DISABILITY RETIREMENT LAW RESOURCE

STATE ASSOCIATION OF COUNTY RETIREMENT SYSTEMS

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Disability Retirement Law Resource

10/17/04

What's new?

Passim:

With the issuance of the Supreme Court's opinion in *City of Anaheim v. Nolan*, all references to the Court of Appeal's opinion were removed from the Resource. One reference to the Supreme Court's opinion is added at page 38. That reference concerns the Supreme Court's *ipsi dixit* statement that an available position to which an otherwise disabled member might be assigned must be one that has the same or similar promotional opportunities. The statement is made without cited authority and it is arguably *dictum,* extraneous to the Court's *ratio decidendi.* On the other hand, the Court declared it as an element of its holding and it is supportive of the position taken by applicants' attorneys that, under *Stuessel, infra*, an available position must provide same or similar promotional opportunities.

Page 20

More of the Court of Appeal's opinion in *Sweeney v. Industrial Accident Commission* is added to better clarify the meaning of "permanent" as it is used in the workers' compensation system.

Page 26 - 27

We add an extracts of the opinions in *Sweeney v. Workmen's Compensation Appeals Board* and *Employers' Liability Assurance Corp. Ltd. of London England v. Industrial Acc. Comm.* that support the position that subjective complaints alone may support a finding on disability even in the absence of corroborating evidence and even when contrary to expert opinion.

Page 33 to 35

Extracts from the opinion in *Smith v. City of Napa* are added. That case involved a fire fighter who filed an application for disability retirement on the day he was fired for having failed tests of his competency at required skills.

Page 45

Typographical error in the citation to Government Code § 31725.5 is corrected. It was erroneously cited as "31725" in the previous edition.

Pages 46 - 47

Reference is made to the fact that the vocational rehabilitation program authorized by Labor Code section 139.5 was repealed by the Legislature. The effect of that repeal on Government Code § 31725.6's rehabilitation provision and the need for AB 2986 is discussed.

Pages 48 - 49

An extract is added from the court of appeal opinion in *Alesi v. Board of Retirement* in which the court discusses the error the *Heaton* court made when it equated *result*, meaning "effect of," with its antonym, *cause,* meaning "source of."

Page 129

Further authorities, pro and con, are added concerning whether the fact finder may pick and choose items of opinion given by a physician versus giving full effect to all the opinions of a physician.

Page 152

The new definition of "permanent disability" under the April 2004 workers' compensation reform law is added to the list of other definitions of "permanent disability."

Page 161

An extract from the unpublished court of appeal opinion in *Herzog v. Board of Retirement* is added to show how the court responded to a contention that an association's method of assigning hearing officers was contrary to the opinion in the *Haas* case.

Disability Retirement Law Resource

4/30/04

What was new?

Page 14:

An Associations' comment is added addressing the following issue:

What does the Board do when its medical consultant concludes that, though perhaps somewhat impaired, the applicant is not incapacitated for duty but the county department, recognizing and enforcing work restrictions that are more limiting than the Board's consultant recommends, takes the position that it cannot provide the applicant with an assignment that is safe?

Page 84-85:

The Workers' Compensation Appeals Board's decision in *Faust v. City of San Diego* (En Banc) (2003) 68 Cal. Comp. Cases 1822 is discussed. In *Faust* the WCAB ruled that the defendant in a workers' compensation case must, in order to rebut the cancer presumption, "explicitly demonstrate that medical or scientific research has shown that there is no reasonable inference that exposure to known carcinogen or carcinogens is related to [the cancer] or causes the development of the cancer." In other words, proof that there has been no research demonstrating a causal link between a carcinogen and the cancer will not rebut the presumption. An additional Associations' comment on *Faust* is included.

Page 160:

The Resource contains a section dealing with the argument that boards of retirement that hire attorneys to defend against disability retirement applications and unilaterally hire doctors to examine applicants and referees to preside at administrative hearings are engaged in practices that cause the process to be unfair, inject into the administrative hearing procedure a "systemic prejudice" against the applicant, and deny applicants their right to due process. Added to the discussion is an Associations' comment that addresses the idea that the same attorney should not both advise a board and appear as an advocate before the board. Cited are *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 and *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575.

Passim

Various corrections of citation, grammar, and punctuation errors.

Preface

At the Fall 1996 conference of the State Association of County Retirement Systems (SACRS), it was determined that an ad hoc committee should be formed to discuss and make recommendations concerning whether the disability provisions of the County Employees Retirement Law of 1937 should be modified. The Ad Hoc Committee on Disability Retirement Reform was formed of representatives from various interest groups and, under the chairmanship of then President of SACRS, Ed O'Neill, III, of San Joaquin County, held meetings beginning in 1997. Among the recommendations made by the Committee was one proposed by Harry Hatch of San Bernardino County and Sylvia Miller, Division Manager, Disability Retirement Services for the Los Angeles County Employees Retirement Association. They proposed that SACRS develop an educational program for those involved in the disability retirement process. As originally conceived, the educational program would be designed for attorneys serving as referees appointed by boards of retirement to take evidence and recommend decisions. A written manual of the law, eventually called the “Disability Retirement Law Resource,” was considered to be necessary as the core of such a program. Expressions of interest in such a manual were received from various county retirement associations, referees and applicants’ attorneys. Some associations that do not use referees saw that a legal resource would be of assistance to association staff and members of the boards. A drafting committee of those interested was formed to work on the Resource. Deputy County Counsel Lance Kjeldgaard, counsel to the San Bernardino County Employees Retirement Association, took on the task of chairing the committee, prepared the initial outlines of the Resource and the initial drafts that were discussed in committee meetings and special meetings at SACRS conferences.

The drafting committee established several ground rules for the development of the Resource. First and foremost, the Resource must be a balanced presentation of the law. To guard against a “defense bias,” input must be solicited from referees and applicant’s attorneys. Interpretation must be kept to a minimum, except where identified as "Associations' comments" or "Applicants' comments." Statutes and court opinions must be quoted, as opposed to being interpreted. As a result of this approach, the Resource is lengthy, but its length is justified by the benefit derived from providing a balanced presentation.

In November 1998, a draft of the Resource was shared with a number of applicants’ attorneys. Their comments were discussed at a meeting of the drafting committee held in March 1999. At that meeting it was agreed that the purpose of the document should be broadened from being an aid to referees to a legal resource for anyone who might be involved in the disability retirement process.

In April 1999, a draft of the Resource was distributed to all of the retirement associations formed under CERL of 1937 for discussion at a meeting of those interested

in the project that was held at the Spring 1999 SACRS conference. Further revisions to the Resource were made based on modifications proposed at that meeting. In August 1999, a draft of the Resource was distributed to the retirement associations with a request that it be shared with attorneys who act as referees and attorneys who represent applicants. The draft was modified to reflect recommendations and comments from a number of sources.

The modified draft of the Resource was discussed at a meeting open to all interested persons that was held at the Fall 1999 SACRS Conference. The meeting was led by Mark Burstein of Los Angeles, an attorney whose specialty is acting as an arbitrator and hearing officer and who has extensive experience in acting as a referee in disability retirement cases. Additional modifications were made to the Resource as a result of suggestions made at that meeting.

Those serving on the drafting committee were its Chair, Deputy County Counsel Lance Kjeldgaard of San Bernardino, Los Angeles County Employees Retirement Association Chief Counsel David Muir, LACERA's Chief Counsel, Disability Litigation, Dan McCoy, Deputy County Counsel Denise Eaton May of the Office of the County Counsel, County of Alameda, Deputy County Counsel Deirdre McGrath of the Office of the County Counsel, San Diego County and Annette Paladino of the Santa Barbara County Employees Retirement Association. A special "thank you" is extended to Dan McCoy for serving as the chief draftsman of the Resource.

Without implying that they all agree with the entire content of the Resource, the following are recognized for taking the time to review it and provide their comments: attorney and hearing officer James S. Armstrong, Jr., of the California and Colorado Bars; attorney and hearing officer Gregory J. Politiski of Orange; Judge Carlos M. Teran (Ret.) of Claremont; hearing officer George Liskow of Sierra Madre; hearing officer and referee James Alan Crary of Ojai; hearing officer Robert Neal of Solana Beach; John R. Descamp of the Sacramento County Employees Retirement Association; hearing officer Catherine Harris; Kathy Somsen, Retirement Benefits Manager, Contra Costa County Employees Retirement Association; Auditor-Controller/Treasurer-Tax Collector Gary W. Peterson of Fresno County; applicants' attorney Thomas J. Wicke of the law firm of Lewis, Marenstein, Wicke and Sherwin, Woodland Hills; applicants' attorneys Steven Pingel and Mark Ellis Singer of the law firm of Lemaire, Faunce, Pingel and Singer, Cerritos; Lori A. Nemiroff, Assistant County Counsel, Ventura County; Terry Rein of Modesto's Rein & Rein; JAMS Endispute's Judge William E. Sommer (Ret.); Deputy County Counsel Patricia J. Randolf of the Office of the County Counsel, County of Kern, Walter Cress, Assistant County Counsel, Office of the County Counsel, Imperial County, and Senior Staff Counsel Dixon M. Holston, Fern Billingy and E. Steven Tallant, Los Angeles County Employees Retirement Association.

It is anticipated that the SACRS Disability Retirement Law Resource will be updated, revised and improved based on suggestions for improvement that will be made when it is used as a reference. We are especially interested in input from those who represent applicants for disability retirement benefits. Please send suggestions for changes

including the text of any proposed additions, to:

Daniel E. McCoy
Chief Counsel, Disability Litigation
P.O. Box 7060
Pasadena, CA 91109-7060

E-mail: dmccoy@lacera.com or
Fax: (626) 564-2336.

May 4, 2000
Lance Kjeldgaard,
Deputy County Counsel
County of San Bernardino
Chair, Disability Retirement Law Resource Drafting Committee

Disclaimer

This Disability Retirement Law Resource is intended to be an aid to those who are involved in the process of determining rights and obligations under the disability retirement provisions of the County Employees Retirement Law of 1937. Its purpose is to provide information as to what the law provides and, where the law is in dispute, what arguments may be made on how the law should be interpreted. However, the information provided in the Resource may not be sufficient in dealing with a particular legal problem. Neither SACRS nor any of the authors of the Resource warrant or represents its suitability for such a purpose. The Resource should not be relied on as a substitute for independent legal research

The statutes quoted or cited in the Disability Retirement Law Resource and the authoritative status of court opinions cited may not be current. The user should independently verify the status of cited statutes and opinions of the courts.

There are 20 counties with retirement associations formed under the County Employees Retirement Law of 1937. There is no uniformity in the manner in which those associations process disability retirement applications. Each retirement association follows its own bylaws and regulations. These differences must be kept in mind by those attorneys who appear before different boards, by those attorneys who act as referees for different boards and by the members of the various boards of retirement who might refer to this resource. An attempt has been made to keep this resource generic so that it will be of use to a greater number of persons involved in the disability retirement process.

Members of boards and board staff who have questions about the applicability or validity of information contained in this resource should direct their questions to the board's attorney.

An applicant for a disability retirement pension who might refer to this resource should understand that an applicant is best served in an administrative hearing if he or she engages the services of an attorney for representation and/or advice concerning the many and often complicated medical and legal questions that arise in disability retirement proceedings. An applicant should not presume that the issues discussed in this resource are easily applied to his or her particular case nor should an applicant presume that the law is too complicated to allow the applicant to represent him or her self in a disability retirement proceeding. Such a decision should be made in the light of sound advice from an attorney with expertise in disability retirement matters.

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STATE ASSOCIATION OF COUNTY RETIREMENT SYSTEMS' DISABILITY RETIREMENT LAW RESOURCE

I. INTRODUCTION

A. Purpose of County Employees Retirement Law of 1937

Government Code § 31451 defines the purpose of the County Employees Retirement Law of 1937 as follows:

> The purpose of this chapter is to recognize a public obligation to county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation for future services and to provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of the public service without prejudice and without inflicting a hardship upon the employees removed.

B. Statutory authority for disability retirement pension

The County Employees Retirement Law of 1937 is contained in the Government Code, Title 3, Division 4, Part 3, Articles 1 through 18. The disability retirement provisions of the County Employees Retirement Law of 1937 are contained in Article 10, Government Code §§ 31720 - 31752. Section 31720 provides as follows:

> Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:
>
> (a) His incapacity is a result of injury or disease arising out of and in the course of his employment and such employment contributes substantially to such incapacity, or
>
> (b) The member has completed five years of service, and
>
> (c) The member has not waived retirement in respect to the particular incapacity or aggravation thereof as provided by Section 31009.
>
> The amendments to this section enacted during the 1979-1980 Regular Session of the Legislature shall be applicable to all applicants for disability retirement on or after the effective date of such amendments.

C. Allowances related to service-connected disabilities

If the member is incapacitated for duty as a result of an injury or illness arising out of and in the course of employment, that is, a "service-connected disability," the member is entitled to an allowance equal to 50% of final compensation, or the amount of a years-of-service pension if it is greater than 50% of final compensation and the member is eligible to retire on a years-of-service retirement. (Government Code § 31727.4)

Upon the death of a member while receiving a service-connected disability retirement allowance, 100% of the allowance continues to either a surviving spouse, who is designated as beneficiary and who was married to the member prior to retirement, or eligible children, unless the member elected an optional allowance. (Government Code §§ 31760, 31786.) There are additional allowances for the children of members and for the spouses of safety members who die as a result of accident or external violence or physical force incurred in the performance of duty. (Government Code §§ 31787.5 and 31787.6, discussed further, *infra*.)

D. Allowances related to nonservice-connected disabilities

If the member is incapacitated for duty as a result of an injury or illness that is not service-connected and the member has five years of service, the allowance is the amount of the years-of-service retirement or, with certain exceptions, an allowance equal to 1/3 of final compensation. (Government Code §§ 31726, 31726.5, and 31727.) Upon the death of a member while receiving a nonservice-connected disability retirement allowance, 60% of the allowance continues to either a surviving spouse, who is designated as beneficiary and was married to the member one year prior to retirement, or eligible children, if the member died before June 24, 2002, or 65% if the member dies on or after June 4, 2002, unless the member elected an optional allowance. (Government Code §§ 31760, 31760.1, 31760.12, 31785, and 31785.4.)

Associations' comment
A member who retires on a years-of-service pension before age 62 and is fully vested in the social security system may select a retirement option that coordinates the retirement allowance and the expected social security allowance. (Government Code §§ 31810 and 31811) Under this option, the association advances the retirement allowance, increasing the monthly amount to reflect the anticipated social security allowance the member will receive when he or she becomes eligible, at age 62. Once social security starts paying, the association's payment is reduced by the equivalent actuarial values, allowing the association to recoup the advances. This option is only available to one who retires for service and is <u>not</u> available to a member who retires for disability. This so-called "level income option" or "pension advance option" may result in an allowance that exceeds the amount of a nonservice-connected disability retirement pension. In that case, it may be to the member's benefit to retire for service and not for disability. A member who has been receiving a service retirement under the level income option may find that the nonservice-connected disability retirement monthly allowance is less than the years-of-service allowance the member is receiving. A disability retirement awarded after a years-of-service retirement may also create a debt to the association that the applicant must repay.

E. Who may file an application for disability retirement?

Government Code § 31721 provides,

> (a) A member may be retired for disability upon the application of the member, the head of the office or department in which he is or was last employed, the board or its agents, or any other person on his behalf, except that an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any eligible member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Article 9 (commencing with Section 31700).
>
> (b) When a member appeals from a separation for disability, disputing the employer's assertion or assumption that he is not eligible for disability retirement, the official, entity other than the board, or court to whom appealed shall transfer the proceedings to the board for determination of the eligibility and of disability if so eligible.
>
> The appointing authority shall have the burden of proving disability. Thereafter, the appellant shall have the burden of proving job causation.
>
> This subdivision shall not be operative in any county until such time as the board of supervisors shall, by resolution adopted by a majority vote, make the provisions applicable in that county.

F. Time to file application

Government Code § 31722 states:

> The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

G. Authority for Board determination of disability

California Constitution, Article 16, section 17, provides in part as follows:

> Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority

and fiduciary responsibility for . . . .administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

Government Code § 31723 provides,

> The board may require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability.

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 736-737:

> Finally, we reject appellant's claim that the Board lacks authority to require an applicant both to submit medical records for review and submit to an examination by a Board-appointed doctor. There is no evidence appellant was required to do both; rather, he was required to provide a medical history so the Board could obtain a meaningful medical examination. This practice is fully consistent with section 31723, which permits the Board to "require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability."

Government Code § 31724 provides,

> If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him effective on the expiration date of any leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the

expiration of such leave of absence with compensation. His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation. Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the member consents to his retirement at an earlier date.

When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

Government Code § 31725 provides,

Permanent incapacity for the performance of duty shall in all cases be determined by the board.

If the medical examination and other available information do not show to the satisfaction of the board that the member is incapacitated physically or mentally for the performance of his duties in the service and the member's application is denied on this ground the board shall give notice of such denial to the employer. The employer may obtain judicial review of such action of the board by filing a petition for writ of mandate in accordance with the Code of Civil Procedure or by joining or intervening in such action filed by the member within 30 days of the mailing of such notice. If such petition is not filed or the court enters judgment denying the writ, whether on the petition of the employer or the member, and the employer has dismissed the member for disability the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal.

H. Authority for referral to a referee for an administrative hearing

Government Code § 31533 provides as follows:

Whenever, in order to make a determination, it is necessary to hold a hearing the board may appoint either one of its members or a member of the State Bar of California to serve as a referee. The referee shall hold such a hearing and shall transmit, in writing to the board his proposed findings of fact and recommended decision.

I. Who may represent an applicant for disability retirement benefits?

An applicant may represent himself or herself or the applicant may be represented by a member of the bar. An applicant may not be represented by one who is not a member of the State Bar. A judgment obtained against a person who was represented by a person who does not have a license to practice law may be invalid. (See *People v. Malone* (1965) 232 Cal.App.2d 531) The practice of law is restricted to active members of the State Bar. (Business and Professions Code § 6125) There are exceptions to the rule (see State Bar Rules for Practical Training of Law Students, rule 4 and *People v. Clark* (1992) 3 Cal.4th 41 regarding legal representation by law students; Labor Code §§ 5501 and 5700 regarding representation for an applicant before the Workers' Compensation Appeals Board.) No similar special legislation allows a nonlawyer to represent an applicant in a hearing conducted by a retirement association under the CERL of 1937.

J. Board's subpoena power

Government Code § 31535 provides,

> The board may issue subpoenas and subpoenas duces tecum, and compensate persons subpoenaed. This power shall be exercised and enforced in the same manner as the similar power granted the board of supervisors in the Article 9 (commencing with Section 25170) of Chapter 1, Part 2, Division 2; except that the power shall extend only to matters within the retirement board's jurisdiction, and committees of the board shall not have this power. Reasonable fees and expenses may be provided for by board regulation for any or all of such witnesses regardless of which party subpoenaed them.
>
> Subpoenas shall be signed by the chairman or secretary of the retirement board, except that the board may by regulation provide for express written delegation of its subpoena power to any referee it appoints pursuant to this chapter or to any administrator appointed pursuant to Section 31522.2.
>
> Any member of the board, the referee, or any person otherwise empowered to issue subpoenas may administer oaths to, or take depositions from, witnesses before the board or referee.

Government Code § 31535.1, specifically applicable to the County of Los Angeles, contains all the provisions of the first and third paragraphs of Section 31535. The third paragraph of Section 31535.1 provides,

> Subpoenas shall be signed by the chairman or secretary of the retirement board, except that the board may by regulation provide for express written delegation of its subpoena power to the retirement administrator or to any referee it appoints pursuant to this chapter.

The last paragraph of Section 31535.1 provides,

> This section shall apply only in a county of the first class, as defined by Section 28020, as amended by Chapter 1204 of the Statutes of 1971, and Section 28022, as amended by Chapter 43 of the Statutes of 1961.

K. Duties of the referee

In general, the referee's duties include,

Conducting a hearing. (Government Code § 31533)

Making written suggested findings of fact. (Government Code § 31533)

> Compare the court of appeal's discussion in *Insurance Co. of North America v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 905, 924-925. The referee's suggested findings of fact on medical issues must be supported by medical evidence. Where the medical issues are in controversy, findings must be explained by specific statement or analysis of the evidence that leads the referee to his or her conclusions. The referee must comment on facts stated to be in support of contrary medical opinions.

Making a written recommended decision. (Government Code § 31533)

The Board may adopt the referee's recommended decision as its own. If it does adopt the recommended decision as its own, the recommended decision must meet standards set by the Legislature and the courts for decisions of administrative agencies. See discussion below in paragraph "I, M."

L. Board's action on referee's recommended decision

Government Code § 31534 provides as follows:

> The proposed findings of fact and recommendations of the referee shall be served on the parties who shall have 10 days to submit written objections thereto which shall be incorporated in the record to be considered by the board.
>
> Upon receiving the proposed findings of fact and the recommendations of the referee, the board may:
>
> (a) Approve and adopt the proposed findings and the recommendations of the referee, or
>
> (b) Require a transcript or summary of all the testimony, plus all other evidence

received by the referee. Upon the receipt thereof the board shall take such action as in its opinion is indicated by such evidence, or

(c) Refer the matter back with or without instructions to the referee for further proceedings, or

(d) Set the matter for hearing before itself. At such hearing the board shall hear and decide the matter as if it had not been referred to the referee.

Associations' comment
A board may have special rules on whether the successful party may respond to the objections and whether the referee must respond to objections.

M. Legal standards that the board's decision must meet

The Board's decision may be reviewed by a court. A dissatisfied member or the county or district employer may petition the superior court for a "writ of mandate." A writ of mandate is an order issued by the court that directs an administrative agency to correct an erroneous action. Code of Civil Procedure § 1094.5 sets forth certain requirements for a decision of an administrative board like a Board of Retirement. A referee's recommended decision should satisfy these requirements because, if it is adopted, it will be the Board's decision.

In pertinent part, Code of Civil Procedure § 1094.5 provides as follows:

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. . . . ."

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion

is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

. . . .

(e) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent. (Emphasis added.)

In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, the California Supreme Court explained the requirement that decisions of administrative agencies be supported by adequate findings and rationale.

We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "the findings" (italics added) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.

Our ruling in this regard finds support in persuasive policy considerations. (Citations omitted) According to Professor Kenneth Culp Davis, the requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law (citations omitted), and is "remarkably uniform in both federal and state courts." As stated by the United States Supreme Court, the "accepted ideal ... is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'" (Citations omitted)

> Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. (Citations and footnote omitted) In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. (Citations omitted)
>
> Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. (Footnote references omitted.) Moreover, properly constituted findings (footnote omitted) enable the parties to the agency proceeding to determine whether and on what basis they should seek review. (Citations omitted.) They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable. *Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d, 514-517.

Associations' comment

The extent of the referee's jurisdiction will depend on the Board of Retirement's commission to the referee. If the referee or a party has doubts about whether hearing evidence and making a recommended decision on an issue is part of the commission, the Board of Retirement should be requested to give direction. Some boards are more restrictive than others.

N. Significance of referee's recommended decision if Board rejects it

The Board of Retirement is specifically authorized by section 31534, subdivision (b), to make a decision based on its own independent review of the testimony and the other evidence. *Keith v. San Bernardino County Retirement Bd.* (1990) 222 Cal.App.3d 411, 415.

> . . . [F]rom the moment of the agency's rejection thereof, it serves no identifiable function in the administrative adjudication process or, for that matter in connection with the judicial review thereof. (*Travelers Ind. Co. v. Gillespie* (1990) 50 Cal.3d 82, 103.)

Compton v. Board of Trustees of Mt. San Antonio Community College (1975) 49 Cal.App.3d 150, 158, interpreted Government Code § 11517, subdivision (c), applicable to administrative adjudication under the Administrative Procedure Act, §§ 11400 - 11529. Subdivision (c), similar to Government Code § 31534, subdivision (b), of the County Employees' Retirement Law of 1937, provides that an agency may reject the recommendation of a hearing officer and decide the case itself on the record. The court in *Compton* said,

> At most, it seems, they can claim that the proposed decision might have suggested an approach which did not occur to their attorney. (Id., 49 Cal.App.3d, 157.)
>
> Be that as it may, it is clear that from the moment of the agency's rejection thereof, it [the hearing officer's recommended decision] serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof. (Id., 49 Cal.App.3d, 158.)

Associations' comment

California has not adopted the rule of *Universal Camera Corp v. NLRB* (1951) 340 U.S. 474, that a trial court may give that reasonable weight to the findings of the trial examiner who observed the witnesses even though the examiner's findings were rejected by the administrative board.

The Board of Retirement may reject the credibility determinations of its referee and make its own credibility determinations. (*Mixon* v. *Fair Employment and Housing Commission* (1987) 192 Cal.App.3d 1306, 1310, Fn 2.):

> Mixon takes the position that the Commission must accept the factual findings of the administrative law judge who originally heard the matter. We find no merit in this argument. Under Government Code section 11517, subdivision (c) the Commission may refuse to adopt the administrative law judge's proposed decision and may then decide the case itself "upon the record, including the transcript, with or without taking additional evidence ...." It follows that once the administrative law judge's proposed decision is rejected, "it serves no identifiable function in the administrative adjudication process" (*Compton v. Board of Trustees* (1975) 49 Cal.App.3d 150, 158), and is in no way binding on the Commission. Mixon's cases (for example, *Merrill Farms v. Agricultural Labor Relations Bd.* (1980) 113 Cal.App.3d 176) stand only for the general proposition that the credibility of a witness is a matter solely within the province of the finder of fact, and are inapposite here.

If a petition for writ of mandate is filed, the superior court may ignore the credibility determinations made by the Board and/or the referee and make its own credibility determinations. (*Barber* v. *Long Beach Civil Service Commission* (1996) 45 Cal.App.4th 652, 658.)

> Contrary to the Commission's assertion and the trial court's ruling, an exercise of independent judgment does permit (indeed, it requires) the trial court to reweigh the evidence by examining the credibility of witnesses. As we explained 20 years ago, in exercising its independent judgment "the trial court has the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of witnesses."

Levingston v. Retirement Board (1995) 38 Cal.App.4th 996, 1000: Trial court may make

its own findings after independently reviewing the evidence.

Fukuda v. City of Los Angeles (1999) 20 Cal.4th 805, 808:

> Under the independent judgment test, the trial court may weigh the credibility of witnesses in determining whether the findings of the agency are supported by the weight of the evidence.

O. Effect of the Board of Retirement's denial of a disability retirement

In *McGriff v. County of Los Angeles (*1973) 33 Cal.App.3d 394, a county employee was released from her position by the county on the basis of a medical inability to perform her duties. The Board of Retirement subsequently found her not to be incapacitated for duty. The county refused to reinstate her. McGriff filed a petition for writ of mandate seeking reinstatement as of the day after she was released. The trial court granted the petition. On appeal, the trial court's decision was affirmed. The appellate court stated,

> (Government Code) Section 31725 was amended, effective November 23, 1970, to provide that if the Retirement Board determines a dismissed employee is not incapacitated and denies his application for benefits, the employer may obtain judicial review of the board's action. If the employer does not do so or if the court upholds the board, the section specifically provides that the employer shall reinstate the employee to his job. *(Id*., 33 Cal.App.3d, 398-399.)

In *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, a firefighter was taken off duty on the basis of work restrictions defined by a workers compensation judge. The firefighter applied for a disability retirement that the Board denied on the basis that he was not incapacitated for duty and he returned to duty. He demanded full salary between the time his workers' compensation benefits terminated and the time he returned to work. The department refused his demand and he filed a petition for writ of mandate that the trial court denied. The court of appeal reversed the trial court. Citing *McGriff*, the appellate court stated,

> *McGriff* is legally indistinguishable from the instant case. Therefore, we have concluded that the trial court erred in denying appellant's petition for a writ of mandate. Appellant is entitled to be reinstated to his position with the Los Angeles County Fire Department effective August 11, 1976. Respondent is entitled to credit for all wages and benefits paid to appellant from August 1976 through August 1978 (*Id*., 148 Cal.App.3d, 989.)

In *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, the county resisted the employee's reinstatement where the Board of Retirement had denied the employee's application for disability retirement and the county, after notice of the Board's decision, did not file a petition for writ of mandate under Section 31725. The county argued that it was not required to reinstate an employee who, though not permanently incapacitated,

was temporarily incapacitated. The court of appeal rejected the county's argument.

> We recognize the sheriff has the ultimate authority and responsibility to determine whether a deputy is fit to engage in active duty. Clearly a person who suffers from a physical, emotional or mental disability should not be forced to perform the strenuous and dangerous duties of a deputy sheriff. Section 31725 does not mandate reinstatement to active duty status. The language and legislative intent reflect the purpose of the statute is to mandate reinstatement to paid status.
> . . . . .
> The employer cannot deny disability retirement on the basis of there being no disability and then claim disability in order to deny employment income. If the employer and Retirement Board do not agree that the employee is entitled to disability retirement, the employer's recourse is to seek judicial review of the Retirement Board's decision. If review is not pursued, the employee must be reinstated. Section 31725 recognizes no middle ground. (*Id*., 225 Cal.App.3d, 1257-1258.)

In *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, after a deputy marshal had been found not to be incapacitated by the Board of Retirement, the county marshal refused to reinstate him because he had been found in his workers' compensation case to have a psychiatric condition requiring that he not carry a weapon. The trial court denied Raygoza's petition for writ of mandate compelling his reinstatement. The appellate court reversed the trial court's decision:

> The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. Raygoza cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch. (*Id*., 17 Cal.App.4th , 1247.)

In *Tapia v. County of San Bernardino* (1994) 29 Cal.App.4th 375, the court of appeal rejected the county's argument that a deputy sheriff had not been "dismissed" within the meaning of Government Code § 31725 because the Sheriff's Department brought her back to work after the Board of Retirement determined that she was not permanently incapacitated for duty.

Tapia was injured in 1987. In February 1989 the county's occupational health unit determined that Tapia was not able to return to full duty and also that the Sheriff's Department had no light duty to offer her. Tapia filed an application for disability retirement in June 1989. The Board denied the application on its initial review and Tapia requested a hearing. In July 1990, the Board adopted a referee's suggested finding that Tapia was not incapacitated. The department brought Tapia back to work within two weeks. Tapia filed a petition for writ of mandate against the county demanding payment of salary between February 1989 and the date she returned to work. The county argued that an employee was "dismissed" within the meaning of Section 31725 only when the employer refused to bring the employee back to work after

a final decision by the Board of Retirement that the employee was not permanently incapacitated. Tapia was brought back to work directly after the Board's decision.

The court of appeal ruled that Tapia's claim was governed by *Leili* and under Government Code § 31725, she was entitled to reinstatement effective the day following the she was dismissed for disability by the county's occupational health unit. The court of appeal distinguished the right of reinstatement that is set forth in Section 31725 and the claim to salary that accrues between the employee's dismissal because of disability and the employee's return to work following the Board's decision that the employee is not permanently incapacitated. Tapia's claim for salary was subject to the claims requirements of the Tort Claims Act.

Tapia v. County of San Bernardino , *supra*, 29 Cal.App.4th, 382:

> When we apply Phillips to the case here, Tapia's dismissal occurred on February 2, 1989, when the county's occupational health service found that she was not medically qualified for regular duty coupled with the fact that the sheriff did not then approve her for light duty. Accordingly, Tapia was entitled to retroactive reinstatement as of February 3, 1989, the day following the effective date of the dismissal as defined by section 31725.

Tapia v. County of San Bernardino, 29 Cal.App.4th, 384:

> Tapia's claim is not governed by section 31725, because section 31725 "does not prescribe the procedures for filing a claim for wages. Rather, this section only gives rise to the duty to [reinstate]."

1. What does the Board do when its medical consultant concludes that, though perhaps somewhat impaired, the applicant is not incapacitated for duty but the county department, recognizing and enforcing work restrictions that are more limiting than the Board's consultant recommends, takes the position that it cannot provide the applicant with an assignment that is safe?

Associations' comment

The Board of Retirement is not bound by its consultant's opinion and may reach a different conclusion if there is substantial evidence supporting the Board's contrary conclusion. However, if it is convinced that its consultant's conclusion is correct, it has the authority to deny the application for disability retirement. Either the applicant or the employer or both may contest the Board's decision. But if neither contests the Board's decision, or after an administrative hearing the Board's administrative decision becomes final, the Board's decision is preeminent.

In *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, the court explained that the Legislature gave the authority to determine whether a member is permanently

incapacitated to the Board of Retirement. When the county department has a remedy in court if it disagrees with the Board's determination. Otherwise, the Board's determination is preeminent.

> The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. Raygoza cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch. (*Id*., 17 Cal.App.4th, 1247.)

In any one case, the possibility of inconsistency between the county's and retirement association's positions concerning the same issues of incapacity and service-connection is a reality with which counties and retirement associations must contend.

A county department may take the position that the employee is permanently incapacitated because it recognizes and gives effect to work restrictions developed in the workers' compensation case, recommended by the county's medical advisor or consultant, or imposed by the applicant's treating or consulting physician. The retirement association's staff, however, may reach a different conclusion, usually based on the analysis and conclusions of a medical consultant the association has appointed.

County departmental officials act on information obtained from a variety of sources, most notably the workers' compensation case, and they justifiably consider themselves obligated not to expose the applicant to further injury, the county to further liability and other employees to the risks of working with someone who has been determined to be impaired.

The members of the retirement association's staff also act on information they are provided. The investigation into the disability retirement application may develop information not available to county officials -- information that convinces the retirement association's staff and medical consultant that the applicant is not incapacitated.

In *Hanna v. County of Los Angeles* (2002) 102 Cal.App.4th 887 the Board of Retirement made an initial determination denying the application for disability retirement. Hanna appealed the decision and requested an administrative hearing. However, before the hearing took place, Hanna withdrew her request and the Board dismissed the appeal. Hanna presented herself for a return to work and the Sheriff's Department, on the basis that Hanna was incapacitated for duty, refused to allow her back to work or pay her salary. Hanna petitioned for a writ of mandate against the county for reinstatement to paid status. The superior court granted the writ. The county appealed. The Court of Appeal ruled as follows:

Hanna v. County of Los Angeles, supra, 102 Cal.App.4th, 894-895:

> In this case, the Retirement Board denied Hanna's application for disability retirement and the Department did not request a hearing by a board-appointed referee or seek

judicial review of the decision. Based on these facts, section 31725 mandates the Department reinstate Hanna to paid status as a deputy sheriff regardless of the work restriction. The Department may refuse to allow Hanna to perform some of the duties of a deputy sheriff, but it must pay her as a deputy sheriff.

In *Alvarez-Gasparin v. County of San Bernardino* (2003) 106 Cal.App.4th 183, a Station Clerk for the Sheriff's Department began losing time from work in 1987. From 1991 to 2000, she worked only three weeks. In that time, she filed a workers compensation case in which an agreed medical examiner concluded that she was a qualified injured worker and should be vocationally rehabilitated to another occupation. She also met with a staff member of the county occupational health unit and a rehabilitation counselor concerning her options for accommodation, transfer and rehabilitation services. She filed an application for disability retirement that was denied both on initial determination in 1995 and after an administrative hearing in 1997. In 1999 Alvarez-Gasparin's petition for writ of mandate to overturn the Board of Retirement's decision was denied. She returned to work as a Station Clerk. She filed another writ petition and complaint for damages, seeking salary and other benefits from April 1994 to September 2000. The court denied such relief under Government Code § 31724 because the county had not dismissed Alvarez-Gasparin for disability.

Alvarez-Gasparin v. County of San Bernardino, supra, 106 Cal.App.4th, 187:

We first observe it appears questionable whether section 31725 applies in this case because plaintiff continues to be employed by the County. She has not been denied both retirement disability and employment as she persistently complains. Although plaintiff may have worked irregularly (or for only three weeks) during the nine years between October 1991 and September 2000, the record shows she began working again as a station clerk in September 2000 was still employed in June 2001. Because plaintiff returned to employment after denial of the retirement disability, section 31725's reinstatement requirement does not apply.

Alvarez-Gasparin v. County of San Bernardino, supra, 106 Cal.App.4th, 187:

Notwithstanding our foregoing preliminary comment, according to the County, section 31725 does not apply because it did not dismiss plaintiff. After the Retirement Board's finding of no disability was upheld, plaintiff simply returned in 2000 to her position. She was not entitled to reinstatement with back pay because she had never been dismissed.

Alvarez-Gasparin v. County of San Bernardino, supra, 106 Cal.App.4th, 188:

. . . . The evidence does not prove what plaintiff would like it to prove. There is simply no showing that plaintiff was dismissed, expressly or impliedly. For that reason, this case differs from the cases relied upon by plaintiff in which the employee

is fired, [FN7] denied any comparable job opportunity with the public employer, [FN8] or refused reinstatement. [FN9] In October 1991, plaintiff effectively stopped working for the County and in the intervening nine years, her employment status was admittedly uncertain. But that does not mean she was dismissed for disability and entitled to a remedy under section 31725.

FN7 *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240 [21 Cal.Rptr.2d 896]; *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394 [109 Cal.Rptr. 186].

FN8 *Phillips v. County of Fresno, supra,* 225 Cal.App.3d 1240; *Tapia v. County of San Bernardino, supra,* 29 Cal.App.4th 375; *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985 [196 Cal.Rptr. 427].

FN9 *Hanna v. Los Angeles County Sheriff's Dept., supra,* 102 Cal.App.4th at pages 891-895.

Associations' comment

In addition to the county having standing under Government Code § 31725 to challenge the Board of Retirement's denial of a disability retirement pension, it has standing to challenge the grant of a disability retirement under Code of Civil Procedure § 1094.5 as was done in *County of Alameda v Board of Retirement (Carnes)* (1988) 46 Cal.3d 902.

II. THE FOUR PRIMARY ISSUES IN DISABILITY RETIREMENT HEARINGS

Is the member permanently incapacitated?

If the member is incapacitated, is the incapacity service-connected?

Should the application be deemed to have been filed on the day following the day for which the applicant last received regular compensation?

Is the applicant entitled to a Supplemental Disability Allowance (some counties)?

A. Is the member permanently incapacitated?

Government Code § 31724, provides in part as follows:

> If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him effective on the expiration date of any leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation.

Associations' comment
Finding permanent incapacity involves a two-step determination:

> (1) whether the member is physically or mentally incapable of performing the duties of the job; and,
>
> (2) whether the incapacity is permanent.

1. Incapacity is the inability to substantially perform the usual duties of a position.

Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876:

> [I]ncapacitated for the performance of duty" within section 21022 means the substantial inability of the applicant to perform his usual duties.

The *Mansperger* definition of "incapacity" under the Public Employees Retirement Law has been applied in cases arising under the County Employees Retirement Law of 1937. *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 694-696 (Permanent incapacity for the performance of duty is the substantial inability of a member to perform his or her usual duties.); *Schrier v. San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957; *Curtis v. Board of Retirement*

(1986) 177 Cal.App.3d 293. See additional discussions on the meaning of disability in *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76; *Subsequent Injuries Fund v. Industrial Acc. Com.* (1964) 226 Cal.App.2d 136; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155;

a) What is a "usual duty."

Associations' comment
The court in *Mansperger* did not define "substantial inability" or "usual duty." The closest the court came to providing a definition was stating what was *not* a usual duty. The court held that a duty that is a "remote occurrence" or "not a common occurrence" is not a "usual duty." Therefore, we submit that an inability to perform a duty that is a remote or uncommon occurrence is not a substantial inability perform the usual duties of the job. (*Mansperger v. Public Employees' Retirement System, supra*, 6 Cal.App.3d, 877.)

