

Civil No: H044300
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

STATE COMPENSATION INSURANCE FUND

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA and JOSE A. GUZMAN

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ6839277

Application Of

CALIFORNIA WORKERS' COMPENSATION INSTITUTE
for Leave To File Amicus Curiae Brief In Support Of Petitioner

STATE COMPENSATION INSURANCE FUND

[Submitted Concurrently With Amicus Curiae Brief]

Michael A. Marks, Esq. [SBN 071817]
Law Offices of Allweiss &McMurtry
18321 Ventura Blvd., Suite 500 - Tarzana, CA 91356
Tel: (818) 343-7509

Attorneys for Amicus Curiae
California Workers' Compensation Institute

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT:

The California Workers' Compensation Institute (hereafter CWCI or Institute) hereby applies to this Court for an order granting leave to file an *amicus curiae* brief (concurrently submitted) in support of Petitioners STATE COMPENSATION INSURANCE FUND.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 83% of California's workers' compensation premium¹, and self-insured employers with \$65B of annual payroll (30% of the state's total annual self-insured payroll).² The Institute's research, which is typically based on claims data collected from

¹ Insurer members of the Institute include AIG, Alaska National Insurance Company, Allianz/Fireman's Fund Insurance Company, AmTrust North America, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Group, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America

² Self-insured employer members represent a broad range of industries, and include Adventist Health, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, Country of Alameda, County of San Bernardino Risk Management, County of Santa Clara, Dignity Health, Foster Farms, Grimmway Enterprises Inc., Kaiser Permanente, Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group; Southern California Edison, Special District Risk Management Authority, Sutter Health, University of California, and The Walt Disney Company.

member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. On behalf of its membership, the Institute further serves as a liaison with employer, labor, medical, and legal communities within the workers' compensation system, and frequently provides input at legislative and regulatory hearings. Based upon its expertise in workers' compensation, the Institute has made multiple appearances as *amicus curiae* before the California Supreme Court and Courts of Appeal.³

In this case, CWCI seeks to provide the Court a broader historical perspective underlying the SB893's adoption of Labor Code Section 3208.3 in

³ Cases in which the Institute has been granted *amicus* status include *Christian v. WCAB* (1997), *SCIF v. WCAB (Stuart)* (1998), *Avalon Bay Foods v. WCAB* (1998), *Rosales v. Depuy Ace Medical Company* (2000), *Lockheed Martin v. WCAB (McCullough)* (2002), *Wal-Mart v. WCAB (Garcia)* (2003), *Honeywell v. WCAB (Wagner)* (2005), *Green v. WCAB* (2005), *Rio Linda School District v. WCAB (Schefiner)* (2005), *Nabors v. WCAB* (2006), *Yeager Construction v. WCAB (Gatten)* (2006), *Chang v. WCAB* (2007), *Vaira v. WCAB* (2007), *Brodie, et al. v. WCAB* (2007), *Babbitt v. Ow Jing* (2007); *Pendergrass v. Duggan Plumbing* (2007), *Tanimura & Antle v. WCAB (Lopez)* (2007), *Palm Medical Group v. State Compensation Insurance Fund* (2007), *Smith & Amar v. WCAB* (2007), and *Facundo-Guerrero v. WCAB* (2008), *Smith & Amar v. WCAB* (2009), *Benson v. WCAB* (2009), *Boughner v. WCAB* (2009), *Aguilar v. WCAB* (2009), *El Aguila Food Products v. WCAB (Cervantes)* (2010), *Almaraz & Guzman v. WCAB* (2011), *Baker v. WCAB & X.S.* (2011), *Ogilvie v. WCAB* (2011), *Valdez v. WCAB* (2012); *Pacific Compensation vs. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013)], *Stevens v. Outspoken Enterprises* (2014), *California Insurance Guaranty Association v. WCAB (Elite Surgery Centers)* (2014), *South Coast Framing v. WCAB (Clark)* (2014)], *Angelotti Chiropractic v. Baker (Administrative Director of Division of Workers' Compensation* (2014 — 9th Cir.), *Ramirez v. WCAB (Calif. Dept. of Health Care Services)* (2015); *Contra Costa County v. WCAB (Dahl)* (2015); *McFarland v. WCAB* (2015), *Stevens v. WCAB & Outspoken Enterprises* (2015); *Hallmark Marketing v. WCAB (Southard)* (2015), *State Compensation Ins. Fund v. WCAB (Margaris)* (2016). *Travelers Casualty & Surety Company et al. v. WCAB (Dreher)* (2017); *State Compensation Ins. Fund v. WCAB (Margaris)* (2016).

