip without falling, non-lifting over-exertion, transportation and highway accident, repetitive motion, assaults by persons or animals, exposure to harmful substances, fires/explosions. A review of the other years of statistical reporting reflected on the DWC website shows this as a consistent trend year-after-year.

unexpected by the specific employee would eviscerate the legislative intent to reduce psychiatric claims and raise the proof threshold, as nearly every event causing injury is unexpected by the worker … otherwise s/he wouldn't have done it! This Court should instead adopt a more objective approach that is consistent with the legislative intent.

CONCLUSION

It is not objectively reasonable to conclude that the risk of live-in multi-building apartment manager/maintenance worker's suffering a slip and fall on a rain-soaked exterior walkway while carrying his toolbox was outside the ordinary risks and hazards of his occupation. This Court should follow the lead of *State Compensation Insurance Company v. WCAB (Garcia)* 204 Cal. App. 4th 766 that an event does not become presumptively extraordinary because the employer offers no evidence it is regular or routine, and adopt a commonsense approach that looks at whether the risks and hazards giving rise to the injury are regular or routine and foreseeable in the workplace, regardless of whether the injured employee was personally aware of those risks, placing the burden of proof squarely on the employee to demonstrate objectively that the risks and hazards giving rise to the injury were the result of an "extraordinary employment condition" and not risks that are "regular or routine". Respectfully submitted, January 16, 2016.

LAW OFFICES OF ALLWEISS & McMURTRY
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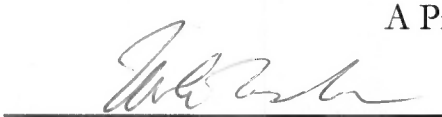

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