See subsection II, A, 9, below, for a discussion of the effect of the employer providing a light duty assignment of indefinite duration to a disabled employee.

Associations' comment
An employee need not be physically or mentally incapable of performing each and every duty that may arise within the job classification in order to qualify for a disability retirement.

Other laws in respect to disability create controversial issues as to what standard is to be used to judge a "disability." If an employee is disabled for his or her usual and customary duties, the employee may be "a qualified injured worker" and entitled to rehabilitation under the Workers' Compensation Act. However, entitlement to rehabilitation benefits is not entitlement to retirement. For example, a clerk may be disabled for his or her usual and customary duties and may be entitled to rehabilitation services in the form of assistance with placement. Such services may entail only switching from one desk to another. In such circumstances, the facts that entitle one to rehabilitation benefits may not entitle one to retirement benefits.

The employer may find that the member is unable to perform an "essential job function," a standard under the Americans With Disabilities Act (42 U.S.C. §§ 12101 et seq.) and conclude that the employee is unable to continue working. The Board of Retirement may determine that the member is able to substantially perform her usual duties, even if the member is unable to perform what the employer considers an essential job function. In such a case, the Board's decision is supreme and the employer must reinstate the member. (*Raygoza v. County of Los Angeles*, *supra.*)

In *Raygoza* , the court stated,

> Government Code section 31725 (footnote omitted) provides that when a county employee is fired for disability, and disability retirement is denied because the

evidence does not satisfy the retirement board "that the member is incapacitated physically or mentally for the performance of his duties," the employer may file a petition for a writ of mandate, or join in such a writ filed by the employee, seeking to compel a disability retirement. "If the employer does not do so or if the court upholds the [retirement] board, the section specifically provides that the employer shall reinstate the employee to his job." (*McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, 399.) (*Raygoza v. County of Los Angeles, supra,* 17 Cal.App.4th, 1244.)

The Legislature decided that an employee in this situation either stays on the job or is given disability retirement. It, in essence, left the decision up to the retirement board. The Legislature's intent is plain. Raygoza cannot be denied both work and disability retirement. If there is a hole in the statutory scheme, the county has to go to the Legislature for a patch. (*Id*., 17 Cal.App.4th, 1247.)

2. "Permanent" defined

Sweeney v. Industrial Acc. Com. (1951) 107 Cal.App.2d 155, 159:

It is a fact that on four different occasions since February, 1949, when exposed to cinnamon, he developed dermatitis and all the doctors agree that he is now sensitive to cinnamon and exposure to it at present will result in dermatitis. Those facts alone, however, do not establish that such condition will continue for the balance of his life or meet the test of permanent disability. "... a disability is generally regarded as 'permanent' where further change—for better or worse—is not reasonably to be anticipated under usual medical standards. It may be that no further treatment is possible, or that the only treatment suggested is so problematical of success as to warrant the employee's refusal to undergo it. In such an event, it is permanent within the meaning of the Act. In practical legal results, the healing period is over and a permanent aftermath of disability exists. ... Ordinarily the term permanent, when applied to a personal injury means 'lasting during the future life of the injured party.' " (Campbell, Workmen's Compensation, vol. I, § 813, p. 719.) The evidence upon which petitioner relies is the statement of Dr. Epstein that the "sensitivity to cinnamon will probably remain for an indefinite period of time but it is impossible to know how long such a sensitivity will remain." This is not a prognosis that it will remain all his life or will be permanent. The most that can be said of the statement is that it is susceptible of two reasonable inferences, one that it might continue for his lifetime, the other that it may not so continue. The commission adopted the second inference and we are bound by their selection. Dr. Epstein's statement in nowise compels the adoption of the first inference.

The Public Employees Retirement Law, in Government Code § 20026, equates a permanent disability or incapacity for duty with one that is of "extended and uncertain

duration."

The Division of Workers Compensation, Administrative Director – Administrative Rules in Title 8, California Code of Regulations, section 10152, provides,

> §10152. Disability, When Considered Permanent.
>
> A disability is considered permanent after the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time.

Associations' comment

Since the physicians who render opinions in disability retirement cases often use the terminology of the workers' compensation system, it is important to consider the difference between the nature of permanent disability for workers' compensation purposes and the nature of permanent disability, or incapacity, for disability retirement purposes.

Conceivably, one can be temporarily disabled for workers' compensation purposes but permanently incapacitated for purposes of disability retirement.

For example, an ocean lifeguard may sustain permanent loss of vision in an accident that also causes orthopedic injuries to the back and other parts of the body. The orthopedic injuries may be expected to heal over the course of a year. For workers' compensation purposes, the ocean lifeguard will be temporarily disabled and not permanent and stationary until the orthopedic injuries have reached maximum improvement. However, due to the loss of vision, the lifeguard is permanently incapacitated right away, long before the temporary disability period ends. On the other hand, an employee may have a very high permanent disability rating for workers' compensation purposes, yet still be capable of performing the duties of the job.

The concept of "permanent and stationary status" in workers' compensation law is not the equivalent of permanency of an incapacity for disability retirement purposes.

The definition of "permanent disability" in PERS' Government Code § 20026 clearly does not require evidence that the disability will last for the rest of the injured member's life. Proof that the disability will remain for an "extended and uncertain" duration is sufficient.

3. Effect of a need for continuing medical treatment on the question of permanency of incapacity

Industrial Indem. Exch. v. *Ind. Acc. Com*. (*Riccardi*) (1949) 90 Cal.App.2d 99, 102:

> Any disability must have been temporary during the healing period but that cannot prevent its later becoming permanent. ¶ Respondents also argue that because Riccardi may become progressively worse and because digitalis and restricted activity

> may improve his general condition his physical condition is not stable and is therefore temporary. This confuses physical condition with disability. His disability is now permanent though his physical condition may be subject to change for the worse or to slight periodic improvement. The need for medical treatment is not incompatible with a status of permanent disability and may be allowed in connection with an award for permanent total disability where necessary.

Subsequent Injuries Fund v. Industrial Acc. Com. (1964) 226 Cal.App.2d 136, 144, held, "the need for further medical treatment is not incompatible with the status of permanent disability."

4. Preexisting conditions waivers

Government Code § 31009, provides:

> Prior to January 1, 1981, an applicant for employment who does not meet the physical standards established for his employment because of a physical impairment existing on the date of his employment may be required by the county as a condition to such employment to execute a waiver of any and all rights to a disability retirement under the County Employees Retirement Law of 1937 arising as a result of such impairment or any aggravation thereof while in county service.

Burdick v. Board of Retirement (1988) 200 Cal.App.3d 1248 held that a waiver was unenforceable:

> In determining the validity of the waiver executed by Burdick, the crucial issue is whether her diabetic condition when she applied for County employment constituted a job-related impairment. The record contains no evidence Burdick's diabetic condition at that time made her unable to perform her duties as an intermediate clerk typist or unable to perform such duties in a manner not dangerous to the health and safety of herself or others. The waiver was not based upon a job-related impairment or any other bona fide occupational qualification. Thus, the waiver is unenforceable against Burdick. (*Id*., 200 Cal.App.3d, 1254.)
>
> At the time Burdick was required to execute the waiver, her controlled diabetes did not interfere with her ability to perform [her duties] or pose a risk to the health and safety of herself or others. It was not reasonably foreseeable her job duties would likely aggravate her diabetic condition or enhance the probability of disability. The County's discrimination… was impermissible because her controlled diabetes did not constitute a job-related impairment. (*Id*., 200 Cal.App.3d, 1256.)

Associations' comment

Government Code § 31009, enacted in 1965, permitted an applicant for employment to waive a right to a disability retirement if he or she did not meet the physical standards

established for the position because of a physical impairment. Section 31009 was amended in 1980 to limit its application to persons employed prior to January 1, 1981. The California Attorney General has concluded that Section 31009 is constitutional. *See* 64 Ops. Atty. Gen. 837, 846:

> Section 31009, as amended, does not . . . . present any significant constitutional question, nor is it, for the reasons hereinabove set forth, in conflict with any state or federal law.

In order for a pre-existing conditions waiver to be enforceable, the waiver must be based on a job-related impairment or other bona fide occupational qualification.

5. Pain as incapacitating

When is pain a factor of disability? Issues arise when the applicant's complaint of pain cannot be verified by the presence of objective findings consistent with the pain.

a) Pain as not disabling

Universal City Studios, Inc. v. *Workers' Comp. Appeals Bd*. (1979) 99 Cal.App.3d 647, 656-657:

> At bench the evidence (as opposed to the statutory presumption) of actual physical inability to compete (the disability) is based entirely upon subjective complaints of slight or minimal pain. There is no testimony or other evidence of objective findings that the condition in any way, physiologically or functionally, prevents or disables the employee from performing whatever work she could have or would have performed in the future. There is only evidence that when she stands for a protracted period of time, dances, squats, or walks a certain number of blocks, she then complains of some aching or pain. While there is no evidence of any reason to doubt the truthfulness of the employee, the presence of pain is not a compensable limitation. It is but one of the subjective factors that the doctor considers in determining the actual existence of new limits upon motion or actual use of the particular part of the body.
> . . . .
> Examining the evidence closely, it is clear that the only evidence which supports the theory that the employee should be confined to semisedentary work as classified by the rater, is the evidence of the employee's own subjective complaints and the doctor's acceptance of that subjective complaint. There is no objective evidence that the doctors concluded that Lewis is permanently restricted by reason of this injury to semisedentary work. None of the objective findings of any doctor disclose any physical abnormality or any functional disability of Lewis' left foot.

b) Acceptance of subjective complaints in the absence of evidence to the contrary

Baker v. Workmen's Comp. Appeals Bd. (1971) 18 Cal.App.3d 852, 859-860:

> In the absence of evidence to the contrary, the referee and the board must assume the truth of petitioner's uncontradicted and unimpeached testimony respecting the genuineness of his complaints. (See *Place v. Workmen's Comp. App. Bd*., 3 Cal.3d 372, 379 [90 Cal.Rptr. 424, 475 P.2d 656].) Given the truth of petitioner's testimony, the board's finding that petitioner did not sustain an industrial injury cannot be reached by simply ruling out heart disease. The only reasonable inference which can be drawn from the evidence is that petitioner suffers from a form of psychoneurotic injury which doctors termed "cardiac neurosis."

Associations' comment
Baker was a firefighter who developed chest pains after he was exposed to smoke at a fire. Medical evidence established that he did not have heart disease. The Appeals Board denied his claim on the basis that he did not have heart disease and the presumption that heart trouble is work-related therefore did not arise. The court of appeal reversed on the basis that there was no substantial evidence supporting a finding that the applicant did not have a work-related injury nonetheless, perhaps on the basis of a cardiac neurosis. The court's opinion addresses the question of whether Baker's had sustained a compensable injury, not whether he was permanently incapacitated.

Gillette v. Workmen's Comp. Appeals Bd. (1971) 20 Cal.App.3d 312, 321.

> As stated above, the carrier has argued that petitioner's description of the September 1968 incident was unbelievable as being "self-serving." We find no merit to this argument. Every time an applicant testifies to facts which favor his claim of disability he testifies to further that cause. If the carrier denounces such testimony as unbelievable because it is "self-serving," it effectually argues that an applicant may neither testify nor state a subjective history to his doctor. That, of course, is to argue an absurdity. It also disputes well settled law to the contrary. (See Witkin, Cal. Evidence, supra, s 555, pp. 529, 530, discussing Evid. Code s 1251.) The referee properly considered all of the evidence relating to the September 1968 incident.

Associations' comment
In *Gillette*, a firefighter claimed to have a disability caused by injury to his heart. The court defined the issue as follows:

> The only real question presented to us here is: Where a trier of fact accepts the opinion of a doctor who has used as a part of that opinion a history given by the patient, has it relied upon inadmissible evidence?

Evidence Code § 1251 provides that expressions of pain are not made inadmissible by the hearsay rule where the declarant is unavailable to testify.

> *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, involved a decision by the Workers' Compensation Appeals Board that because the applicant delayed in reporting his injury, his claim that he sustained injury to his back could not be believed. The Supreme Court rejected the Appeals Board's rationale, stating at 3 Cal.3d, 317-318,
>
> As a general rule, the board "must accept as true the intended meaning of [evidence] both uncontradicted and unimpeached." (*LeVesque v. Workmen's Comp. App. Bd., supra.*, 1 Cal.3d 627, 639; *McAllister v. Workmen's Comp. App. Bd., supra.*, 69 Cal.2d 408, 413; see *Wilhelm v. Workmen's Comp. App. Bd., supra.*, 255 Cal.App.2d 30, 33.) At the hearing, respondents made no effort to impeach petitioner's testimony by showing, through medical opinion, that he suffered no injury on January 5, or by proving that such an injury could not have occurred in the manner testified to by him. Indeed, with one possible exception, [footnote omitted] the evidence relied upon by the appeals board sustains petitioner's assertion that he suffered an industrial accident on that date.
> There is no question that petitioner did in fact have a back condition which ultimately required surgery to correct, and petitioner adequately explained his reasons for not reporting his injury to his employer or doctors.

Zurich Insurance Company v. Workmen's Comp. Appeals Bd. (1973) 9 Cal.3d 848, 853:

> . . . .I am persuaded by the views expressed by Dr. Poliak. He says, in substance, that although there may be no organic reasons for applicant's subjective complaints, those complaints are nonetheless reasonably attributable to the work incidents of March 1 and June 14, 1966; that these incidents initiated 'the disabling psychoneurotic condition which is now in evidence.'"

Associations' comment

Whether the applicant's expressions of pain can support a finding of incapacity for duty is an issue of fact. Complaints of pain that are verified in the circumstances may amount to a disabling factor. Complaints of pain that are not consistent with the disability claimed or are not corroborated in the circumstances may not be sufficient to support a finding of disability.

In *Universal City Studios* the described level of pain, minimal to slight, was inconsistent with the high level restriction imposed by the physician on whose opinion the Appeals Board relied, specifically, a restriction to semi-sedentary work. There were no objective findings that would support the claimant's complaints. Therefore, the court of appeal held that the finding of disability based on the semi-sedentary work restriction was

unsupported by substantial evidence.

On the other hand, in the cases of *Baker*, *Gillette*, and *Zurich Insurance Company*, pain without an organic cause was found to be genuine based on expert opinion that it stemmed from a psychiatric reaction. In *Garza* the applicant claimed that he sustained an injury at work, but he did not report it for a number of days. Later, he needed surgery. His complaint of pain was consistent with the injury he described and the treatment he subsequently obtained. The court of appeal held that the Appeals Board's suspicion, based on the applicant's delay in reporting the injury, was not substantial evidence on which to base a rejection of the claim when the rest of the circumstances were consistent with the applicant's claim.

We find no authority for the bare proposition that the description by the applicant of pain alone, that is, expressions of pain that are unsupported by any corroborating findings, *must* be accepted as true evidence of incapacity even in the absence of evidence that contradicts or impeaches the testimony.

However, there is authority that an applicant's uncorroborated description of pain *may* be accepted by the fact finder as true and, in that event, the applicant's uncorroborated complaint of pain will constitute substantial evidence on which to base a finding that the applicant actually suffers from the pain.

Sweeney v. Workmen's Comp. Appeals Bd. (1968) 264 Cal.App.2d 296, 302:

> Usually a scientific or medical question is one "where the truth is occult and can be found only by resorting to the sciences," and where the issue is exclusively a matter of scientific or medical knowledge. (See *Peter Kiewit Sons v. Industrial Acc. Com*., 234 Cal.App.2d 831, 838.) The question as to whether a person has pain, to the extent that he cannot work, is not one which can be determined only by resorting to sciences. That question may be determined upon the testimony of the person alone. (*Employers' etc. Corp. v. Industrial Acc. Com*., 42 Cal.App.2d 669, 671.) While such an issue is of a medical nature, it is not a scientific or medical question within the usual acceptation or understanding of that expression. In *Employers' etc. Corp. v. Industrial Acc. Com.*, *supra*, it was said: "[T]he injured person naturally was in the best position to tell whether he was suffering pain." It is reasonable, of course, to conclude that an investigation or inquiry as to the extent of disability suffered by a certain individual would include physical examination and questioning of the injured person. In this connection it is to be noted, from Dr. Krepela's testimony, that also it has been his experience in his medical practice, while examining patients, that he had acquired insight regarding the validity or invalidity of their complaints from *their responses during the examination.*

Employers' Liability Assurance Corp. Ltd. of London England v. Industrial Acc. Comm. (1941) 42 Cal.App. 699 (Cited in *Sweeney*), 671 - 672:

> It appears from the reports of the physicians that the employee did in fact receive an injury to his back. The testimony of the employee presented substantial evidence to support the finding of the commission that the disability had not ceased on January 8, 1940. We are not unmindful of the rule that the commission may not disregard the opinion of medical experts in cases where the question is "one within the knowledge of experts only and not within the common knowledge of laymen." (*William Simpson C. Co. v. Industrial Acc. Com*., 74 Cal. App. 239.) The present case however, is not one in which experts only could supply information, for the injured person naturally was in the best position to tell whether he was suffering pain. The experts could give opinions as to the probable duration of the pain but their opinions would not be conclusive in a particular case. Expert testimony must be relied upon "in cases where the truth is occult and can be found only by resorting to the sciences". (*State Comp. Ins. Fund v. Industrial Acc. Com*., 195 Cal. 174.) The question whether Mr. Christian was suffering such pain as would prevent his working at the time of the hearing by the commission was not one which could be determined only by resorting to the sciences. In *County of Los Angeles v. Industrial Acc. Com.*, 14 Cal. App. (2d) 134, the employee suffered a severe pain in the lower part of his back while lifting a heavy tire wheel. The commission made an award for permanent injury based upon the testimony of the employee without the evidence of experts. This court refused to annul the award.

Since it is rare that the applicant's expressions of pain are not evaluated by a consulting physician, thus opening the door to contradiction and impeachment, this issue may be academic.

Note that of the cases cited in this section, only *Universal City Studios* and *Zurich* deal with pain as a factor of permanent disability. In *Employer's Liability,* the issue was whether the employee's subjective complaints of pain could support an finding of continuing temporary disability even though those complaints were contrary to the opinions of examining physicians. *Universal City Studios* deals with the question of whether pain is a disabling factor. In *Zurich* the issue was whether pain that is generated by a neurosis is to be rated as a psychiatric impairment or an impairment of the part of the body where the pain is felt. In *Sweeney v. Workmen's Comp. Appeals Bd.,* the issue was whether the report and testimony of a non-examining physician, who apparently did not accept the applicant's complaints of pain on ambulation or ignored them, could establish that the level of the applicant's disability was "light work only" versus a limitation to sedentary work, a much higher level of disability that was endorsed by other physicians who had actually examined the applicant. The other opinions deal with pain as an item of evidence that an injury was sustained, not as a factor of permanent disability.

Pain is recognized as a factor of permanent disability in the workers' compensation system, though it has usually been rated as an add-on to the primary disabling factor, e.g., a loss of range of motion. See 1 Herlick, California Workers' Compensation Law,

(Fifth Edition) §§ 7.6, 7.32; Title 8, California Code of Regulations, § 9727, *infra*.

6. Effect of a refusal of medical care

Reynolds v. City of San Carlos (1981) 126 Cal.App.3d 208, 216:

> The Commission found that appellant's disability was not permanent because the "probabilities are great that [he] will be restored to normal functioning if he submits to surgery ...." In making this finding, the Commission relied on Labor Code section 4056 (see part A above), which denies workers' compensation benefits if an injured employee unreasonably refuses recommended medical treatment. Section 4056 merely codifies the common law rule requiring mitigation of damages (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 870, p. 3158), which is properly applied in determining eligibility for disability retirement. The Commission has inherent power under Government Code section 21025 to determine whether a claimant has undergone the medical treatment that reasonably could be expected to effect a cure.
>
> As previously discussed, the Commission also has the authority to apply workers' compensation law by analogy. (See *Heaton v. Marin County Employees Retirement Bd.*, *supra.*, 63 Cal.App.3d at pp. 427-428.) [The] disability [is] not permanent because the 'probabilities are great that [the employee] will be restored to normal functioning if he [or she] submits to surgery…[T]he common sense rule [is] that [the employee] is not permanently disabled when he [or she] unreasonably refuses remedial surgery.

See also *Gallegos v. Workmen's Comp. Appeals Bd.* (1969) 273 Cal.App.2d 569; *Bethlehem Steel Co. v. Industrial Accident Comm.* (1945) 70 Cal.App.2d 369; Labor Code § 4056.

In *Montgomery v. Board of Retirement* (1973) 33 Cal.App.3d 447, it was held that an applicant could refuse surgery based upon her religious beliefs and still be granted a permanent disability retirement pension.

Montgomery v. Board of Retirement, supra, 33 Cal.App.3d, 450:

> It is undisputed that so long as appellant does not have an operation her condition, which incapacitates her from work, is permanent. The Board in effect found that because her condition was correctable by surgery appellant was not permanently incapacitated within the meaning of Government Code section 31720 and, therefore, denied her benefits. Since it is appellant's religious beliefs which do not permit her to undergo surgery, we therefore squarely face the question of whether she is entitled to the retirement benefits though the condition from which she suffers is correctable by an operation presenting no unusual hazards but which procedure is violative of her sincerely held religious beliefs.

Montgomery v. Board of Retirement, supra, 33 Cal.App.3d, 451:

> The denial of disability retirement forces appellant to choose between following the precepts of her religion and forfeiting the disability retirement benefits on the one hand and abandoning one of the precepts of her religion in order to cease to be permanently disabled and return to work on the other hand. In effect, appellant may not practice her religion and receive benefits.

Montgomery v. Board of Retirement, supra, 33 Cal.App.3d, 450.

> Measured against this stringent standard, we perceive no compelling state or county interest enforced in the eligibility provisions of the disability retirement statute justifying the substantial infringement of appellant's First Amendment right to the free exercise of her religion.

Applicants' comment
Reynolds does not correctly state the law under the CERL of 1937. We question whether *Reynolds* is even good law under the CalPERS statute, given some amendments to the State Labor Code that the court in *Reynolds* cited.

Associations' comment
The employer or insurance carrier in a workers' compensation case is charged with the duty to provide medical care. The employer meeting its duty enables the employee to avoid the consequences of not obtaining treatment, i.e., prolonged or a higher level of disability. The employer cannot fail to meet its duty and then claim that it is not responsible for an increased level of disability that results from the applicant's failure to obtain treatment. The retirement association, on the other hand, does not provide medical care and has no duty to tender it. Therefore, the fact that the employer or anyone else did not make an offer of treatment cannot logically preclude an association from denying an application based on an unreasonable refusal of medical care. Rather, the fact that the employer did not offer medical treatment is one factor that must be considered in determining whether the refusal to obtain treatment is reasonable. The determination of the "reasonableness" of the employee's refusal must include consideration of whether the applicant has a source of medical care that is reasonably available. If the applicant is shown not to have a source of medical treatment or is not able to afford the treatment, the applicant's refusing the treatment is not unreasonable. *Flores v. Workmen's Comp. Appeals Bd*. (1973) 36 Cal.App.3d 388; *Marshall v. Ransome Concrete Co.* (1917) 33 Cal.App. 782.

The court of appeal in *Thompson v. Workers' Comp. Appeals Bd*., (1994) 25 Cal.App.4th 1781, rejected the employer's argument that, apart from Labor Code section 4056, workers' compensation benefits were forfeit by an employee's unreasonable failure to comply with medical advice. After being diagnosed with hypertension and being noncompliant with medical advice about treatment, the

employee died of a stroke. The Appeals Board found that the employee's unreasonable noncompliance was the proximate cause of the death and ruled that his death was, therefore, not work-related under Labor Code section 4056. The court of appeal overruled the Workers' Compensation Appeals Board. The court held that Labor Code section 4056 was not applicable since, at the time of injury, there was no workers' compensation claim and no offer of medical care by the employer. The court also rejected the defendant's argument that, aside from the provisions of Labor Code section 4056, the employer was protected from liability by the doctrine of avoidable consequences.

> . . . ."The remaining question is whether the board's decision is sustainable under the mitigation doctrine applicable in tort actions. According to this doctrine, sometimes referred to as the doctrine of avoidable consequences, a person injured by the wrong of another must mitigate the damages if reasonably possible, and he is bound, at least to the extent of his financial ability, to exercise reasonable diligence in procuring medical or surgical treatment to effect a speedy and complete recovery." (*Flores v. Workmen's Comp. Appeals Bd* [(1973) 36 Cal.App.3d 388], at p. 393.) After explaining why the doctrine did not apply to require an employee to resort to public welfare or risk the loss of benefits, the court stated that it did not declare, "unequivocally, that we believe that the mitigation doctrine is never applicable to a workmen's compensation claim; it is conceivable that circumstances could arise where justice and equity would dictate some duty on the part of the employee 'to mitigate the trouble and promote recovery.' " (Id. at p. 396, quoting *Marshall v. Ransome Concrete Co*. (1917) 33 Cal.App. 782, 786 [166 P. 846].)
>
> The employee in Marshall as in Flores was not precluded from compensation since the employee in Marshall could not afford to pay for the operation which, in any event, was not indisputably beneficial for the medical problem.
>
> No case has been cited in which the doctrine of "avoidable consequence [s]" has actually been applied to deny workers' compensation benefits to an employee. Despite the dictum of *Flores* and *Marshall*, it is extremely doubtful that it could ever be applied. Prosser and Keeton suggest "that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not." (Prosser & Keeton on Torts (5th ed. 1984) § 65, p. 459.) Labor Code section 3708 expressly abolishes the common law defenses of contributory negligence, assumption of risk and the negligence of a fellow servant. If the stroke was caused by the stress of Mr. Thompson's work and thus arose out of and occurred in the course of his employment, benefits cannot be forfeited because of the negligence of Thompson which contributed to the fatal event.

This issue is also discussed, below, at V., G, in connection with the use of workers'

compensation statutes and court opinions as precedent and guides in dealing with similar issues in CERL of 1937 cases.

7. Risk of further injury as a basis for a disability

a) A physician-imposed work restriction, recommended as a prophylactic measure to protect an employee from further injury, is a "disability" under the workers' compensation law.

Levesque v. *Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627

> The referee's only support for his conclusion appears in his report and recommendation on the petition for reconsideration. After reviewing Dr. Dedinsky's reports and Dr. Messinger's report, the referee observed, "The general tenor of the medical reports, especially when considered in the light of other factors, suggests that the doctor's cautions were more in the nature of prophylactic advice rather than rigid restrictions." (*Levesque v. Workmen's Comp. App. Bd., supra*, 1 Cal.3d, 639.)
>
> . . . . [T]he only two physicians who have seen or treated petitioner[] since his temporary disability payments ceased, have concluded that petitioner cannot perform work requiring lifting. Neither doctor has released petitioner from the lifting limitation. In essence, the referee's report confronts petitioner with the grisly choice of obeying the medical advice of his treating physician or risking further injury by following the medical views of the referee. (*Id*., 1 Cal.3d, 639-640.)

b) The same principles apply to a disability retirement application filed under the CERL.

Wolfman v. Board of Trustees (1983) 148 Cal.App.3d 787, 791:

> Although physically capable at the time of hearing to perform her duties, it would be medically unwise. …During her final year of employment she consistently reached a medically determinable stage of severity. It was not merely a prospective probability, but a medical certainty.

Associations' comment
In *Wolfman*, the employee was *certain* to suffer future injury if she returned to duty. Therefore, she was found to be incapacitated for that duty. This is not to say, however, that proof of future injury must be stated in terms of medical "certainty" in order for a prophylactic work restriction to be the basis of a finding of incapacity. Medical opinion based on what "probably" is true is substantial evidence on which a board may rely in making a finding of fact. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416-417; *Paneno v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 136, 153.) Evidence of what the truth probably is can establish the preponderance of evidence. (*Spolter v. Four Wheel Brake Service Co.* (1950) 99 Cal.App.2d 690, 693.)

The employee's burden of proof on the issue of permanent incapacity is not met by a medical opinion offering prospective *possibility* of injury (i.e. speculation), but by a medical opinion that future injury *probably will* occur if the patient does not comply with prophylactic restrictions .

On the other hand, a finding of present disability cannot be supported by testimony of a physician who speculates about future injury.

Hosford v. Board of Administration (1978) 77 Cal.App.3d 854, 863:

> Throughout the hearing, and again in his briefs, Hosford relied and relies heavily on the fact that his condition increases his chances for further injury. As the Board correctly points out, however, this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently in existence.

Raven v. *Oakland Unified School Dist*. (1989) 213 Cal.App.3d 1347, dealt with a teacher's request for a court order compelling the school district to reinstate her after she had been on sick leave for a work-related mental illness:

> Moreover, the district has repeatedly denied Raven's request for reinstatement because its staff psychiatrist has concluded or speculated that Raven may reexperience stress-related symptoms. It also has denied her request because Raven's psychiatrist states that he was not "certain" that Raven could "weather the stress" in the future, although he felt that her condition had progressed to the point that she deserved the opportunity to return to work. It is interesting to note that in analogous administrative contexts, the risk or fear of prospective disability is not considered a permanent incapacitation compensable by disability retirement. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 863-865.) (*Id*., 213 Cal.App.3d, 1359-1360.)

8. Disability due to termination

Bray v. Workers' Comp. Appeals Bd. (1994) 26 Cal.App.4th 530, dealt with an employee who was unexpectedly terminated and suffered psychiatric injuries which occurred after termination ". . . . caused solely by the fact of termination." There was no evidence of any pretermination injury or disability. The court held that ". . . . [P]osttermination injuries not resulting from pretermination events [are] not compensable under existing law in any event." (*Id., p. 539.)*

> ". . .[T]he fact of job termination by an employer, without more, cannot result in liability to the terminated employee by way of a workers' compensation award. (*Id*., 26 Cal.App.4th, 540.)

Associations' comment
In the case of a termination, two areas of controversy are involved when the stress of

the termination causes physical and/or mental injuries and disability.

The first area of controversy involves the question of whether disability that came on after termination can be the basis of a disability retirement. The association will assert that if the applicant stopped working because he or she was terminated, and not because of disability, the applicant is not entitled to a disability retirement pension.

The second area of controversy involves whether the events at work which led to the termination may be the basis of a disability pension and, if so, whether those events "arise out of and in the course of employment" so as to qualify the applicant for a service-connected disability retirement. This second area of controversy is addressed below under the section dealing with "Service-connected Incapacity."

Haywood v. American River Fire Protection District (1998) 67 Cal.App.4th 1292, 1306:

> As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically unable to perform his usual duties and one who has become unwilling to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. (*Id*., 67 Cal.App.4th, 1297.)
>
> As we have noted, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was properly terminated for cause. There is no claim, or evidence which would support a claim, that the termination for cause was due to behavior caused by a physical or mental condition. And there is no claim, or evidence which would support a claim, of eligibility for disability retirement that could have been presented before the disciplinary actions were taken. Instead, Haywood asserts he has become psychologically unable to return to employment with the District as the result of his reaction to the disciplinary proceeding which resulted in a complete severance of the employment relationship. (*Id.*, 67 Cal.App.4th, 1306.)
>
> For all the reasons stated above, we conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed. (*Id*., 67 Cal.App.4th, 1307.)

Smith v. City of Napa (2004) 120 Cal.App.4th 194, 198:

> In the published part of this opinion, we reject [Smith's] criticisms of the *Haywood* holding as dictum extraneous to its ratio decidendi and as inconsistent with Supreme Court precedent. We also explain an oft repeated qualification in *Haywood* that its ruling does not apply to a dismissal that "preempts" an otherwise valid claim for disability retirement. (67 Cal.App.4th at pp. 1297, 1306, 1307.) Contrary to the belief of the defendants, it does not refer only to a dismissal intended to thwart a claim for disability retirement, because a dismissal for cause cannot defeat an employee's matured right to a disability retirement antedating the event providing cause for the dismissal.

Smith v. City of Napa, supra, 120 Cal.App.4th, 203 – 204:

> [In Haywood] [w]e noted the lack of any evidence that Haywood was eligible for a disability retirement before the dismissal, or of any basis in a physical or mental disability for the conduct resulting in the dismissal. (*Haywood, supra,* 67 Cal.App.4th at p. 1306.) We concluded that the legislative intent underlying the disability retirement laws presupposed a continuing if abated employment relationship the disabled annuitant can petition to return to active service, and the employing agency can compel testing to determine if the disability is no longer continuing (at which point it can insist on a return to active service). Therefore, if an applicant is no longer eligible for reinstatement because of a dismissal for cause, this also disqualifies the applicant for a disability retirement. (*Id*. at pp. 1305 1306, 79 Cal.Rptr.2d 749.) To interpret the statutes otherwise overrides the power of public agencies to discipline employees, and would reward poor employees with early retirement. (*Id*. at p. 1306, 79 Cal.Rptr.2d 749.) Finally, we rejected an argument that the timeliness of an application for disability retirement is determinative of eligibility. (*Id*. at pp. 1306 1307, 79 Cal.Rptr.2d 749.)
> . . . .
> In the first place, our conclusion that a dismissal for good cause unrelated to a medical disability disqualifies an employee for a disability retirement was essential to the dispute before us and our analysis. Nothing about it exceeds the necessary *ratio decidendi* of the case. We therefore reject the plaintiff's characterization of the principle as mere unpersuasive dicta.

Smith v. City of Napa (2004) 120 Cal.App.4th, 205:

> It is not a material factual distinction from *Haywood* that the plaintiff desired to continue working. *Haywood* contrasted the "unwilling" firefighter with an employee "unable" to perform job duties. That was, however, only the manner in which the facts in *Haywood* presented the dichotomy. The distinction with which we were

concerned is between employees dismissed for cause and employees unable to work because of a medical disability.

Smith v. City of Napa (2004) 120 Cal.App.4th, 205 - 206:

> However, as the plaintiff has correctly attempted to argue throughout the CalPERS proceedings, even if an agency dismisses an employee *solely* for a cause *unrelated* to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect. (Citations omitted.) Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot "preempt" the right to receive a disability pension for the duration of the disability. . . .
>
> The key issue is thus whether his right to a disability retirement matured before the plaintiff's separation from service. [FN11 omitted] A vested right matures when there is an unconditional right to immediate payment.

9. Effect of employer accommodation and permanent or indefinite assignment to light duty

Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873:

> We hold that to be "incapacitated for the performance of duty" within section 21022 means the substantial inability of the applicant to perform his usual duties. (*Id*., 6 Cal.App.3d, 876-877.)

Barber v. Retirement Board (1971) 18 Cal.App.3d 273:

> Barber first contends that the Chief's interpretation of the term "his duty" in section 171.1.3 of the [city] charter (footnote omitted) to mean any and all duties that are performed by firemen appears unreasonable and arbitrary in view of the evidence that some men in the fire department were assigned to permanent limited duty positions. We see merit in this contention. As there is no judicial or legal construction of the term as used in the city charter provisions, the question is one of first impression. The courts will ordinarily follow a contemporaneous administrative construction of a statute which is reasonably susceptible of more than one interpretation but such a construction cannot be followed where it is clearly erroneous (*Hoyt v. Board of Civil Service Commrs.*, 21 Cal.2d 399, 407). We think that in view of the well recognized public policy favoring the employment and utilization of physically handicapped persons (Welf. & Inst. Code, § 10650), the Chief's interpretation here was too broad. Under the circumstances, where there were permanent light duty assignments, a narrower construction declaring "his duty" in section 171.1.3 to refer to duties required to be performed in a given permanent assignment within the department

would more reasonable. (*Id*., 18 Cal.App.3d, 278.)

Craver v. *City of Los Angeles* (1974) 42 Cal.App.3d 76

> We agree with the court in *Barber v. Retirement Board, supra*, 18 Cal.App.3d at page 278, that where there are permanent light duty assignments and a person who becomes "incapacitated for the performance of his duty . . . . shall be retired," that person should not be retired if he can perform duties in a given permanent assignment within the department. He need not be able to perform any and all duties performed by firemen or, in the instant case, policemen. Public policy supports employment and the utilization of the handicapped. (*Barber v. Retirement Board, supra*.) If a person can be employed in such an assignment, he should not be retired with payment of a disability retirement pension. (*Id*., 42 Cal.App.3d, 79-80.)

Harmon v. *Board of Retirement* (1976) 62 Cal.App.3d 689:

> Under the provision of the County Employees Retirement Law of 1937, the employer is entitled to secure judicial review of a decision denying an employee retirement because the retirement board, as here, is not satisfied from the medical examination and other evidence that the member is incapacitated for the performance of his duties. If no such action is taken by the employer and the denial becomes final the employer must reinstate the employee. (See *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, 398-400.) Moreover, the assistant sheriff's testimony when taken as a whole does not foreclose the possibility that there were positions in the sheriff's office which could be performed by one subject to the disabilities which the doctors reported that the deputy suffered. (*Id*., 62 Cal.App.3d, 696-697.)

O'Toole v. *Retirement Board* (1983) 139 Cal.App.3d 600:

> In *Barber v. Retirement Board* (1971) 18 Cal.App.3d 273, the appellate court construed the phrase "incapacitated for the performance of his duty," by stating that where there are permanent light duty assignments available, "his duty" reasonably could be construed to refer to "duties required to be performed in a given permanent assignment within the department ...." (Id., at p. 278 italics in original.) In *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76, the court held that a "person should not be retired if he can perform duties in a given permanent assignment within the department. He need not be able to perform any and all duties performed by ... policemen. Public policy supports employment and utilization of the handicapped. [Citations.] If a person can be employed in such an assignment, he should not be retired with payment of a disability retirement pension. (*Id*., at p. 80.) (*Id*., 139 Cal.App.3d, 603.)
>
> Looking at the realities of this case, O'Toole was employed as a public affairs officer

for some six and one-half years following the inception of his disability. He could have continued in his position had he not chosen to retire. . . .

The record establishes that as a matter of police department practice there was a permanent light duty assignment as a public affairs officer available to O'Toole as long as he wanted the job. If there was one fact clear, it is that O'Toole was not incapacitated for the performance of the duties of this permanent position with the police department.

It comes down to this: Is a police department paper policy that there are no permanent limited duty positions--a policy honored in the breach rather than in the observance--substantial evidence that there are no such positions? We think not. (*Id*., 139 Cal.App.3d, 604-605.)

Associations' comment

In *O'Toole*, the evidence showed that the department had 40 permanent, indefinite light duty positions for officers, although the police chief testified that ". . . . the availability of light duty assignments depended on the desire of the applicant. If the applicant wanted to retire, the police chief would tell the board that no light duty assignments were available. (*Ibid*.)

Stuessel v. *City of Glendale* (1983) 141 Cal.App.3d 1047:

The central issue in this case is whether a police officer, who is industrially incapacitated from the full performance of his "in field" duties, may be placed in a permanent modified light duty position within the police division of the City as a front desk or operations officer, or combination of both, where he is not incapacitated from carrying out the requirements of such position.

We shall hold that where, as here, such employee retains his police officer classification, continues to receive the same salary and fringe benefits and has the same promotional opportunities as other employees in the police officer classification, he may be placed in such available permanent modified light duty position even though he no longer has the right to carry a firearm or make arrests as a peace officer. (*Id*., 141 Cal.App.3d, 1051.)

There was substantial evidence to support the trial court's finding that the permanent modified light duty positions existed before the onset of Stuessel's disability and were available within the police division. Further, there was substantial evidence that he retained his police officer classification and his rights to receive the same salary and fringe benefits and promotional opportunities as other employees in the police officer classification. There was also substantial evidence that he was not incapacitated from the performance of duties in a given permanent assignment within the police division

> of the City. As was said in *Craver*: "Public policy supports employment and utilization of the handicapped. [Citations.] ¶ If a person can be employed in such an assignment, he should not be retired with payment of a disability retirement pension. (*Craver v. City of Los Angeles, supra*, 42 Cal.App.3d at p. 80.)" (Id., 141 Cal.App.3d, 1053.)