eliminating psychiatric injury claims based on the subjective opinions of the employee, limiting psychiatric injury compensability, to inform the Court of relevant legislative history, to advise the Court of prior cases relating to the issues raised, and thereby supplement and support the Petitioner's positions herein.

In the view of CWCI and its membership, the decision below subverts the purpose behind the series of statutory changes which were intended to stem proliferation of workers' compensation cases with claims for psychiatric injuries, as reflected in the reforms of 1989 [stats. 1989, ch. 893], [Stats 1990 ch 1550], 1991 [Stats 1991 ch 115], and 1993 [Stats 1993 ch 11,], whereby the Legislature progressively eliminated "subjective perception" as basis for psychiatric compensability, added first a 10% then a 50% "predominant causation" threshold for psychiatric claims, required at least 6 months of employment as a condition precedent to psychiatric claims (subject to the "sudden and extraordinary" exception herein at issue), barred claims substantially caused by good faith personnel actions, required evaluation under the strict criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders 4th Ed., and placed significant barriers to claims filed "post-termination."

Those legislative reforms were enacted specifically to increase the burden of proof and decrease the frequency of compensable psychiatric claims, and the decision below undermines all of those legislative goals by finding that a condition of the employment is "extraordinary" merely because the worker testifies s/he was working on a sloped hillside for the first time and didn't

expect the falling incident to occur⁴ and didn't expect the equipment he was using would fall down-hill on top of him.⁵ If that were to become the standard for compensability of psychiatric injury claims, the legislative reforms would go out the window. As shown by the proposed amicus brief, fundamental principles of statutory interpretation prohibit such an outcome.

We submit that the attached brief provides important analysis to the Court. The certified record is not due to be returned by the Appeals Board until July 17, 2017, there is ample time for further briefing, and thus no prejudice will result by granting this amicus request.

Respectfully submitted,

July 14, 2017.

LAW OFFICES OF ALLWEISS & McMURTRY
A Professional Corporation

Michael A. Marks, Esq. (SBN 0701817)

⁴ According to the Liberty Mutual Research Institute for Safety's 2016 Workplace Safety Index, based on data from Liberty Mutual Insurance, the U.S. Bureau of Labor Statistics (BLS) and the National Academy of Social Insurance, falls on the same level, such as that which occurred in this case, are the second most frequent (16.4%) and costly (\$10.17 billion) industrial injuries. Another 8.7% costing \$5.4 billion results from falls to a lower level, and a further slip/trip without falling accounts for 3.8% costing \$3.25 billion. [<http://www.libertymutualgroup.com/omapps/ContentServer?pagename=LMDGroup/Views/LMG&ft=4&fid=1240029010623&ln=en>]

⁵ This despite that he was operating a top-heavy soil compacting machine while standing below it on a 45 degree slope.

DECLARATION OF SERVICE
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

STATE COMPENSATION INSURANCE FUND

Petitioner

VS.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA and JOSE A.
GUZMAN

Respondent(s)

Civil No: H044300
WCAB Case No. ADJ6839277

Declaration of Service

Via
TrueFiling

I, the undersigned, declare under penalty of perjury pursuant to the laws of the State of California 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, and that on July 14, 2017, filing and service of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief AND Amicus Curiae Brief of California Workers' Compensation Institute* was electronically performed through the TrueFiling electronic system of the court for service pursuant to California Rules of Court 8.70 and 8.71.

