

California Workers' Compensation Institute

Minutes of the Legal Committee meeting, held via Zoom videoconference
on Thursday, May 22, 2025

Present: David Skaggs, CopperPoint Insurance Companies, Chair
Saul Allweiss, Schools Insurance Authority
Matthew Barravecchia, City and County of San Francisco
Jackson Chang, CNA Insurance
Laura Domercq, The Hartford Insurance Group
Henry Gaus, County of Santa Clara Risk Management
Dottie Ghanbarian (by Catherine Lynch), The Hanover Insurance Group
Bradley Haumont, Berkshire Hathaway Homestate Companies
Natalie Kaplan (by Barry Weitz), AmTrust North America
Denise MacRae (by Nam Tran), AF Group/CompWest
Alan Paik, Zürich North America
Cathryn Pine (by Jennifer Chmielewski), Zenith Insurance Company
Randy Pollak, WCF Insurance
Scott Rountree, ICW Group Insurance Companies
Joan Sheppard, North American Casualty Company/Applied Underwriters
Laurel Thurston, Republic Indemnity
Darren Wong (by Mary Huckabaa), State Compensation Insurance Fund

Excused:
Laura Chapman, Travelers
John Knobel, EMPLOYERS
Janet W. Nowakowski, AIG
Helen Santana, Liberty Mutual Insurance

Also Present:
Gideon Baum, CWCI Chief Operating Officer
Alex Swedlow, CWCI President
Joanne Swedlow, CWCI Legal Assistant
Sara Widener-Brightwell, CWCI SVP - Claims and General Counsel
Ellen Sims Langille, CWCI Amicus Counsel

PRELIMINARY

Chair Skaggs called the meeting to order at 10:02 AM. A quorum was present and active throughout the meeting.

Antitrust Guidelines: Ms. Widener-Brightwell reviewed applicable antitrust guidelines for Institute meetings with the committee. The committee was advised that they should avoid discussion related to specific company practices, focusing on general litigation issues and trends. Committee members were advised to raise any concerns about antitrust violations to Ms. Widener-Brightwell's attention.

Introductions, Announcements, and Communications: Ms. Widener-Brightwell welcomed the committee members and guests.

Review of Minutes: The minutes of the January 16, 2025, Legal Committee meeting, which were previously distributed to the committee, were reviewed.

Upon motion made and seconded, it was

RESOLVED, That the revised minutes of the January 16, 2025, meeting of the Legal Committee are hereby approved.

Adopted unanimously.

AMICUS CONSIDERATION

Ms. Widener-Brightwell reviewed the primary considerations for CWCI participation as amicus in appellate court cases.

AMICUS UPDATE

California Department of Corrections and Rehab v. WCAB (Ayala): EIDL or TD Rate

Significance: Applicant prevailed on Serious and Willful action and argued the 50% increase in benefits should be based on the enhanced industrial disability leave (EIDL) rate rather than the TD rate. Defendants argued the calculation should be based on the TD rate, because EIDL is not a form of compensation created under Division 4 of the Labor Code but was rather conferred by the Government Code. The WCJ ruled the TD rate-controlled calculation of the S&W award. The WCAB reversed on reconsideration. CDCR appealed. The DCA granted review, reversed, and remanded on 08/14/23. The Court followed the reasoning in *Ellison (State of California v. WCAB)* (1996) 44 Cal.App.4th 128, which held that the 10% penalty for unreasonable delay of benefits under section 5814 must be calculated using the TD rate, and not the EIDL rate. The committee voted to recommend filing an amicus brief, which the CWCI Executive Committee approved. CWCI's brief was filed 03/20/24. Oral argument was completed 12/04/24.

Status: On 02/20/25, a unanimous California Supreme Court affirmed in full, finding that the Board's conclusion was plainly inconsistent with the statutory definition of "compensation" as limited to "compensation under" the workers' compensation law. (Lab. Code, §3207.)

Zenith v. WCAB (Hernandez): Going and Coming

Significance: Applicant alleged injury due to an MVA while riding home from work in a carpool van arranged by another employee. The applicant worked as a laborer at a location sixty miles from his home. The applicant did not have a driver's license or a car and did not

know how to drive. The claim was denied based on the going and coming rule. The WCJ found injury AOE/COE. The WCJ found the special risk exception to the going and coming rule applied. He determined that the applicant had to take extraordinary action to ensure that he could make it to work on time, every day, and get home afterwards by participating in the van-pool. The WCJ found that this employment-related condition created a special risk, noting the applicant would never have been in a van coming home from work, at the location where the accident took place, but for this special condition of employment. The WCJ also found this case fell within the “dual purpose” exception to the going and coming rule. The WCJ concluded this exception applies because the applicant’s employer obtained a benefit from the vanpool which permitted applicant to arrive at work and on time every day. The Board denied reconsideration. Defendant appealed. The Institute filed an amicus brief on 12/18/24.

Status: On 05/01/25, the COA annulled and remanded, holding 1) special risk exception only applies to situations just outside ER premises - this case does not meet that requirement and 2) facts were not sufficient to apply dual purpose exception, as they do not go beyond the “normal need of the presence of the person for the performance of the work.”