Applicants' comments on *Stuessel*

Stuessel involved a policeman employed by a city operating under PERS. The opinion does not apply to CERL of 1937 cases.

The California Supreme Court's opinion in *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, at 338, (also pages 344 -345) provides support for the applicants' contention that the offer of a permanent modified assignment does not negate the grant of a disability retirement if it does not provide the same or similar promotional opportunities as the injured member's assignment at the time the member became permanently disabled.

> We conclude that in order to qualify for disability retirement under section 21156, Mr. Nolan will have to show not only that he is incapacitated from performing his usual duties for Anaheim, but also that he is incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies. Assuming Mr. Nolan makes such a prima facie showing, the burden will then shift to Anaheim to show not only that Mr. Nolan is capable of performing the usual duties of a patrol officer for other California law enforcement agencies, but also to show that similar positions with other California law enforcement agencies are available to Mr. Nolan. By similar positions, we mean patrol officer positions with reasonably comparable pay, benefits, and promotional opportunities.

The Supreme Court did not cite any authority for its statement about promotional opportunities. The Associations may argue that this *ipsi dixit* statement may be only *dictum* and not party of the Court's *ratio decidendi,* but the Court introduced the promotional opportunities limitation with the phrase "We conclude . . . ."

Associations' comment on *Stuessel*

The court commented that Stuessel retained promotional opportunities in his permanent modified assignment. That does not mean that retaining promotional opportunities is a prerequisite to finding an injured member to be capable of substantially performing his or her duties.

In *Harmon v. Board of Retirement, supra*, a 1976 opinion in a CERL of '37 case, the member, a deputy sheriff who was subsequently found not to be incapacitated, had been disqualified for a promotion to sheriff's sergeant because of his disability. (*Id*., 62 Cal.App.3d, 692.) Contrary to the argument that the *Stuessel* court announced a "retention-of-promotional-opportunities" factor, Harmon's having been denied a promotional opportunity on the basis of his disability was not a factor in the *Harmon* court's analysis.

Associations' comment
If the employer offers an indefinite modified or alternative assignment to a member who is incapacitated for his or usual duties by a service-connected injury, the employer should meet the requirements of Labor Code section 4644, subdivision (a), and Title 8, Cal. Code of Regulations, sections 10122 and 10126 which restrict the kinds of jobs the employer may offer.

a) "Full range of duties test" rejected in CERL of '37 cases.

Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 695 - 697:

> . . . . Here even accepting in full the facts and opinions in the doctor's reports, and disregarding the testimony of the investigator and the supporting motion pictures, the record supports the implied finding that the deputy was not incapacitated for the performance of the duties of bailiff or other duties set forth in the civil service classification which did not involve heavy lifting or frequent necessity, as on patrol, for the use of considerable physical effort to subdue arrestees or prisoners.
>
> The deputy seeks to avoid the foregoing conclusion by reference to testimony of the assistant sheriff that since July 1, 1973, it was the policy of the sheriff's office not to restore officers to duty unless they were 100 percent fit for any duty to which they might be assigned, and that at the time of the hearing before the referee in April 1974, some eight months after the deputy, not the sheriff, had terminated the employment relationship, there was no position available in the sheriff's office which would not involve a significant risk of violence. He relies upon *Barber v. Retirement Board, supra*, where the board, the trial court, and the Court of Appeal upheld the compulsory retirement of the fire lieutenant sought by the fire chief because there was no light duty available for one of the lieutenant's rank with his disability. (18 Cal.App.3d at pp. 279-280. See also *Dobbins v. City of Los Angeles* (1970) 11 Cal.App.3d 302, 305-306 [89 Cal.Rptr. 758]; and *O'Neal v. City of San Francisco* (1969) 272 Cal.App.2d 869, 874-875 [77 Cal.Rptr. 855].) In this case the sheriff is not a party seeking to force the deputy to retire.
>
> Under the provisions of the County Employees Retirement Law of 1937, the employer is entitled to secure judicial review of a decision denying an employee retirement because the retirement board, as here, is not satisfied from the medical examination and other evidence that the member is incapacitated for the performance of his duties. If no such action is taken by the employer and the denial becomes final the employer must reinstate the employee. (Footnote omitted (See *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, 398-400 [109 Cal.Rptr. 186].)
>
> Moreover, the assistant sheriff's testimony when taken as a whole does not foreclose

the possibility that there were positions in the sheriff's office which could be performed by one subject to the disabilities which the doctors reported that the deputy suffered.

Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957:

> The standard applicable to appellant is set forth in section 31729 as "incapacitated for service in the office or department of the county or district where he was employed and in the position held by him when retired for disability." When retired for disability, appellant was in the position of deputy sheriff. The only current limitation which affects his incapacity is the possible inability to drive a pursuit vehicle. However, there are many permanent full-time positions in the sheriff's office which do not require vehicular pursuit.' (*Id*., 142 Cal.App.3d, 961.)
> . . . .
> Appellant's claim that the trial court failed to make findings concerning a "full range of duties" standard is irrelevant. The proper standard is that contained in sections 31729 and 31730, as defined in Harmon, supra., 62 Cal.App.3d 689, and again herein, and the trial court properly applied that standard. (*Id*., 142 Cal.App.3d, 963.)

Associations' comment
An employer may accommodate the employee's medical conditions within the employee's existing permanent position. An employee is not disabled if he or she can perform modified duties in his permanent assignment. In other words, a claimant is not necessarily disabled even though he is unable to perform the "full range" of duties of a given job assignment. *Schrier v. San Mateo County Employees' Retirement Assn.* (1983) 142 Cal.App.3d 957, 959.

Applicants' comment
The duty of the Board of Retirement to retire an employee first and then apply accommodation rules, if any apply, is an ongoing source of dispute with many of the Boards' advocates.

Winslow v. *City of Pasadena* (1983) 34 Cal.3d 66:

> As in *Craver* and *Barber*, and in contrast to *Newman*, the relevant charter provision before us permits reinstatement when the employee can "perform the duties of the rank or position he held at the time of retirement," providing additionally that a reinstated member shall return "at the rank and in a position of the same grade as the member occupied at the time of retirement." Thus, no charter requirement conditioned Winslow's reinstatement upon his capacity to serve either as a motorcycle officer or in every other police position. Rather, the charter permits his reinstatement to any equivalent position which his health permits. Here, the record shows that the positions created were intended to be filled by a "regular police officer," which was

the position held by petitioner upon his retirement. His ordered reinstatement would be to the same rank and "in a position of the same grade" as that which he formerly held." (*Id*., 34 Cal.3d, 70-71)

Plaintiff argues that, at best, Dr. Gillis' report merely concluded that he could perform the duties of a desk officer, but did not suggest that he could perform the full range of duties of a police officer. Thus, plaintiff contends, there was no change in the original disability which would justify his reinstatement in a new position. However, ample evidence supported the board's conclusion that plaintiff was not totally disabled, preventing service in an available and appropriate position. The board could consider Dr. Gillis' report and Winslow's own testimony regarding his capacity to work during 1978 and 1979. From this record, it could reasonably be concluded that plaintiff's disability was no longer total. (*Id*., 34 Cal.3d, 71.)

b) How "light" can the light duty be and still be an accommodation as opposed to a completely different occupational classification?

Associations' comment

When a limited-duty assignment is sufficient to keep an otherwise incapacitated member on the job is controversial. Two opinions of the court of appeal have addressed the issue.

Curtis v. *Board of Retirement* is often cited for the proposition that an application for a disability retirement cannot be defeated simply by the employer offering the applicant some other kind of job than the job the applicant was doing at the onset of disability.

The court in *Brooks v. Pension Board* held that if the applicant is able to work, performing duties to which other employees of the same rank are assigned, even though the applicant is not able to perform all the duties performed by those in that same rank, the applicant is fit for duty.

Curtis v. *Board of Retirement* (1986) 177 Cal.App.3d 293, 297-298:

By the terms of Government Code section 31720 [footnote omitted], the appellant need be incapacitated only for performance of duty and it is not enough to disqualify appellant to show that she is able to do some other kind of job than she has been working in the county.

The court in *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876-877, in a case involving injuries to a game warden's arm that he contended made him physically incapacitated from performing his duties, stated as follows: "We hold that to be 'incapacitated for the performance of duty' within section 21022 means the substantial inability of the applicant to perform his usual duties. [¶]

> While it is clear that petitioner's disability incapacitated him from lifting or carrying heavy objects, evidence shows that the petitioner could substantially carry out the normal duties of a fish and game warden. The necessity that a fish and game warden carry off a heavy object alone is a remote occurrence. Also, although the need for physical arrests do occur in petitioner's job, they are not a common occurrence for a fish and game warden. A fish and game warden generally supervises the hunting and fishing of ordinary citizens." (Italics in original.)

Applicants' comment
Curtis supports the applicants' contention that it is the job duties to which the applicant was assigned when she became disabled that constitute the standard against which the applicant's incapacity is to be judged, not the duties of any job to which the applicant might be assigned.

Associations' comment
The *Curtis* court's decision was to send the matter back to the trial court because new evidence in the form of additional medical reports generated after the retirement board's decision were offered into evidence and should have been considered by the trial court. The appellate court's discussion of how incapacity is to be determined is only dicta (not a ruling on the case which would serve as precedent or authority for the way future cases should be decided). The court did not rule on Curtis' claim of incapacity. The court's statements quoted above are at odds with the decisions in *Barber, Craver, Harmon, O'Toole, and Schrier*. .

The court of appeal in a City of Alameda retirement case (*Brooks v. Pension Board* (1938) 30 Cal.App.2d 118) defined the problem and provided a solution. In *Brooks*, the city's pension law was changed while Brooks was employed with the city as a policeman and one of the issues was whether he was incapacitated for duty prior to the change in the law. It was in Brooks' interest to establish that he was permanently incapacitated for his job before the change in the law. He asserted that the fact that he was actually on the job until the change in the law did not negate the fact that he was incapacitated for the duties of a policeman. He asserted that before the pension law was amended, he was assigned to limited duties and could not perform all the duties to which a policeman might be assigned.

Brooks v. Pension Board, supra, 30 Cal.App.2d, 121:

> ". . . . The size of the department and the work that may be assigned to one of the same rank are matters to be taken into consideration. A traffic officer standing for hours at a busy intersection of streets might be disabled from performing such work, and still completely and effectively patrol a beat on foot, drive a vehicle or do other work performed by the officers or employees of the same rank. If the officer or employee is disabled to the extent that he is unfit to perform the duty of the rank to which he may be assigned, then he should be retired. The determination of this question is left under this ordinance to the discretion of the pension board and should

not be disturbed unless the exercise of such discretion is abused.

Brooks v. Pension Board, supra, 30 Cal.App.2d, 122-123:

¶ . . . . Upon the hearing of the petition for a writ of mandate in the present case the court found that at no time prior to the March, 1933, amendment did petitioner become physically disabled from the performance of his duties, etc. This finding is supported by testimony that appellent (sic), after the accident, was actually doing police work in the department as a traffic officer, an investigator of violations of the law, and certain clerical work. There is no evidence in the record to show that this class of work was not performed by officers of equal rank. In *People ex rel. Metcalf v. McAdoo*, 184 N. Y. 268, 272 [77 N. E. 17, 18], the court said: "Fitness for police duty means the ability to discharge with average efficiency the duty of the grade to which the member belongs."

Appellant relies upon the case of *Simmons v. Policemen's Pension Com*. (Deal), 111 N. J. L. 134 [166 Atl. 925], wherein the court said: "If a policeman is unable to perform the ordinary every day duties of a policeman, and is permanently unfitted therefor, he is under permanent disability, and it is no answer to say that the statute does not entitle him to retire, because he is able to sit at a desk and make entries in a book. ... We think the theory of our statute is that a fireman is a fireman, a policeman a policeman, and neither a desk clerk." We cannot adopt the holding in the Simmons case. If clerking at a desk is a class of work to which some members of the same rank are assigned, and the member of the department has the ability to discharge with average efficiency the duties thereof, then the officer or employee is fit for duty within the grade to which the member belongs.

As was said in *People ex rel. Metcalf v. McAdoo, supra*: "A large police force must have some members of unusual ability who are peculiarly fit to discharge the duties of their positions. It must have some of a low degree of efficiency who are barely able to fill the requirements of the office. The statute refers to neither of these classes, but to the great mass of the force, representing its average efficiency."

Clark v. Board of Police Pension Fund Commrs., 189 Wash. 555 [66 Pac. (2d) 307], is a case in which a pensioned police officer was directed to return to duty. Similar questions were involved as in the present case. The court affirmed the judgment. In the decision the court commented upon *Simmons v. Policemen's Pension Fund Com. (Deal.), supra.*, and *People ex rel. Metcalf v. McAdoo, supra*, and adopted the rule that if the member of the department is reasonably able to perform the ordinary duties of a police officer he should be restored to service.

10. What if the applicant's job was eliminated while the applicant was off work following an injury?

Associations' comment

Whether the job continues to exist is irrelevant to the issue of incapacity for duty.

> There is a distinction between the availability of the job and one's capacity to perform it. In a disability retirement case, the issue is whether the applicant is capable of substantially performing the usual duties of the job.

11. Inability to work with specific people as causing permanent incapacity

Associations' comment
Under workers' compensation law, inability to work with a single, named supervisor, does not entitle an injured worker to status as a qualified injured worker and entitled to rehabilitation benefits where there are available jobs in the same occupation with the same employer. The focus of the issue of whether an injured worker needs vocational rehabilitation is the employee's capacity to perform the usual and customary duties of the job, not under whose supervision those duties will be performed. *Save Mart Stores v. Workers' Comp. Appeals Bd*. (1992) 3 Cal.App.4th 720, 726-727.

12. Reinstatement and cancellation of disability retirement allowance after a disability retirement has been granted

Government Code § 31729 provides as follows:

> The board may require any disability beneficiary under the age 55 to undergo medical examination. The examination shall be made by a physician or surgeon appointed by the board at the place of residence of the beneficiary or other place mutually agreed upon. Upon the basis of the examination the board shall determine whether the disability beneficiary is still physically or mentally incapacitated for service in the office or department of the county or district where he was employed and in that position held by him when retired for disability.

Government Code § 31730 provides,

> If the board determines that the beneficiary is not incapacitated, and his or her employer offers to reinstate that beneficiary, his or her retirement allowance shall be canceled forthwith, and he or she shall be reinstated in the county service pursuant to the regulations of the county or district for reemployment of personnel.

Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957:

> Most persuasive, however, is *Harmon v. Board of Retirement, supra*., 62 Cal.App.3d at pp. 694-695, in which the court, defining the phrase "permanently incapacitated physically or mentally for the performance of his duties in the service" as contained in section 31724, adopted the construction of *Mansperger* and *Barber, supra*.. Sections 31724, 31729 and 31730 are all in article 10, entitled "Disability Retirement," of the County Employees' Retirement Law. (Gov. Code, § 31450 et seq.) They were

> enacted simultaneously, deal with the same subject matter and are in pari materia. As such, they should be harmonized and similarly construed.

Associations' comment
These statutes were applied in *Schrier v. San Mateo County Employees' Retirement Association.* In *Schrier*, a former deputy sheriff who had been retired in 1975 was re-examined by a physician in 1978. Based on the physician's opinion, the board of retirement found that Schrier was not substantially incapacitated for his usual duties. He was ordered to return to work. The superior court denied his petition for writ of mandate. The appellate court affirmed. Schrier's physical condition had substantially improved. The court of appeal rejected his claims that his department required that he be capable of the "full range of duties" of a deputy sheriff, that he was denied equal protection of laws in that others similarly situated were permitted to remain retired and that to require that he return to work would deny him his rights as a safety member. (*Id.*, 142 Cal.App.3d, 963.)

13. Rehabilitation positions

a) Nonwork-related injuries

Government Code § 31725.5 allows retired members with nonservice-connected disabilities to return to the same employer in a new position through a rehabilitation program. It provides in part,

> If the board finds, on medical advice, that a member in county employment, although incapacitated for the performance of his duties, is capable of performing other duties in the service of the county, the member shall not be entitled to a disability retirement allowance if any competent authority in accordance with any applicable civil service or merit system procedures offers and he accepts a transfer, reassignment, or other change to a position with duties within his capacity to perform with his disability. . . . .

Associations' comment:
Refer to Section 31725.5 for its technical provisions. The general idea is this: Section 31725.5 involves a four-step process. First, the Board finds that the applicant is permanently incapacitated for his or her duties for nonservice-connected reasons. Second, the Board finds that the applicant is capable of performing other duties for the county. This involves an analysis of at least one other position in county service similar to the analysis that would be performed for vocational rehabilitation purposes in a workers' compensation case. Third, the county offers the position to the applicant. Fourth, the applicant must accept the position. This benefit is a voluntary one on the part of the applicant.

Assuming all four steps are completed, and assuming the salary of the applicant's new position is less than the position for which the applicant has been found permanently

incapacitated, the disability retirement benefit is the difference between the new, lesser paying position and the higher paying position. The maximum disability retirement benefit would be the amount of the disability retirement pension allowance the applicant would have received had the applicant not returned to work under this section. If the applicant is found to be permanently incapacitated before the arrangements for the new position can be made, the applicant receives the disability retirement pension until the new position is available and the interim period is not considered a break in the continuity of service.

b) Service-connected disabilities

Government Code § 31725.6 allows retired members with service-connected disabilities to return to same employer in a new position through a rehabilitation program and, if the new position pays less than the member's former position, without a reduction in take-home pay. Section 31725.6 provides in part,

> (a) When the board finds, based on medical advice, that a member in county service is incapacitated for the performance of the member's duties, the board shall determine, based upon that medical advice, whether the member is capable of performing other duties. If the board determines that a member, although incapacitated for the performance of the member's duties, is capable of performing other duties, the board shall inform the appropriate agency in county service of its findings and request that the agency immediately initiate a suitable rehabilitation program for the member pursuant to Section 139.5 of the Labor Code, whereby the member could become qualified for assignment to a position in county service consistent with the rehabilitation program. . . . .

Associations' comment:
Section 31725.6's purpose, to provide employment in county service for a member who is permanently incapacitated for his or her usual duties, is identical to that of Section 31725.5, but is applicable to service-connected disabilities. While the first three of the four-steps outlined in the Associations' comment to Section 31725.5 apply as well to service-connected disabilities under Section 31725.6, Section 31725.6 also weaves into the process the provisions of the Labor Code's rehabilitation law applicable to work-related injuries. Unlike Section 31725.5, Section 31725.6 does not contain the express provision that a member is not required to accept reassignment or transfer in lieu of a disability retirement allowance. However, under Section 31725.6, the "concurrence" of the member in the rehabilitation plan is required. (Section 31725.6, subdivisions (b) and (h)) Once the member has concurred, however, subdivision (h) of Section 31725.6 provides that the Board "shall be authorized to discontinue the member's disability retirement allowance" if, based on substantial evidence, the Board finds that the member's refusal to report to work in the new position is without reasonable cause.

Note: By legislation effective April 19, 2004, the vocational rehabilitation provisions of the workers' compensation law have been eliminated for employees injured on or after

January 1, 2004. (See Section 47 to 49 of Stats.2004, c. 34 (S.B. 899).) But Section 31725.6 and its connection to Labor Code section 139.5 was apparently overlooked by the Legislature. On August 30, 2004, AB 2982, Chapter 379, was filed with the Secretary of State amending Section 31725.6 and adding Section 31725.65. The Legislative Counsel's Digest describes the statute as follows:

> (1) Under the County Employees Retirement Law of 1937, after the board of retirement determines that a member of the retirement system has been incapacitated for the performance of his or her duties but is capable of performing other duties, the appropriate county agency is requested to initiate and implement a rehabilitation plan pursuant to specified provisions of the Labor Code, which have been repealed.
>
> This bill would require the appropriate county agency, after the board of retirement makes that determination with respect to a member who is incapacitated on or after January 1, 2004, to notify the member of suitable county positions and to consult with the member to develop a reemployment plan for approval by the member, as specified.
>
> (2) Existing law provides that, if a member of a county retirement system, without reasonable cause, refuses an offer of alternative work within one year after being determined to be eligible for a disability retirement allowance, the agency employing the member may have the member's disability allowance discontinued.
>
> This bill would make that provision applicable only to members who were incapacitated before January 1, 2004.
>
> (3) The bill would declare that it is to take effect immediately as an urgency statute.

There is an issue as to whether those injured between January 1, 2004 and April 19, 2004 are nonetheless entitled to the benefit of the vocational rehabilitation provisions of Labor Code section 139.5. The date of injury is the date upon which the rights of an employee and the duties of the employer under the workers' compensation laws are measured. Labor Code section 4453.5; *Aetna Casualty & Surety Co. v. Industrial Accident Commission, et al.* (1947) 30 Cal.2d 388, 392. The issue is whether the Legislature's clear statement of its intention that the law effective on April 19, 2004 is to reach back to January 1, 2004 will justify extinguishing the rights and duties established between the employer and employee prior to April 19, 2004.

B. If the member is incapacitated, is the incapacity service-connected?

Government Code § 31720, provides in pertinent part as follows:

> Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

(a) The member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity…

Heaton v. Marin County Employees Retirement Bd. (1976) 63 Cal.App.3d 421, 428:

[T]he disability does not have to be entirely service-connected. The section states that a member 'permanently incapacitated …shall be retired for disability…if, and only if: …(a) His incapacity is a result of injury or disease arising out of and in the course of his employment,' not the result thereof. …Had the legislature determined that the incapacity had to be completely service-connected the Legislature would have stated that his incapacity must be the result of his employment.

Associations' comment

The *Heaton* court's equating *result*, meaning "effect of," with its antonym, *cause,* meaning "source of" was noted by another district of the court of appeal in dealing with an issue arising from an injury to a city employee.

Alesi v. Board of Retirement (2000.) 84 Cal.App.4th 597, 602-604:

Heaton's analysis confuses the distinct concepts of cause and effect. Because a "result" clearly falls into the latter category, *Heaton's* view that significant information about *causation* is communicated by the article modifying the word "result" is puzzling. When the phrases "*a* result" and "*the* result" are interpreted in accordance with their plain and commonsense meaning, the only distinction between them is that the former suggests one of two or more *results* whereas the latter suggests a sole result. Even that distinction is not very meaningful, however, as either phrase can be used to refer to one of several results. [FN3]

FN3. For example, the statement "Bob missed the meeting as the result of a flat tire" does not necessarily communicate that Bob's missing the meeting was the *only* result of his flat tire.

In any event, whether something is referred to as "*a* result" of X or "*the* result" of X, the reference communicates nothing about whether X was the sole *cause* or one of several causes of the result. Notwithstanding that linguistic fact, *Heaton* interpreted the articles "a" and "the" in the phrases "a result" and "the result" as referring to the *cause* or *causes* of the injury rather than the noun they modify, namely, "*result.*" I.e., *Heaton,* construed the phrase "incapacity is *a* result of injury ... arising out of ... employment" to mean the injury arising out of employment is a *cause* (i.e., one of more than one cause) of the incapacity, and construed the phrase "incapacity is *the* result of injury arising out of employment" (had the Legislature chosen to use it) to

mean the injury arising out of employment was the sole cause of the disability. (*Heaton, supra,* 63 Cal.App.3d at p. 428, 133 Cal.Rptr. 809.)

Heaton's interpretation is not consistent with the plain meaning of the phrases "a result" and "the result" as both phrases refer to *effect* rather than *cause.* Thus, in the context of Charter section 141 and section 24.0501, neither phrase is determinative of whether an employment-related injury must be the *sole* cause, a *substantial* cause, or merely *a* cause of an employee's disability to entitle the employee to a disability retirement. It follows that Alesi's perceived conflict between Charter section 141 and section 24.0501 does not exist.

Bowen v. Board of Retirement (1986) 42 Cal.3d 572, 578:

[A]n "infinitesimal" or "inconsequential" connection between employment and disability would be insufficient for a service-connected disability requirement. Instead, …"while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job."

Hoffman v. Board of Retirement (1986) 42 Cal.3d 590, 593:

As we explained in Bowen, supra, ante, page 572, the 1980 amendment to section 31720 does not substantively change the test for a service-connected disability retirement. Relying on case law interpreting the preamended statute, we determined that the substantial contribution test of amended section 31720 requires substantial evidence of a real and measurable connection between an employee's disability and his employment in order for the employee to qualify for a service-connected disability retirement.

Pacheco v. Board of Retirement (1986) 188 Cal.App.3d 631, 635:

. . . . [S]ubstantial causation mean[s] a material and traceable cause" of a disability by an industrial trigger.

1. What is the effect of a physician's use of a percentage estimate of the significance of employment contribution?

Associations' comment:
Physicians will often attempt to define the relative importance of employment causation by the use of percentages. For example, the physician might state the opinion that the job was 25% responsible for a permanent incapacity and the other 75% is related to non-industrial factors.

The term "contributes substantially" in Government Code § 31720 has not been assigned a percentage figure. The Board of Retirement in the *Bowen* and *Hoffman* cases argued that the term "substantial" meant more than 50%. The Supreme Court majority found no basis for such an interpretation in the law. In his dissenting opinion, Justice Malcolm Lucas proposed that the term "substantial" should be assigned a meaning of "more than 10% . . . ." *Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 587] However, "[t]he statements in the dissenting or concurring opinions of individual justices which do not have the concurrence of a majority of the justices are not precedent, and constitute only the personal views of the writer*." People v. Superior Court of the City and County of San Francisco* (1976) 56 Cal.App.3d 191, 194. Justice Lucas's dissenting opinion, therefore, does not amount to legal authority.

Rather, the substantial contribution amendment to Government Code § 31720 requires substantial evidence of a real and measurable connection between the job and the incapacity. A physician's use of a percentage figure may be helpful in the assessment of the reliability of the evidence of an employment connection, but there is no percentage threshold above which the substantial contribution test is satisfied. For example, if a physician uses a low percentage level to demonstrate the importance of the employment in producing the incapacity, for example, the 1 to 5% range, this may tend to show that the physician's opinion that the incapacity is in any way service-connected is not "substantial" evidence, that is, the kind evidence reasonable people tend to rely on. A small percentage figure may tend to show that, in the opinion of the physician, the employment contribution is "inconsequential" and, therefore, not "substantial contribution." If the physician assigns a high percentage, for example, 30%, this may tend to show that the evidence of service-connection is "substantial" and reliable proof that the incapacity was in part caused by the job.

But in either case, if the physician states a percentage figure without discussing the data on which the physician relies and the reasoning by which the physician progresses from the data to the conclusion, the physician's opinion on the issue of service-connection is not "substantial evidence" and, therefore, cannot establish or refute the fact that the employment contributed substantially to the incapacity. See *People v. Bassett* (1968) 69 Cal.2d 122, 141

2. Aggravation of pre-existing condition

Turner v. Workmen's Comp. Appeals Bd. (1974) 42 Cal.App.3d 1036, 1042:

> Aggravation of an existing infirmity is compensable, as is an injury which is the result of cumulative work effects.

Gelman v. Board of Retirement (1978) 85 Cal.App.3d 92, 96-97:

> [I]t is not the law that the aggravation must be the sole or proximate cause of the disability. … Instead the law, both statutory and decisional, is clear that all that is required is a material and traceable connection to appellant's mental deterioration that

was caused by the stress of his county job.

Associations' comment
The courts use a “but for” test. The member only has to prove that “but for” the aggravation of his medical condition by the work environment, he or she would not be incapacitated.

Gurule v. Board of Pension Commissioners (1981) 126 Cal.App.3d 523, 526-27:

> The basic principle enunciated by the [*Gelman*] opinion is that acceleration or aggravation of a preexisting condition is an incapacity that is a result of an injury arising out of the course of employment and therefore entitles the employee to a service-connected disability.

Lundak v. Board of Retirement (1983) 142 Cal.App.3d 1040:

> It has been held, based on reasoning parallel to that behind the principle in workers’ compensation law, that an employer takes his employee as he finds him, and therefore an acceleration or aggregation of a preexisting disability becomes a service-connected injury of that employment, and that an applicant for a government retirement pension will be awarded service-connected benefits where he or she can show a material and traceable connection between the disability and employment.” (*Id*., 142 Cal.App.3d, 1043.)
>
> Prior to the 1980 amendment of Government Code section 31720, it had been held that employment had to have more than an "infinitesimal and inconsequential" relationship to the applicant's incapacity, although it could comprise "a very small part of the disability." (*DePuy v. Board of Retirement, supra.*, 87 Cal.App.3d at p. 398.) The DePuy court defined infinitesimal as "capable of being made arbitrarily close to zero, immeasurably or incalculably small," and inconsequential as "not regularly flowing from the premises, irrelevant, inconsequent (lacking worth, significance or importance)." (*Ibid*.) The court stated that while it was not the intent of the Legislature that the board make awards where such a slight causal connection was demonstrated, the contribution of the applicant's employment to his disability need only be "real and measurable" in order to support an award. (*Id*., at p. 399.) The medical testimony regarding the contribution of appellant's two work-related accidents to his disability clearly established that it was more than "inconsequential," placing it somewhere between 10 and 60 percent. We think the record shows the contribution of appellant's employment to his disability meets the "small part" and "real and measurable" tests of DePuy. (*Lundak, supra*, 142 Cal.App.3d, at 1044-45.)

3. Stress

a) 1937 Act Cases

Heaton v. Marin County Employees Retirement Bd. (1976) 63 Cal.App.3d 421, 431, in a case dealing with a disability based upon a stressful work situation, the court held:

> Moreover, section 31722 of the Government Code which sets out the requirements for applying for service-connected disability explicitly recognizes that such a disability may be mental as well as physical in nature.

Lundak v. Board of Retirement (1983) 142 Cal.App.3d 1040, 1046:

> The job stresses involved in performing his job are not 'so insignificant that no ordinary mind would think of them as causes' of his disability. … [R]easonable people would regard appellant's employment as a cause of his disability, on this basis of the record in this case. … [A]ppellant's employment contributed substantially to his disability…

Traub v. Board of Retirement (1983) 34 Cal.3d 793, 799:

> Disability from emotional stress caused by psychological pressures imposed by an employer is ordinarily service-connected if based on the employer's dissatisfaction with the employee's job performance.

Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1336-1338:

> [W]hile the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job.

See also DePuy v. Board of Retirement (1978) 87 Cal.App.3d 392.

b) Workers' Compensation Cases

Associations' comment
In discussing stress-related disabilities under the 1937 Act, parties often cite court opinions that interpret Labor Code sections under the Workers' Compensation Act.

Bowen v. Board of Retirement (1986) 42 Cal.3d 572, 578, fn. 4, stated that courts, "have found that the County Employees Retirement Act of 1937 (here at issue) and the Workers' Compensation Act are related in subject matter and harmonious in purpose.' …In fact, courts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law." (Emphasis added.)

In *Albertson's Inc. v. Workers' Comp. Appeals Bd.* (1982) 131 Cal.App.3d 308, 313, the court approved the following analysis of stress related disability:

> . . . [A] subjective test (that is, one personal to the applicant) has been applied in California to injuries resulting from stress. . . .The proper focus of inquiry, then, is not how much stress should be felt by an employee in this work environment, based on a "normal" reaction to it, but how much stress is felt by an individual worker reacting uniquely to the work environment.

Albertson's Inc., supra, at 316:

> Nevertheless, the statutory requirement retains sufficient force that compensation may not be awarded where the nature of the employee's duties "merely provided a stage for the event. . . . 'the employment itself must be a positive factor influencing the course of disease.

Associations' comment

Albertson's is a workers' compensation case. It uses a "subjective" test for determining whether a work-related injury resulted from on-the-job exposure to stress. It is such an important case, and the court's opinion is cited so frequently, that we quote the opinion at length as follows:

> This point was made by the Michigan Supreme Court *in Deziel v. Difco Laboratories, Inc*. (1978) 403 Mich. 1 [268 N.W.2d 1, 97 A.L.R.3d 121], which adopted a subjective standard crediting claimants' honest perception in a scholarly and far reaching opinion: "[All] people manufacture their own concepts of reality. [¶] 'Normal' persons are those who manufacture a reality which most closely parallels that which the vast majority of 'average' people encounter. Psychoneurotics and psychotics fail to manufacture or encounter the same reality because their reactions and adjustment mechanisms either distort, warp or completely fail. [¶] However, their distorted concept of reality is just as 'real' for them as the average person's concept of reality is for him. This is the critical. insight. [¶] Once it is determined that (1) a psychoneurotic or psychotic is disabled and (2) a personal injury is established, it is only logical. that we employ a subjective standard in determining whether the claimant's employment combined with some internal weakness or disease to produce the disability. A subjective standard acknowledges that the claimant is 'mis-manufacturing' or misperceiving reality, otherwise the person would not be a psychoneurotic or psychotic by definition." (*Id*., at pp. 12-13.)
> In *Deziel*, the Michigan court adopted a "'strictly subjective causal nexus' standard" under which "a claimant is entitled to compensation [for mental injuries] if it is factually established that claimant honestly perceives some personal injury incurred during the ordinary work of his employment 'caused' his disability .... [¶] The focal. point of this standard is the plaintiff's own perception of reality." (*Id*., at p. 11.) The board's limiting language in this case, that the claimed causal relationship between employment and injury not be a mere "after-the-fact rationalization," is equivalent to

Michigan's "honest perception" rule. Its reservation of the question whether a psychiatric injury is compensable where the "employment was a mere passive element that a nonindustrial condition happened to have focused on" is a point of departure from the Deziel rule, which found industrial causation for a psychiatric disability where the applicant's job merely "[performed] the function of a convenient hook on which he can attach causation for troubles of all kinds and once this is set up, this traumatic event becomes the assigned cause by the patient." (*Deziel v. Difco, supra.*, 268 N.W.2d at p. 18.)

The limitation by the board finds support in a feature of California's workers' compensation law. Labor Code section 3600 requires not only that an injury "aris[e] out of and [occur] in the course of the employment," it also requires that the injury be "proximately caused by the employment, either with or without negligence." (Lab. Code, § 3600, subd. (c).) [Footnote omitted.) "While Labor Code section 3600 requires that an injury] be 'proximately caused' by the employment, this term has received a much broader construction in workmen's compensation law than it has in tort law. All that is required is that the employment be one of the contributing causes without which the injury would not have occurred. (*Madin v. Industrial Acc. Com.*, 46 Cal.2d 90 [292 P.2d 892].) Warren L. Hanna observes: 'Thus our courts, in the name of liberal interpretation and the modern trend, have evinced a willingness, in fact, a determination, to accept almost any incidental, indirect, or merely contributing relationship or connection as a substitute for the "proximate cause" required by the compensation law.' (2 Hanna, California Law of Employee Injuries and Workmen's Compensation (2d Ed. (1969), § 8.03.)" (*Wickham v. North American Rockwell Corp.* (1970) 8 Cal.App.3d 467, 473; see also *Wiseman v. Industrial Acc. Com.* (1956) 46 Cal.2d 570, 573 [297 P.2d 649].) *Albertson's Inc. v. Workers' Comp. Appeals Bd.* (1982) 131 Cal.App.3d 308, page 315 -316.)

Associations' comment

Note that *Albertson's* deals with whether a work-related injury had occurred. It does not address whether any of the permanent disability the applicant might be left with after the healing period is work-related.

The court did not hold that the board must accept as undisputed the claimant's testimony regarding his or her perception of events at work or the testimony about how these events affected him or her.

In *Atascadero Unified School District V Workers' Comp. Appeals Bd. (Geredes)* (2002) 98 Cal.App.4th 880, a bus driver had an affair with a co-worker. After the affair ended, co-workers, on the job, gossiped about her, using terminology such as "tramp" and "husband stealer." The fact that there was gossip was passed on to the applicant. She complained to her supervisors who held meetings with the employees involved and the gossip stopped. Geredes filed an application for workers' compensation benefits on the basis of a psychiatric injury she sustained as a result of the gossip. The workers' compensation judge denied the application on the basis that the injury did not arise out

of employment. The WCAB reversed and, on review the court of appeal reversed the WCAB, siding with the workers' compensation judge.

> It is not sufficient for purposes of finding industrial causation if the nature of the employee's duties "merely provided a stage" for the injury (*Transactron, Inc. v. Workers' Comp. Appeals Bd*. (1977) 68 Cal.App.3d 233, 238 [137 Cal.Rptr. 142]); " 'if the employment were an after the fact rationalization' " (*Albertson's, Inc. v. Workers' Comp. Appeals Bd.* (1982) 131 Cal.App.3d 308, 313 [182 Cal.Rptr. 304]); or if " 'the evidence established that the employment was a mere passive element that a nonindustrial condition happened to have focused on' " (ibid.). A finding of industrial injury is proper only where the employment plays an "active" or "positive" role in the development of the psychological condition. (Id. at pp. 316-317; *Bingham v. Workmen's Comp. App. Bd*. (1968) 261 Cal.App.2d 842, 848 [68 Cal.Rptr. 410].)
>
> An injury that grows out of a personal grievance between the injured employee and a third party does not arise out of the employment if the injury occurred merely by chance during working hours at the place of employment, or if the employer's premises do not place the injured employee in a peculiarly dangerous position. Thus, when a third party intentionally injures the employee and there is some personal motivation or grievance, there has to be some work connection to establish compensability. (*California Comp. & Fire Co. v. Workmen's Comp. App. Bd., supra*, 68 Cal.2d at pp. 161-162; *California State Polytechnic University v. Workers' Comp. Appeals Bd.* (1982) 127 Cal.App.3d 514, 518-520 [179 Cal.Rptr. 605]; *Murphy v. Workers' Comp. Appeals Bd., supra*, 86 Cal.App.3d at p. 1002: *Transactron, Inc. v. Workers' Comp. Appeals Bd., supra*, 68 Cal.App.3d at pp. 238-239; *Ross v. Workmen's Comp. Appeals Bd.* (1971) 21 Cal.App.3d 949, 956 [99 Cal.Rptr. 79].)
>
> In finding no compensable injury, the WCJ stated: "Clearly, the source of applicant's problem is the rumors and gossip about the applicant. Those rumors and gossip about the applicant virtually all stemmed from acts and occurrences of applicant's personal life that all occurred off the job and had no connection with her employment.... Gossip about an individual's personal life ... is simply not part of the employment relationship." This result is supported by the above cited case law and the decision of our Supreme Court in *LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [72 Cal.Rptr.2d 217, 951 P.2d 1184]. In that case, an employee who suffered a heart attack due to a preexisting heart condition while attending a work-related seminar did not suffer a compensable injury. The court stated: " '[T]he statute requires that an injury "arise out of" the employment .... [I]t must "occur by reason of a condition or incident of [the] employment ...." [Citation.] [T]he employment and the injury must be linked in some causal fashion.' " (Id. at p. 651, fn. omitted, quoting *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733-734 [190 Cal.Rptr. 904, 661 P.2d 1058].)
>
> In awarding compensation, the WCAB relied on *Albertson's, Inc. v. Workers' Comp. Appeals Bd., supra*, 131 Cal.App.3d 308, reasoning that the injury is compensable

because it was caused by an "actual event of her employment." We are not persuaded. With due respect to the WCAB, the facts in Albertson's differ markedly from the facts in this case. In Albertson's, the employee was out of work during the pendency of a union grievance arising from a layoff. When she returned to work 10 days later, she perceived that her supervisor's attitude toward her had changed. She asserted she overheard her supervisor ridiculing her and talking about getting rid of her with a coworker. Two other coworkers informed her that they too had overheard her supervisor expressing an intent to get rid of her. In Albertson's, the employee's psyche injury arose from a conflict between the employee and her supervisor relating to scheduling her hours and her temporary layoff, undeniably work-related issues. None of these facts are present here. The cases relied on by the WCJ and those cited above, especially the physical assault cases, are factually similar in that, as the District points out, Geredes is alleging a "verbal assault."