Michael A. Marks, Esq.
SBN071817

Civil No: H044300

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

STATE COMPENSATION INSURANCE FUND

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA and JOSE A. GUZMAN

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ6839277

Application Of

CALIFORNIA WORKERS' COMPENSATION INSTITUTE
for Leave To File Amicus Curiae Brief In Support Of Petitioner

STATE COMPENSATION INSURANCE FUND
[Submitted Concurrently With Amicus Curiae Brief]

Michael A. Marks, Esq. [SBN 071817]
Law Offices of Allweiss &McMurtry
18321 Ventura Blvd., Suite 500 - Tarzana, CA 91356
Tel: (818) 343-7509

Attorneys for Amicus Curiae
California Workers' Compensation Institute

TO BE FILED IN THE COURT OF APPEAL

APP-003

COURT OF APPEAL, SIXTH APPELLATE DISTRICT, DIVISION		Court of Appeal Case Number: H044300
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michael Marks, Esq. SBN 071817 Law Office of Allweiss & McMurtry 18321 Ventura Blvd., Suite 300 Tarzana, CA 91356 TELEPHONE NO.: 818-343-7509 FAX NO. (Optional):		Superior Court Case Number: ADJ6839277
E-MAIL ADDRESS (Optional): ATTORNEY FOR (written): Amicus - California Workers Compensation Institute		FOR COURT USE ONLY
APPELLANT/PETITIONER: State Compensation Insurance Fund		
RESPONDENT/REAL PARTY IN INTEREST: Jose Guzman & WCAB		
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): Amicus California Workers Compensation Institute

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

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: July 14, 2017

Michael A. Marks, Esq.

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Page 1 of 1

Form Approved for Optional Use
Judicial Council of California
APP-003 (Rev. January 1, 2005)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

TABLE OF CONTENTS

Cover Page	1
Certificate of Interested Parties	2
Table of Contents	3
Table Of Authorities Cited	4
Verification & Word Count	5
Declaration of Service	6
Argument & Authorities	7

FALLING DOWN A SLOPED HILL WHILE OPERATING MACHINERY AT A
CONSTRUCTION SITE SHOULD NOT CONSTITUTE AN “EXTRAORDINARY
EMPLOYMENT CONDITION” UNDER LABOR CODE SECTION 3208.3(d)
MERELY BECAUSE CLAIMANT HAD PERSONALLY NEVER WORKED ON A
SLOPE BEFORE AND THUS WAS UNAWARE OF THE RISK. THE HOLDING
BELOW WOULD UNDERMINE LONGSTANDING LEGISLATIVE EFFORTS
TO SIGNIFICANTLY REDUCE PSYCHIATRIC CLAIMS DUE TO THEIR
PROPENSITY FOR FRAUD AND ABUSE

Conclusion	18
------------------	----

TABLE OF AUTHORITIES

CASES

<i>Alves v. State Compensation Insurance Fund</i> 79 Cal. Comp. Cases 430	15
<i>Bayanjargal v. WCAB</i> (2006) 71 Cal. Comp. Cas 1829	16
<i>Bonilla v. WCAB (Cameo Cleaners)</i> (2011) 76 Cal. Comp. Cases 788	15
<i>Matea v. WCAB</i> (2006) 144 Cal.App.4th 1435	10, 11, 12, 13, 14
<i>Pacific Gas & Electric Co. v. WCAB</i> 114 Cal.App.4th at p. 1182	8, 11, 18
<i>Smith v. WCAB</i> 79 Cal.App.4th at p. 537	15
<i>State Compensation Ins Co v. WCAB (Garcia)</i> 204 Cal. App. 4th 766 ...	11, 12, 13, 14, 15, 18
<i>Travelers Casualty & Surety Co. v. WCAB (Dreher)</i> (2017) 246 Cal. App. 4th 1101 ...	10, 13
<i>Verga v. WCAB</i> (2008) 159 Cal. App. 4th 174	10