The committee discussed the good result here, but noted the COA left the door open to the WCAB to revisit the issue.

Zenith v. WCAB (Chan): Initial aggressor, LC §5909

Significance: Applicant claimed injury following an argument with and subsequent assault by a co-worker. The claim was denied based on an initial aggressor defense. The timeline of proceedings was 10/31/22 - Take nothing - initial aggressor; 11/23/22 - Petition for Reconsideration filed by applicant; 11/28/22 - Report and Recommendation on Reconsideration; 11/30/22 - File transmitted to Board; 01/17/23 - Board received notice (no known explanation for 11/30/22 - 01/17/23 delay); 03/03/23 - Petition granted for further study; 11/01/24 - Opinion and Decision after Reconsideration. The Board granted the petition on 03/03/23, which was within 60 days of the petition being “discovered”, but more than 60 days after the file was transmitted to them. The Board’s order included language regarding jurisdiction. “In so doing so, we sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration. Neither party expressed any opposition to this course of action, and it appears clear from the fact that neither party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.” On appeal, defendant argued the Board did not have jurisdiction to issue a decision once the 60-day period allowed by LC §5909 elapsed, and that the order granting reconsideration for further study does not comply with LC §§5903 and 5908.5. The Institute filed an amicus letter in support of Zenith’s petition on 12/30/24.

Status: Ms. Widener-Brightwell noted there was no new COA activity on this case.

The committee noted there are several similar cases pending at the COA level, likely on hold for the California Supreme Court’s decision in *Mayor*.

CASE LAW UPDATE

Mayor v. Ross Valley Sanitary District: The WCJ found the applicant PTD based on medical reports and the applicant's voc expert on 03/02/23. Defendant filed recon on 03/23/23, arguing that applicant's voc expert reached an unsubstantiated conclusion, failed to consider the entire medical record, and that the F&A did not discuss the apportionment identified by physicians. The WCAB granted recon for further study on 08/14/23. WCAB issued their first decision on 01/26/24, then a second on 02/02/24 to clarify jurisdiction. They noted the Board received notice of the timely recon on 06/15/23 and citing *Shipley* (4th DCA) found the initial grant on 08/14/23 was within the 60 days allowed by LC §5909. The applicant filed a Petition for Writ of Mandate. The 1st DCA issued an OSC on 03/14/24. On 06/28/24, the COA issued a peremptory writ of mandate directing the WCAB to rescind their orders granting Ross Valley's petition for reconsideration as Valley's petition was denied by operation of law under former §5909 on 05/22/23. Therefore, the WCJ's award of 100% PD and attorney's fees issued on 03/02/23, was now final. Certified for Publication. The WCAB filed a petition for rehearing on 09/12/24. Rehearing denied on 09/18/24. The WCAB filed a petition for review with the California Supreme Court on 10/07/24. The California Supreme Court granted review 12/11/24.

Status: Ms. Widener-Brightwell advised the committee APCIA was granted permission to file an amicus brief. Their brief is due 6/2/25.

The committee discussed the briefing process at the California Supreme Court. Ms. Sims-Langille noted that the parties will be able to file responses to the amicus brief. Oral argument will follow.

Vazquez v. Zenith en banc: On 05/19/25, the WCAB issued an en banc decision holding that only the Board (not the Medical Unit) has jurisdiction to determine if a replacement QME panel is appropriate. The WCAB held that in a represented case, when a QME cannot set an appt within timeframes in AD Rule 31.3, replacement is not automatic. The WCJ has discretion to order replacement QME upon showing of good cause. The WCAB provided 5 factors the WCJ may consider when deciding whether good cause exists: 1) Length of delay caused by QME's unavailability, 2) Amount of prejudice caused by delay in availability vs. amount of prejudice caused by restarting QME process, 3) What efforts have been made to remedy the QME's availability, 4) Case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection, and 5) Board's constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, §4.)

Status: The Appeals Board noted that its decision applied prospectively only.

DPR Construction v. WCAB (McClanahan): Unpublished: Applicant claimed injury to shoulder. The claim was denied. Dr. Hanley was the initial QME, issuing 2 reports. Dr. McGahan replaced Hanley as QME. The PTCS stipulated McGahan was the QME. Hanley's reports were not listed as exhibits. The WCJ admitted Hanley's reports over DPR's objection. Based on applicant's "credible testimony, the treatment records, and the findings by QME McGahan," the WCJ found injury. The Board affirmed in split decision finding that applicant erred by omitting Hanley reports from PTCS but concluded error was harmless as (1) WCJ did not rely on Hanley reports to find injury; and (2) WCJ retains discretion to determine if evidence

should be admitted as a matter of due process. Dissent opined error re Hanley reports was fundamental to proceedings, and it was unclear whether Hanley reports contributed to WCJ's decision.

Status: Citing *San Bernardino*, the COA noted "the absence of prejudice cannot be the deciding factor" because "[a]n opposing party might often be unable to show specific prejudice" or the WCJ "could virtually always obviate any possible prejudice by granting a continuance or scheduling further hearings . . . [which] would threaten to make LC 5502(d)(3) meaningless." Annulled and remanded.