We agree with the WCJ that gossip about an employee's personal life is not part of the employee-employer relationship. Geredes's off-duty affair had nothing to do with her employment. Even though Geredes and her paramour were both employees of the District and the gossip occurred at work, the nature of her duties was not the proximate cause of her injury for it merely provided a stage for the event. (*LaTourette v. Workers' Comp. Appeals Bd., supra*, 17 Cal.4th 644.) In other words, the employment was not a contributory cause of the injury. (*Madin v. Industrial Acc. Com*. (1956) 46 Cal.2d 90, 92 [292 P.2d 892]; see also *Wiseman v. Industrial Acc. Com*. (1956) 46 Cal.2d 570, 573 [297 P.2d 649].) *Atascadero Unified School District v. Workers' Comp. Appeals Bd. (Geredes), supra*, 98 Cal.App.4th, 884-885

Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp) (1981) 122 Cal. App. 3d 905, 911-912:

Whether applicant sustained a compensable psychiatric injury as the result of her employment at Volt requires both lay and medical evidence for support. Lay testimony must support the occurrence of injurious incidents which are employment related. Lay testimony alone, however, cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition. (citations) "'[W]here the truth is occult and can be found only by resorting to the sciences,'" the WCAB must utilize expert medical opinion. (citation) "The difficulty is that the problem was not one of lay theory, but one of diagnosis, prognosis and treatment in an occult branch of medicine." (citation)

In *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, at 786, the court stated:

Factual determinations of the Board must be upheld if there is substantial evidence in their support and the relevant and considered opinion of one physician, though

inconsistent with other medical opinions, may constitute substantial evidence" that such alleged injury is not caused by work.

The court in *Power, supra,* at 787, stated that the Workers' Compensation Board acted reasonably in declining to give substantive credit to claimant's testimony regarding her perceptions of the disability and its causes, stating:

> [T]he principle of resolving all reasonable doubts in favor of the employee applies "[w]hen there is no conflicting evidence and the inference [of industrial causation] is undisputed[.] [In such a case,] the board in furtherance of the legislative command of liberal construction in favor of the workingman must find industrial causation." …Here, however, the evidence as to both injury and industrial causation was conflicting…. Applicant seems to be arguing that whenever the evidence is in conflict, the principle of liberal construction must result in a finding in favor of the employee, irrespective of whether the evidence against him "has more convincing force and the greater probability of truth." …Were this the case, however, the preponderance of the evidence standard in section 3202.5 would be meaningless, as would the review process of the Board..

(1) Workers' Compensation reform laws are not applicable to claims of psychiatric incapacity under public pension law.

Beginning in 1989, the Legislature enacted laws intended to restrict the compensability of workers' compensation psychiatric claims. Labor Code section 3208.3 This "reform" legislation includes, but is not limited to, provisions requiring the following:

(1) That the injury not be the result of a "good faith personnel action." This criterion relieves the employer of liability for otherwise job-related psychiatric injuries that are caused by reasonable personnel actions taken by the employer.

(2) That the injury be the result of "actual events in employment." This requirement is thought to require more than an honest misperception on the part of the employee.

(3) That the actual events of employment be the "predominant cause," applicable to injuries sustained on and after July 16, 1993, or 10% of all causes, applicable to injuries sustained on and after January 1, 1990 and up to July 15, 1993.

(4) That in the case of psychiatric injury resulting from injury as a victim of a violent act or from direct exposure to a significant violent act, that actual events in employment were a substantial cause (at least 35 to 40%) of all causes.

(5) That compensation shall not be paid on a psychiatric claim unless the employee has been employed for at least 6 months, unless the injury is caused by a sudden and extraordinary employment condition.

(6) That compensation shall not be paid where the claim is filed after a notice of termination of employment and the claim is for an injury that allegedly occurred before the notice of termination, unless certain specified statutory conditions are met that verify that injury occurred before the notice of termination.

Because the courts have looked to workers' compensation law for guidance when dealing with the issue service-connection of disabilities under retirement laws, some questioned whether the workers' compensation reforms were applicable to disability retirement applications based on psychiatric incapacity and whether the reforms restrict the associations' members' ability to obtain service-connected disability retirements. The Supreme Court's decision in *Pearl* would seem to answer both questions with a "No."

Pearl v. Workers Comp. Appeals Bd. (2001) 26 Cal.4th 189, 196-197:

> Before Labor Code section 3208.3's enactment in 1989, courts reasonably gave a similar construction to the similarly worded standards for industrial injury under Labor Code section 3600, subdivision (a), and Government Code section 20046. (See *United Public Employees v. City of Oakland* (1994) 26 Cal.App.4th 729, 733 [31 Cal.Rptr.2d 610] [statutes on the same subject of employee benefits and using the same statutory definition must be read together].) However, once the Legislature enacted Labor Code section 3208.3, it thereby eliminated what had been parallel language governing compensability of industrial injuries under the workers' compensation scheme and the Public Employees' Retirement Law. The enactment therefore undermines the rationale for similarly construing whether a psychiatric injury is industrial under the two statutory schemes.
>
> As discussed, Labor Code section 3208.3 does not expressly provide that it apply to retirement disability claims under the Public Employees' Retirement Law. On the contrary, it refers to compensability under "this division," i.e., division 4 of the workers' compensation law. (3) Although both the Public Employees' Retirement Law and the workers' compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. We may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]; *cf. People v. Goodloe* (1995) 37 Cal.App.4th 485, 491 [44 Cal.Rptr.2d 15] ["When a particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion ... is that a different legislative intent existed"].)

4. Disability resulting from a wrongful acts

a) Statutory provisions

Government Code § 31726, applicable to members who retire for nonservice-connected

disability, distinguishes between those who retire before age 65 and those who retire after age 65. It provides,

> Upon retirement for nonservice-connected disability a member who has attained age 65 shall receive his or her service retirement allowance.
>
> Every member under age 65 who is retired for nonservice-connected disability and who is not simultaneously retired as a member on deferred retirement of the State Employees' Retirement System or a retirement system established under this chapter in another county shall receive a disability retirement allowance which shall be the greater of the following:
>
> (a) The sum to which he or she would be entitled as service retirement.
>
> (b) A sum which shall consist of any of the following:
>
> (1) An annuity which is the actuarial equivalent of his or her accumulated contributions at the time of his or her retirement.
>
> (2) If, in the opinion of the board, his or her disability is not due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on his or her part, a disability retirement pension purchased by contributions of the county or district.
>
> (3) If, in the opinion of the board, his or her disability is not due to conviction of a felony or criminal activity which caused or resulted in the member's disability, a disability retirement pension purchased by contributions of the county or district. This paragraph shall only apply to a person who becomes a member of the system on or after January 1, 1988.

Government Code § 31726.5, applicable to safety members, provides:

> Upon retirement for nonservice-connected disability a safety member who has attained age 55 shall receive his or her service retirement allowance. Every safety member under age 55 who is retired for nonservice-connected disability and who is not simultaneously retired as a member on deferred retirement of the Public Employees' Retirement System or a retirement system established under this chapter in another county shall receive a disability retirement allowance which shall be the greater of:
>
> (a) The sum to which he or she would be entitled to as service retirement; or
>
> A sum which shall consist of:

(1) An annuity which is the actuarial equivalent of his or her accumulated contributions at the time of his or her retirement.

(2) If, in the opinion of the board, his or her disability is not due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on his or her part, a disability retirement pension purchased by contributions of the county or district.

(3) If, in the opinion of the board, his or her disability is not due to conviction of a felony or criminal activity which caused or resulted in the member's disability, a disability retirement pension purchased by contributions of the county or district.

Paragraph (3) shall only apply to a person who becomes a member of the association on or after January 1, 1988.

Keith v. San Bernardino County Retirement Bd. (1990) 222 Cal.App.3d 411, 417, construing section 31726.5:

We conclude that the Legislature meant nothing more than what it said: an applicant, such as Keith, may receive a retirement pension paid for with county contributions "if, in the opinion of the board, his or her disability is not due to intemperate use of alcoholic liquor." The intemperate use of alcohol on even a single occasion is such an "intemperate use" if the words of the statute are given their "usual, ordinary import." Our interpretation of the statutory language comports not only with the plain meaning of the words used, but also with the apparent policy objectives. The Legislature has determined that certain categories of public employees, because of the nature of their public employment and service, should receive disability pensions paid for with public funds even though the disability is not job related. Where, however, the disability is not only not job related, but also is exclusively the result of the public employee's own excessive, illegal or wilfully (sic) improper conduct, no public benefit is obtained by requiring the public to "pick up the tab." The fact that the intemperate conduct occurred only once is irrelevant, in light of the policy objective. It is illogical. to suggest that policy objectives are promoted only where the disability is the result of habitual intemperance. The Legislature clearly did not intend such a limitation, and we will not now create one.

Government Code § 31728 provides,

If, in the opinion of the board, the disability is due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on the part of the member, and his annuity is less than two hundred forty dollars ($240) a year, the board may pay the member his accumulated contributions in one lump sum in lieu of his annuity.

Associations' comment

Given the fact that this section is not applicable to any member whose annuity is over $240 a year, it has no practical impact.

Government Code § 31728.2 provides,

> Notwithstanding Sections 31728 and 31728.1, if, in the opinion of the board, the disability is due to or results from the conviction of the member of a felony under state or federal law or if the board determines that the criminal activity caused or resulted in the member's disability, the board may pay the member a lump sum which is equal to the sum of his or her accumulated contributions in lieu of the benefits to which the member would otherwise be entitled as set forth in this article and provided that nothing in this section shall be construed to divest a member of any vested right to a service retirement allowance.
>
> This section shall apply only to a person who becomes a member of the system on or after January 1, 1988. (Emphasis added.)

b) Disability resulting from criminal misconduct while performing acts in the course of employment in an unauthorized manner may be service-connected.

In *Williams* v. *Workmen's Comp. Appeals Bd*. (1974) 41 Cal.App.3d 937, a part-time delivery man sustained personal injuries in a rear-end collision that occurred while he was driving his car at high speeds, pursued by the police for running a red light, on his way back to his employer's office after completing assigned errands and deliveries.

> . . . . [T]he fact that he was performing that duty in a "negligent" or unlawful manner did not constitute abandonment of employment. . . . . ¶
> Where an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment. (*Associated Indem. Corp. v. Ind. Acc. Com*., 18 Cal.2d 40, 47 [112 P.2d 615]; *Auto Lite etc. Corp. v. Ind. Acc. Com*., 77 Cal.App.2d 629, 632 [176 P.2d 62].) "[The employee's] transgression of rules, instructions, or established custom, as the case may be, is wholly within the sphere of the employment. It may constitute serious and willful misconduct of the employee, but it does not take him out of the course of his employment." (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed.) § 9.02[1][c].)
>
> Illegal or even criminal conduct by an employee in the course of his employment does not necessarily remove him from the scope of employment. (*Id*., 41 Cal.App.3d, 940-941)

c) Disability resulting from termination, discipline or investigation of an

allegation of criminal conduct

(1) Injury sustained as a result of investigation into alleged criminal conduct off the job for which the employee was not charged and for which no discipline was imposed

In *City of Los Angeles* v. *Workers' Comp. Appeals Bd*. (*Rivard*) (1981) 119 Cal.App.3d 355, a police officer claimed that he sustained an injury to his psyche resulting from his treatment by the police department for which he worked during its investigation of the accusation that he had solicited someone to murder his wife and/or conspired to murder her.

> Here, however, the underlying activity for which the police department investigated applicant (solicitation of someone to murder applicant's wife) was unconnected with his duties within the course of his employment, but related to his personal marital problems.
>
> In our view a police officer who is accused of criminal activity *which pertains to matters outside of his functioning as a police officer* is in no different a position from any private citizen accused of criminal activity. In the event such accusations should prove to be false, his rights should be no greater than any to which the ordinary private citizen is entitled since such accusation dealt not with his actions in the capacity of a police officer but in the capacity of a private citizen. (Emphasis in italics is the court's.) *Id*., 119 Cal.App.3d, 364-365.

For the same result in the disability retirement case brought by the same city employee, see *Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405.

(2) Injury sustained as a result of discipline for noncriminal misconduct outside the scope of employment is not service-connected.

Rockwell International v. Workers' Comp. Appeals Bd. (1981) 120 Cal.App.3d 291:

> The question presented herein is what impact on the compensability of applicant's claimed industrial injury is there whether or not the conduct for which applicant was disciplined [fleeing from a security guard and attempting to destroy evidence of drinking on the job] was outside the course of applicant's employment. (*Id*. 120 Cal.App.3d 296)
> It is clear that in *Pacific Tel. & Tel. Co.* [(1980) 112 Cal.App.3d 241] the employee's conduct of forging signatures on contracts (if indeed he did so) would be outside the course of employment. No rational distinction can be made between the treatment as to compensability under the Workers' Compensation Act of criminal conduct and of noncriminal conduct which is also outside the course of employment. To hold

otherwise would lead to some inconsistent results under the Workers' Compensation Act. *(Id*. 120 Cal.App.3d, 298.)

Accordingly, we hold that if applicant were disciplined for conduct outside the course of his employment, any injury sustained as a consequence of such discipline is not compensable under the Workers' Compensation Act. (*Ibid*.)

(3) Injury resulting from allegation of criminal conduct on the job, for which the employee is exonerated, but involving an act that, if true, is not in the course of employment, is service-connected.

In *Traub* v. *Board of Retirement* (1983) 34 Cal.3d 793, a county probation officer was accused of negotiating a sale of drugs with a former inmate ward and was discharged. As a result of the discharge, which was eventually overturned, he became permanently incapacitated. The Board of Retirement granted a nonservice-connected disability retirement but denied the larger service-connected disability pension on the basis that the conduct for which he was accused was not service-connected.

The issue is whether disability from an employer's investigation of, and dismissal for, employee wrongdoing is service-connected when (1) proof of the charges would establish misconduct outside the scope of employment but (2) the charges are not proved and the dismissal is set aside.
We conclude that psychiatric injury resulting from an employer's investigation of ultimately unproved charges against an employee arises out of and in the course of the employment whether or not the alleged misconduct was within the scope of employment. (*Id*. 34 Cal.3d, 796)

While illegal conduct in the performance of a job-related act will not preclude a finding that resulting disability *is service-connected (Williams* v. *Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937), the present charges if sustained would have established illegal activity wholly unrelated to plaintiff's duties and thus outside the scope of his employment. And for purposes of analysis we assume, without deciding, that had plaintiff been demonstrated to be guilty of those charges, and his termination upheld, he would not be entitled to a disability pension by reason of the resultant stress. But the fact is that the charges were not proved, (footnote omitted) the purported determination was overturned, and plaintiff was reinstated to his former job with back pay. To say that he should be barred from a disability pension because of unsubstantiated charges that he engaged in misconduct, whether within or outside the scope of his employment, seems to us wholly illogical, and contrary to applicable legal principles. (*Id*. 34 Cal.3d, 799-800)

We therefore conclude that when an employee is investigated and disciplined by the employer on charges of misconduct that are unproved and therefore presumably false,

and the discipline set aside, the resulting psychological stress and injury arises out of and in the course of employment within the meaning of section 31720. (*Id*. 34 Cal.3d, 801)

5. Presumptions that incapacities from heart trouble, cancer, blood borne infectious disease and illness caused by exposure to biochemical substance are service-connected

a) How presumptions work

(1) Proof that the job was a cause of incapacity is required in the ordinary, nonpresumption case.

In a non-presumption case, a service-connected injury will be established only if the applicant can show that there is a link between the injury and the job. The link normally must be established by a medical opinion from a physician. *Peter Kiewit Sons v. Industrial Accident Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831 (back injury); *City and County of San Francisco v. Industrial Accident Comm. (Murdock)* (1953) 117 Cal.App.2d 455 (heart). A physician will describe the mechanism by which the employment caused the injury. If the Board finds the explanation to be believable, the employee has met his burden of proving the connection between the job and the injury. Then it is up to the respondent to produce evidence that will change the Board's mind.

The laws that establish presumptions in favor of certain safety employees make establishing that a link in fact exists between the injury and the job unnecessary.

(2) Presumptions generally.

A "presumption" is defined as an assumption of fact the law requires to be drawn from one or more other facts already established in the action. (Evidence Code § 600.) Presumptions may be "rebuttable" or "conclusive." (Evidence Code § 601.)

A *rebuttable* presumption establishes a fact unless evidence is introduced which would support a finding that the presumed fact does not exist. (Evidence Code §§ 604 and 606.) The presumption shifts the burden of proof and persuasion to the respondent, once evidence is presented that is favorable to the claimant's position. McCormick on Evidence (1984) 3rd. Ed., West Publishing Company, at 980.

A *conclusive* presumption is a finding of fact that the law requires to be made once prerequisite facts are established, even if there is evidence that would establish that the presumed fact is not true. Unless a presumption is by its terms conclusive, the courts will find a presumption to be rebuttable. (See Evidence Code §§ 620, et seq.)

Government Code § 31720.5 is an example of a presumption. It provides that once prerequisite facts are established, heart trouble in a member involved in a specified public safety occupation is presumed to arise out of and in the course of employment.

(3) What is the effect of the presumption on the burden of proof?

Presumptions are classified in Evidence Code section 601, et seq. Presumptions are first classified as “conclusive” and “rebuttable.” Rebuttable presumptions are further classified as either “presumptions affecting the burden of producing evidence” or “presumptions affecting the burden of proof.”

A presumption affecting the burden of producing evidence is one created only to aid in the determination of the action, not to further some other public policy.

A presumption affecting the burden of producing evidence is based on an underlying logical inference that has such a high probability of truth that it makes sense to assume its truth absent evidence to the contrary

evidence that tends to prove the nonexistence of the basic facts, but, instead, introduces evidence that tends to prove the nonexistence of the presumed fact and such evidence is sufficient to support a finding of the nonexistence of the presumed fact:
The trier of fact must find that the presumed fact exists, unless the party against whom presumption operates convinces the trier of fact, by preponderance of the evidence, or by another burden of proof standard if applicable to the presumption, of the nonexistence of the presumed fact; and
If the trier of fact is a jury, the court should instruct the jury that the jury must find the specified fact (the presumed fact) exists, unless the jury is convinced by preponderance of the evidence, or by another burden of proof standard if applicable to that presumption, of the nonexistence of the specified fact (the presumed fact).

Similarly, where the party relying on the presumption introduces evidence tending to prove the existence of the basic facts and the party against whom the presumption operates introduces evidence tending to prove the nonexistence of both the basic facts and the presumed fact, the trier of fact must determine by the preponderance of the evidence whether the basic facts exists and, if so, the trier of fact is to presume the existence of the assumed fact unless convinced by the preponderance of the evidence that the assumed fact does not exist.

(4) Is the presumption of service-connection treated the same as evidence of service-connection?

A presumption is not "evidence." (Evidence Code section 600) By shifting the burden of proof to the respondent, the law does not impose on the respondent any greater burden to prove the nonexistence of the presumed fact by preponderance of the evidence. That burden is not made greater by the presumption itself. The evidence offered by the respondent is not "weighed" against the presumption. As stated in the commentary to Evidence Code section 600,

The most that should be expected of a party in a civil case is that he prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is that it establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

b) Specific presumptions

(1) Presumption that heart trouble is service-connected

(a) Section 31720.5

Government Code § 31720.5 provides,

> If a safety member, a fireman member, or a member in active law enforcement who has completed five years or more of service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200) or both or under this retirement system or under the State Employees' Retirement System or under a retirement system established under this chapter in another county, and develops heart trouble, such heart trouble so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of employment. Such heart trouble so developing or manifesting itself in such cases shall in no case be attributed to any disease existing prior to such development or manifestation.
>
> As used in this section, "fireman member" includes a member engaged in active fire suppression who is not classified as a safety member.
>
> As used in this section, "member in active law enforcement" includes a member engaged in active law enforcement who is not classified as a safety member.

(b) Prerequisites for the heart presumption

[1] Safety membership or specified occupation

Safety member, fireman member or a member in active law enforcement.

[a] "Active fire suppression"

The second paragraph of Section 31720.5 states that "fireman member" for purposes of Section 31720.5 includes a member engaged in active fire suppression who is not a safety member. The term "active fire suppression" is not defined in the statutes or in case law. However, similar terms, such as "active firefighting" and "active fire prevention," have been construed by the courts.

(i) Does an employee have to be involved in extinguishing flames and rescuing victims in order to be entitled to the presumption?

Taylor v. Workers' Comp. Appeals Bd. (1983) 148 Cal.App.3d 678, 682:

A heavy equipment operator for the Department of Forestry who assisted at or delivered equipment to fire sites approximately 24 times in an 18 year career was entitled to the heart presumption. The court rejected the WCAB rationale that the presumption is limited to firefighters who "pull hoses, climb ladders, rescue victims, chop through doors

and roofs and engage in like activities." (Id. 148 Cal.App.3d, 680.)

> Additionally, the semantical nuances between "fire prevention" and "fire fighting" are so elusive as to defy pragmatic distinctions. (Cf. Webster's New Internat. Dict. (3d ed. 1961) p. 855.) One who cuts fire lines to contain fires is as actively engaged in firefighting as one who extinguishes flames to prevent the fire from spreading. (Id., 148 Cal.App.3d, 682)

(ii) Does the applicant have to establish that he or she was engaged in physically arduous duties in order to qualify as a "firefighter?"

> The companion argument that we should limit the scope of the presumption to "the physically active work of suppressing fires, in addition to the administrative control of those duties" is similarly flawed. To the extent that the suggested definition focuses on the activity of extinguishing flames, it completely ignores the well-reasoned analysis in *McNerney* and the persuasive dicta stated in *Buescher*. Moreover, to the extent importance is placed on control of administrative duties, it injects a factor neither found decisive in *McNerney* nor relevant under the statute. And clearly the suggested limitation to physically active work in suppressing fires would include the firefighting duties performed by Taylor. (Id. 148 Cal.App.3d, 683.)

(iii) Does the applicant have to establish that he or she was frequently engaged in active fire suppression?

Taylor v. Workers' Comp. Appeals Bd. (1983) 148 Cal.App.3d 678, 683:

> Arguably, the Legislature intended that the term "active firefighting members" include only those who are commonly or frequently involved in firefighting activities. But in light of our analysis, we cannot conclude with any reasonable degree of certainty that the term "active firefighting members of the Department of Forestry whose duties require firefighting" was intended to exclude those whose job *duties* involve only occasional or infrequent assistance at fire sites. In such circumstances, we are guided by relevant precedent: "The legislative command is that workmen's compensation laws shall be liberally construed 'with the purpose of extending their benefits for the protection of persons injured in the course of their employment.' (Lab. Code, s 3202.)

See also *Buescher v. Workmen's Comp. Appeals Bd.* (1968) 265 Cal.App.2d 520 (Equipment maintenance foreman might have been in "active firefighting."); *Charles v. Workers' Comp. Appeals Bd.* (1988) 202 Cal.App.3d 781 (Civilian paramedic was entitled to full salary under Labor Code section 4850 as a member of a fire department whose duties involved active firefighting. , "[W]e conclude those who perform some of

the duties of firemen and who assume some of the physical and emotional risks firemen encounter come within the Legislature's "firefighter" rubric and are entitled to the benefits of the statute." *Id*., 202 Cal.App.3d, 783.) However, compare *Charles v. Board of Administration* (1991) 232 Cal.App.3d 1410 (The same paramedic was denied status as a safety worker because (a) he did not actually fight fires and rescue people from burning buildings and (b) city had not exercised its option to accept civilian paramedics as safety workers.)

State Employees' Retirement System v. Workmen's Comp. Appeals Bd. (McNerney) (1968) 267 Cal.App.2d 611 (Dispatcher for the Department of Forestry held entitled to presumption under Labor Code section 3212.)

> The process of firefighting includes persons performing tactical and logistic functions as well as those who physically extinguish the flames. The preparation of fire plans and the dispatch of personnel and equipment are integral to the process. The statute does not confine itself to those who physically extinguish the flames; rather, it comprehends 'active firefighting members ... whose duties require firefighting.' The notion is a transient one, progressing back from the fire line to some undetermined point in the tactical-logistic activities. McNerney's functions were such that the WCAB found him in the covered category. (Citation omitted) A court cannot say, as a matter of law, that this finding is without substantial support in the evidence. *Id*., 267 Cal.App.2d, 615.)

Associations' comment
Labor Code section 3212 was amended in 1965 to exclude from the presumption employees whose principal duties were clerical in nature. McNerney died in 1964. Whether the limited duties McNerney had would have excluded him from the benefit of the presumption under the amended statutes was not addressed.

[b] "Active law enforcement"

Ames v. Board of Retirement (1983) 147 Cal.App.3d 906, 916:

> As we noted in *Neeley* [*Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815], the key to finding "active law enforcement" is (1) contact with prisoners on a regular basis; (2) exposure to hazards from prisoner conduct; and (3) risk of injury from the necessity of being able to cope with potential dangers inherent in the handling of prisoners.

See also: *Kimball v. County of Santa* Clara (1972) 24 Cal.App.3d 780; *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567; *Boxx v. Board of Administration* (1980) 114 Cal.App.3d 79; *Schaeffer v. California Public Employees' Retirement System* (1988) 202 Cal.App.3d 609; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.

[2] Length of service under specified pension system or systems.

[a] The applicant must have completed five years of service under one or more of the following kinds of pension systems:

County Peace Officers' Retirement Law (Government Code §§ 31900, et seq.) or

County Fire Service Retirement Law (Government Code §§ 32200, et seq. or both,

"This retirement system" (County Employees Retirement Law of 1937, Government Code § 31450)

Public Employees Retirement System

Under a retirement system established under "this chapter," the County Employees Retirement System of 1937, in another county.

[b] The "five years or more of service" does not have to be entirely with the county from which the member is retiring.

53 Ops. Cal. Atty. Gen. 175 (1970), at 176:

> Service for earlier employment with a public body where the employee was a member of the Public Employees' Retirement System is to be counted in determining whether the presumption [under Government Code section 31720.5] is applicable, regardless of whether membership in the Public Employees' Retirement System is maintained.

[3] Is there "heart trouble?"

A myocardial infarct or heart attack is not the only kind of heart trouble that gives rise to the presumption. *Knowles v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 1027.

The question is: Has the heart been placed in a *troubled condition*? *Muznik v. Workmen's Comp. Appeals Bd*. (1975) 51 Cal.App.3d 622. See *Boehrer v. Workers' Comp. Appeals Bd.* (1982) (Not certified) 47 Cal.Comp.Cases 722.

Any heart trouble which develops or manifests itself during service may give rise to the presumption, even heart trouble which is not the result of hypertensive cardiovascular disease or coronary arteriosclerosis or any other stress-related heart disease. (E.g. cardiomyopathy, rheumatic heart disease, endocarditis, cardiomegaly.) See *Muznik v. Workmen's Comp. Appeals Bd., supra,* 51 Cal.App.3d, 635.

If hypertension has progressed to the point that the heart has been placed in a "troubled

condition," the heart problem is presumed to be caused by the employment. *Muznik v. Workmen's Comp. Appeals Bd., supra.*

If hypertension has not placed the heart in a troubled condition, the presumption does not arise. *Hart v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 619; *Hamilton v. Workers' Comp. Appeals Bd.* (1979) 93 Cal.App.3d 587. *Boehrer v. Workers' Comp. Appeals Bd.,* supra. Look for evidence of left ventricular hypertrophy.

Arteriosclerosis of the coronary arteries which is disabling is heart trouble and gives rise to the presumption. *Knowles v. Workers' Comp. Appeals Bd., supra.*

Coronary arteriosclerosis which is asymptomatic and non-disabling is not sufficient to give rise to the presumption. *Permanente Medical Group, Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 770, interpreting *Stephens* v. *Workmen's Comp. Appeals Bd*. (1971) 20 Cal.App.3d 461. If it is asymptomatic but disabling by way of a prophylactic restriction, it gives rise to the presumption. *Parish v. Workers' Comp. Appeals Bd*. (1989) 210 Cal.App.3d 92.

Arteriosclerosis which appears in a part of the body removed from the heart (e.g. cerebrovascular system) does not give rise to the presumption. *Permanente Medical Group, Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.,* 69 Cal.App.3d 770, supra. Peripheral arteriosclerosis in the lower extremities, in a case in which there is also no heart trouble, has been held not to give rise to the presumption. *Quigg v. Workers' Comp. Appeals Bd*.(1982) (Writ Denied) 47 Cal.Comp.Cases 291.

Arteriosclerotic disease of the peripheral vasculature and abdominal aorta is not presumptively work-related, even if there is also presumptively work-related heart trouble present in the form of left ventricular hypertrophy, where there is no causal connection between the heart disease and the arteriosclerotic disease of the peripheral vasculature and abdominal aorta. *Bennett v. Workers' Comp. Appeals Bd*. (1986) (Writ Denied) 51 Cal.Comp.Cases 139.

Calcific congenital bicuspid aortic stenosis is heart trouble and gives rise to the presumption. *City of Berkeley v. Workers' Comp. Appeals Bd. (Pomeroy)* (1982) (Writ Denied) 47 Cal.Comp.Cases 801. Compare *Zegalia v. Workers' Comp. Appeals Bd.* (1981) (Writ Denied) 46 Cal.Comp.Cases 132 and *Miller v. Workers' Comp. Appeals Bd*. (1990) 218 Cal.App.3d 350.

Mitral valve disease manifesting while the employee is in service raises the presumption. *State Emp. Retirement System v. Workmen's Comp. Appeals Bd. (McNerney)* (1968) 267 Cal.App.2d 611; *Parish v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 92.

Congenital aortic valve insufficiency and coarctation of the aorta causing left ventricular hypertrophy, although first manifest at age 12, gives rise to the presumption where the disease further developed after the employee began work as a police officer. *City of*

Concord v. Workers' Comp. Appeals Bd. (Pearsall) (1986) (Writ Denied) 51 Cal.Comp.Cases 5.

There is a basis for the argument that the Legislature meant the presumption to arise only in cases of heart diseases affected by stress. *Muznik v. Workmen's Comp. Appeals Bd., supra*; City and *County of San Francisco v. Workers' Comp. Appeals Bd.* (*Wiebe*) (1978) 22 Cal.3d 103. There is no court opinion that specifically restricts the presumption to certain kinds of heart disease. As it stands now, all kinds of heart trouble give rise to the presumption, though the presumptions arising from some kinds of heart trouble are probably more susceptible of being rebutted than others.

A cardiac neurosis without actual organic heart trouble may be work-related, but not on the basis of the presumption. The presumption is not that heart trouble is present, but that once it is found, the heart trouble is work-related. *Baker v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal.App.3d 852.

[4] Did the disease develop or manifest itself as required?

[a] Section 31720.5 does not expressly require that the disease develop or manifest while the member is in service.

Associations' comment

There is no appellate court opinion in a CERL of 1937 case holding that heart trouble must develop or manifest "in service" in order to raise the presumption. The parallel provisions of the Labor Code dealing with presumptions all require that heart trouble be shown to have manifested or developed *in service.* (Labor Code § 3212 -3213) That an "in service" requirement is implied in Section 31720.5 is supported by several factors:

First, the words "develop or manifest" in Section 31720.5 are meaningless unless they refer to some period of time. If the "in service" requirement is not implied, the words "develop or manifest" could be removed from Section 31720.5 and the meaning of the statute would not change. Rules of statutory construction guide the courts to interpret a statute so as to give meaning to all the words of a statute and not render any words meaningless. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.)

Second, "[s]imilar phrases or sentences used in statutes in pari materia will be given the same interpretation, including similar words used in different code sections or provisions standing in pari materia. (58 Cal Jur 3d, Statutes, § 127.)

The term "in pari materia" means "[o]n the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *Black's Law Dictionary,* Seventh Edition, p. 794.

Frediani v. Ota (1963) 215 Cal.App.2d 127, 133.

> It is a basic rule of statutory interpretation that, when a statute is but one in a series of like statutes and a particular phrase or expression appears in each of them those other statutes may be looked to as a guide to the proper construction or interpretation of the instant statute.

The purpose of rules of statutory construction is to achieve the Legislature's intent.

Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645:

> The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (Citations omitted.) Moreover, "every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (Citation omitted.) If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.

Rules of statutory construction will not be mechanically applied if they would achieve a result the Legislature did not intend. See *Delaney v. Baker (*1999) 20 Cal.4th 23, 41. There appears to be no Legislative purpose that would be mitigate against implying an "in service" requirement by the Legislature's use of the words "develop or manifest." There is no reason to conclude that the Legislature intended that the heart presumption in the retirement context would operate differently in this regard from the similar workers' compensation presumption laws. On the other hand, the Supreme Court in *Pearl v. Workers' Comp. Appeals Bd., supra,* 26 Cal.4th, at 190, stated that, although the Public Employees Retirement Law and the workers' compensation law are aimed at the same goals, they are distinct systems. "It should not be assumed that the provisions of one apply to the other absent a clear indication from the Legislature."

Recognizing that this is an area of controversy, if it is given that "in service" development or manifestation is required, heart trouble that neither develops nor manifests during service does not give rise to the presumption under rules developed in workers' compensation cases:

A deputy sheriff had labile hypertension while in service but he had no heart problem. After retirement he drank excessively and developed alcoholic cardiomyopathy. Held: The presumption did not arise. The heart trouble neither developed nor manifested itself during service. *Hamilton v. Workers' Comp. Appeals Bd., supra*, 93 Cal.App.3d 587. Affirms dicta in *State Employee's Retirement System v. Workmen's Comp. Appeals Bd.* (McNerney) (1968) 267 Cal.App.2d 611. See also *Fremont v. Workers' Comp. Appeals Bd.,* (1980) (Writ Denied) 45 Cal.Comp.Cases 22.

If the disease both developed and manifested *before* employment in the safety occupation, the presumption does not arise.

In *Anderson v. Workers' Comp. Appeals Bd.* (1980) (Writ Denied) 45 Cal.Comp.Cases 481, a police officer had heart trouble in the form of a congenital heart block. One physician stated that it developed during the employee's employment. Another physician reviewed military records that showed that the heart block was diagnosed before the employee became a police officer.

In annulling the judge's award, the Workers' Compensation Appeals Board explained that the first physician's opinion was not substantial evidence because he did not show that he reviewed the military medical records. It was found that the heart block developed and manifested before the applicant's employment as a police officer. Therefore, the presumption did not arise.

If either development or manifestation occurs *during* service, the presumption arises irrespective of what caused the development or manifestation.

In *City of Buena Park* and *R.L. Kautz* and *Co. v. Workers' Comp. Appeals Bd.* (Manchester) (1982) (Writ Denied) 47 Cal.Comp.Cases 1153, a fireman had a congenital heart condition which was asymptomatic until after his employment with the City. An Independent Medical Examiner opined that the disease was not caused, accelerated or aggravated by employment and "may" have "manifested" itself irrespective of employment. Apparently the physician's use of the word "may" placed his opinion in the realm of possibility and his opinion was held insufficient to rebut the presumption.

Note that the cause of the manifestation does not have to be proven to invoke the presumption. The manifestation itself, while the member is in service, gives rise to the presumption. Then the question is: Is there convincing substantial evidence, evidence that is not inconsistent with the intent of the Legislature when it created the presumption, that shows that the heart trouble is not work-related? See *City of Monterey v. Workers' Comp. Appeals Bd.* (*Greathouse*) (1990) (Writ Denied) 55 Cal.Comp.Cases 92: Pneumonia resulting from treatment for nonindustrial lung cancer was found presumptively work-related under the similar presumption under the workers' compensation law that pneumonia suffered by those certain public safety occupations is work-related.

If the first manifestation of disease was prior to employment, but there was further development after hire, the presumption arises. See *City of Concord v. Workers' Comp. Appeals Bd.* (Pearsall) (1986) (Writ Denied) 51 Cal.Comp.Cases 5.

(c) Nonattribution provisions: proof that the heart trouble is related to pre-existing disease is eliminated as a basis for rebutting the presumption by the nonattribution provision in the second sentence of Government Code § 31720.5.

The **presumption** in Government Code § 31720.5 is patterned after the presumptions

for heart trouble contained in Labor Code §§ 3212, et seq., that benefit public employees engaged in various public safety occupations. The **nonattribution provision** in Section 31720.5 is also patterned after the nonattribution provisions of the heart presumption statutes in the Workers' Compensation Act.

Prior to the enactment of the nonattribution provisions, the Labor Code's presumptions that heart trouble is work-related would disappear upon the presentation of evidence that the heart trouble is not service-connected. See *City and County of San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103, 112. Such evidence might include a medical opinion that heart trouble was not related to the stress and strain of employment.

Havel v. *Industrial Acc. Comm.* (1957) 154 Cal.App.2d 737, 742-743 (a case decided before the nonattribution provision was added to the workers' compensation presumption laws):

> When a presumption is controverted by other evidence, an issue of fact is raised which it is the duty of the trier of facts to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it is manifestly without support in the evidence. (citation)

Similarly, in a case dealing with a presumption provision in a city charter not containing a nonattribution provision, evidence that applicant's myocardial infarct was precipitated by cold and altitude while applicant was on vacation was found to rebut the presumption. *Geoghegan* v. *Retirement Board* (1990) 222 Cal.App.3d 1525, 1531:

> Given our required deference to the adequately supported factual determinations of the trial court, the conclusion is inescapable that plaintiff's disability was due to the myocardial infarction caused by the cold and altitude encountered while skiing.

The non-attribution provision was added to the law to preclude rebutting of the presumption by the opinion of a physician who does not accept the theory that stress is be a factor in heart trouble.

Stephens v. Workmen's Comp. Appeals Bd. (1971) 20 Cal.App.3d 461, 466-467:

> Dr. DeSilva stated and restated that in his opinion stress and stressful occupations do not cause or relate to acceleration of any arteriosclerosis. He argued that the majority of medical opinion was to that effect. He even characterized the theory (and thus the opinion of Dr. Friedman) as being a "ridiculous assumption."
> That requires this court at this point to pause to reflect where that leaves us in this matter.
> Statistically we cannot assert at the appellate level on the basis of this record that the majority of doctors do accept the proposition that stress and tension relate to acceleration of arteriosclerosis of the coronary artery. But what we can and must

assert is that the Legislature has declared that in workmen's compensation applications stress and tension are to be taken into consideration. We have pointed out above that sections 3212 and 3212.2 have allied the state in workmen's compensation cases with those medical practitioners who disagree with doctors holding Dr. DeSilva's beliefs. It is impermissible for a compensation carrier to "repeal" this legislation, wiping out the presumption created by section 3212.2, by seeking out a doctor whose beliefs preclude its possible application. It is impermissible for the board or its referee to accept the opinion of a physician so disposed as the basis for disallowing a claim. . . . . ¶

Stephens v. Workmen's Comp. Appeals Bd., 20 Cal.App.3d, supra, 468:

Still, this court may not usurp the board's exclusive fact finding power. Section 3212.2 creates a presumption. That presumption, however, is rebuttable. It was and is possible, both fairly and legally, for the board to find that the presumption never arose; that it was absent because no heart trouble which is disabling exists. It could have disbelieved Dr. Friedman; but it could not reject his opinion without substituting the opinion of a doctor willing to accept the premises Dr. DeSilva refuses to accept that stress and tension do cause heart trouble. (Footnote omitted.)

Associations' comment:
For a discussion of the historical development of presumptions and the non-attribution clause, see *City and County of San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103.

(d) Evidence that a heart attack is "attributed to" a nonindustrial exertion may be a basis for rebutting the presumption.