STATUTES

Labor Code Section 3208.3	<i>passim</i>
---------------------------------	---------------

SECONDARY SOURCES

Bureau of Labor Statistics [http://beta.bls.gov/labs/blogs/2015/12/11/why-this-counts-slips-trips-and-falls-in-the-workplace]	13
California Department of Industrial Relations http://www.dir.ca.gov/oprl/Injuries/Demographics/2009/Menu.htm	13
US Department of Labor [https://www.osha.gov/SLTC/walkingworkingsurface]	12

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 3,890 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 pursuant to the laws of the State of California, and that this verification was executed this 14th day of July 2017, at Essex, Vermont.

Michael A. Marks (SBN 071817)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

STATE COMPENSATION INSURANCE
FUND

Petitioner

VS.

WORKERS' COMPENSATION
APPEALS BOARD
OF THE STATE OF CALIFORNIA and
JOSE A. GUZMAN

Respondent(s)

Civil No: H044300
WCAB Case No. ADJ6839277

Declaration of Service
Via
TrueFiling

I, the undersigned, declare under penalty of perjury pursuant to the laws of the State of California 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, and that on July 14, 2017, filing and service of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief AND Amicus Curiae Brief of California Workers' Compensation Institute* was electronically performed through the TrueFiling electronic system of the court for service pursuant to California Rules of Court 8.70 and 8.71.

Michael A. Marks, Esq.
SBN071817

Michael A. Marks, Esq. (SBN 071817)

FALLING DOWN A SLOPED HILL WHILE OPERATING MACHINERY AT A CONSTRUCTION SITE SHOULD NOT CONSTITUTE AN “EXTRAORDINARY EMPLOYMENT CONDITION” UNDER LABOR CODE §3208.3(d) MERELY BECAUSE CLAIMANT HAD PERSONALLY NEVER WORKED ON A SLOPE BEFORE AND THUS WAS UNAWARE OF THE RISK. THE HOLDING BELOW WOULD UNDERMINE LONGSTANDING LEGISLATIVE EFFORTS TO SIGNIFICANTLY REDUCE PSYCHIATRIC CLAIMS DUE TO THE PROPENSITY FOR FRAUD AND ABUSE

According to the Minutes of Hearing included within Petitioner’s exhibits, this case arises from a fall while using a hand-operated soil compactor on a sloped area of a construction site for the first time. The only evidence on the issue of whether there was a “sudden and extraordinary employment condition” [within the meaning of Labor Code §3208.3(d) psychiatric compensability threshold] came from the injured worker who said that he had never before operated a compactor on a slope, never before felt that he was in any danger of having a compactor fall on him, and never heard of a compactor falling on top of anyone else.

Based solely on the worker’s limited one-time personal experience compacting on a slope, the WCAB Judge and the Appeals Board inferred that the injury resulted from a “sudden and extraordinary employment condition” justifying an exemption from the 6-month employment rule otherwise barring psychiatric injuries under Labor Code §3208.3(d).

Because claimant alleges consequential psychiatric injury, the Court must interpret the “sudden and extraordinary employment condition”

language of Labor Code §3208.3(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 a case which also addressed 3208.3, the Court in *Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd.* (2004)114 Cal. App. 4th 1174 succinctly summarize the appellate role, including the legislative intent behind Labor Code Section 3208.3, as follows:

The principles which guide our analysis are well settled. "Although the WCAB's findings on questions of fact are conclusive (§ 5953), the construction of a statute and its applicability to a given situation are matters of law that are reviewable by the courts." (*Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 1465, 1470–1471 [62 Cal. Rptr. 2d 393, 62 Cal. Comp. Cas 441].) "The [WCAB's] administrative construction of statutes that it is charged to enforce and interpret is entitled to great weight unless it is clearly erroneous. [Citation.]" (*Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828 [45 Cal. Rptr. 2d 197, 60 Cal. Comp. Cas 840].) "An erroneous interpretation or application of law by the WCAB is a ground for annulment of [its] decision. [Citations.]" (*Rex Club v. Workers' Comp Appeals Bd.*, *supra*, 53 Cal.App.4th at p. 1471, see also *Lockheed Martin Corp. v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1237, 1241 [117 Cal. Rptr. 2d 865, 67 Cal. Comp. Cas 245].)

A reviewing court's "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance . . . to every word, phrase and sentence in pursuance of the legislative purpose." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387 [743 P.2d 1323, 241 Cal. Rptr. 67].) "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]" (*Id.* at p. 1387.) "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]" (*Ibid.*)

"[S]ection 3208.3 was enacted as part of the Margolin-Greene Workers' Compensation Reform Act of 1989. It is part of the Legislature's response to increased public concern about the high cost of workers' compensation coverage, limited benefits for injured workers, suspected fraud and widespread abuses in the system, and particularly the proliferation of workers' compensation cases with claims for psychiatric injuries." (*Hansen v. Workers' Compensation Appeals Bd.* (1993) 18 Cal.App.4th 1179, 1183–1184 [23 Cal. Rptr. 2d 30, 58 Cal. Comp. Cas 602], fn. omitted.) As originally enacted, subdivision (b) of the statute provided, "In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were responsible for at least 10 percent of the total causation from all sources contributing to the psychiatric injury." (Stats. 1989, ch. 892, § 25, p. 3003.) However, in 1993 the Legislature amended section 3208.3, subdivision (b)(1) to impose a significantly higher quantum of proof to establish that a psychiatric injury is compensable. The section now states, "In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes [**10] combined of the psychiatric injury." This language has been interpreted to mean that benefits under section 3208.3, subdivision (b)(1) may be awarded only when industrial factors account [*25] for more than 50 percent of a psychiatric disability.

(*Department of Corrections v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 810, 816 [90 Cal. Rptr. 2d 716, 64 Cal. Comp. Cas 1356].)

Section 3208.3, subdivision (c) underscores the Legislature's intent that claims seeking benefits based on psychiatric injuries be evaluated strictly. It states, "It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division."

Noteworthy in understanding the legislative intent behind enactment of Labor Code Section 3208.3 is how it changed the landscape of psychiatric jury claims to eliminate claims based on the worker's subjective perceptions. As stated in *Verga v. WCAB* (2008) 159 Cal. App. 4th 174,

Prior to enactment of the statute, this court held in *Albertson's, Inc. v. Workers' Comp. Appeals Bd.* (1982) 131 Cal. App. 3d 308 [182 Cal. Rptr. 304] (hereafter *Albertson's*) that ...an employee was entitled to workers' compensation benefits if the employee suffered a psychiatric injury based on a *subjective misperception* that his or her employment was stressful. (*Id.* at pp. 314–315.) “All that [was] required [was] the employment be one of the contributing causes without which the injury would not have occurred. [**879] [Citation.]” (*Id.* at p. 316.)

Section 3208.3, subdivision (b)(1) “was intended to overrule [*Albertson's*]” (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, *supra*, § 4.02[3][b], [***21] p. 4-22) by imposing “more stringent requirements for [psychological injuries] than the subjective standard set forth in [*Albertson's*].” (*Save Mart Stores v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.App.4th 720, 724, fn. 3 [4 Cal. Rptr. 2d 597].)