The committee discussed the due process concerns when the WCJ admits evidence not listed on the PTCS.

REGULATORY UPDATE

Ms. Widener-Brightwell discussed pending regulations.

Physician Fee Schedule and Pharmaceutical Fee Schedule: Revised payment methodology utilizing National Average Drug Acquisition Cost, Wholesale Acquisition Cost, Federal Upper Limit, and Maximum Allowable Ingredient Cost in the drug reimbursement formula. Revises pharmacy dispensing fee from \$7.25 to two-tier dispensing fee of \$10.05 or \$13.20, depending on the annual volume of pharmacy claims processed. Ms. Widener-Brightwell noted the proposed regulations initially eliminated the physician dispensing fee, but it was reinstated after the first comment period. The 90-day implementation period was increased to 180 days. The regulations were filed 12/11/24 and are effective 07/01/25.

Utilization Review: The proposed rulemaking implements exemptions to prospective UR created by SB 1160 for treatment rendered within the first 30 days from initial date of injury, and for drugs listed as exempt on the drug formulary. Ms. Widener-Brightwell noted there are also extensive changes to UR enforcement rules including the removal of the 85% UR audit pass rate, and increased penalties. The proposed addition of a new physician reporting form, the PR-1, which combines other reports (Form RFA and PR-2) was removed from this rulemaking. The 2nd 15-day comment period ended 05/02/25.

Pending Regulatory Action: Ms. Widener-Brightwell reviewed pending regulatory action including utilization review, the interpreter fee schedule, audit and LC §5710 fees. She noted there has been no formal activity on the interpreter fee schedule. She advised that the audit regulations working group was on hold as a new DWC attorney was assigned to the Audit Unit.

She noted that the DWC released an RFP for the replacement of EAMS and discussed the proposed timeline for bids.

LEGISLATION

Ms. Widener-Brightwell noted multiple workers' compensation bills were added subsequent to the last legal committee meeting. She reviewed SB 8, SB 230, AB 1125, SB 632, AB 1336,

AB 504, AB 1048, AB 1209, AB 1293, SB 447, SB 487, SB 536, AB 1498, SB 555, SB 668, AB 1329, AB 1398, and SB 291. She encouraged committee members to advise her if they had concerns regarding any other new bills.

The committee discussed the status of the bills, expressing concern about repeated attempts to extend presumptions to the private sector. Mr. Baum advised AB 1209 is dead for the year. The committee noted that SB 555 would permanently tie the PD rate to the CPI, eliminating the PD rate from future reform negotiations. They reviewed how AB 1293 would impact QME reports and cover letters. The committee noted the DWC website has a QME report template created by Dr. Steven Feinberg, discussing whether this issue requires legislation when it could be addressed by regulation.

The committee discussed the ongoing increase in SIBTF cases, and whether AB 1329 would address those costs.

LITIGATION ENVIRONMENT AND GENERAL DISCUSSION

Ms. Widener-Brightwell reviewed the panel topics at CAAA's winter convention. She noted that CAAA is increasing their focus on medical panels that explain how to increase PD for specific injury types including carpal tunnel syndrome, cancer and traumatic brain injuries. The audit panel discussed how adjusting errors are addressed in a DWC audit, and that the audit process is focused on specific issues including timely payment of TD and PD, the AWW calculation, and accurate benefit notices. The AI panel discussed 2026 pending regulation that will address AI transparency in the courts and for clients. Ms. Widener-Brightwell noted that CAAA is including panels on workers' compensation 101 topics to assist newer members.

The committee discussed the new CourtCall video platform, noting mixed experiences, with some technical difficulties and different practices dependent upon the WCJ.

Ms. Widener-Brightwell noted the CAAA summer conference is in June in San Diego. She advised the committee that following a lien conference on 4/8/25 in the ongoing Pacific Hospital of Long Beach case the WCJ issued a Notice of Intent to Sanction the 22 carriers/TPAs that did not appear. Those parties will have the opportunity to be heard 6/10/25 1:30 in Van Nuys. The committee was advised of the parties listed and Ms. Widener-Brightwell offered to provide the Notice to anyone that would like to review. She reviewed a recent case involving a former PD officer charged with 15 felonies for alleged WC fraud. Her stepfather, a WC defense attorney, is charged with two felony counts including making a fraudulent insurance claim and assisting, abetting, conspiring with and soliciting a person in an illegal act. The committee discussed how unusual it was to see an attorney charged for a claimant's alleged fraud.

Ms. Widener-Brightwell advised that CWCI's Annual Case Law seminar is set for September 9.

2025 MEETING SCHEDULE AND ADJOURNMENT

- Tentative 2025 Meeting Schedule:
 - August 21, 2025
 - November 20, 2025

OTHER BUSINESS/ADJOURNMENT

There being no further business before the committee and
Upon motion made and seconded, it was

RESOLVED, That the regular meeting of the Legal Committee be adjourned at 11:54 AM.

Adopted unanimously.

SUBMITTED:

Sara Widener-Brightwell
SVP - Claims and General Counsel