Turner v. Workmen's Comp. Appeals Bd., City of Fort Bragg, et al. (1968) 258 Cal.App.2d 442, 449:

Paraphased (sic) in terms of the "commonly understood meaning" of the word "attributed" in section 3212.5 as amended, the statute provides that a policeman's in-service heart trouble shall in no case be "explained as caused or brought about by" a preexisting disease. (See, e.g., Webster's Third New International Dictionary (1967) p. 142; italics added.) Directed by this plain language, we hold that under the 1959 amendment the statutory presumption cannot be rebutted by evidence of preexisting heart disease, as distinguished from "other evidence" that the in-service heart trouble was not industrially caused. [FN7]

FN7 An illustration of "other evidence" of nonindustrial causation, which may still rebut the section 3212.5 presumption under the 1959 amendment, was suggested in the present case by Dr. Breall's finding that petitioner, during the 24 hours

> preceding his hospitalization, did nothing "of an unusual or excessive nature with respect to physical or emotional exertion." Under appropriate circumstances, for example, Dr. Breall might have "attributed" the March 26 heart attack to the nonindustrial "exertion" involved in petitioner's abalone fishing on March 25.

Johnson v. *Workers' Comp. Appeals Bd*. (1985) 163 Cal.App.3d 770, 775:

> That is, an employer may rebut the presumption, but only with proof of causation by a nonindustrial event occurring at the same time as the heart trouble developed or manifested itself.

Blue Cross of California v. WCAB (Hootman) (2000) (Writ Denied) 65 Cal.Comp.Cases 397:

The presumption under Section 3212.5 did not arise and/or was rebutted by proof that applicant's heart trouble was caused by pancreatic cancer that caused a stroke or strokes and may have caused blood clots to form in the heart. The evidence showed that there was no abnormality of the heart that itself would have caused clots to form in the heart.

(e) Evidence that a heart attack is attributed to concurrent employment activities may be a basis for rebutting the presumption.

Bussa et al. v. *Workmen's Comp. Appeals Bd.* (1968) 259 Cal.App.2d 261, 267-268:

> Under the circumstances, we hold, as previously stated, that the statutory presumption that the decedent's death arose from his employment by respondent city is not and cannot be rebutted by evidence attributing it to pre-existing heart disease; and we annul the order under review for the reason that it cannot be determined from the present record whether the presumption is or can be rebutted by evidence that his death arose from his employment by Acme. The facts of the Acme (concurrent) employment, medical opinion specifically directed to such facts, and the question whether such evidence rebuts the presumption against respondent city, remain to be pursued upon the remand next ordered.

(2) Presumption that cancer in those in certain public safety occupations is service-connected

(a) Government Code § 31720.6

Effective January 1, 2000, Government Code § 31720.6 extended to those in certain public safety occupations in counties with County Employees Retirement Law of 1937 associations a presumption that cancer is service-connected, subject to certain prerequisites.

On September 7, 2000, Section 31720.6, was amended by AB 2176, Chapter 317, Statutes of 2000. The amended section provides as follows:

> (a) If a safety member, a firefighter, or a member in active law enforcement who has completed five years or more of service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200) or both or under this retirement system or under the Public Employees' Retirement System or under a retirement system established under this chapter in another county, and develops cancer, the cancer so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of employment. The cancer so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.
> (b) Notwithstanding the existence of nonindustrial predisposing or contributing factors, any safety member, firefighter member, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of cancer shall receive a service-connected disability retirement if the member demonstrates that he or she was exposed to a known carcinogen as a result of performance of job duties.
> "Known carcinogen" for purposes of this section means those carcinogenic agents recognized by the International Agency for Research on Cancer, or the Director of the Department of Industrial Relations.
> (c) The presumption is disputable and may be controverted by evidence, that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer, provided that the primary site of the cancer has been established. Unless so controverted, the board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
> (d) "Firefighter," for purposes of this section, includes a member engaged in active fire suppression who is not classified as a safety member.
> (e) "Member in active law enforcement," for purposes of this section, includes a member engaged in active law enforcement who is not classified as a safety member.

In addition, AB 2176, Chapter 317, Statutes of 2000 amended Section 31722, a section that sets time limits on when an application for disability retirement may be filed. Effective January 1, 2001, Section 31722 provides,

> The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance

of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

The same public safety occupations in counties covered by PERS had been covered by the cancer presumption under Labor Code section 3212.1 since its enactment in 1982 (firefighters) and amendment in 1989 (peace officers). PERS claims for service-connected disability retirements are adjudicated using the procedural rules of the Workers' Compensation Appeals Board. The enactment of Section 31720.6 brought the County Employees Retirement Law of 1937 in conformity with the law applicable to those covered under PERS and an effort was made in subdivision (a) of Section 31720.6 to coordinate the systems by allowing service for entities operating under other retirement laws to qualify as service which can be counted toward the 5-years-of-service requirement in Section 31720.6.

(b) Prerequisites for application of the cancer presumption.

[1] Occupation

The applicant must be, or must have been, a safety member, a firefighter or a member in active law enforcement. (Section 31720.6, subdivision (a).)

[a] "Active fire suppression."

"Firefighter," for purposes of Section 31720.6, includes a member engaged in active fire suppression who is not classified as a safety member. (Section 31720.6, subdivision (d).) See the discussion, above, in the section dealing with the "heart presumption" concerning the meaning of "active fire suppression."

[b] "Active law enforcement."

"Member engaged in active law enforcement," for purposes of section 31720.6 includes a member engaged in active law enforcement who is not classified as a safety member. (Section 31720.6, subdivision (e).) See the discussion, above, in the section dealing with the "heart presumption" concerning the meaning of "active law enforcement."

[2] Length of service under specified pension system or systems.

The applicant must have completed five years or more of service under a pension system established by Government Code §§ 31900, et seq., or Government Code §§ 32200, et seq., or both or under a retirement system established under this retirement system (i.e., the County Employees Retirement Law of 1937) or the Public Employees Retirement System or a retirement system established under the County Employees Retirement Law of 1937 in another county. (Section 31720.6, subdivision (a).)

Deleted from AB 2176 were provisions that would have provided (1) that the five years of service must be in the specified capacity or occupation and (2) that an applicant with less than five years of safety service would not be able to count his or her time as a general member toward the five years. (AB 2176, Senate amendment of May 24, 2000, page 2, second full paragraph and page 3, line 19, "in this capacity" deleted. See page 4, line 26 of the Senate document.)

[3] The member developed cancer

The applicant must have developed cancer. (Section 31720.6, subdivision (a).)

Like the "heart presumption" in Section 31720.5, there is no express requirement that the development occur while the member is in service. Such a requirement is express in the workers' compensation law. (See Labor Code section 3212.1)

Associations' comment
An in-service development or manifestation requirement would appear to be implied for the same reasons that an "in service" requirement is implied for the heart presumption.

Two references to the term "developing or manifesting" in subdivision (a) of Section 31720.6 that were going to be deleted as of the March 28, 2000 version of AB 2176 were left in the final version, keeping Government Code § 31720.6 more consistent with Labor Code section 3212.1 which contains an express "in service" development or manifestation requirement. The fact that the Labor Code version and the Government Code version are close matches and the fact that Section 31720.6 was written so that service under a PERS system counted toward the service requirement under Section 31720.6 show that the two sections are in *pari materia* and should be read together.

[4] Cancer causes incapacity

The applicant must be permanently incapacitated for the performance of duty as a result of cancer in order to be entitled to the presumption. (Section 31720.6, subdivision (b).)

Associations' comment
This provision expresses what is implied in the heart presumption: the presumption is not a presumption of incapacity. Section 31720.5 is meaningless unless there is an incapacitating heart trouble. Section 31720.6 expressly provides that the presumption is not effectuated unless the cancer is incapacitating.

[5] Exposure to a known carcinogen on the job

The applicant must demonstrate that he or she was exposed to a known carcinogen as a result of performance of job duties. (Section 31720.6, subdivision (b).)

A "known carcinogen" is defined for the purposes of section 31720.6 as a carcinogenic agent recognized by the International Agency for Research on Cancer (IARC) or the

Director of the Division of Industrial Accidents. (For the IARC list of carcinogens go to the IARC web site at www.iarc.fr/. For the list of carcinogens recognized by the Director of the Division of Industrial Accidents, see Title 8, Cal. Code of Regulations, § 330, located on the web at www.dir.ca.gov/title8/330.html.)

[a] Does any amount of exposure to a carcinogen satisfy the "exposure" requirement?

Associations' comment

Section 31720.6 does not establish what is a legally sufficient exposure. The California Workers' Compensation Reporter has a summary of a Workers' Compensation Appeals Board three-member panel decision, *Leach v. West Stanislaus Fire Protection District* (2001) 29 Cal. Workers' Comp. Rptr. 188, 189, in which the panel ruled that a "minimal" exposure is enough to satisfy the applicant's burden. However, this decision appears to be inconsistent with the Supreme Court's ruling in the *Bowen* and *Hoffman* cases. The Supreme Court held that proof of a "infinitesimal or inconsequential" employment contribution was not *substantial evidence* that there was in fact an employment contribution. (See *Bowen v. Board of Retirement, supra,* 42 Cal.3d, at 586.) Using this rationale, proof of only a "minimal" exposure is not substantial evidence that "exposure" under Section 31720.6 in fact happened.

[6] Time limit on presumption is not exceeded

The time limitation provided in Section 31720.6, subdivision (c), is not exceeded.

Section 31720.6, subdivision (c), provides in part as follows:

> This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Government Code § 31722 provides a member the opportunity to file an application within any period during which the presumption is extended beyond his or her discontinuance of service.

(c) What is the effect of the presumption?

[1] Presumed causation

Cancer so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of employment. (Section 31720.6, subdivision (b).)

If the presumption is not controverted, the board is bound to find in accordance with the presumption. (Government Code § 31720.6, subdivision (c).) See below for discussion on how the presumption can be rebutted.

[2] There is no presumption that the member is incapacitated.

Section 31720.6 does not create a presumption that the member is incapacitated for duty. The member must still prove that he or she is incapacitated. Then, if the prerequisites for the presumption are established, the incapacity is presumed to be service-connected.

[3] Service-connected disability retirement required

If the member is otherwise qualified and is permanently incapacitated for the performance of duty as a result of cancer, the member shall receive a service-connected disability retirement if the member demonstrates that he or she was exposed to a known carcinogen as a result of performance of job duties. (Section 31720.6, subdivision (b).)

Associations' comment
A service-connected disability retirement pension follows a demonstration of exposure to a known carcinogen as a result of performance of job duties and establishment of permanent incapacity due to cancer. The statute does not require the applicant to show that there is a link, be it actual, probable, possible or reasonable, between the carcinogen and the kind of cancer that the member has. Whether or not there is a causal link between the exposure and the cancer becomes an issue only if the primary site of the cancer is established. If the primary site is established, then evidence that the cancer is not reasonably linked to the carcinogen is relevant. The burden, however, is on the respondent to prove the absence of a link. If the burden is not met, a service-connected disability pension must be granted to the member.

(d) What sort of evidence will rebut the presumption?

The presumption is "disputable" if the primary site of the cancer has been established. In such a case, the presumption may be controverted by evidence that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. (Section 31720.6, subdivision (c).)

If the primary site of the cancer is not established, the terms of the statute do not provide for any basis on which the presumption may be disputed. Where the primary site of the cancer is unknown, the presumption is conclusive.

[1] Nonattribution provisions

The cancer so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation. (Section 31720.6, subdivision (a).)

A service-connected disability retirement pension is to be granted "[n]otwithstanding the

existence of nonindustrial predisposing or contributing factors . . . .” (Section 31720.6, subdivision (b).)

(e) What is the effect of the cancer presumption on the burden of proof?

Associations’ comment
See the Associations’ comment regarding this issue in the discussion of the heart presumption, above. In short, the cancer presumption is one enacted to achieve a public policy and, therefore, it is one affecting the burden of proof, not merely the burden of producing evidence. This means that, where the primary site of the cancer is established, if the Association is to avoid liability for a service-connected pension, the respondent must prove by the preponderance of the evidence that there is no “reasonable link” between work-related exposures to carcinogens and the cancer.

(f) Is the respondent’s burden of proof made greater by the language that requires the respondent to prove that the “carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer . . . .”?

[1] Proof that there is no evidence of a link satisfies the respondent’s burden to prove that no reasonable link exists.

Associations’ comment
An argument may be made that the presumption raises the bar required of the respondent so that even if the respondent proves by the preponderance of the evidence that a link does not exist between the cancer and industrial exposure, the presumption is not rebutted if there is evidence that the carcinogen is "reasonably linked" to the cancer, although the link is not likely. This would, in effect, require the respondent to prove that a link between industrial exposure and the cancer does not exist beyond that level of “reasonableness” or beyond a reasonable doubt.

The Associations assert that, if the respondent proves by the preponderance of the evidence that the link between the carcinogen and the cancer is not probable, the respondent has met its burden of proof and the presumption is rebutted. Reasonable people do not rely on the existence of a fact if the evidence shows that its existence is unlikely. If the evidence shows that the existence of a fact is only a possibility and not a probability, the evidence is too conjectural to support a finding that it exists. (*Jones v. Ortho Pharmaceutical Corporation* (1985) 163 Cal.App.3d 396, 402-403; *Travelers Ins. Co. v. Industrial Accident Comm.* (1949) 33 Cal.2d 685, 687.)

Facts in disability retirement proceedings must be established by the preponderance, “or weight” of the evidence. Any fact at issue in these proceedings must be established by the preponderance of “substantial evidence.” *Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783. *Glover v. Board of Retirement, supra*, 214 Cal.App.3d 1327,

1337.) Evidence is "substantial" if it is reliable, solid proof. “Substantial evidence” is evidence which ". . . . is reasonable in nature, credible, and of solid value . . . ." *In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644. “. . . .[T]he term means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion." (*Ibid*.) Therefore, when the Legislature used the words “not reasonably linked,” it was referring to proof that the connection between the exposure and the cancer was not a probability. When the presumption has been triggered and the burden of proof has been shifted to the respondent, the respondent’s burden to show that there is “no reasonable link” is met if it demonstrates to the trier of fact that the existence of a link between the job and the cancer is not a probability.

As stated in the commentary to Evidence Code section 600, a presumption is not evidence but a conclusion the law requires to be drawn when some other fact is established. It is not evidence but a device “to aid in determining the facts from the evidence presented.

> “Moreover, the [erroneous] doctrine that a presumption is evidence imposes on the party with the burden of proof a much higher burden of proof than is warranted. For example, if a party with the burden of proof has a presumption invoked against him and if the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional but unascertainable quantum of proof in order to dispel the effect of the presumption. . . . . To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.”

[2] The WCAB has ruled that proof that there is no evidence that a reasonable link exists is <u>not</u> sufficient to rebut the presumption. The WCAB has ruled that the defendant in a workers’ compensation case must demonstrate that medical or scientific research has shown that there is no reasonable link.

Faust v. City of San Diego (En Banc) (2003) 68 Cal. Comp. Cases 1822 involved the claim of a firefighter that his prostrate cancer was work-related. Labor Code section 3212.1, applicable to workers’ compensation claims, contains a presumption that is similar to the presumption in Government Code § 31720.6. The WCAB rescinded the workers’ compensation administrative judge’s decision that the Faust had not sustained a work-related injury and returned the case to the judge for further proceedings. The Board rejected the rationale of the referee that the presumption was rebutted by a medical opinion encapsulated in the following statement by the physician on whose opinion the judge relied: “Based on the literature search, there are no documents in the world medical and scientific literature that associates prostrate cancer and firefighters.” The Appeals Board ruled,

> "Accordingly, evidence showing that no reasonable link has been demonstrated to exist between the carcinogen or carcinogens to which the firefighter has been exposed and the development of the cancer, is *not* adequate to rebut the presumption of industrial causation. To rebut the presumption, the evidence must explicitly demonstrate that medical or scientific research has shown that there is no reasonable inference that exposure to the specific known carcinogen or carcinogens is related to it or causes the development of the cancer." (*Id*., 68 Cal. Comp. Cases, 1831-1832.)

The Appeals Board stated in *Faust* that medical literature that does not relate the exposure to the cancer is not evidence that no link exists. The fact that there are no epidemiological studies showing an increased incidence of the cancer in firefighters does not rebut the presumption. An example of proper rebuttal evidence that no reasonable link existed, the Appeals Board stated, was proof that the period between the exposure and the development of the cancer was shorter than the latency period for the development of such a cancer.

Associations' comment

There are two problems with the WCAB's approach in *Faust*. First, the Appeals Board did not address the inconsistency between its ruling the kind of argument contained in the immediately preceding Associations' comment. Second, the WCAB's opinion is myopic. The cancer presumption laws, in both workers' compensation and retirement, are written so that exposure to <u>any</u> carcinogen gives rise to the presumption, even exposure to a carcinogen that has no conceivable relationship to the applicant's tumor. When there is no conceivable relationship between the exposure and the tumor, the medical-scientific community will not bother to produce a body of literature that affirmatively shows the absence of a link.

It is unreasonable to assume that when the Legislature made the presumption rebuttable, it meant that the presumption would be rebutted only when the medical community had devoted resources to studying the issue of a link and developing literature affirmatively disproving the existence of a link. If that was the intent, the less likely and more far-fetched it is that the presumed fact of a link actually exists, and, therefore, the less likely that there is any medical literature on the subject, the more likely it is that the presumed fact will not be rebutted. The respondent would be unable to prove that no reasonable link exists because no one could reasonably suspect that it was true in the first place and, therefore, no one ever subjected what might be an even ludicrous proposition to scientific study. It should not be inferred that the Legislature would create such an unreasonable system. The WCAB has done what the commentary to Evidence Code section 600 proscribes by requiring "some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly [weighing] the scales of justice against the party with the burden of proof."

(g) Other issues raised by provisions in the cancer presumption

law

Associations' comment

What must occur within the 60 months? The onset of cancer? A permanent incapacity related to the cancer? The filing of the application? The administrative hearing? The decision of the Board of Retirement?

A question remains as to whether the applicant must be able to show that the cancer compelled him or her to retire. The fact that the application is filed timely within the 60-month extension for applications does not mean that the applicant will be entitled to a disability pension. If the applicant retired on a years-of-service pension and then subsequently develops cancer that would incapacitate the applicant if the applicant was still on the job, the applicant may file a timely application under the provisions of Section 31722, but is the applicant entitled to a service-connected disability retirement pension where retirement on a "years-of-service" or "service" pension preceded disability?

What is the meaning of "actually working in the specified capacity?" The statute does not specify a capacity. Is it actually performing the kind of activity the member was doing when the exposure to the known carcinogen occurred? Is the "specified capacity" the assignment the member had when the exposure occurred? Is the specified capacity a reference to safety member, firefighter, and members in active law enforcement or fire suppression?

AB 2176 would have clarified that "the specified capacity" is a reference to the occupation, be it safety member, firefighter or a member in active law enforcement mentioned in subdivision (a), but the proposed language ("in this capacity") was amended out of AB 2176. The fact that these words were deleted might be interpreted to mean that "the specified capacity" is a reference to something other than the occupation, e.g., the actual duties through which the exposure occurred. If that were so, the statutory limitation would run against the member much sooner. However, the deleted words had been proposed to show the Legislature's intent that only service as a safety member, firefighter or member in active law enforcement would qualify towards the 5 years of service. It was not contemplated that "the specified capacity" referred to actual duties during which exposure occurred. Given the limited purpose of the proposed, rejected language, the fact that it was deleted from AB 2176 does not support an argument that "specified capacity" is a reference to something other than the generic occupations of safety member, firefighter or member in active law enforcement.

There is further reason to conclude that "specified capacity" is a reference to the occupation and not specific duties. During the same legislative session in which the cancer presumption was made a part of the County Employees Retirement Law, Labor Code section 3212.1, the workers' compensation law's cancer presumption for safety members, was amended to eliminate the requirement that the injured employee prove that there is a reasonable link between the carcinogen to which he or she was exposed and the cancer that developed. (SB 539, 1999-2000 Regular Session) Section 3212.1 also contains a 60-month extension provision measured from "the last date actually

worked in the specified capacity." Several Assembly staff communications show that the words "specified capacity" was assumed to mean "specified capacity of a firefighter or peace officer." (Staff analysis prepared for March 24, 1999 hearing by Paul Donahue, Assembly Committee on Insurance; Staff analysis prepared for the June 23, 1999 hearing by Stephen Holloway, Senate Committee on Industrial Relations, page 2; Third Reading Analysis of Assembly Bill 539 prepared by the Office of Senate Floor Analyses, page 2.)

If Section 31720.6 is in *pari materia* with Section 3212.1, "specified capacity" would appear to refer to the kinds of occupations (safety member, firefighter or a member in active law enforcement), rather than to an assignment to duties in which there was exposure to carcinogens or to a period of actual exposure.

(3) Presumption that disability resulting from blood-borne infectious disease is service-connected.

Government Code § 31720.7 provides as follows:

> (a) If a safety member, a firefighter, a county probation officer, or a member in active law enforcement who has completed five years or more of service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200), or both, or under this retirement system, under the Public Employees' Retirement System, or under a retirement system established under this chapter in another county, develops a blood-borne infectious disease, the disease so developing or manifesting itself in those cases shall be presumed to arise out of, and in the course of, employment. The disease so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.
> (b) Any safety member, firefighter, county probation officer, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of a blood-borne infectious disease shall receive a service-connected disability retirement.
> (c) The presumption described in subdivision (a) is rebuttable by other evidence. Unless so rebutted, the board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
> (d) "Blood-borne infectious disease," for purposes of this section, means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations.

(e) "Member in active law enforcement," for purposes of this section, means members employed by a sheriff's office, by a police or fire department of a city, county, city and county, district, or by another public or municipal corporation or political subdivision or who are described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code or who are employed by any county forestry or firefighting department or unit, except any of those members whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers, and includes a member engaged in active law enforcement who is not classified as a safety member.

(a) What does "blood-borne" mean?

Subdivision (d) of Section 31720.7 provides,

"Blood-borne infectious disease," for purposes of this section, means a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as "blood-borne pathogens" by the Department of Industrial Relations.

[1] The term "blood-borne" as used in other provisions of the law

Labor Code section 3208.05, relating to the definition of "injury" includes blood-borne disease that results in the need for preventive care to a health care worker:

"(a) 'Injury' includes a reaction to or a side effect arising from health care provided by an employer to a health care worker, which health care is intended to prevent the development or manifestation of any bloodborne disease, illness, syndrome, or condition recognized as occupationally incurred by Cal-OSHA, the Federal Centers for Disease Control, or other appropriate governmental entities."

The preamble to Health & Safety Code section 105325 of Division 103, Disease Prevention And Health Promotion Part 5, Environmental And Occupational Epidemiology, Chapter 6. Safer Medical Devices, states in part,

"The Legislature hereby finds and declares all of the following:

In California, more than 700,000 health care workers and professionals, such as nurses, physicians and surgeons and housekeeping staff, are at risk of infection from bloodborne diseases, including Hepatitis B, Hepatitis C, and Human Immunodeficiency Virus, the causative agent of Acquired Immunodeficiency Syndrome."

Title 29, Code of Federal Regulations, section 1910.1030, relating to labor and occupational safety and health standards and toxic and hazardous substances, provides in part,

> " . . . . . .Blood means human blood, human blood components, and products made from human blood.
>
> Bloodborne Pathogens means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV). . . . . ."

Similarly, Title 8, California Code of Regulations, section 5193, subdivision (b), relating to the control of hazardous substances and processes, defines "bloodborne pathogens" as follows:

> ". . . .
> "Bloodborne Pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HCV) and human immunodeficiency virus (HIV).
> . . . . . ."

(b) Comparison with infectious disease cases generally.

Bethlehem Steel v. Industrial Accident Comm. (1943) 21 Cal.2d 742, 744:

> "It is well established in this state that compensation is not due merely for injury caused by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease, there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. (Citation) It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment. (Citation) The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general public, i.e., the injury must be a natural or a reasonably probable result of the employment or of the conditions thereof. (Citations omitted.)"

(c) Prerequisites to the blood borne infectious disease presumption

[1] Designated occupation

[a] Safety members

(Government Code § 31720.7, subdivision (a))

[b] Firefighters

(Government Code § 31720.7, subdivision (a))

[c] County Probation Officers

(Government Code § 31720.7, subdivision (a))

[d] Members in active law enforcement

(Government Code § 31720.7, subdivisions (a) and (e))

(1) Members employed by a sheriff's office (Government Code § 31720.7, subdivision (e))

(2) Members employed by a police or fire department of a city, county, city and county, district, or by another public or municipal corporation or political subdivision (Government Code § 31720.7, subdivision (e))

(3) Members who are described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code. (Government Code § 31720.7, subdivision (e)). Those Penal Code sections define "peace officers."

(4) Members who are employed by any county forestry or firefighting department or unit, excepting any of those members whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers. (Government Code § 31720.7, subdivision (e))

(5) Members engaged in active law enforcement who are not classified as safety members. (Government Code § 31720.7, subdivision (e))

[2] Requisite years of service: 5 years. May include service with other employers operating under specified retirement systems.

[3] Membership in an identified pension system, including

"this retirement system," a reference to CERL of '37.

[4] Develops blood borne infectious disease

"Blood borne infectious disease" is defined in subdivision (d) of Section 31720.7 as "a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including, but not limited to, those pathogenic microorganisms defined as "blood-borne pathogens" by the Department of Industrial Relations."

The Department of Industrial Relations has defined the following as blood borne pathogens: hepatitis B virus (HBV), hepatitis C virus (HCV) and human immunodeficiency virus (HIV). Title 8, California Code of Regulations, section 5193. Subdivision (d) of Section 31720.7 does not limit the definition of "blood borne infectious disease" to the microorganisms defined by the Department of Industrial Relations.

[5] Permanent incapacity for duty

Government Code § 31720.7, subdivision (b).
Unlike the heart presumption, incapacity is expressly required in order for the presumption to apply.

[6] Permanent incapacity must be a result of blood borne infectious disease

Government Code § 31720.7, subdivision (b).
There must be a cause and effect relationship between the blood borne infectious disease and the incapacity for duty.

[7] Time limitation on presumption is not exceeded

The time limitation provided in Section 31720.7, subdivision (c), is not exceeded. Section 31720.7, subdivision (c), provides in part as follows:

> This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Government Code § 31722 provides a member the opportunity to file an application within any period during which the presumption is extended beyond his or her discontinuance of service.

Associations' comment
The same issues with respect to the 60 month limitation arise in the blood borne disease presumption as for the cancer presumption, e.g., what must occur within the 60

months and does one who retired without disability have a claim to a disability retirement pension if he or she later develops a medical condition that would render the member incapacitated for duty if he or she were still on the job?

(d) Effect of the presumption

[1] Presumed causation

The blood borne disease that develops or manifests itself in those cases is presumed to arise out of and in the course of employment. Government Code § 31720.7, subdivision (a).

[2] Service-connected disability retirement pension is required

A member in a designated occupation who is permanently incapacitated as a result of a blood borne infectious disease "shall" receive a service-connected disability retirement pension.

[3] There is no presumption that the member is incapacitated for duty.

(e) The presumption is rebuttable.

The presumption is rebuttable by other evidence, but unless so rebutted, the Board is required to find in accordance with the presumption.

[1] Nonattribution provision: the illness shall in no case be attributed to any illness existing prior to the development or manifestation.

Government Code § 31720.7, subdivision (a), last sentence.

(f) Proof of on-the-job exposure to a blood borne infectious disease is not required in order for the presumption to arise.

Associations' comment
An amendment to Section 31720.7 effective January 1, 2002 eliminated a requirement that the member establish exposure to infectious disease on the job. However, even before the amendment, there was no express requirement that a relationship be established between the disease to which the member was exposed and the disease which caused the member to become incapacitated.

The presumption is rebuttable, but the infectious illness cannot be attributed to any disease existing prior to its development or manifestation. Does this mean that the Board of Retirement and the courts must isolate when the illness developed or became manifest and then may not attribute the illness to any nonindustrial disease or exposure

prior to that development or manifestation? If this is so, then, as a practical matter, the infectious blood-borne disease presumption may not be rebuttable.

(g) Other infectious disease provisions in the law

[1] Prophylactic medical care for EMT's em.

If a public safety employee identified in Health & Safety Code sections 1797.170, 1797.171 and 1797.172 (those certified as Emergency Medical Technicians) can show that he or she was exposed to an infectious disease listed in Title 17, Code of Regulations, section 2500, (includes among many others, HIV and HBV), that employee is entitled to prophylactic medical treatment. (Health & Safety Code section 1797.186)

[2] Workers' Compensation Law: hepatitis, blood-borne disease and meningitis presumptions

For purposes of workers' compensation law, hepatitis and, effective 1/1/02, blood-borne disease (Labor Code § 3212.8) and meningitis (Labor Code section 3212.9) in certain public safety employees are presumed to be work-related when they develop or manifest during employment. The statutory presumptions of compensability in the workers' compensation law are not applicable to claims under the County Employees Retirement Act of 1937. However, those dealing with the disability retirement law may be assisted by court interpretations of the workers compensation statutes.

(4) Presumption that illness due to exposure to biochemical substance is service-connected.

Government Code § 31720.9, effective January 1, 2003, provides as follows:

> (a) If a peace officer member, as defined in Sections 830.1 to 830.5, inclusive, of the Penal Code, or firefighter member, with service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200), or both, or under this retirement system, under the Public Employees' Retirement System, or under a retirement system established under this chapter in another county, becomes ill or dies due to exposure to a biochemical substance, the illness that develops or manifests itself in those cases shall be presumed to arise out of, and in the course of, employment. The illness that develops or manifests itself in those cases shall in no case be attributed to any illness existing prior to that development or manifestation.
>
> (b) Any peace officer member or firefighter member, as described in subdivision (a), who becomes permanently incapacitated as a result of exposure to a biochemical substance shall receive a service-connected disability retirement.
>
> (c) The presumption described in subdivision (a) is rebuttable by other evidence.

Unless rebutted, the board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(d) For purposes of this section, a peace officer member or firefighter member, as described in subdivision (a), does not include a member whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement services or active firefighting services, such as stenographers, telephone operators, and other office workers.

(e) "Biochemical substance" means any biological or chemical agent that may be used as a weapon of mass destruction, including, but not limited to, any chemical warfare agent, weaponized biological agent, or nuclear or radiological agent, as these terms are defined in Section 11417 of the Penal Code.

(a) Prerequisites for the biochemical substance presumption

[1] Designated 0ccupation

Those in the following occupations receive the benefit of the presumption:

[a] Peace officer member as defined in Penal Code sections 830.1 to 830.5

The identified Penal Code sections include references to the following county employees[1]:

Penal Code section 830.1: sheriff, undersheriff, deputy sheriff of a county and any inspector or investigator employed in that capacity in the office of a district attorney; any deputy sheriff of the counties of Los Angeles, Kern, Humbolt, Mendocino, Plumas, Riverside, San Diego, Santa Barbara, Siskiyou, Sonoma, Sutter and Tehama, who is employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, supervision, security, movement and transportation of inmates or performing other law enforcement duties directed by the employer.

Penal Code section 830.31: a safety police officer of the County of Los Angeles if the primary duty of the officer is the enforcement of the law; a regularly employed and paid park ranger if the primary duty of the officer is the protection of the park and other property of the agency and the preservation of peace therein; a housing authority patrol

[1] The cited sections also include references to employees who are not employed by counties or districts operating under the County Employees Retirement Law of 1937.

officer employed by the county if the primary duty of the officer is the enforcement of law.

Penal Code section 830.33: The following if their primary duty is law enforcement: harbor or port police, regularly employed and paid in that capacity by a county or district; transit police officers employed by a county, transit development board or district; airport law enforcement officers employed by a county or district or a joint powers agency created under Government Code § 6500, et seq.

Penal Code § 830.35: The following if their primary duty is law enforcement: a regularly employed and paid welfare fraud investigator; a child support investigator, regularly employed and paid by a district attorney's office; regularly employed and paid county coroners and deputy coroners if their duties are primarily set forth in Government Code §§ 27469 and 27491 to 27491.4 inclusive.
Penal Code § 830.37: members of a arson-investigating team of a fire department or fire protection agency of a county or district if the primary duty is the detection and apprehension of persons who have violated any fire law or committed insurance fraud; members of a fire department other than an arson investigating unit whose primary duty is the enforcement of laws relating to fire prevention or fire suppression.

Penal Code § 830.5: probation officer or deputy probation officer. (Pursuant to Welfare and Institutions Code § 283, County probation officers had the powers of a peace officer pursuant to Penal Code § 830.5.)

(i) Meaning of "peace officer member."

Associations' comment
While the other presumption laws refer to "safety member," Section 31720.9 identifies one of the classes of employees to which it applies as "peace officer member." Not all peace officers are safety members. Therefore, the term "peace officer member" would appear to encompass more employee classifications than "safety member."

[b] Firefighter member.

[c] Excluded: one who is not engaged in active law enforcement services or active firefighting services

A member whose principal duties are clerical or otherwise do not *clearly* fall within the scope of active law enforcement services or active firefighting services is not included in the term "peace officer member or firefighter member." Government Code § 31720.9, subdivision (d).

[2] Membership in an identified pension system, including "this retirement system," a reference to CERL of '37.

[3] Exposure to a biochemical substance

Government Code § 31720.9, subdivision (a).

[a] Biochemical substance defined

Government Code § 31720.9, subdivision (e), defines biochemical substance" as "any biological or chemical agent that may be used as a weapon of mass destruction, including but not limited to, any chemical warfare agent, weaponized biological agent, or nuclear or radiological agent, as these terms are defined in Section 11417 of the Penal Code.

Penal Code section 11417, subdivision (a), provides as follows:

> (a) For the purposes of this article, the following terms have the following meanings:
> (1) "Weapon of mass destruction" includes chemical warfare agents, weaponized biological or biologic warfare agents, restricted biological agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon, or an aircraft, vessel, or vehicle, as described in Section 34500 of the Vehicle Code, which is used as a destructive weapon.
> (2) "Chemical Warfare Agents" includes, but is not limited to, the following weaponized agents, or any analog of these agents:
> (A) Nerve agents, including Tabun (GA), Sarin (GB), Soman (GD), GF, and VX.
> (B) Choking agents, including Phosgene (CG) and Diphosgene (DP).
> (C) Blood agents, including Hydrogen Cyanide (AC), Cyanogen Chloride (CK), and Arsine (SA).
> (D) Blister agents, including mustards (H, HD [sulfur mustard], HN-1, HN-2, HN-3 [nitrogen mustard]), arsenicals, such as Lewisite (L), urticants, such as CX; and incapacitating agents, such as BZ.
> (3) "Weaponized biological or biologic warfare agents" include weaponized pathogens, such as bacteria, viruses, rickettsia, yeasts, fungi, or genetically engineered pathogens, toxins, vectors, and endogenous biological regulators (EBRs).
> (4) "Nuclear or radiological agents" includes any improvised nuclear device (IND) which is any explosive device designed to cause a nuclear yield; any radiological dispersal device (RDD) which is any explosive device utilized to spread radioactive material; or a simple radiological dispersal device (SRDD) which is any act or container designed to release radiological material as a weapon without an explosion.
> (5) "Vector" means a living organism or a molecule, including a recombinant molecule, or a biological product that may be engineered as a result of biotechnology, that is capable of carrying a biological agent or toxin to a host.
> (6) "Weaponization" is the deliberate processing, preparation, packaging, or synthesis of any substance for use as a weapon or munition. "Weaponized agents" are those agents or substances prepared for dissemination through any explosive, thermal, pneumatic, or mechanical means.

(7) For purposes of this section, "used as a destructive weapon" means to use with the intent of causing widespread great bodily injury or death by causing a fire or explosion or the release of a chemical, biological, or radioactive agent.

[b] Does the applicant have to demonstrate that the exposure to the biochemical substance was on the job?

The statute does not expressly provide that the applicant must have had the exposure to the biochemical substance that causes the illness or death while on the job.

[4] Illness or death

[5] Causation: illness or death is demonstrated to be due to exposure to biochemical substance

Government Code § 31720.9, subdivision (a). The illness or death must be "due to exposure to a biochemical substance." There must be a cause and effect relationship between the biochemical exposure and the illness or death.

[6] Permanent incapacity

Government Code § 31720.9, subdivision (b). Unlike the heart presumption, incapacity is expressly required in order for the biochemical substance presumption to apply.

[7] Causation: permanent incapacity is demonstrated to be a result of exposure to a biochemical substance

Government Code § 31720.9, subdivision (b). There must be a cause and effect relationship between exposure to a biochemical substance and the permanent incapacity.

[8] Time limitation on presumption is not exceeded

The time limitation provided in Section 31720.9, subdivision (c), is not exceeded. Section 31720.9, subdivision (c), provides in part as follows:

This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Government Code § 31722 provides a member the opportunity to file an application within any period during which the presumption is extended beyond his or her discontinuance of service.

Associations' comment

The same issues with respect to the 60 month limitation arise in the biochemical substance presumption as for the cancer and blood borne infectious disease presumptions, e.g., what must occur within the 60 months and does one who retired without disability have a claim to a disability retirement pension if he or she later develops a medical condition that would render the member incapacitated for duty if he or she were still on the job?

(b) 5 years of service is not a prerequisite for the biochemical substance presumption

Absent from the biochemical substance presumption is the requirement, present in the heart trouble, cancer and blood borne infectious disease presumptions, that the member have five years of service.

(c) Effect of the presumption

[1] Presumed causation

The illness that develops or manifests itself in those cases is presumed to arise out of and in the course of employment. Government Code § 31720.9, subdivision (a).

[2] Service-connected disability retirement pension is required

A member in a designated occupation who is permanently incapacitated as a result of a biochemical exposure "shall" receive a service-connected disability retirement pension. Government Code § 31720.9, subdivision (b).

[3] There is no presumption that the member is incapacitated.

(d) The presumption is rebuttable

The presumption is rebuttable by other evidence, but if not rebutted, the Board must find in accordance with the presumption. Government Code § 31720.9, subdivision (c).

[1] Nonattribution provision: the illness shall in no case be attributed to any illness existing prior to the development or manifestation.

Government Code § 31720.9, subdivision (a), last sentence.

(e) Other "biochemical substance" presumption laws

In addition to enacting Section 31720.9, AB 1847 included Labor Code section 3212.85. That section, contained in the Workers' Compensation Act, provides a similar presumption that illness from biochemical exposure is work-related.

c) There may be tax consequences to a finding of service-connection that is made based on a presumption.

Title 26, U.S.C., Internal Revenue Code, section 61, subdivision (a), provides that, except as otherwise provided, gross income means all income from whatever source derived, including compensation for services.

Title 26, U.S.C., Internal Revenue Code, section 104, subdivision (a), excludes from gross income amounts received under workmen's compensation acts as compensation for personal injuries or sickness. Title 26, Code of Federal Regulations, section 1.104-1, subdivision (b), excludes from gross income amounts that are received by an employee under a workmen's compensation act "or under a statute in the nature of a workmen's compensation act that provides compensation to employees for personal injuries or sickness incurred in the course of employment."

Internal Revenue Service has taken the position that a statute providing for a service-connected disability retirement constitutes a statute in the nature of a workmen's compensation act if the benefits (1) are computed by a formula that does not refer to the employee's age, length of service, or prior contributions, and (2) are provided to a class that is restricted to employees with service-incurred injuries, sickness or death. (Rev. Rul. 80-80, 1980-1 CB 35; Rev. Rul. 83-77, 1983-1 CB 37.)