Numerous appellate courts have reiterated with approval the cautionary language first enunciated in the *Pacific Gas &*

Electric Co involving interpreting Labor Code Section 3208.3, wherein that Court noted that 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*)

The 6-month employment requirement for psychiatric injury claims under Labor Code Section 3208.3, and the “sudden and extraordinary employment condition” exception in that context, have been addressed by the Courts of Appeal in at least three published cases. For example,

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.

State Compensation Insurance Fund v. WCAB (Garcia) (2012) 204 Cal. App. 4th 766, involved an avocado picker's fall from a 24' ladder while picking avocados from a 34' 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.” The Court therefore annulled the finding of compensability.

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).** (emphasis added)

Most recently, the Court in *Travelers Casualty & Surety Co. v. WCAB (Dreher)* (2017) 246 Cal. App. 4th 1101 directed its attention to both the *Matea* and *Garcia* cases in analyzing the “sudden and extraordinary employment condition.” The court noted that

The evidence showed that Dreher routinely walked between buildings on concrete walkways at the work site and that he slipped and fell while walking on rain-slicked pavement. Like the accidents in *Garcia, supra*, 204 Cal.App.4th 766 and *Alves, supra*, 79 Cal.Comp.Cases 430, Dreher's slip and fall was the kind of incident that could reasonably be expected to occur.

Where, as here, an employee alleges a psychiatric injury during the first six months of employment, he or she has the burden of proving, by a preponderance of the evidence, that a sudden and extraordinary condition caused the injury. (*Matea, supra*, 144 Cal.App.4th at p. 1449; *Garcia, supra*, 204 Cal.App.4th at p. 772.) Dreher did not meet that burden. **His testimony that he was surprised by the slick surface of the walkway because the other walkways had a rough surface, and his further testimony that the walkway was later resurfaced, did not demonstrate that his injury was caused by an uncommon, unusual, or totally unexpected event.** Because the injury here was not the result of a “sudden and extraordinary employment condition,” Dreher’s claim for psychiatric injury is barred under [section 3208.3, subdivision \(d\).](#))

In finding herein that an “extraordinary employment condition” exists because of claimant’s testimony that *he* had never before operated a compactor on a slope, that *he* never before had felt that he was in any danger of having a compactor fall on him, and that *he* had never heard of a compactor falling on top of anyone else, and noting that defendant did not submit evidence that such events are a routine or ordinary employment condition, the Appeals Board effectively and improperly placed the burden of proof upon defendant, contrary to both *Garcia* and *Dreher*. Moreover, *Garcia* Court discussed but rejected claimant’s subjective awareness as the basis of compensability, and instead held that “An event does not become presumptively extraordinary because the employer offers no evidence it is regular or routine.”⁶

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

In addition to the above referenced published cases, 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 District) 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

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”

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.)

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 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, 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 CWC 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, working on a hillside carries an inherent risk of a fall-related injury and was in no way outside the realm of ordinary risks and hazards of his occupation. Claimant's lack of prior personal experience operating a compactor on a slope does not convert the event into being an "extraordinary employment condition" within the meaning of Labor Code Section 3208.3.

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, such an event, no

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

matter how sudden, should NOT be considered “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 an “extraordinary employment condition” merely because the circumstance was 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! .

CONCLUSION

It is not objectively reasonable to conclude that falling while working on a slope at a construction site is in any way extraordinary. Working on a hillside carries an inherent risk of a fall-related injury and is in no way 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 within the meaning of Labor Code Section 3208.3 merely because the employee has not previously encountered it, or

“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.

because employer offers no evidence it is regular or routine (which is not the employer's burden). Instead, this Court should adopt a commonsense approach that looks at whether the risks and hazards giving rise to the injury are regular or routine and foreseeable given the nature of the work to be performed, regardless of whether the injured employee was personally aware of those risks, and 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" or "objectively foreseeable."

Respectfully submitted, July 14, 2017.

LAW OFFICES OF ALLWEISS & McMURTRY
A Professional Corporation

Michael A. Marks, Esq. (SBN 071817)