The provisions of Government Code § 31720 relating to eligibility for a service-connected disability retirement satisfy all of the above requirements for a service-connected disability retirement allowance to be excluded from income. Section 31720, in part, requires that the member be "permanently incapacitated for the performance of duty . . . regardless of age . . . if [t]he member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity . . . . ." (Emphasis added.)

Section 31720 has no length of service requirement and the member's retirement allowance is 50% of compensation regardless of the amount of contributions to the system.

Therefore, a service-connected disability retirement allowance is excluded from gross income for federal income tax purposes. See *Pearl v. Workers Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 194.

It may be to the claimant's advantage to prove up the service-connection before relying on a presumption of service-connection. A statute is in the nature of a workmen's compensation act only if it allows disability payments solely for service-connected personal injury or sickness. *Haar v. Commissioner*, 78 T.C. 864, 867-868 (1982), aff'd. 709 F.2d 1206 (8th Cir. 1983); *Dyer v. Commissioner*, 71 T.C. 560, 562 (1979); *Robinson v. Commissioner*, 42 T.C. 403, 407-408 (1964). In *Take v. Commissioner of Internal Revenue Service* 804 F.2d 553 (9th Cir. 1986), a public employees' retirement plan provided that ". . . heart, lung and respiratory illnesses shall be construed as

occupational disabilities." The Ninth Circuit Court of Appeals held "that amounts received under [the] ordinance could not be excluded from income under I.R.C. Sec. 104(a)(1)." According to the Tax Court, an ordinance that makes no distinction between occupational diseases and ordinary diseases of life is not "*in the nature of a workmen's compensation act*" as that term is used for the purposes of the exemption under Section 104(a)(1) of the Internal Revenue Code.

As this holding is applied to the 1937 Law, if a claimant is granted a service-connected disability pension based on one of the presumptions, the claimant may not be able to exclude the disability payments from gross income. The Tax Court did not rule that a statute containing an unrebuttable presumption establishing occupational causation could never qualify under Section 104(a)(1), but only required a "more definitive relationship between the occupation and the injury or sickness" than the connection drawn by Section 2 of the Anchorage ordinance.

See also *Doogan v. U.S.* (S.D. Ohio 1957) 154 F. Supp. 703: Firefighter's disability retirement pension was not subject to taxation and he was entitled to a refund of taxes he had erroneously paid because he was retired for disability incurred in the line of duty; *Smelley v. U.S.* (N.D. Ala. 1992) 806 F. Supp. 932, affirmed 3 F.3d 389: State trooper's disability retirement pension was taxable because his hypertension was presumptively work-related and the trooper did not have to prove that his hypertension was in fact work-related.

The exclusion from income applies only to the extent the retirement allowance is not determined by reference to age, length of service, or prior contributions. Many LACERA members retired for service-connected disability receive an allowance in excess of 50% of compensation because the service retirement allowance to which they would be entitled is at a higher percentage. (See, Government Code § 31727.4.) Only that portion of the retirement allowance equal to 50% of compensation qualifies for exclusion from taxable income.

Applicants' comment
Whether a service-connected disability retirement pension awarded for incapacity due to heart trouble on the basis of the presumption is taxable is controversial and not all who have looked at the issue agree that it is taxable.

6. Nonservice-connected disability retirement allowance.

Government Code § 31727.7 states:

> Upon retirement for nonservice-connected disability, in lieu of any other allowance, a member who has five years or more credited service shall receive a disability allowance . . . . . (See also Government Code § 31720.)

If the member is incapacitated for duty as a result of an injury or illness which is not service-connected and the member has five years of service, the allowance is the

amount of the years-of-service retirement or, with certain exceptions, an allowance equal to 1/3 of final compensation. (Government Code §§ 31726, 31726.5, and 31727.) Upon the death of a member while receiving a nonservice-connected disability retirement allowance, 60% of the allowance continues to a surviving spouse who is designated as beneficiary and was married to the member one year prior to retirement (or eligible children) unless the member elected an optional allowance. (Government Code §§ 31760, 31760.1, 31785.)

7. Survivor's allowances

The board may be called upon decide a claim that a member's death was service-connected. If a death is found to be service-connected, the allowance to which the survivor may be entitled may be greater than the allowance that would be paid to the survivor following the member's death for nonservice-connected reasons.

a) General Rules

The death benefit provisions of the CERL of 1937 are contained in Articles 11 and 12, Government Code §§ 31760-31792. Which of these provisions is applicable to each county is beyond the purview of this resource. We will venture two general rules that are subject to a number of modifications, including differences depending on the county involved, and options available to the member and/or the survivor. The general rules are:

(1) Nonservice-connected benefits

That qualifying survivors are entitled to receive 60% of the amount of the pension allowance to which the deceased member would have been entitled when the member died before retirement, or when the member dies after retirement on a years-of-service pension allowance or a nonservice-connected disability retirement allowance. (E.g., Government Code §§ 31760.1, (retired members on years-of-service retirement allowances and nonservice connected disability retirement allowances) 31780, 31781.1, 31781.2, 31785 (retired safety member).

(2) Service-connected benefits

That upon the death, before retirement, of a member as a result of an injury arising out of and in the course of employment or upon the death of a retired member while receiving a service-connected disability retirement allowance, 100% of the allowance continues to a qualifying survivor. (E.g., Government Code §§ 31786, 31787 (service-connected death prior to retirement) .)

b) Additional survivor allowances

(1) Additional allowance for children

Government Code § 31787.5 provides that if a member is killed in the performance of duty or dies as a result of an accident or any injury caused by external violence or physical force incurred in the performance of duty, there is an additional benefit provided to a surviving spouse. The benefit is equal to 25% of the death allowance for one child, 40% for two children and 50% for three or more children. If the surviving spouse does not have legal custody of the children, the additional benefit is payable to the legal guardian during the lifetime of the child or until the child marries or reaches the age of 18. If the child is unmarried and enrolled as a full time student in an accredited school as determined by the board, the benefits otherwise payable continue through age 21. See other restrictions in the text of Section 31787.5.

(2) Additional allowance for spouse of a safety member

Government Code § 31787.6 provides as follows:

> A surviving spouse of a safety member who is killed in the performance of duty or who dies as a result of an accident or injury caused by external violence or physical force, incurred in the performance of his duty, shall be paid the following amount in addition to all other benefits provided by this chapter:
> A one-time lump sum benefit equal to an amount, provided from contributions by the county or district, equal to the annual compensation earnable by the deceased at his monthly rate of compensation at the time of his death.

C. Should the application be deemed to have been filed on the day following the day for which the applicant last received regular compensation?

1. Time to file application

Government Code § 31722 states:

> The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

2. Date of application

Government Code § 31724 provides:

> If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him effective on the expiration date of any leave of absence with compensation to which he shall become entitled

under the provisions of Division 4 (commencing with Section 3201) of the Labor Code or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation. Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the member consents to his retirement at an earlier date.

When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

3. General Rule: A disability retirement allowance, or pension, is effective on the date the application is filed. (Government Code § 31724)

a) Exceptions

There are three categories of exception to the general rule and one or more kinds of exception may come into play in a single case:

The first and second types of exception deal with alteration of the date on which the pension will commence because the member is receiving some form of compensation from the employer.

The third type of exception deals with alteration of the date an application is considered, or "deemed," filed. The application might be deemed filed on a day earlier than the date it was actually filed. This will occur when there is an excuse, recognized by the Legislature, that relieves the tardy applicant of the potential consequences of his or her delay in filing an application.

(1) The pension commencement is delayed because the applicant continues to receive regular compensation.

Section 31724 provides that the disability retirement allowance commences on the date of the application but not earlier than the day following the last day for which the applicant last received regular compensation.

However, where the applicant took a lower-paying job pending the resolution of his application for disability retirement from his position as a fireman, he was entitled to the approved retirement allowance for the period his application was pending, rather than

only from the date of approval of the application. The pension payment obligation of the Association was offset by the compensation the applicant received for the lower paying county position he took while his application was pending before the Board. (*Puckett v. Orange County Bd. of Retirement* (1988) 201 Cal.App.3d 1075)

(2) When the member is granted or is entitled to compensated time off for illness, the pension commencement date may be delayed to a date after the application is actually filed or is "deemed" filed.

Extensions are built into the statutory scheme for workers' compensation leave of absence with compensation and sick leave with compensation which delay the commencement of the disability pension allowance.

(a) Full salary under Labor Code § 4850

If the applicant receives a leave of absence at full salary in lieu of permanent disability compensation and/or temporary disability compensation under the Labor Code (Sections 4800 and 4850), he or she is to be retired on the expiration of the leave of absence or on the employee's consent to retirement on an earlier date.

(b) Sick leave with compensation

If the employee has been "granted or is entitled to sick leave," the retirement shall not become effective until the expiration of such sick leave "with compensation" unless the employee consents to an earlier retirement date.

b) The pension commencement date may be set earlier than the actual date the application was filed if the delay in filing is excused.

If the filing of the application was delayed by administrative oversight and/or inability to determine permanence of incapacity until a day after the last day for which the applicant last received regular compensation, the application is deemed filed on the day following the day for which the applicant last received regular compensation.

c) Effect of the "deemed filed" clause

The "deemed filed" clause does not directly establish the effective date of the retirement allowance. **It only establishes when the application is to be considered filed**. The date for the commencement of the disability pension may still be a date after the application is deemed filed.

Example: The applicant continues to be granted, or entitled to receive, sick leave and does not consent to his or her retirement on an earlier date.

d) Deduction of advanced disability payments made pursuant to Labor Code sections 4850.3 or 4850.4.

Government Code § 31897.6 (Statutes of 2002, Chapter 877 [AB 2131], effective January 1, 2003) provides as follows:

> The board shall deduct the amount of advanced disability pension payments made to a local safety member pursuant to Section 4850.3 or 4850.4 of the Labor Code from the member's retroactive disability pension payments. If the retroactive disability allowance is not sufficient to reimburse the total advanced disability pension payments, an amount no greater than 10 percent of the member's monthly disability allowance shall be deducted and reimbursed to the local agency until the total advanced disability pension payments have been repaid. The local safety member and this system may agree to any other arrangement or schedule for the member to repay the advanced disability pension payments.

Labor Code § 4850.3 provides as follows:

> A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement System, may make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance. The payments shall be no less than 50 percent of the estimated highest average annual compensation earnable by the local safety officer during the three consecutive years of employment immediately preceding the effective date of his or her disability retirement, unless the local safety officer chooses an optional settlement in the permanent disability retirement application process which would reduce the pension allowance below 50 percent. In the case where the local safety officer's choice lowers the disability pension allowance below 50 percent of average annual compensation as calculated, the advanced pension payments shall be set at an amount equal to the disability pension allowance. If a local agency has an adopted policy of paying for any accumulated sick leave after the safety officer is eligible for a disability allowance, the advanced disability pension payments under this section may only be made when the local safety officer has exhausted all sick leave payments. Advanced disability pension payments shall not be considered a salary under this or any other provision of law. All advanced disability pension payments made by a local agency with membership in the Public Employees' Retirement System shall be reimbursed by the Public Employees' Retirement System pursuant to Section 21293.1 of the Government Code.

Labor Code section 4850.4 (Statutes of 2002, Chapter 877 [AB 2131], effective January 1, 2003) provides,

(a) A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement Systems, shall make advanced disability pension payments in accordance with Section 4850.3 unless any of the following is applicable:
(1) After an examination of the employee by a physician, the physician determines that there is no discernable injury to, or illness of, the employee.
(2) The employee was incontrovertibly outside the course of his or her employment duties when the injury occurred.
(3) There is proof of fraud associated with the filing of the employee's claim.
(b) Any employer described in subdivision (a) who is required to make advanced disability pension payments, shall make the payments commencing no later than 30 days from the date of issuance of the last disbursed of the following:
(1) The employee's last regular payment of wages or salary.
(2) The employee's last payment of benefits under Section 4850.
(3) The employee's last payment for sick leave.
(c) The advanced disability payments shall continue until the claimant is approved or disapproved for a disability allowance pursuant to final adjudication as provided by law.
(d) An employer described in subdivision (a) shall be required to make advanced disability pension payments only if the employee does all of the following:
(1) Files an application for disability retirement at least 60 days prior to the payment of benefits pursuant to subdivision (a).
(2) Fully cooperates in providing the employer with medical information and in attending all statutorily required medical examinations and evaluations set by the employer.
(3) Fully cooperates with the evaluation process established by the retirement plan.
(e) The 30-day period for the commencement of payments pursuant to subdivision (b) shall be tolled by whatever period of time is directly related to the employee's failure to comply with the provisions of subdivision (d).
(f) After final adjudication, if an employee's disability application is denied, the local agency and the employee shall arrange for the employee to repay any advanced disability pension payments received by the employee pursuant to this subdivision. The repayment plan shall take into account the employee's ability to repay the advanced disability payments received. Absent an agreement on repayment, the matter shall be submitted for a local agency administrative appeals remedy that includes an independent level of resolution to determine a reasonable repayment plan. If repayment is not made according to the repayment plan, the local agency may take reasonable steps, including litigation, to recover the payments advanced.

D. Is the applicant entitled to a Supplemental Disability Allowance? (For some

counties)

Associations' comment
Some counties have implemented the provisions of Article 15.6 of the 1937 Act (commencing with section 31855), which provides both retirements and federal social security benefits to members on a nonintegrated basis.

Government Code § 31740, provides:

> In any county which has implemented the provisions of Article 15.6 (commencing with Section 31855), any member who is thereafter retired for disability shall receive a supplemental disability retirement allowance in the sum of three hundred dollars ($300) per month in addition to any other benefits due under this chapter, provided the member's disability is such that the member is incapable of gainful employment. . . . "[t]he board [of retirement] may adopt regulations, including a requirements for periodic declarations of non-employment, to administer this supplemental allowance.

Associations' comment
The issue is how to define the term "incapable of gainful employment." Government Code § 31740 has left the task of determining the criteria for the supplemental disability allowance to the individual CERL of 1937 counties. Typically the board of retirement has enacted regulations defining "incapable of gainful employment." One example of a local definition of "incapable of gainful employment" includes: *not capable of performing any service for compensation with the exception of service as a juror or witness in a court proceeding, or service as an election official*.

If this guideline is used, the hearing officer must determine whether the claimant is capable of gainful employment, that is, whether he is capable of **any** service for compensation, with exceptions not applicable here. An important note: the standard in these cases does not include the federal requirement that the employee be unable to engage in a *"substantially gainful"* occupation for which he is, or may reasonably become, qualified by reason of his education, experience, or training. Rather, the standard only requires that the employee be incapable of any service for compensation. We note that being capable of any service for compensation also does not necessarily mean that claimant has to have a full-time job. Even a part-time job may qualify as any service for compensation.

Applicants' comment
We do not believe that the analysis given is an adequate discussion of this subject. Claiming that the state statute leaves up to individual boards the unfettered discretion to define "incapable of gainful employment" raises a number of perplexing issues, e.g., unlawful delegation of legislative authority. Furthermore, there has apparently been no attempt to resolve this issue by referring to the legislative history.

III. BURDEN OF PROOF

A. Meaning of “burden of proof” in general

Tusker v. *Gabrielsen, et al.* (1998) 68 Cal.App.4th 131, 144-145:

> Appellants misapprehend the evidentiary process. As provided by Evidence Code section 500: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Once this initial burden is met, the opposing party will be charged with producing its own evidence as to the matters established. "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. [¶] (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." (Evid.Code, § 550.) " 'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid.Code, § 110.) Thus, if a plaintiff presents evidence to establish each element of its case, the defendant has the burden of going forward with its own evidence as to those issues. This does not alter the ultimate burden of proof, which rests with the plaintiff to prove each of the relevant facts supporting its cause of action. In the present case, both sides presented evidence on the easement issue. The court was left to weigh the evidence, and found for the Gabrielsens. There was no error in placing on the Tushers the burden of proving their causes of action.

B. Burden of going forward and burden of persuasion by a preponderance of the evidence

McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, fn. 5:

> As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.

See also *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 161.

Proof by a preponderance of the evidence means proof which leads the trier of fact to become persuaded that, considering all of the evidence in the case, the proposition on which the applicant has the burden of proof is more probably true than not true. McCormick on Evidence (3rd. ed. 1984) sec. 339, p. 957.

Lindsay v. County of San Diego Retirement Board (1964) 231 Cal.App.2d 156, 162:

A party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for the agency to show the negative of the issue when the positive is not proved.

C. What does <u>not</u> meet the burden of proof

1. The "liberal construction of the law" argument

Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 877:

> Petitioner argues that pension statutes are to be liberally construed. (Citations omitted.) The object of the disability allowance is not solely to compensate a member with a pension. The disability retirement allowance has as its objective the effecting of efficiency and economy in public service by replacement of employees, without hardship or prejudice, who have become superannuated or otherwise incapacitated. (Gov. Code, § 20001.) Therefore, the primary test before us is whether petitioner is substantially incapacitated from the performance of duty, and the rule on liberality of construction does not change that test.

Reynolds v. City of San Carlos (1981) 126 Cal.App.3d 208, 216:

> Appellant argues that any doubt about application of the condition contained in Labor Code section 4850 must be resolved in his favor, since pension laws are to be liberally construed. We do not agree that the doctrine of liberal construction precludes the Commission from applying the common sense rule that appellant is not permanently disabled when he unreasonably refuses remedial surgery.

City of Oakland v. Public Employees' Retirement System (2002) 95 Cal.App.4th 29, 39:

> The PERS laws are to be interpreted in favor of the employee or beneficiary when a semantic ambiguity is presented by the statute at issue. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1488 [280 Cal.Rptr. 847]. See, e.g., *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189 [109 Cal.Rptr.2d 308, 26 P.3d 1044] [construing PERL to preclude application of Labor Code limit on psychiatric disabilities for PERS safety members].) The PERS Board's interpretation and application of the statutes is to be given great weight. (*City of Sacramento v. Public Employees Retirement System*, *supra*, 229 Cal.App.3d at p. 1478; see *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921 [156 P.2d 1].) Although pension legislation is to be construed liberally, this rule "should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended." (*Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 822 [111 Cal.Rptr. 841].)

Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332:

> We agree that pension legislation must be liberally construed, resolving all ambiguities in favor of appellant…; however, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence… or change the test on appeal.

Power v. Workers' Comp. Appeals Bd. (1986) 179 Cal.App.3d 775, 787:

> The principle of resolving all reasonable doubts in favor of the employee applies "[w]hen there is no conflicting evidence and the inference [of industrial causation] is undisputed[.] [In such a case,] the board in furtherance of the legislative command of liberal construction in favor of the workingman must find industrial causation." …Here, however, the evidence as to both injury and industrial causation was conflicting…. Applicant seems to be arguing that whenever the evidence is in conflict, the principle of liberal construction must result in a finding in favor of the employee, irrespective of whether the evidence against him "has more convincing force and the greater probability of truth." …Were this the case, however, the preponderance of the evidence standard in section 3202.5 would be meaningless, as would the review process of the Board.

2. A "possibility" of service-connection does not meet the burden of proof.

Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1700-01:

> The applicant in a workers' compensation proceeding has the burden of proving industrial causation by a "reasonable probability." …That burden manifestly does not require the applicant to prove causation by scientific certainty. The question… is whether 'substantial evidence supports a finding that there is not a reasonable probability that decedent's illness arose out of his employment.

Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal.App.3d 396, 402 - 403: Expert testimony of a "reasonable medical possibility" of causation, defined as less than a 50-50 chance, held to be too conjectural.

Travelers Ins. Co. v. Industrial Accident Comm. (1949) 33 Cal.2d 685, 687:

> An award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained.

3. A "prima facie" case as sufficient proof

It has been argued that the member is entitled to a disability retirement and/or a service-connected disability retirement after merely presenting a "prima facie" case that he or

she is incapacitated for work-related reasons.

Is a prima facie case enough to establish a right to a disability retirement pension even when there is contrary evidence of considerable weight?

Associations' comment
An applicant is not entitled to meet a lesser burden of proof based upon the theory that he or she has made a “prima facie” showing of evidence in her favor.

A “prima facie case" is established when the party with the burden of proof has proceeded upon sufficient proof to the stage where the supporting evidence will support a finding if evidence to the contrary is disregarded. Evidence Code §606; BAJI (7th ed.) appendix E., p. 336; 1 Witkin, California Evidence, §130 (“The burden of producing evidence will shift to the other party if the party with that initial burden (1) proves a fact giving rise to a presumption…, or (2) produces evidence of such weight that a determination in his favor would necessarily be required in the absence of contradictory evidence.”).

Therefore, the claimant’s burden is not met by merely establishing a prima facie case. Claimant may not shift the burden of proof to the board, if and when the claimant establishes a prima facia case. With the exception of a case falling under one of the presumptions for service-connection, the applicant’s burden of *proof* never shifts to the respondent Association. Rather, the claimant must establish by a preponderance of credible evidence that it is more likely true than not true that the claimant is incapacitated and that there is a causal nexus between the disorder and the job.

D. Determining the weight of the evidence

Therefore, if the trier of fact has doubts, they may be resolved by examining all of the evidence and following these steps:

Determine if there is evidence that is reliable, “substantial” evidence in support of the applicant’s claim. The evidence which is not “substantial evidence” should be disregarded. Only substantial evidence may be placed on the scales that will determine the “preponderance” or “weight” of the evidence. If there is no substantial, reliable evidence in support of the applicant’s claim, the analysis stops there. The applicant has not met his or her burden of proof and the respondent prevails.

The substantial evidence supporting the applicant’s claim is placed on the scales. If the applicant’s evidence is sufficient to establish entitlement to the benefit the applicant is seeking, ignoring evidence to the contrary, the applicant has met the initial burden of producing evidence and the referee or Board now turns to the respondent’s evidence.

Determine if there is evidence that is reliable, ‘substantial” evidence in support of the respondent’s position. The evidence which is not “substantial evidence” should be disregarded. Only substantial evidence may be placed on the scales that will determine

the “preponderance” or “weight” of the evidence.

If there is no substantial, reliable evidence favorable to the respondent and contrary to the substantial evidence the applicant has already produced to establish a prima facie case, the scales tip only in the direction of the applicant whose application should be granted.

The substantial evidence supporting the respondent’s position is placed on the scales that determine the weight of the evidence and determine where the preponderance of the evidence lies. Consider the substantial evidence on both sides of the issues and, balancing favorable facts, the credibility of witnesses and documentary evidence against unfavorable facts and credibility of other witnesses and documentary evidence, determine whether the evidence on one side is more convincing and outweighs the other. The side with the preponderance of the evidence is the position on the issue that appears more likely to be true.

If the trier of fact, after going through the weighing process, is left unconvinced as to what is probably true, the party with the burden of proof looses.

E. Service-connection as an “entitlement” or “vested right”

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal.App.4th 30, 47, flatly denied that a service-connected disability was an entitlement or a vested right. The court stated,

> The critical point is that a disability pension shall be awarded ‘if the member qualifies.’ . . . Thus, it clearly appears that no member is simply 'entitled' to a disability pension upon application and submission of a favorable doctor’s report. The award of a disability pension depends upon proof, which varies from case to case, of the requisite qualifying facts. It is the board’s job to 'determine' whether sufficient proof has been made . . . and it must do so ‘to [its] satisfaction’.

F. Issues on which the respondent has the burden of proof

The respondent has the burden to prove the facts concerning any matter that it must affirmatively establish in order to successfully defend against an application for a disability retirement. The following list is not exhaustive:

1. **Application is barred by the statute of limitations. (Government Code § 31722)**

2. **Application is barred by laches.**

3. **Disability is the result of an injury sustained by intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on the part of the member, or is due to or results from the conviction of the**

member of a felony under state or federal law. (Government Code §§ 31728, 31728.1 and 31728.2)

4. **Disability is the result of unreasonable refusal of medical treatment.**

5. **Disability is result of an intentionally self-inflicted injury.**

6. **Disability is due to an injury sustained during a voluntary off-duty recreational, social, or athletic activity not constituting part of the applicant's work-related duties.**

7. **Disability or death is result of injury sustained in altercation in which applicant was the initial physical aggressor.**

8. **The member knowingly and intelligently waived a statutory right.**

(*Hittle v. Santa Barbara County Employees Retirement Assn*. (1985) 39 Cal.3d 374)

9. **That a permanent assignment to light or modified duty is available.**

10. **The beneficiary of a previously granted disability retirement pension is not incapacitated for the position he or she held when retired for disability and his employer offers to reinstate the beneficiary. (Government Code §§ 31729 31730.)**

11. **Where the presumption has arisen that heart trouble is service-connected, that the heart trouble is due to contemporaneous nonindustrial exertion or otherwise does not arise out of and in course of employment. (Government Code § 31720.5)**

12. **Where the primary site of cancer suffered by one in a public safety occupation is known, that there is no reasonable link between the cancer and the member's exposure to a known carcinogen. (Government Code § 31720.6)**

13. **Where a presumption has arisen that disability caused by a blood borne disease is service-connected, that the disease did not arise out of and occur in the course of employment. (Government Code § 31720.7)**

14. **Where the presumption that illness due to exposure to biochemical substance is service-connected has arisen, that the illness or death did not arise out of and in the course of employment. (Government Code § 31720.9)**

IV. MEDICAL EXPERTS AND THEIR REPORTS

A. The burden of proof is only met with reliable, "substantial" evidence.

The applicant must meet the burden of proof by establishing facts by a preponderance of the evidence. *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332:

> We agree that pension legislation must be liberally construed, resolving all ambiguities in favor of appellant (*Gorman v. Cranston* (1966) 64 Cal.2d 441, 444*; Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 822); however, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence (citation) or change the test on appeal. (citation)"

The evidence that is deemed to preponderate must amount to "substantial evidence." *Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783:

> The trial court determines the truth of the fact in dispute based on the record before it and not merely the sheer volume of evidence presented. Appellant's argument that there was no substantial evidence is without merit. As stated in *Smith v. Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 588, 592,
>
> We recognize at the outset these two well-settled principles: (1) factual determinations of the board must be upheld if there is substantial evidence in their support and the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence [citations]; . . . .
>
> After the trial court has exercised its independent judgment in weighing the evidence, our task is to review the record to determine whether the trial court's findings are supported by substantial evidence. (citation) The trial court's decision should be sustained if it is supported by credible and competent evidence. (citation) [End quotation from *Weiser*.]

B. "Substantial evidence" defined:

> "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (*Hosford v. State Personnel Bd.*(1977) 74 Cal.App.3d 302, 307.) Such evidence must be reasonable, credible and of solid value. (*Kuhn v. Dept. of General Service* (1994) 22 Cal.App.4th 1627, 1633.)

Evidence is "substantial" if it is reliable, solid proof. "Substantial evidence" is evidence which ". . . . is reasonable in nature, credible, and of solid value . . . ." *In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644:

> Webster's International Dictionary defines the word as follows: "Consisting of, pertaining to, of the nature of or being, substance, existing as a substance; material." Its meaning is further defined as "not seeming or imaginary, not illusive, real, true; important, essential, material, having good substance; strong, stout, solid, firm." (2) The word means "considerable in amount, value or the like; firmly established, solidly based." Synonyms are "tangible, bodily, corporeal, actual, sturdy, stable."
>
> "Substantial evidence," according to Words and Phrases, Fifth Series, page 564, where many definitions are collected, is evidence "which, if true, has probative force on the issues." It is more than "a mere scintilla," and the term means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion," citing *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 [59 S.Ct. 206, 83 L.Ed 126]. To preclude a reviewing court from disturbing a verdict, it is essential that the supporting evidence be "such as will convince reasonable men who will not reasonably differ as to whether evidence establishes plaintiff's case," quoting from *Morton v. Mooney*, 97 Mont. 1 [33 P.2d 262]. And as said in *Missouri Pac. R. Co. v. Hancock*, 195 Ark. 414 [113 S.W.2d 489], "improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not be sustained where testimony is at variance with physical facts and repugnance is material and self-evident."
>
> The sum total of the above definitions is that, if the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case. (*Id*., 112 Cal.App.2d, 644.)

[The *In re Teed's Estate* definition of "substantial evidence" was applied in the workers' compensation context in *Insurance Co. of North America* v. *Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 910.]

Therefore, expert medical opinion is normally required when a medical issue is involved since the opinion of laymen on a medical issue will not be reliable. *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838 (back injury):

> Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. (citations) Expert testimony is necessary "where the truth is occult and can be found only by resorting to the sciences." (citation) In some cases the issue, while of a medical nature, is sufficiently within the grasp of lay experience and understanding to permit a finding without expert medical evidence. (citation)

C. Examples of the requirement for expert medical opinion in specific cases:

Expert medical opinion, based on facts lay evidence has established to be true, is required to prove a claim based on psychiatric disability. *Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (Kemp) (1981) 122 Cal. App. 3d 905, 911-912:

> Whether applicant sustained a compensable psychiatric injury as the result of her employment at Volt requires both lay and medical evidence for support. Lay testimony must support the occurrence of injurious incidents which are employment related. Lay testimony alone, however, cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition. (citations) "'[W]here the truth is occult and can be found only by resorting to the sciences,'" the Workers' Comp. Appeals Bd. must utilize expert medical opinion. (citation) "The difficulty is that the problem was not one of lay theory, but one of diagnosis, prognosis and treatment in an occult branch of medicine. (citation)

Expert medical opinion is required to prove the causal connection between an act and a heart attack *San Francisco v. Industrial Accident Comm. (Murdock*) (1953) 117 Cal.App.2d 455:

> To make out a prima facie case it is necessary to prove more than the fact that decedent died while performing a task required by his employment which he had performed on various occasions throughout the years apparently without incident. The present record is wholly devoid of evidence of the cause of death. It is true that the employee died immediately after performing a task that was the most arduous of any required by his employment. However, it is not a matter of common knowledge, that operating a cross-cut saw with a partner on the other end is labor of such a strenuous type as to bring on a fatal heart attack. (*Id.*, 458.)
> . . . .
> Where the subject matter is within the exclusive knowledge of experts trained in a scientific subject, expert evidence is essential. (*Id.*, 459.)

Expert medical opinion is required to prove the causal connection between an exposure and cancer.

> *Jones v. Ortho Pharmaceutical Corp*. (1985) 163 Cal.App.3d 396, 403:
>
> Although juries are normally permitted to decide issues of causation without guidance from experts, "the unknown and mysterious etiology of cancer" is beyond the experience of laymen and can only be explained through expert testimony. (*Parker v. Employers Mutual Liability Ins. Co. of Wis., supra*., at p. 46.) Such testimony,

however, can enable a plaintiff's action to go to the jury only if it establishes a reasonably probable causal connection between an act and a present injury.

Associations' comment:
The rule requiring a connection between the exposure and cancer is not applicable to the presumption for public safety personnel under Government Code § 31720.6.

D. One physician's considered opinion may constitute substantial evidence though it is in conflict with the opinions expressed by other physicians.

Where medical opinions are in conflict, the relevant and considered opinion of one physician arrived at after adequate examination and investigation, though in conflict with the opinions of other physicians, may constitute substantial evidence.

Nash v. *Workers' Comp. Appeals Bd., supra*, 24 Cal.App.4th, 1810:

> It has long been established that the relevant and considered opinion of one physician, arrived at after adequate examination and investigation, may constitute substantial evidence in support of a factual determination by a WCJ [workers' compensation judge] or the Board, even when it conflicts with other medical opinion. (*Smith v. Workmen's Comp. App. Bd*. (1969) 71 Cal.2d 588, 592.)

Insurance Co. of North America v. *Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 905, 917:

> While it is true that the "relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence" (*Market Basket v. Workers' Comp. Appeals Bd*. (1978) 86 Cal.App.3d 137, 144), section 10606 recognizes that not all medical reports may be relied upon by the Workers' Comp. Appeals Bd.. "[N]ot all medical opinion constitutes substantial evidence upon which the board may rest its decision. Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, or inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 169.) Further, as "A report which offers a [mere] conclusion as to whether or not the case is 'compensable' intrudes upon a matter which is not a medical question, but one for ultimate determination by [a workers' compensation judge] and Appeals Board" (1 Hanna, op. cit., supra., § 12.03 [6], p. 12-30.2, fn. 34), such a conclusionary report also does not support a decision awarding or denying benefits.

E. Medical reports are <u>not</u> substantial evidence if based upon erroneous information, inadequate medical histories, incorrect legal theories, or

speculation.

Hegglin v. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162, 169:

> Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based upon surmise, speculation, conjecture, or guess.

Place v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378:

> [T]he board may not rely on medical reports which it knows to be erroneous . . . , upon reports which are no longer germane . . . , or upon reports based upon an inadequate medical history or examinations.

Zemke v. Workmen's Comp. Appeals Bd. (1968) 68 Cal.2d 794, 798:

> [A]n expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence" upon which the court may base an apportionment finding. [Likewise, an expert's opinion that], ". . . was a matter of speculation [is also not substantial evidence to support a finding].

Ryan v. Workmen's Comp. Appeals Bd. (1968) 265 Cal.App.2d 654, 659:

> An expert opinion is worth no more than the reasons on which it is based.

Neumann v. Bishop (1976) 59 Cal.App.3d 451, 463:

> It [is] for the jury to determine whether [an expert's] opinions were based on reliable information. See also *People v. Bandhauer* (1970) 1 Cal.3d 909, 918.

Baker v. Workmen's Comp. Appeals Bd. (1971) 18 Cal.App.3d 852, 861:

> An expert's opinion which rests on "surmise, speculation, conjecture, guess" or assumes an incorrect legal theory cannot constitute substantial evidence to support an order or decision. (citations omitted)

Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1701:

> Medical reports and opinions are not, however, substantial evidence if . . . they are known to be erroneous or based on inadequate medical histories and examinations." In addition, "a physician's opinion based upon a misunderstanding of legal standards or the relevant facts cannot constitute substantial evidence. . . .

F. A medical opinion based on a false, inaccurate or incomplete history is not substantial evidence and cannot support a finding of fact.

The value of a medical opinion is not found simply in the physician's conclusion, but it lies in the facts on which the opinion is based and the reasoning by which the physician progresses from the facts to the conclusion.

People v. Bassett (1968) 69 Cal.2d 122, 141:

> To make a reasonable inference concerning the relationship between a disease and a certain act, the trier of the facts must be informed with some particularity. This must be done by testimony. Unexplained medical labels—schizophrenia, paranoia, psychosis, neurosis, psychopathy—are not enough. Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion." (Italics added.) (*Carter v. United States* (D.C.Cir. 1957) 252 F.2d 608, 617 [102 App.D.C. 227] .) In short, "Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." (citations omitted.)

Owings v. *Industrial Acc. Comm*. (1948) 31 Cal.2d 689, 692:

> In this state of the record, we cannot say that the commission was required to accept the "guesses" of Dr. Shepardson as conclusively establishing that the disease was of industrial origin. A "Guess, in current best usage, implies a hitting upon (or attempt to hit upon), either at random or from insufficient, uncertain or ambiguous evidence." (Webster's Dictionary of Synonyms [1942 ed.], p. 188.) (4) An opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value (*Brant v. Retirement Board of S. F.*, 57 Cal.App.2d 721 [135 P.2d 396]; see *Estate of Stone*, 59 Cal.App.2d 263 [138 P.2d 710]). Although it may be possible that the witness did not intend to indicate that his statement was merely surmise or conjecture, the commission nevertheless could properly give the word its usual meaning and conclude that the doctor did not profess to give an expert opinion on the matter.
>
> In any event, the value of an expert's opinion is dependent upon its factual basis . . .

Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135 - 1136:

The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. (*People v. Coogle*r (1969) 71 Cal.2d 153, 166; *People v. Basset* (1968) 69 Cal.2d 122, 141.) Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. (*Hyatt v. Sierra Boat Co*. (1978) 79 Cal.App.3d 325, 338-339; *Richard v. Scott* (1978) 79 Cal.App.3d 57, 63 [144 Cal.Rptr. 672].) In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. (*Hyatt v. Sierra Boat Co., supra*..) When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence. (*In re Marriage of Hewitson, supra*., 142 Cal.App.3d at pp. 885-887; *In re Marriage of Rives* (1982) 130 Cal.App.3d 149-151. See also Evid. Code, § 801.) For example, in *In re Marriage of Hewitson, supra*., the expert attempted to determine the value of a closely held corporation by using the selling price/book value ratio of publicly traded corporations. Due to the differences in the two types of companies the analogy was improper and the judgment based upon the expert's testimony was not supported by substantial evidence. (142 Cal.App.3d at p. 887; see also *In re Marriage of Lotz* (1981) 120 Cal.App.3d 379, 384.) Likewise, in *In re Marriage of Rives, supra*., 130 Cal.App.3d at pages 149-151, this court reversed a determination of the value of a queen bee business because the court accepted the testimony of an expert who had relied upon false assumptions and improper factors, and who had failed to consider all of the relevant factors which established value.

Turner v. Workmen's Comp. Appeals Bd. (1974) 42 Cal.App.3d 1036, 1044:

And a medical report devoid of a relevant factual basis "cannot rise to a higher level than its own inadequate premises. Such reports do not constitute [sufficient] evidence to support a denial" of benefits. (*Zemke v. Workmen's Comp. App. Bd.*, 68 Cal.2d 794, 801.) Hence, an appellate court must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence (*Redner v. Workmen's Comp. Appeals Bd*., 5 Cal.3d 83, 96-97; *Hegglin v. Workmen's Comp. App. Bd*., 4 Cal.3d 162, 170, bearing in mind that the board is not at liberty to completely ignore those parts of a doctor's report and testimony which do not support its conclusion. (*Greenberg v. Workmen's Comp. Appeals Bd., supra,* 37 Cal.App.3d 792, 799.) In other words, an expert's opinion is no better than the facts upon which it is based.

G. A medical report based on a history of job stress given to the physician by the claimant which itself is at variance with the applicant's testimony at trial, or otherwise is not supported by facts established to be true, is not substantial evidence and is insufficient to support a finding.

Georgia-Pacific Corp. v. *Workers' Comp. Appeals Bd.* (Byrne) (1983) 144 Cal.App.3d 72, 76, overruled on other grounds in *Schoemaker* v. *Myers* (1990) 52 Cal.3d 1, 18:

> The Amstadter report contains information concerning the circumstances of Byrne's leaving his employment which is contrary to Byrne's testimony at trial and to that in another medical report. The doctor's broad conclusion that Byrne's condition was work-related is not sufficient as no specific connections were described." (*Id*., 144 Cal.App.3d, 77.)

. . . .

> We are, of course, precluded from substituting our choice of the most convincing evidence, medical or otherwise, for that of the compensation judge or the Board. However, in the instant case, in view of the speculative nature of the medical reports upon which the Board relied, and the reports' failure to either provide a history consistent with Byrne's testimony or to make specific conclusions demonstrating that the employment was an active factor in the development of Byrne's condition, we decline to find that these reports constituted adequate medical, or substantial evidence. (*Id*., 144 Cal.App.3d, 79.)

Twentieth Century Fox Film Corp. v. Workers' Comp. Appeals Bd. (Conway) (1983) 141 Cal.App.3d 778, 784:

> Dr. Bloch admits that his "commentary on this case is limited by inadequate information," which suggests that Dr. Bloch's conclusions are speculative, and therefore, do not provide substantial evidence. The opinion of Dr. Bloch does not adequately distinguish whether the applicant's employment, the nonindustrial incident involving the rejection of his screenplay, or a combination of the two was the cause of the applicant's psychiatric disease. Dr. Bloch's explanation of the cause of applicant's breakdown implies that applicant's anxiety was due to his hope that Fox would accept his screenplay, a totally nonindustrial matter. Then, Dr. Bloch opines, "With the initial rejection of the screenplay, his efforts at binding anxiety collapsed, as did his efforts to maintain impulse control." Dr. Bloch concludes that the applicant then "misinterpreted what might have been a minor crisis in his department" and applicant's "reality perception was blurred," resulting in applicant's leaving work.
>
> Based only on the evidence contained in Dr. Bloch's report, we do not believe that the Board on remand could make the necessary findings on the issue of whether the applicant's employment was a positive factor, or played an active role in the development of the psychological disease. (*Id*., 144 Cal.App.3d, 785.)

The principle that a medical opinion's value is dependent on the accuracy of the data on which the opinion is based has equal application to the question of whether an applicant is substantially incapacitated for disability retirement purposes. Where the diagnosis and prognosis stated by a physician are dependent on the truth of subjective symptoms

and the claimant's testimony is contradicted and his or her credibility is impeached, the trier of fact is entitled to reject the claim.

Harmon v. *Board of Retirement* (1976) 62 Cal.App.3d 689, 697:

> In the second place neither the referee, the board, nor the trial court were required to disregard the evidence concerning the deputy's actual physical activities. Motion picture evidence is recognized as competent evidence in determining the extent of disability. (See *Redner v. Workmen's Comp. Appeals Bd*. (1971) 5 Cal.3d 83, 94; and *Cansdale v. Board of Administration*, *supra*, 59 Cal.App.3d 656, 665.) A review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms. His credibility was impeached by the contradictions in his testimony concerning his ability to play, and his actually engaging in playing, golf. On such a record the fact finders were entitled to consider what was observed by the witness, and what they, and we, could observe on the motion pictures. We cannot say as a matter of law that the finding of the trial court that the deputy is not permanently incapacitated for the performance of duty is erroneous as a matter of law.

H. Treating physician v. examining physician

Associations' comment
In the Social Security system, a treating physician's opinion on the issue of the applicant's capacity to work is given more weight if the consulting physician's findings are no more than the same as the treating physician's and the two physicians differ only as to their conclusions. This judicially created rule was in 1991 codified in regulations adopted by the Commissioner of Social Security. 20 CFR §§ 404.1527(d)(2), 416.927(d)(2) (2002)). Applicants argue that the same rule should be followed in disability retirement cases. On the other hand, even in social security disability matters, there may be a reason for giving the opinion of a consulting physician more weight than the opinion of a treating physician. In that case, deference is not given to the opinion of the treating physician.

There is no authority for importing the "treating physician rule" from the federal, Social Security arena to a disability retirement matter under California's CERL of 1937.

Even in disability matters regulated by federal law outside of the social security system, there is no obligation to accord special deference to the opinions of treating physicians absent a statutory or regulatory requirement.

Black & Decker Disability Plan v. Nord (2003) 123 S.Ct.1965, 1970 - 1971:

> . . . . Nothing in the Act [Employee Retirement Income Security Act of 1974] itself, however, suggests that plan administrators must accord special deference to the

> opinions of treating physicians. Nor does the Act impose a heightened burden of explanation on administrators when they reject a treating physician's opinion." ¶ ERISA empowers the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out" the statutory provisions securing employee benefit rights. (citation) The Secretaries regulations do not instruct plan administrators to accord extra respect to treating physicians' opinions.
>
> The question whether a treating physician rule would "increas[e] the accuracy of disability determinations" under ERISA plans, as the Ninth Circuit believed it would, Regula, 266 F.3d, at 1139, moreover, seems to us one the Legislature or superintending administrative agency is best positioned to address. As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, "ha[ve] a greater opportunity to know and observe the patient as an individual." Ibid. (internal quotation marks and citation omitted). Nor do we question the Court of Appeals' concern that physicians repeatedly retained by benefits plans may have an "incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements." Id., at 1143. But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. And if a consultant engaged by a plan may have an "incentive" to make a finding of "not disabled," so a treating physician, in a close case, may favor a finding of "disabled." Intelligent resolution of the question whether routine deference to the opinion of a claimant's treating physician would yield more accurate disability determinations, it thus appears, might be aided by empirical investigation of the kind courts are ill equipped to conduct.

In social security disability matters, the treating physician rule has limitations.

Perez v. Secretary of Health, Education and Welfare (1980) 622 F.2d 1, 2:

> First of all, Dr. Acosta's findings were substantiated. His finding that there was "(n)o clinical evidence of classical angina pectoris or heart failure" was made on the basis of a physical examination and an electrocardiogram; he also noted the results of a Master's test taken at the Veterans Administration Hospital. His comment that Perez's hernia was correctible (sic) by surgery apparently followed from his judgment that Perez had no serious heart condition that would preclude surgery.[FN3] His conclusion that, even with chronic paravertebral lumbar fibromyositis, Perez had a full although painful range of motion in his back, was premised on the results of a physical examination during which he noted no muscle spasm, swelling, tenderness, or deformity of the back, and no atrophy, swelling, tenderness, or deformity of the extremities, and on x-ray results showing only mild osteoarthritis of the lumbar spine.

Second, unlike the conclusory statements of disability made by the two Dr. Susoni Hospital doctors, Dr. Acosta's evaluation of Perez's residual functional capacity was detailed and accompanied by specific clinical and laboratory findings. See 20 C.F.R. s 404.1526 (1979). Although Dr. Acosta's evaluation strikes us as a bit sanguine, considering his acknowledgement that Perez's back condition is painful, we cannot say that the evaluation was baseless and that the Secretary was obliged to disregard it. Finally, Dr. Acosta's opinion is consistent with some of the other evidence of record, e. g., electrocardiograms that were taken at the Veterans Hospital and appear to have been read there as "within normal limits," and observations by agency interviewers that Perez appeared to be in no distress although he looked older than his years.

Murray v. Heckler 722 F.2d 499, 501-502 (9th Cir. 1983), stated:

We note that the First Circuit's holding in *Perez* is not so absolute as the district court suggests. A careful review of that case shows that the non-treating physician's findings were substantiated by other evidence in the record, were much more detailed than those of the treating physicians and were accompanied by specific clinical and laboratory findings. See *Perez*, 622 F.2d at 2. The Perez court expressly distinguished other cases in which a single doctor's report was in conflict with considerable other evidence. See *Perez*, 622 F.2d at 3, distinguishing *Hayes v. Gardner*, 376 F.2d 517, 520- 21 (4th Cir.1967); *Miracle v. Celebrezze*, 351 F.2d 361, 372-73 (6th Cir.1965); *Sebby v. Flemming*, 183 F.Supp. 450, 454 (W.D.Ark.1960).

Murray's case stands in stark contrast to Perez. In this case, as the ALJ recognized, the findings of the non-treating physician were the same as those of the treating physician. It was his conclusions that differed. The "diagnosis" upon which the Secretary relies to base her decision consists of check marks in boxes on a form supplied by the Secretary. This "opinion" is in sharp contrast to the detailed analysis of the doctor relied on by the ALJ in Perez and also to the opinions of Murray's three doctors, one of whom had been treating Murray for over five years.

We note also that the Fifth Circuit has joined the Second and Sixth Circuits in giving greater weight to the opinions of treating physicians. See *Bowman v. Heckler*, 706 F.2d 564, 568 & n. 3 (5th Cir.1983). In *Bowman*, as in this case, "[t]he ALJ did not attempt to resolve the conflict in the testimony of the two [doctors] ...." See 706 F.2d at 568. The Fifth Circuit gave greater weight to the testimony of the treating physician because of the purpose for which he or she was employed: "Our reliance on the opinion of the treating physician is based not only on the fact that he is employed to cure but also on his greater opportunity to observe and know the patient as an individual." Id. We agree. If the ALJ wishes to disregard the opinion of the treating physician, he or she must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record. Cf. *McLaughlin v. Secretary of HEW*, 612 F.2d at 705 (opinion of treating physician

binding unless substantial evidence to the contrary). No such evidence exists in this case.

Sandgathe v. *Chater* (1997) 108 F.3d 978, 980:

> Although "more weight is given to a treating physician's opinion than to the opinion of a nontreating physician," the ALJ [administrative law judge] may reject controverted testimony of a treating physician if he has specific and legitimate reasons supported by substantial evidence. *Andrews*, 53 F.3d at 1040-41 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751, 755 (9th Cir.1989)). "Reports of consultative physicians called in by the [Commissioner] may serve as substantial evidence." *Id.*
>
> Dr. Moser testified that "certain of [Sandgathe's] limitations identified in Dr. Hayes' report were attributable to unspecified physical problems." Dr. Hayes' report rested on Sandgathe's self-reporting of the extent of his physical ailments. Inasmuch as the ALJ found that Sandgathe's self-reports were exaggerated, the ALJ determined that Dr. Hayes' report was unreliable as well. Thus, the ALJ concluded that Dr. Moser's testimony was more reliable. This conclusion is supported by the record, which indicates that Sandgathe's psychological problems may have been volitional or affected by his physical impairments. Thus, the ALJ's reliance on Dr. Moser's testimony was based on substantial evidence.

Andrews v. Shalala (9th Circuit,1995) 53 F.3d 1035),) 1042:

> Our review of the record persuades us that the ALJ met the appropriate burden for discrediting (Dr.) McConochie's diagnosis and rejecting his opinion that Andrews was severely handicapped by chronic drug abuse, depression and paranoid ideation such that he was a poor occupational candidate. Andrews consulted McConochie only because he had to in order to obtain benefits; McConochie himself observed that Andrews had no interest in pursuing treatment for his self-reported psychological symptoms. (Footnote omitted.) Andrews admitted that he manipulated situations to his advantage, and that he self-treated his anxiety by smoking marijuana. Green, the nonexamining psychologist, testified as well. Because she was subject to cross-examination, the ALJ could legitimately credit her testimony. *See Torres v. Secretary of H.H.S.*, 870 F.2d 742, 744 (Ist Cir.1989)(greater weight may be given to opinion of nonexamining physician who testifies at hearing subject to cross-examination); *see also Ramirez*, 8 F.3d at 1453 (noting that nonexamining physician testified at the hearing as a medical expert).

Associations' comment

A “treating” physician may not have been in any better position than a consulting physician to observe the applicant in relation to the facts of the claim and there may be other reasons for finding the opinion of the consulting physician to be more reliable.

Bowman v. Heckler (1983) 706 F.2d 564, 568:

> The ALJ did not attempt to resolve the conflict in the testimony of the two psychiatrists nor did he give his reasons for accepting the consultant's opinion rather than the one reached by the psychiatrist consulted by Ms. Bowman. Ordinarily the opinion of a treating physician is entitled to more weight than that of a non-treating physician. [FN3] However, the ALJ's report at least inferentially gives the rationale for rejecting the conclusion of the "treating" psychiatrist. The ALJ took into account the report of the internist who had treated Ms. Bowman for years. On the whole, the ALJ apparently found the consultative report more reliable. At the time of the hearing, Ms. Bowman had not been under treatment by the psychiatrist whom she calls her "treating" psychiatrist but had merely consulted him at her lawyer's suggestion. He apparently had little, if any, more opportunity to observe her than had the consultant. The main differentiation between the two was the expressed reason for their employment. Our reliance on the opinion of the treating physician is based not only on the fact that he is employed to cure but also on his greater opportunity to observe and know the patient as an individual. Neither reason existed here.
>
> FN3. We have recognized that the treating physician's opinion is entitled to more weight than that of a consulting physician who has never examined the applicant. *Oldham v. Schweiker*, 660 F.2d 1078, 1084 (5th Cir.1981); *Warncke v. Harris*, 619 F.2d 412, 416 (5th Cir.1980); *Strickland v. Harris*, 615 F.2d 1103, 1109-1110 (5th Cir.1980). We have also deferred to the treating physician when the consulting physician examined the applicant only on a "one-shot" basis. See *Smith v. Schweiker*, 646 F.2d 1075, 1081 (5th Cir.1981); *Williams v. Finch*, 440 F.2d 613, 616-17 & n. 6 (5th Cir.1971).

Associations' comments

Murray v. Heckler is a decision of a federal court in a social security case. It has never been applied as authority by a California court. It was referred to by one California court as a source of information on the policy of the Social Security Administration in requiring its hearing officers to make specific findings, *Oldham* v. *Kizer* (1991) 235 Cal.App.3d 1046, 1070.

The referee's and the Board's task is to analyze the information in the record and determine what makes sense, what is the truth, in each case. That should be done, not by looking at the name on the letter head, or how many times a physician has examined the patient or who hired the physician. In a case involving an issue of alleged psychiatric impairment, the Supreme Court has provided instruction on how an expert's opinion is to be analyzed:

> Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an

expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion.' (Italics added.) (*Carter v. United States* (D.C.Cir. 1957) 252 F.2d 608, 617 [102 App.D.C. 227].) In short, 'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions.' (Italics added.) (*People v. Martin* (1948) 87 Cal.App.2d 581, 584;" (further citation omitted.) *People v. Bassett* (1968) 69 Cal.2d 122, 141.

I. Consideration of one or more medical reports

Ortzman v. Van Der Waal (1952) 114 Cal.App.2d 167, 170:

Even if several competent experts concur in their opinions and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment assisted by the statements of the experts. (citation) Nor does the presence of expert testimony exclude consideration of other facts which are pertinent to the issue involved. *Id*. 114 Cal.App.2d, 170.

The trier of the facts is the exclusive judge of the credibility of the witnesses. (Code Civ. Proc., § 1847.) While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony ... or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (See cases collected 27 Cal.Jur. 180, § 154.) Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. (*Id*. 114 Cal.App.2d, 170.)

Kelley v. Trunk (1998) 66 Cal.App.4th 519, 523-524:

Expert witnesses normally testify concerning the bases for their opinions, and the court may require the expert to state the bases before giving his opinion. (See Evid. Code, 802.) Standard instructions give juries the common sense directive that "[a]n opinion is only as good as the facts and reasons on which it is based." (BAJI No. 2.40.) An expert's opinion, even if uncontradicted, may be rejected if the reasons given for it are unsound. (*Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58; *Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847 [expert opinions, though uncontradicted, are worth no more than the reasons and factual data upon which they are based]; BAJI No. 2.40 ["[Y]ou may not arbitrarily or unreasonably disregard the opinion testimony ... which was not

contradicted ... unless you find that it is not believable ...."].)

Baker v. Workmen's Comp. Appeals Bd. (1971) 18 Cal.App.3d 852, 858:

> A competent opinion of a single physician is sufficient evidence to support a finding of industrial injury.

Turner v. Workmen's Comp. Appeals Bd., supra, 42 Cal.App.3d, 1043-44:

> While the opinion of a single physician can constitute substantial evidence on which the [WCAB] may base a decision. . . , the opinion of a doctor based on mere surmise does not constitute substantial evidence.

Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1338:

> The trial court may accept the relevant and considered opinion of one medical expert over the other medical opinions even though inconsistent with them.

Nash v. Workers' Comp. Appeals Bd. (1994) 24 Cal.App.4th 1793, 1810:

> [T]he relevant and considered opinion of one physician, arrived at after adequate examination and investigation, may constitute substantial evidence in support of a factual determination by a WCJ [workers' compensation judge], even when it conflicts with other medial opinions.

J. Role of the Board's Medical Advisor

Government Code § 31530 provides,

> The county health officer shall advise the board on medical matters and, if requested by the board, shall attend its meetings.

Rau v. Sacramento County Retirement Bd. (1966) 247 Cal.App.2d 234, 237-38:

> In 31530, . . . it is stated: "The county health officer shall advise the board on medical matters and, if requested by the board, shall attend its meetings". . . . [The health officer] was present at the board hearings . . . , and heard all of the testimony . . . pertaining to the application . . . for a service-connected disability retirement. His letter and advice appear to have been based solely upon his review and analysis of the medical evidence which had been presented to the retirement board. His views did not represent new evidence . . . ."

Associations' comment

The opinion and advice of the county health officer who is an ex-officio medical advisor

to the retirement board and who hears all the testimony pertaining to an application for service-connected disability retirement, may properly be received and considered after the case has been submitted to the board for decision, but the county health officer's views do not represent new evidence. Such an opinion is based solely upon a review and analysis of other medical evidence that has already been presented to the board.

K. Expert medical opinion is required to prove psychiatric condition

Insurance Co. of North America v. Workers' Comp. Appeals Bd. (1981) 122 Cal.App.3d 905, 912:

> Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition.

See also *Georgia-Pacific Corp. v. Workers' Compensation Appeals Bd., supra*, 144 Cal.App.3d, 76:

> This requirement, of substantial medical evidence, was reiterated in *Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 912, as follows: "Lay testimony cannot establish psychiatric injury. Expert medical evidence must support the proposition that the employment incidents are related to the development of the psychiatric condition." And, "it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence." (*Market Basket v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 137, 144.

L. Is it permissible for the Board to pick and choose portions of various medical opinions for support for a finding of fact?

Turner v. Workmen's Comp. Appeals Bd. (1974) 42 Cal.App.3d 1036, 1044:

> Hence, an appellate court must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence (*Redner v. Workmen's Comp. Appeals Bd.*, 5 Cal.3d 83, 96-97; *Hegglin v Workmen's Comp. App. Bd*., 4 Cal.3d 162, 170), bearing in mind that the board is not at liberty to completely ignore those parts of a doctor's report and testimony which do not support its conclusion. (*Greenberg v. Workmen's Comp. Appeals Bd., supra*, 37 Cal.App.3d 792, 799.) In other words, an expert's opinion is no better than the facts upon which it is based.

Rosas v. Workers' comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1701:

> When the Board relies upon the opinion of a particular physician in making its determination, it may not isolate a fragmentary portion of his report or testimony and

disregard other portions that contradict or nullify the portion relied on; it must give fair consideration to all the physician's findings.

Bracken v. Workers' Comp. Appeals. Bd., (1989) 214 Cal.App.3d 246, 255:

Thus, in relying on the opinion of a particular physician in making its determination, the Board may not isolate a fragmentary portion of the physician's report or testimony and disregard other portions that contradict or nullify the portion relied on; the Board must give fair consideration to all of that physician's findings. (*City of Santa Ana v. Workers' Comp. Appeals Bd., supra*, 128 Cal.App.3d at p. 219.) (3) As stated in *Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564, in evaluating the evidentiary value of medical evidence, a physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability. (See *Lamb v. Workmen's Comp. Appeals Bd., supra*, 11 Cal.3d at p. 281; *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 416-417.) Hence, the Board may not blindly accept a medical opinion that lacks a solid underlying basis and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd., supra*, 121 Cal.App.3d at p. 426.)

Gay v. Workers' Comp. Appeals Bd. (1979) 96 Cal.App.3d 555, 564:

In evaluating a medical report, isolated statements may be misleading.... [A] physician's report and testimony must be considered as a whole rather than in segregated parts.

City of Santa Ana v. Workers' Comp. Appeals Bd. (1982) 128 Cal.App.3d 212, 219:

When the Board or the trial court exercising its independent judgment "relies upon the opinion of a particular physician in making its determination, it may not isolate a fragmentary portion of his report or testimony and disregard other portions that contradict or nullify the portion relied on; it must give fair consideration to all of his findings."

Associations' comment
But, there is some authority for the opposite proposition:

In re Frederick G . (1979) 96 Cal.App.3d 353, 366 [testimony of a single witness may support judgment despite being contradicted or inconsistent in part] the court of appeal ruled,

> The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. (Evid. Code, § 411; [FN2] (Citations omitted.)
>
> > FN2 Evidence Code section 411 provides: "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

In re Frederick G. was cited by the appellate court in the unpublished opinion in *O'Brien v. Board of Retirement* (2001) 2001 WL 1545481 (Not certified for publication) Cal.App. 2 Dist. Dec 05, 2001) (NO. B146044), for the following proposition:

> The trial court read and weighed conflicting expert opinions concerning the nature of O'Brien's psychological illness and its causation. "The trial court may accept the relevant and considered opinion of one medical expert over the other medical opinions even though inconsistent with them." (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1338.) The trial court was also free to accept only a portion of one expert's opinion. (*In re Frederick G* . (Cite as: 2001 WL 1545481, (Cal.App. 2 Dist.)) (1979) 96 Cal.App.3d 353, 366 [testimony of a single witness may support judgment despite being contradicted or inconsistent in part] .)

V. OTHER LEGAL ISSUES

A. Misrepresentation in the employment application

Associations' comment
If the member was hired by the county and became a member as a result of misrepresentation in the employment application, the member may be precluded from applying for a disability retirement. However, we have found no reported disability retirement opinions that are directly on the point.

The right of a member of the association to a disability retirement is an element of compensation that is a contract right. Pension rights and obligations, as opposed to a civil servant's right to tenure, are regulated by contract law. (See, e.g., *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541 (pension benefits are contractual rights); *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863; *Miller v. State of California* (1977) 18 Cal.3d 808; 814; *Stork v. State of California* (I976) 62 Cal.App.3d 465, 468)

City of Oakland v. Public Employees Retirement System (2002) 95 Cal.App.4th 29, 38-39:

> "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 [148 Cal.Rptr. 158, 582 P.2d 614].) "The contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute." (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 662 [6 Cal.Rptr.2d 77]; see *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1131-1133 [61 Cal.Rptr.2d 207].)

The mutual consent that is required for the formation of a contract may be negated by "fraud," whether the misrepresentation of fact is intentional or negligent. Where a party is induced to enter into a contract by misrepresentation, the resulting contract is void, or may be ground for rescission or reformation. (See Witkin, Summary of California Law, Ninth Edition, Vol. 1, Contracts, §§392, et seq.)

> The elements of actual fraud, whether as the basis of the remedy in contract or tort, have been stated as follows: There must be (1) a *false representation* or concealment of a material tact (or, in some cases, an opinion) susceptible of knowledge, (2) made with *knowledge* of its falsity or, without sufficient knowledge to warrant a representation, (3) with *intent* to induce the person to whom it is made to act upon it; and such person must (4) act in *reliance* upon the representation (5) to his damage. (Citations omitted) (*Id*., at §393.)
>
> . . . .

The representation must be made "with intent to deceive" another party to the contract. (C.C. 1572; see *Torts*.)

The Restatement sets forth three ways in which this requirement of "scienter" may be satisfied: (1) The maker knows or believes that the assertion is untrue; (2) he does not have the confidence that he states or implies the truth; (3) he knows that he does not have the basis that he states or implies for the assertion. (Citation omitted.) (*Id*., at 397.) ¶ . . . .

"The suppression of that which is true, by one having knowledge or belief of the fact" is actual fraud. (Citations omitted) . . . .¶ The Restatement (§160, supra) points out that concealment is an affirmative act, equivalent to a misrepresentation. (Comment a); and that it usually consists either in actively hiding something from the other party, or preventing him from making an investigation that would have disclosed the true facts (Comment b). (Id. at §398.)

B. Previously Litigated Issues

Preciado v. *County of Ventura, et al.* (1982) 143 Cal.App.3d 783, 787, Fn 2:

The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment. A prior judgment for the defendant on the same cause of action is a complete bar to the new action. (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, §§ 147-148, pp. 3292-3293.) Collateral estoppel is a distinct aspect of res judicata. It involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. (Id., § 197, at p. 3335.) In this case we are dealing with a claim of collateral estoppel rather than res judicata.

Winn v. Board of Pension Commissioners (1983) 149 Cal.App.3d 532, 537:

Where the subsequent action in on the same cause of action, a prior judgment is a complete bar. But where the subsequent action is on a different cause of action, the former judgment is not a complete merger or bar, but is effective as a collateral estoppel, i.e., it is conclusive on issues actually litigated between the parties in the former action.

Associations' comment

Sometimes, an applicant applies for disability retirement more than once. In that case, the pension board has usually made a determination as to one or more of the applicant's bases for disability in the prior application. There are no CERL of 1937 cases directly on the issue of how to treat these prior litigated issues between the

applicant and the pension system. However, the two cases cited above may be used as some guidance on the matter.

Associations' comment
If an applicant can establish that his/her condition has deteriorated over time, or that a new injury has occurred subsequent to denial of the first application for disability retirement, his/her second application may not be barred by the doctrine of res judicata. A former judgment may not operate as res judicata if the second action concerns changed circumstances or new facts. (See 7 Witkin, Cal. Proc. (4th ed. 1997) § 372, pp. 943-944.) However, "Newly discovered facts that do not establish a previously undiscovered theory of liability or a change in the parties' legal rights, but instead merely go to the weight of the evidence, do not preclude collateral estoppel. (See *Evans v. Celotex Corp*. (1987) 194 C.A.3d 741, 747 . . .[evidence of lung biopsy from deceased, whose personal injury action resulted in judgment for defendant, insufficient to preclude application of collateral estoppel to wrongful death action.)" (*Ibid.)*

Applicant's comment
The fact that a physician's opinion about the applicant's level of disability does not change between the time the Board made its decision on the first application and the time the applicant attempts to file a second application does not mean that the second application should be rejected on the basis that there has been no change in the applicant's condition.

Bowman v. Board of Pension Commissioners, *supra*, 155 Cal.App.3d, at 945:

> Inasmuch as the Board chose not to rely on Dr. Handelman's opinion at the original hearing, its reliance thereon at the present hearing for the purpose of negating a deterioration in petitioner's condition can only be characterized as inequitable, for "One must not change his purpose to the injury of another." (Civ. Code, § 3512.)

C. Credibility of Claimant and Witness Testimony

Ortzman v. Van Der Waal, supra, 114 Cal.App.2d, 171:

> Provided the trier of facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontroverted.

People v. Brophy (1954) 122 Cal.App.2d 638, 644:

> The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. . . .

Baker v. Workmen's Comp. Appeals Bd. (1971) 18 Cal.App.3d 852, 859:

In the absence of evidence to the contrary, the referee and the board must assume the truth of petitioner's uncontradicted and unimpeached testimony respecting the genuineness of his complaints. (See *Place v. Workmen's Comp. App. Bd*., 3 Cal.3d 372, 379 [90 Cal.Rptr. 424, 475 P.2d 656].) Given the truth of petitioner's testimony, the board's finding that petitioner did not sustain an industrial injury cannot be reached by simply ruling out heart disease. The only reasonable inference which can be drawn from the evidence is that petitioner suffers from a form of psychoneurotic injury which doctors termed "cardiac neurosis."

Snell v. Telehala (1969) 274 Cal.App.2d 61, 67 - 68:

Our Supreme Court, in *Davis v. Judson* (1910) 159 Cal. 121, 128, laid down the respective provinces of the trial court and the appellate court in a situation such as we have in the instant case, as follows: "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." (P. 128. See also: *Hunter v. Schultz* (1966) 240 Cal.App.2d 24, 33-34; *Camp v. Ortega* (1962) 209 Cal.App.2d 275, 281- 283; *Kurtz v. Kurtz* (1961) 189 Cal.App.2d 320, 324- 325; *La Jolla Casa de Manana* v. *Hopkins* (1950) 98 Cal.App.2d 339, 345-346; *Barham v. Khoury* (1947) 78 Cal.App.2d 204, 215.)

In *Hunter v. Schultz, supra,* appellant claimed that the trial court was required to accept the undisputed testimony of her husband that between four to five thousand dollars had been expended for improvements on the real property involved. The appellate court said: "The trial judge was justified in considering that Melvin, as a one- fourth owner and as the spouse of another one-fourth owner, had an obvious interest in the amount to be allowed for improvements. The credibility of Melvin's testimony could also properly be weighed in the light of the circumstance that he could produce receipts for only $1,862.10 of the claimed expenditures but could not produce any kind of corroborative evidence in verification of the claimed balance. The trial judge observed the witness on the stand, was in a far better position that we are to evaluate the trustworthiness of his 'best estimate,' and in the final result was the arbiter of his credibility." (240 Cal.App.2d at p. 34.)

In *Kurtz v. Kurtz, supra*, appellant wife complained about the amount of support money allowed to her and contended that, since her testimony that she is ill and unable to work is uncontradicted, the findings of the trial court must be in accordance with her uncontradicted testimony. This contention was rejected, the court commenting: "By her own testimony, she had worked steadily for many years, despite the same condition which she now claims prevents her from working. No medical corroboration was offered as to her physical or mental condition or to support her statement that she is unable to work. No excuse was offered for the failure to produce her doctor." (189 Cal.App.2d, at p. 325.)

In the *La Jolla* case, *supra*, the court stated the rule which has been consistently adhered to by the appellate courts: "An appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced." (98 Cal.App.2d, at pp. 345- 346.)

D. De Novo Hearing

In some retirement associations, the Board of Retirement makes an initial determination on an application based on a staff investigation and recommendation that will usually include the findings and opinion of an expert medical consultant. If the application is denied, the member then may request that an administrative hearing be held. The propriety of the Board's initial determination is not at issue at the administrative hearing. Rather, the applicant has the burden to prove that he or she is incapacitated and that the incapacity is service-connected. The fact that in its initial determination the Board found the applicant to be disabled, though not service-connected, does not insure that, after the administrative hearing, the applicant will be found to be disabled. That issue will be determined anew based on the record developed at the administrative hearing.

Weiser v. Board of Retirement (1984) 152 Cal.App.3d 775, 781-82:

> The Board's procedures for disability retirement hearings specify that when a hearing is requested by an applicant, it shall be referred for a hearing "de novo before a Board-appointed referee." . . . "Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard." . . . Thus, the Board's interpretation of its own rules allowing for a fresh determination of appellant's disability was consistent with appellate decisions.

E. Hearsay

Walker v. City of San Gabriel (1942) 20 Cal.2d 879, 881:

> It is well settled that a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence establishing just cause for revocation, and that hearsay evidence alone is insufficient to support the revocation of such a license. . . . 'Mere uncorroborated hearsay or rumor does not constitute substantial evidence.'

Associations' comment
Rules of administrative hearing procedures typically contain a provision that hearsay is admissible, but will not support a finding of fact unless the hearsay would be admissible over objection under the Evidence Code.

F. Rules of Evidence

McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1054:

> An administrative agency is not required to observe the strict rules of evidence enforced in the courts, and the admission or rejection of evidence is not a ground for reversal unless there has been a denial of justice. . . . Such error is not prejudicial if the evidence was merely cumulative or corroborative of other evidence properly in the record, or if the evidence was not necessary, the judgment being supported by other evidence.

G. Application of Workers' Compensation Law

Bowen v. Board of Retirement, supra, 42 Cal.3d, 578, fn. 4:

> Generally, courts have found that the County Employees Retirement Act of 1937 (here at issue) and the Workers' Compensation Act "are related in subject matter and harmonious in purpose." (*Kuntz v. Kern County Employees' Retirement Assn.* (1976) 64 Cal.App.3d 414, 421 [134 Cal.Rptr. 501]; accord, *Minor v. Sonoma County Employees Retirement Bd*. (1975) 53 Cal.App.3d 540, 544 [126 Cal.Rptr. 16].) In fact, courts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law. (citations omitted.)

Kuntz v. Kern County Employees' Retirement Assn. (1976) 64 Cal.App.3d 414, 421-422:

> Furthermore, the decisions interpreting the workers' compensation law of this state (Lab. Code, div. 4), which adhere to the proposition that an employer takes his employee as he finds him, and that a disability from a preexisting injury or disease, or

a death resulting therefrom, is compensable if the employee's work aggravates or accelerates the injury or disease, are authoritative. (See *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 282-283 [113 Cal.Rptr. 162, 520 P.2d 978]; *Ballard v. Workmen's Comp. App. Bd*. (1971) 3 Cal.3d 832, 837 [92 Cal.Rptr. 1, 478 P.2d 937]; *Smith v. Workmen's Comp. App. Bd*. (1969) 71 Cal.2d 588, 592 [78 Cal.Rptr. 718, 455 P.2d 822]; (further citations omitted.) While the County Employees Retirement Act of 1937 and the workers' compensation law serve different functions, they are related in subject matter and harmonious in purpose. (*Minor v. Sonoma County Employees Retirement Bd.* (1975) 53 Cal.App.3d 540, 544 [126 Cal.Rptr. 16]; *Pathe v. City of Bakersfield* (1967) 255 Cal.App.2d 409, 414-415, 416 [63 Cal.Rptr. 220].) Both laws are designed for the comfort, health, safety and general welfare of employees; (footnote omitted) as to the payment of death and disability benefits, each contains essentially similar language; (footnote omitted) both must be construed liberally. (Footnote omitted.)

It is the rule that when words used in a statute have acquired a settled meaning through judicial interpretation, the words should be given the same meaning when used in another statute dealing with an analogous subject matter; this is particularly true, where, as here, both statutes were enacted for the welfare of employees and are in harmony with each other. (See 73 Am.Jur.2d (1974) Statutes, § 165, p. 369; *cf. Union Iron Wks. v. Industrial Acc. Com*. (1922) 190 Cal. 33, 43-44 [210 P. 410].)

1. Application of workers' compensation statutory law: Disability retirement pension denied where refusal of surgery or medical treatment is unreasonable.

a) Labor Code section 4056 is applicable by analogy.

Reynolds v. City Of San Carlos (1981) 126 Cal.App.3d 208, *supra*, 214:

Appellant argues that only the WCAB can make a finding under Labor Code section 4056, incorporating a substantive rule of tort law, which provides: "No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

It is true that there is no comparable provision in the Public Employees' Retirement Law, but, as we have seen, neither the Constitution nor the Labor Code restricts a retirement board, here the Commission, from exercising its authority to determine eligibility for retirement under PERS. The Commission can apply workers' compensation laws by analogy when making a finding of eligibility or noneligibility.

Associations' comment:
Compare *Montgomery v. Board of Retirement* (1973) 33 Cal.App.3d 447, *supra*,: Applicant found to be entitled to disability retirement benefits though the condition from which she suffered was correctable by an operation presenting no unusual hazards but which procedure was violative of her sincerely held religious beliefs which are protected by the First Amendment.

b) Is the doctrine of avoidable consequences applicable to claims for disability retirement?

In *Flores v. Workman's Comp. Appeals Bd*. (1973) 36 Cal.App.3d 388 the court explained the purpose of Section 4056:

> "Section 4056 (of the Labor Code) obviously was adopted by the Legislature to protect employers who tender medical or surgical treatment to their injured employees by making certain that workmen will be returned to the labor market as quickly as possible; its plain purpose is to prevent employees with treatable injuries from resorting to unfounded beliefs, ungrounded fears or personal idiosyncrasies or convictions to reject proffered treatment."

Associations' comment:
In *Flores* the argument was made that the injured employee has a duty to avoid adverse consequences by taking advantage of available medical care even where Labor Code section 4056 is not applicable because an injury has not been accepted by the employer as work-related or no tender of treatment has been made by the employer. The theory is that, though the employer does not offer the medical care, the employee would not be entitled to disability benefits to the extent they are the result of the employee's unreasonable refusal of treatment available from some other source. The *Flores* court rejected this argument. The court reasoned that the mitigation doctrine could not be used to shift the statutorily imposed burden of providing medical care from industry to the injured worker. The court in *Thompson v. Workers' Comp. Appeals Bd.* (1994) 25 Cal.App.4th 1781 added another reason for not applying the doctrine of avoidable consequences in a workers' compensation case. The doctrine of avoidable consequences is an aspect of the common law defense of contributory negligence. The *Thompson* court pointed out that the defense of contributory negligence on the part of the employee was abolished in the workers' compensation law. (Labor Code section 3708)

There are a number of reasons why *Flores* and *Thompson* would not apply to a disability retirement claim under the CERL of 1937.

First, there is no provision in the County Employees Retirement Law of 1937 that precludes application of the doctrine of avoidable consequences.

Second, unlike the workers' compensation law, the County Employees Retirement Law of 1937 provides a disability retirement allowance for incapacities that are not work-related. In the case of a nonservice-connected illness or injury, there will be no employer acceptance of an injury and tender of treatment.

Third, even in the case of a service-connected injury, the retirement association will not be in the position to make a tender of medical treatment.

As the *Flores* court explained, however, the acceptance of liability for an injury and tender of medical treatment is a prerequisite to the application of Labor Code section 4056. Therefore, the authority invested in the Board of Retirement to make determinations of eligibility and noneligibility, an its associated inherent power that was recognized by the court in *Reynolds,* would appear to include the authority not only to apply Section 4056 by analogy, but also the authority to apply the doctrine of avoidable consequences.

Whether the injury is work-related or not work-related, whether the employer has accepted liability or made a tender of treatment, under the doctrine of avoidable consequences, the member must act reasonably in making decisions about medical care. Incapacity, work-related or not, that results from unreasonable refusal of medical care, may not be a "permanent" incapacity.

On the other hand, if medical treatment is not reasonably available, as where the member is unable to pay for it, the failure of the member to obtain the treatment would not be "an unreasonable refusal."

2. Application of workers' compensation case law: Going and Coming Rule and its exceptions:

Singh v. Board of Retirement (1996) 41 Cal.App.4th 1180, 1186-1187:

> B. Case Law [6]
>
> In *Smith v. Workmen's Comp. App. Bd*. (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365], our Supreme Court reiterated the principle that "[u]nder the well established going and coming rule, an employee does not pursue the course of his employment when he is on his way to or from work." The court noted, however, that "[i]n a number of cases we have established exceptions to this rule ..." (id. at p. 816), and went on to consider whether "we should recognize another exception to the rule ...: that at the time of the accident [the employee] was engaged in the course of his employment inasmuch as he was bringing his car to work as required by his employer." (Ibid., fn. omitted.)
>
> FOOTNOTE 6. Board argues we should not consider workers' compensation cases in determining an employee's retirement matter. Board is incorrect, as "the County

> Employees Retirement Act ... and the Workers' Compensation Act 'are related in subject and harmonious in purpose.' [Citations.] In fact, courts have looked to workers' compensation law precedent for guidance in contending with similar issues in pension law. [Citations.]" (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, fn. 4 [229 Cal.Rptr. 814, 724 P.2d 500].) There is no reason the going-and-coming rule should be interpreted in one way in one context, and differently in another.

Associations' comment
Singh answers the question of whether the "going and coming rule" is applicable to cases arising under the CERL of 1937. (Compare *Minor v. Sonoma County Employees Retirement Board* (1975) 53 Cal.App.3d 540: court in dicta stated that the going and coming rule would not render police officer's injury nonwork-related. After reporting to his employer that he had been involved in an automobile accident on the way to work and while returning to the accident scene to render first aid to accident victims, direct traffic, and secure the scene pending the arrival of the Highway Patrol, Minor attempted to vault a fence and broke his ankle.)

H. Use of WCAB Decisions and Orders

1. In general: Res Judicata, Collateral Estoppel and Judicial Estoppel.

Preciado v. *County of Ventura, et al.* (1982) 143 Cal.App.3d 783, 787, Fn 2:

> The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment. A prior judgment for the defendant on the same cause of action is a complete bar to the new action. (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, §§ 147-148, pp. 3292-3293.) Collateral estoppel is a distinct aspect of res judicata. It involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. (Id., § 197, at p. 3335.) In this case we are dealing with a claim of collateral estoppel rather than res judicata.

Associations' comment
Most frequently the issue of whether collateral estoppel is applicable comes into play in retirement cases when there has been a prior determination made in a workers' compensation case that involves some of the same issues of fact that are present in the retirement case. The claimant may try to use a favorable decision of the Workers' Compensation Appeals Board against a board of retirement. The respondent may attempt to use against the applicant a Workers' Compensation Appeals Board decision that was not favorable to the applicant.

Whether the claimant can use a decision of the Workers' Compensation Appeals Board against the board of retirement depends on the type of retirement system involved.

If the system is an "integrated system" as is seen in most city pension programs, the retirement system and its board or commission is simply an arm of the employer/city. When the city looses a litigated workers' compensation case or stipulates to certain facts in the workers' compensation case, the retirement system and its governing board or commission, as part of the city entity, is bound under the principle of collateral estoppel by the Workers' Compensation Appeals Board's findings of fact and the city's stipulations of fact to the extent those identical issues present themselves in the retirement case. The issue of service-connection will usually be identical, whereas the WCAB issue of the extent of disability is not identical to the issue of whether the claimant is incapacitated for duty.

Winn v. *Board Of Pension Commissioners* (1983) 149 Cal.App.3d 532, 537.

> Appellant urges that *Dakins v. Board of Pension Commi*ssioners (1982) 134 Cal.App.3d 374 is controlling on the issue of res judicata and collateral estoppel. In *Dakins*, a policeman had applied for a service-connected disability pension. The Board of Pension Commissioners found that the disability was not service connected. Prior to the pension board's finding, the policeman had filed a workers' compensation claim for the same disability. The Workers' Compensation Appeals Board found, prior to the Pension Board's finding, that the disability was service connected. On appeal, the appellate court held that the pension board was collaterally estopped to deny that the disability was service related. The court found that although the workers' compensation claim and the pension claim were not the same cause of action, the identical issue of whether or not the disability was service connected was litigated before the pension board and the Workers' Compensation Appeals Board. The court also found that the workers' compensation finding was part of a final judgment, and that the parties (in both cases an entity or agent of the City of Los Angeles) were identical. (*Id*., at p. 387.)

Associations' comment

A retirement system under the CERL of 1937 is a "nonintegrated system." It is not a mere administrative subdivision of the county. It is a separate legal entity. It is not bound by the factual determinations made against the county in the workers' compensation case. (*Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 402-403.)

While a nonintegrated retirement system will not be bound by the decision made against the employer, the collateral estoppel aspect of res judicata will operate to estop the applicant from relitigating against the Board of Retirement an issue identical and common to both the workers' compensation case and the retirement case, following an adverse decision before the workers' compensation appeals board.

The principle of “judicial estoppel” may also operate to bind the employee to facts the employee established or agreed to in the workers’ compensation case. For instance, if the employee agrees that his or her permanent disability is as described by a particular physician in a medical report, the employee may be “judicially estopped” from asserting in a disability retirement case that the disability is more severe.

As explained by the court in *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171,

> 'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' (Citation omitted) 'This obviously contemplates something other than the permissible practice ... of simultaneously advancing in

Dakins v. Board of Pension Commissioners (1982) 134 Cal.App.3d 374, 386-387:

> Thirdly, the parties to the WCAB proceedings and the Board proceedings were identical. The City was a party to the WCAB proceedings. The Board administers the City's department of pensions and thus acts as the agent for the City. As the City was bound by the WCAB proceedings, the Board in its representative capacity was similarly bound. The facts of the instant case are distinguishable from *Summerford v. Board of Retirement* (1977) 72 Cal.App.3d 128 [139 Cal.Rptr. 814]. In S*ummerford*, the Santa Barbara County Employees' Retirement Association (retirement board) was formed pursuant to the 1937 County Employees' Retirement Law, Government Code section 31450[et seq. The county employees' retirement associations created under the 1937 act are organizations totally distinct from the county. (*Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397 [18 Cal.Rptr. 256].) Thus, in *Summerford*, while the county was represented in WCAB proceedings, the retirement board was not. Therefore, the findings of the WCAB regarding the claimant's injury were not binding on the retirement board.

Associations' comment:
The court in *Dakins* distinguished the integrated City of Los Angeles pension system from the County of Santa Barbara's nonintegrated system formed under the County Employees Retirement Law of 1937. In *Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, the City of San Diego retirement system was treated as the city itself and found to be bound by a stipulation the city made in the member's workers' compensation case. *Id*., 57-58. The court relied on the Supreme Court's decision in a City of Oakland case, *French v. Richelle* (1953) 40 Cal.2d 477. But in *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, the appellate court ruled that the City's pension system was a separate entity, similar to the treatment given to pension plans formed under the County Employees Retirement Law of 1937. The court found the factors identified by the Supreme Court in *Traub v. Board of Retirement* (1983) 34 Cal.3d 793 that distinguish a county retirement association from the county itself to also distinguish the city pension system from the City itself. On that basis, among others, the court ruled that the city pension system was not collaterally estopped by a WCAB decision against the City.

Bianchi v. City of San Diego, supra, 214 Cal.App.3d 563, 566-67:

> Under limited circumstances, a WCAB award to an employee may collaterally estop the employee's retirement board from relitigating issues previously decided in the WCAB proceeding. . . . However, the courts have more frequently declined to give WCAB ruling collateral estoppel effect in subsequent retirement board proceedings, either because of a lack of identity of parties . . . , or because of differences between the nature of the issues considered during a workers' compensation proceeding and the nature of issues considered by a retirement board proceeding."

3. In a nonintegrated, CERL of 1937, system, a board of retirement is not bound by determinations of fact made by the Worker' Compensation Appeals Board against the county or by stipulations of fact made by the county in that case.

a) Stipulations With Request For Award

Where a self-insured county or its workers' compensation carrier enters into stipulations of fact with a request that the WCAB issue an award based on those stipulations:

(1) Disability

Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 697:

> The fact that the county through its compensation carrier stipulated to a 33 percent disability rating before the Workmen's Compensation Appeals Board does not bind the retirement board in these proceedings with respect to the issue of the deputy's capacity to perform his duties. (See *Grant v. Board of Retirement (*1967) 253 Cal.App.2d 1020, 1021; and *Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 402, 406.)

(2) Service-connection

McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1048, fn. 2:

> [S]tipulations and orders in . . . WCAB action[s] have no collateral estoppel or res judicata effect [in the retirement hearing] because the requisite privity between the County, against which the workers' compensation award is made, and the Retirement Board, is lacking.

See also *Traub v. Board of Retirement* (1983) 34 Cal.3d 793.

McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1055:

> We conclude that the County's stipulations as to industrial causation constituted relevant evidence of the sort on which responsible persons are accustomed to rely in the conduct of serious affairs. ([LACERA's Procedures For Disability Retirement Hearings,] Rule 10(c); [Gov. Code] § 11513, subd. (c).) The stipulations were properly subject to the trial court's independent review of the evidence. While the stipulations were not binding against the Board herein (*Traub v. Board of Retirement, supra*., 34 Cal.3d at pp. 798-799), and while they may not be entitled to great weight given that the County's reasons for conceding industrial causation remain a mystery, they nevertheless possess a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see rule

10(c); § 11513, subd. (c).)

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement (2001) 91 Cal.App.4th 730, 736:

> Nor is the Board obligated to accept a stipulation between employer and employee that a disability is service connected. The Board is responsible for administering the retirement fund. The Board must, therefore, make its own determination on the factual question of whether a disability is service connected. (ss 31725.7, 31725.8; *Masters v. San Bernardino County Employees Retirement Assn., supra*, 32 Cal.App.4th 30, 45.)

b) Findings and Award

Where the county or its insurance carrier litigate the issues before the Workers' Compensation Appeals Board and the Appeals Board issues its decision:

Flaherty v. Board of Retirement, supra, 198 Cal.App.2d , 405- 406:

> The association had no standing to appear in the proceeding before the Industrial Accident Commission and there contest the claim that there was a causal relation between Captain Flaherty's participation in the volleyball game and his permanent disability. In rejecting a similar contention that the doctrine of res judicata was applicable with respect to an award in a proceeding to obtain workmen's compensation, it was said in *Mutual Benefit Health & Accident Assn. v. Neale*, 43 Ariz. 532 [33 P.2d 604], at page 610 [33 P.2d]: "As a matter of common law, it has long been the rule that a judgment in personam against any person who is a stranger to the cause, is evidence only of the fact of its own rendition, and may not be introduced to establish the facts upon which it has been rendered. [Citations.] And the test of whether a person is a stranger is whether he was interested in the subject-matter of the proceeding, with the right to make defense, to adduce testimony, to cross-examine the witness on the opposite side, to control in some degree the proceeding, and to appeal from the judgment. [Citations.]" No basis exists in the present case for a claim that the findings of fact of the commission are binding upon the association under the doctrine of res judicata. (See *Bernhard v. Bank of America*, 19 Cal.2d 807, 811 [122 P.2d 892]; cf. *Dillard v. McKnight*, 34 Cal.2d 209, 214-215 [209 P.2d 387,11 A.L.R.2d 835.

Summerford v. Board of Retirement (1977) 72 Cal.App.3d 128, 132**:**

> While the county was represented in the WCAB proceeding, the Retirement Board was not. Therefore, findings of the WCAB regarding the claimant's injury are not binding upon the Retirement Board. The Retirement Board has a 'valid, independent right to determine whether petitioner suffered injury in the course and within the

scope of his employment.' (citations omitted)

Preciado v. *County of Ventura, et al.* (1982) 143 Cal.App.3d 783:

> Three requirements must be met before collateral estoppel will be applied: (1) the issue decided in the prior adjudication must be identical with the one presented in the action in question; (2) a final judgment on the merits must have been reached in the prior proceeding; (3) the party against whom the plea is now asserted must have been a party or in privity with a party to the earlier action. (citations omitted.) (*Id*., 143 Cal.App.3d, 787.)
>
> An association formed under the County Employees' Retirement Act of 1937 is separate and distinct from the county." (Citations omitted. *Id*., 143 Cal.App.3d, 788.)
>
> The retirement board was a party to the retirement proceedings but was not represented in the WCAB proceeding. Accordingly, the requirement of identity of parties has not been met and the doctrine of collateral estoppel does not apply. (*Id*., 143 Cal.App.3d, 789.)

c) Findings and Order

Where the county or its insurance carrier litigate the issues and the Workers' Compensation Appeals Board issues a decision or decisions on issues of fact adverse to the applicant:

Bernhard v. Bank of America (1942) 19 Cal.2d 807, 811-812:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. (*Coca Cola Co. v. Pepsi Cola Co., supra*. See cases cited in 24 Am. & Eng. Encyc. (2d ed) 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. (Ibid.) There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

d) Compromise and Release

The county or its insurance carrier and the applicant settle the applicant's claim for compensation for a certain sum of money going to the applicant and, in exchange, the applicant releases the county and/or its carrier from liability for certain identified benefits. Such a settlement may or may not contain admissions of, or stipulations to,

facts.

The usual settlement agreement is formulated on one of three approved forms [DIA Form 15 (Compromise and Release), DIA Form 16 (Compromise and Release (Dependency Claim), DIA Form 17 (Third Party Compromise and Release)] which set forth what the applicant claims occurred rather than an agreement as to what did occur. See discussions in the following treatises: Hanna, *California Law of Employee Injuries and Workers' Compensation* (Revised Second Edition), Chapter 29, "Compromise and Release"; Herlick, *California Workers' Compensation Law*, (Fifth Edition) Chapter 18, "Settlements and Case Evaluation" ."

Labor Code § 5001:

> Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee.

Title 8, California Code of Regulations, Rules of Practice and Procedure of the Workers Compensation Appeals Board, § 10870:

> Agreements which provide for the payment of less than the full amount of compensation due or to become due, and which undertake to release the employer from all future liability, will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval would be for the best interests of the parties.

2 Herlick, *California Workers' Compensation Law*, *supra*, 18.7:

> Compensation is the measure of the responsibility of the employer or insurance carrier, therefore, a settlement will not be approved unless it is deemed adequate under the circumstances.

Associations' comment
Whether the issue to be settled is the extent of benefits involved or whether there is a legal issue involving liability, the starting point in determining adequacy is an estimation of the benefits which might be awarded. Because of a conflict in medical evidence, a case may present a range of benefit possibilities. These factors are then measured according to the strength of the record on liability to determine if the settlement is adequate.

I. Interpretation of Medical Reports Submitted in WCAB Proceedings

1. Methods of Measurement

Physicians reporting in workers' compensation proceedings are directed to describe physical impairment and psychiatric disability in accordance protocols established by the Department of Industrial Relations, Division of Workers' Compensation.

Title 8, California Code of Regulations, Chapter 4.5, Division of Workers' Compensation, Subchapter 1, Administrative Director - Administrative Rules:

§ 9725. Method of Measurement.

> The method of measuring physical elements of a disability should follow the Report of the Joint Committee of the California Medical Association and Industrial Accident Commission, as contained in "Evaluation of Industrial Disability" edited by Packard Thurber, Second Edition, Oxford University Press, New York, 1960.'
>
> Note: Authority cited: Sections 5307.3 and 4660(b), Labor Code.

§ 9726. Method of Measurement (Psychiatric).

> The method of measuring the psychiatric elements of a disability shall follow the Report of the Subcommittee on Permanent Psychiatric Disability to the Medical Advisory Committee of the California Division of Industrial Accidents, entitled "The Evaluation of Permanent Psychiatric Disability," (hereinafter referred to as the "Psychiatric Protocols") as adopted, forwarded for adoption on July 10, 1987, and subsequent amendments and/or revisions thereto adopted after a public hearing.
>
> Note: The Report (which contains these Protocols) of the Subcommittee on Permanent Psychiatric Disability, as adopted, does not appear as a printed part of the Administrative Director's Regulations (8 California Code of Regulations, Section 9726); copies will be available through the Medical Director of the Division of Industrial Accidents.
>
> Authority cited: Sections 4660 and 5307.3, Labor Code. Reference: Section 4660, Labor Code.

2. Industrial Medical Council evaluation methodolgy for certain medical conditions

The Industrial Medical Council examines and appoints physicians to be qualified medical evaluators in workers' compensation claims and regulates the evaluation process.

The Industrial Medical Council, in Title 8, California Code of Regulations, sections 43 through 47, provides "guidelines . . . . to serve as standards to be used by evaluating physician(s) when performing medical-legal evaluations for specific types of injuries. Those guidelines deal with the following kinds of disability: psychiatric, pulmonary,

cardiac (including hypertension), neuromusculoskeletal, and immunologic. The guidelines may be accessed at www.dir.ca.gov/IMC/ guidelines.html.

3. Definitions of Terms Used to Describe Subjective Complaints

Physicians reporting in workers compensation proceedings describe subjective disability in accordance with a certain protocol established by the Department of Industrial Relations, Division of Workers' Compensation.

Title 8, California Code of Regulations, § 9727. Subjective Disability, provides,.

Subjective Disability should be identified by:

A description of the activity which produces the disability.
The duration of the disability.
The activities which are precluded and those which can be performed with the disability.
The means necessary for relief.

The terms shown below are presumed to mean the following:

A severe pain would preclude the activity precipitating the pain.
A moderate pain could be tolerated, but would cause marked handicap in the performance of the activity precipitating the pain.
A slight pain could be tolerated, but would cause some handicap in the performance of the activity precipitating the pain.
A minimal (mild) pain would constitute an annoyance, but causing no handicap in the performance of the particular activity, would be considered as nonratable permanent disability.

4. Guidelines For Work Capacity (Work Restriction Categories)

The descriptive categories typically used for work restrictions applicable to disabilities of the pulmonary system, heart, abdomen, spine and lower extremities are set forth in the Guidelines For Work Capacity listed and defined in former DIA Form 302, the Schedule For Rating Permanent Disabilities. A new schedule applicable to injuries sustained on or after April 1, 1997 preserves the substance of the former guidelines. They describe levels of disability that are assigned a standard percentage rating which then may be adjusted up or down depending on the age and occupation of the injured employee. Physicians who must describe disabilities may use the descriptive categories when they are applicable. Referees and trustees will see the categories used frequently in written reports prepared for workers' compensation proceedings and will hear the terms used in the testimony of physicians who are familiar with the workers' compensation system.

Disability Precluding Very Heavy Lifting 10%

contemplates the individual has lost approximately one-quarter of his pre-injury capacity for lifting.
(A statement 'inability to lift 50 pounds' is not meaningful. The total lifting effort, including weight, distance, endurance, frequency, body position and similar factors should be considered with reference to the particular individual.)

Disability Precluding Very Heavy Work 15%
contemplates the individual has lost approximately one-quarter of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling and climbing or other activities involving comparable physical effort.

Disability Precluding Heavy Lifting 20%
contemplates the individual has lost approximately half of his pre-injury capacity for lifting.
(See statement regarding lifting under “Very Heavy Lifting” above.)

Disability Precluding Heavy Lifting, Repeated Bending 25%
and Stooping
contemplates the individual has lost approximately half of his pre-injury capacity for lifting, bending and stooping.

Disability Precluding Heavy Work 30%
contemplates the individual has lost approximately half of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, and climbing or other activities involving comparable physical effort.

Disability Precluding Substantial Work 40%
contemplates the individual has lost approximately 75% of pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, and climbing or other activities involving comparable physical effort. [This guideline applies to injuries sustained on or after 4/1/97.]

Disability Resulting in Limitation to Light Work 50%
contemplates the individual can do work in a standing or walking position, with a minimum of demand for physical effort.

Disability Resulting in Limitation to Semi-Sedentary Work 60%
contemplates the individual can do work approximately one half the time in a sitting position, and approximately one half the time in a standing or walking position, with a minimum of demands for physical effort whether standing, walking or sitting.

Disability Resulting in Limitation to Sedentary Work 70%
contemplates the individual can do work predominantly in a sitting position at a bench, desk or table with a minimum of demands for physical effort and with some degree of walking and standing being permitted.

J. Distinctions in the Meaning of “Disability”

1. ADA

“Disability” is

> (1) A physical or mental impairment that substantially (by comparison to an "average person") limits (considering nature, severity, duration and impact) a major life activity (e.g., caring for oneself, seeing, hearing, walking, speaking, breathing, learning, working, sitting, standing, lifting, reaching, concentrating, interacting with others, sleeping.) or
>
> (2) A record of such impairment, or
>
> (3) Being regarded as having such an impairment. (42 U.S.C. § 12101, subd. (2))

Associations' comment
Under the expansive definition of "disability", the impairment does not have to be permanent or even presently incapacitating.

2. Workers' Compensation

“Permanent disability” is a permanent injury that impairs a worker's earning capacity or a worker's bodily function, or that creates a competitive handicap for the worker in the open labor market. (*Franklin v. Workers’ Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 237.)

In its *Summary of SB 899 by Labor Code section,* the Commission on Health and Safety and Workers’ Compensation explained that the workers’ compensation reform act of April 2004, SB 899, provides that “diminished ability to compete” element of permanent disability in California is now replaced by “diminished future earning capacity.” ‘Other basic principles remain the nature of the physical injury or disfigurement, age, and occupation. ¶ The “nature of the physical injury or disfigurement” shall incorporate the AMA Guides for both descriptions and percentage impairments.’

The journal of the American Academy of Family Physicians, “American Family Physician,” November 1, 2001, stated,

> According to the American Medical Association's "Guides to the Evaluation of Permanent Impairment," (footnote omitted) impairment can be defined as a loss of physiologic function or anatomic structure. Permanent impairment implies that the condition has persisted to a sufficient degree that further medical, psychologic, surgical and rehabilitative interventions are unlikely to produce any substantial improvement in the condition, level of function or quality of life over the course of the next year. By contrast, disability can be defined as a reduced ability to meet

> occupational demands as a result of impairment and other associated factors. Therefore, disability is a broad term that encompasses not only impairment but also a multitude of other factors, as listed in Table 1.5, (Table and Footnote omitted) Disability is frequently stratified in terms of extent and permanency (Figure 1, omitted).

The new California permanent disability rating system will be applicable to injuries on or after the issuance of the new rating schedule which is due on January 1, 2005. It is also applicable to injuries before January 1, 2005 if there has been no comprehensive report written, there is no report from a treating physician that declares the injured worker permanent and stationary, and there is no obligation for employer to issue Labor Code section 4061 notice that temporary disability is being terminated.

3. CERL of 1937

"Permanent incapacity" for the performance of duty is the substantial inability of a member to perform his or her usual duties. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 694-696.)

Associations' comment
The Board of Retirement has no authority to enforce the ADA or to force the employer to provide reasonable accommodations to a member. However, in determining whether a member is permanently incapacitated for the performance of the usual duties of his job, the Board should consider those accommodations that have been offered by the employer.

K. Confidentiality

Government Code § 31532 provides as follows:

> Sworn statements and individual records of members shall be confidential and shall not be disclosed to anyone except insofar as may be necessary for the administration of this chapter or upon order of a court of competent jurisdiction, or upon written authorization by the member.

L. Interest

Weber v. Board of Retirement (1998) 62 Cal.App.4th 1440, 1442:

> We hold CERL does not authorize the board, either implicitly or explicitly, to award interest under section 3287(a), and so based on AFL-CIO and CERL, judgment was properly entered on the pleadings.

M. Motion picture films and video tape

Baker v. Workmen's Comp. Appeals Bd., supra, 18 Cal.App.3d, 859:

> The record suggests only three possible alternatives: (1) petitioner is malingering, or (2) he has cardiovascular disease, or (3) he sustained a psychoneurotic injury.
>
> There was no evidence that petitioner's complaints were feigned. The board did not so find. Petitioner's testimony concerning his complaints was uncontradicted and unimpeached. None of the many doctors who examined petitioner suggested that his complaints were not genuinely felt. While performing a treadmill exercise test at the White Memorial Hospital, petitioner lost consciousness and had to be administered oxygen and was given nitroglycerin. Dr. Madlem who made the psychiatric evaluation did not suggest that petitioner's complaints were contrived. Although respondents introduced motion pictures taken by its investigators showing petitioner doing light work in his yard, the referee noted that the episodes filmed were too brief to be of any significance and the activities depicted were entirely consistent with petitioner's testimony. The motion picture evidence thus would not have constituted substantial evidence to support a finding that petitioner had not incurred a permanent disability. (See *Redner v. Workmen's Comp. Appeals Bd*., 5 Cal.3d 83, 96-97.)"

Redner v. *Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 83:

> In early July 1968 a person who told applicant that his name was Robert Hendry befriended applicant and invited him to his ranch for the following weekend; applicant accepted. Hendry drove applicant to this ranch; there Hendry gave a small party, serving very little food but a great number of mixed drinks. The guests became inebriated. Hendry suggested that the party go horseback riding, and applicant joined the others in doing so.
>
> During the riding and saddling of the horses, Chavez concealed himself in Hendry's barn and took about 350 feet of film. The motion picture shows applicant saddling, riding, walking, and unsaddling a horse. Thereafter, on the next day applicant rode again. Unobserved by the riding party, Chavez took more motion pictures of applicant's activities. [FN3 (omitted] On the basis of the film the insurance carrier ceased payment of temporary disability compensation on August 6, 1968, and refused to provide further medical care for applicant.
>
> After the riding episode, applicant, upon arriving home and sleeping that night, could not arise the next day because of severe pain in his back. Recuperating at home, applicant remained largely in bed for three weeks." (*Id*., 5 Cal.3d, 87)
>
> . . . .
>
> Even if the motion picture evidence had been offered in a timely fashion at the referee's hearing, the referee should have refused to rely upon it because the carrier obtained it by fraudulent inducement. The record contains uncontradicted testimony

by applicant that the private investigator induced applicant's intoxication and subsequent horseback ride in order to obtain a film of this activity. The carrier thereafter attempted to profit by this questionable conduct: it sought to introduce the film in evidence at the compensation proceeding.

We recognize that motion picture evidence is now quite commonly utilized in personal injury and workmen's compensation litigation. (citations omitted) Ordinarily, of course, motion pictures are obtained without fraudulent inducement. [FN12 (omitted)] Under such circumstances the film may constitute competent evidence to be considered in determining the extent of disability. On rare occasions, however, the insurance carrier or its private investigators have deceitfully induced applicants to perform acts for the hidden camera which they would not otherwise have committed. (Citation omitted) [FN13 (omitted)]

In the present proceeding, the carrier should not profit from its own deceitful conduct. The investigators feigned friendship and concealed their employer's identity in bringing about applicant's inebriation and effectuating his horseback ride.

Harmon v. *Board of Retirement* (1976) 62 Cal.App.3d 689, 697:

A review of the physician's reports reflects that aside from a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms. His credibility was impeached by the contradictions in his testimony concerning his ability to play, and his actually engaging in playing, golf. On such a record the fact finders were entitled to consider what was observed by the witness, and what they, and we, could observe on the motion pictures. We cannot say as a matter of law that the finding of the trial court that the deputy is not permanently incapacitated for the performance of duty is erroneous as a matter of law.

Sully-Miller Contracting Company v. *Workers' Comp. Appeals Bd.* (1980) 107 Cal.App.3d 916, from the editorial summary:

. . . .At the hearing on its petition to reopen, the employer presented a surveillance film which revealed the worker engaged in activities which were inconsistent with the earlier finding of disability. In addition, a physician testified that the film corroborated his earlier diagnosis that the worker was not disabled. The worker did not contradict either the film or the physician's testimony.

The Court of Appeal held that the board erred in denying the employer's petition to reopen and remanded the case for further proceedings. The court held that the board was required to accept as true the evidence presented through the surveillance film and the physician's testimony, since neither was contradicted or impeached. Under

these circumstances, the court held the board was unreasonable in concluding that the surveillance film was not representative of the worker's activities during the day depicted and in concluding that the physician was not a truly impartial witness.

National Convenience Stores v. *Workers' Comp. Appeals Bd*. (1981) 121 Cal.App.3d 420, 426:

> At the hearing before the workers' compensation judge, applicant presented a picture of a gravely disabled person. He told the judge that he lacked the strength to pick up a glass of liquid, and that in pouring milk from a one-half gallon container, he needed two hands to accomplish the task. Applicant testified variously as follows: "I can't lift anything of any weight. I can't grasp. I tried lifting a bowling ball .... I can't lift a bowling ball .... When I walk or stand, I still have pain [in the knees] .... Medium to severe .... The more I stand or walk, the worse it gets."
> Employer then produced surveillance motion picture films taken of applicant just a few days prior to the hearing. In that film, applicant is shown playing a round of golf carrying his clubs unassisted by a cart or caddy. This activity obviously involved considerable walking, lifting and grasping. (*Id*., 121 Cal.App.3d, 426)
> Many of the [psychiatrist] doctor's conclusions are based upon the fact that the applicant apparently told the doctor that he was physically unable to do anything. The statement is of course disproved by the surveillance film. . . . The Workers' Comp. Appeals Bd.'s finding that applicant sustained injury to his psyche as the result of his industrial accident of March 15, 1978, is annulled. (*Id*., 121 Cal.App.3d, 430)

M/A Com-Phi v. *Workers' Comp. Appeals Bd*. (1998) 65 Cal.App.4th 1020, 1024 - 1025:

> Although evidence should be considered in light of the entire record, medical reports and opinions are not substantial evidence sufficient to support a decision if they are based on incorrect or inadequate histories, examinations, legal theories, speculation, or are no longer germane. (*Bracken v. Workers' Comp. Appeals Bd*. (1989) 214 Cal.App.3d 246 and *Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372.)

> Dr. Stalberg reported very slight disability and a need for vocational rehabilitation, if Sevadjian's alleged fear of electrical shock was reasonable and honest, as it appeared. Dr. Ruffman, in finding some disability, stated he was not sure whether Sevadjian was exaggerating or malingering. Although both doctors may have discounted Sevadjian's subjective complaints as the WCJ concluded, this does not rule out that the false history, also found by the WCJ, influenced their opinions to some extent. In addition, without addressing the surveillance films the doctors' reports were no longer germane.

See also *County of Alameda v. Board of Retirement (Carnes)* (1988), supra 46 Cal.3d 902, 905.

N. Systemic Prejudice and Due Process:

1. Does the Board's fiduciary duty require that it remain neutral on the question of whether the applicant is entitled to benefits and leave to the employer the decision to oppose the application?

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement, supra, 91 Cal.App.4th 734-735, 734-735:

> Appellant correctly notes that the Board owes fiduciary duties of good faith and loyalty to the county employees who are members of the retirement system. (*Hittle v. Santa Barbara County Employees Retirement Assn*. (1985) 39 Cal.3d 374, 392-393 [216 Cal.Rptr. 733, 703 P.2d 73].) He contends this duty of loyalty requires the Board to avoid taking a position adverse to any employee. Thus, appellant contends, the Board breaches its duty of loyalty whenever it "actively" opposes an application by retaining counsel, hiring a doctor who opines that an employee is not eligible for benefits, or permits staff members to testify against an applicant at a hearing. Appellant appears to contend that the Board's fiduciary duties require it uncritically to approve every application for benefits, or at the very least to remain neutral on the question of whether a particular applicant is entitled to benefits. We are not persuaded.
>
> Board members "are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty (Gov. Code, s 31725) and whether the disability is service connected (cf. Gov. Code, ss 31725.7, 31725.8)." (*Masters v. San Bernardino County Employees Retirement Assn*. (1995) 32 Cal.App.4th 30, 45 [37 Cal.Rptr.2d 860].) The Board is therefore required to administer the retirement system "in a manner to best provide benefits to the participants of the plan." (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1493 [280 Cal.Rptr. 847]; see also Cal. Const., art. XVI, s 17.) It cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. (*City of Sacramento v. Public Employees Retirement System, supra*, 229 Cal.App.3d at p. 1494; see also Gov. Code, s 31723 [board may require such proof as it deems necessary to determine the existence of a disability]; *Masters v. San Bernardino County Employees Retirement Assn., supra*, 32 Cal.App.4th at p. 46.) Thus, the Board fulfills, rather than breaches its fiduciary duties when it retains staff, lawyers and doctors to represent it at benefit hearings.
>
> For the same reasons, we reject appellant's contention that to fulfill its fiduciary duty to remain neutral at the hearing, the Board must rely only upon the employer to oppose applications that lack merit. The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant. It is not

required to rely upon third parties, even interested third parties, to make those determinations on its behalf.

2. Does the retirement association's hiring of staff to investigate the applicant's claims, physicians to examine the applicant and offer opinions, and attorneys to oppose the application in a hearing violate the due process and/or statutory rights of applicants for disability retirement benefits?

a) Right to due process:

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement, supra, 91 Cal.App.4th, 735-736:, 735:

Appellant contends the Board violates his due process rights by unilaterally selecting a hearing officer to decide his application and by actively opposing the application. Appellant presents no evidence that any person involved with his application is actually biased against him. Instead, his argument assumes that that all hearing officers and staff members are biased against all applicants because they are paid by the Board, which is itself biased against all applicants. The claims are without merit. First, the claims fail because they are unsupported by any evidence of actual bias and bias may not be presumed. (3a) "[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. [Citation.] We must start, however, from the presumption that the hearing officers ... are unbiased. [Citations.] This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. [Citations.] But the burden of establishing a disqualifying interest rests on the party making the assertion." (*Schweiker v. McClure* (1982) 456 U.S. 188, 195-196 [102 S.Ct. 1665, 1670, 72 L.Ed.2d 1, 8], fn. omitted; accord, *Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590, 623 P.2d 151] ["A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. 'Bias and prejudice are never implied and must be established by clear averments.' "].)

b) Statutory rights:

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement, supra, 91 Cal.App.4th, 735-736:, 735:

Neither CERL nor article XVI, s 17 of our state Constitution prohibits staff members from participating in benefit hearings. To the contrary, both require the Board to administer the retirement fund for the benefit of its members and to manage the fund with care, prudence and skill. The Board cannot fulfill these functions unless it investigates applications and pays benefits only to applicants who are eligible for them. (*City of Sacramento v. Public Employees Retirement System, supra*, 229

Cal.App.3d at p. 1494.)

Moreover, CERL permits the Board to "require such proof" of disability "as it deems necessary" before determining that an applicant is eligible for benefits. (s 31723.) To that end, the statute permits the Board to retain counsel, appoint staff, obtain medical reports and hold hearings on applications. (ss 31522.1, 31529, 31533, 31723.) Nothing in the statute or the Constitution requires the Board to remain neutral throughout the application process. Accordingly, the Board does not violate CERL when it participates in (sic) as a party in benefit hearings.

Associations' comment

This does not mean that boards of retirement need not be mindful of the requirement that it proceed with due process. If a board's fact finding process involves an adversary model, the board's legal advisor should not act as an advocate before it. The chance that the board will show preference toward the advocate if the advocate is also the board's advisor is present and unacceptable. "The attorney may occupy only one position at a time and must not switch roles from one meeting to the next." (*Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817; *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575.)

3. Does the selection of referees by a CERL of 1937 Retirement Association violate the due process rights of applicants for disability retirement benefits?

Some, but not all, Boards of Retirement under the CERL of 1937 utilize referees to conduct administrative hearings and make proposed findings of fact and recommended decisions that the Boards may or may not adopt as their decisions. (Government Code §§ 31533 - 31534) More than one law firm that represent disability retirement applicants raise the issue of "systemic prejudice" at the administrative hearing, challenging the procedure followed by some boards of hiring attorneys to perform the functions of referees.

Applicant's comment

Where one party to a dispute has the unrestricted right to select a decision-maker from a list of hearing officers, and pays that hearing officer, the due process rights of the other party have been violated. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986) 475 U.S. 292, 106 Sup.Ct. 1066. The California Supreme Court in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, without citing *Chicago Teachers*, concluded that, in connection with an administrative hearing on the revocation of a massage license, due process requires disqualification of a hearing officer who is chosen on an ad hoc basis and paid unilaterally by a county.

Haas v. County of San Bernardino, supra, 27 Cal.4th, 1024-1025:

The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects

and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes. To summarize the governing principles, due process requires fair adjudicators in courts and administrative tribunals alike. [FN7 omitted] While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, [FN8 omitted] the rules are not more flexible on the subject of financial interest. [FN9 omitted] Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. [FN10 omitted] No persuasive reason exists to treat administrative hearing officers differently. We consider each of these points in more detail below.

Haas, supra, 1029-1030:

The compensation system at issue in the case before us is functionally similar to the system condemned in Brown, supra, 637 F.2d 272, and the other fee system cases (citations omitted). Here, as there, the prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law for at least five years. (Gov. Code, s 27724.) [FN16 omitted] Here, as there, while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. Finally, adjudicators selected and paid in this manner, for the same reason here as there, have a "possible temptation ... not to hold the balance nice, clear and true." (citations omitted)

Haas, supra, 1037:

The problem we address in this case arises only when counties forgo these options (establishing an office of the county hearing officer or contracting with the State Office of Administrative Hearings) and, instead, hire temporary hearing officers under Government Code section 27724. Because that section imposes only the requirement that a person selected as hearing officer have been licensed to practice law for at least five years, counties by default have much freedom to experiment and to adopt selection procedures adapted to their individual needs. [FN22] To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county. (1d) The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an

adjudicator's future income from judging depends on the good will of frequent litigants who pay the adjudicator's fee.

> FN22 While we do not require any particular set of rules, or pass judgment on rules not before us, to suggest some procedures that might suffice to eliminate the risk of bias may be helpful. For example, a county that wished to continue appointing temporary hearing officers on an ad hoc basis might adopt the rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time long enough to eliminate any temptation to favor the county. Under such a rule, an attorney might be appointed to hear all cases arising during the designated period. A county that needed more hearing officers might, under similar rules, appoint a panel of attorneys to hear cases under a preestablished system of rotation. None of these options would likely entail significant additional costs. Finally, it bears repeating that counties may use their existing statutory authority to contract with the state for the services of an administrative law judge (Gov. Code, s 27727) or to establish and staff the office of county hearing examiner (id., s 27720).

Associations' comment

The *Haas* court's footnote 22 shows that a system of rotation can avoid the appearance of impropriety. Note the following excerpt from an unpublished opinion of the Court of Appeal in a Santa Barbara County Employees Retirement Association case. This opinion cannot be cited to any court, but shows how the court handled a post-*Haas* attack on the use of a panel of attorneys who act as referees.

Herzog v. Board of Retirement (2003) (Not Officially Published; Cal. Rules of Court, Rules 976, 977; 2003 WL 21054796 (Cal.App. 2 Dist.))

> Furthermore, [applicant/appellant's] counsel acknowledges in his opening brief that the instant referee was appointed from an approved panel under a neutral system of rotating appointments. (*Haas v. County of San Bernardino, supra,* 27 Cal.4th at p. 1037, fn. 22, 119 Cal.Rptr.2d 341, 45 P.3d 280 [approving this method].) Due process only requires the use of a reasonably impartial, noninvolved reviewer. Picking a hearing officer from a rotating panel of attorneys satisfies due process. (See *Haas,* at p. 1037, fn. 22, 119 Cal.Rptr.2d 341, 45 P.3d 280.)

McIntyre v. Santa Barbara County Employees' Retirement System, Board of Retirement, supra, 91 Cal.App.4th, 735-736:, 735-736:

> We also reject the contention that the Board violates due process by unilaterally selecting hearing officers. "Due process does not require a perfectly impartial hearing officer for, indeed, there is no such thing. [Citation.] Rather ... due process in these circumstances requires only a ' reasonably impartial, noninvolved reviewer.' " (*Linney*

v. Turpen (1996) 42 Cal.App.4th 763, 770-771 [49 Cal.Rptr.2d 813].) (2b) The fact that hearing officers are selected and compensated by the Board does not demonstrate their anti-applicant bias. Due process does not compel applicants' participation in the selection of hearing officers. (Id. at p. 777.)

Nor is the Board prohibited from both investigating and adjudicating applications for retirement benefits. (3b) As the Supreme Court explained in *Withrow v. Larkin* (1975) 421 U.S. 35 [95 S.Ct. 1456, 43 L.Ed.2d 712], "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation ...." (Id. at p. 58 [95 S.Ct. at p. 1470, 43 L.Ed.2d at p. 730]; see also *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1809 [20 Cal.Rptr.2d 903] [due process permits city manager to terminate police chief, select and pay hearing officer to review termination, and disregard or veto recommendation of hearing officer]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 579 [257 Cal.Rptr. 427].)

Associations' comment

A referee in a CERL of 1937 case does not *make* a decision. The referee *proposes* findings of fact and *recommends* a decision to the Board of Retirement. (Government Code § 31533) The applicant has the opportunity to object to the proposed decision and bring any defect in the referee's recommendation to the Board's attention. (Government Code § 31534) The decision-maker is not the referee. The decision is made by the Board of Retirement, whether it adopts the referee's proposed decision or makes its own decision on the record made before the referee or on the evidence received in a subsequent hearing before the Board itself. (Government Code § 31534)

The facts of the *Chicago Teachers* case differ markedly from the administrative hearings held under the CERL of 1937. That opinion does not support the claim that a retirement association's selection of a referee violates due process. In *Chicago Teachers*, the teachers' union and the Board of Education entered into an agreement whereby an "agency fee" would be deducted from nonmembers' paychecks for a proportionate share of the union's costs representing the cost of the nonmembers' enjoyment of the benefits of the collective bargaining process. The agency fee was set by the union at 95% of the amount of dues paid by members of the union.

The union attempted to install a process by which nonmembers' objections to the fees could be heard and if, after initial review of the objections by the union's Executive Committee, the nonmember still persisted, the union's Executive Board would consider the objections. If the nonmember still complained, the union would select an arbitrator from a list of arbitrators maintained by the State Board of Education.

The Supreme Court of the United States found that the arbitrator-selection process violated principles of due process. The Court reasoned that a "union shop" was "a significant impingement on First Amendment rights" (*Id.*, 475 U.S., 302), the potential of a rebate after forced exaction of dues does not protect the individual's freedoms of expression and association against temporary violation (*Id.,* 475 U.S., 305 – 306) and

the burden is placed on the individual nonmember to raise an objection.

> "The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." (*Id.* 475 U.S., 307) . . . .
>
> The Union's procedure does not meet this requirement. As the Seventh Circuit observed, the "most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees." 743 F.2d, at 1194-1195. The initial consideration of the agency fee is made by Union officials, and the first two steps of the review procedure (the Union Executive Committee and Executive Board) consist of Union officials. The third step--review by a Union-selected arbitrator--is also inadequate because the selection represents the Union's unrestricted choice from the state list. [Footnote omitted] (*Id*., 475 U.S., 308)

There are factors that distinguish the typical CERL of 1937 hearing officer selection process from *Chicago Teachers* and *Haas*. Exactly how many are applicable to a particular Retirement Association will depend on the facts and circumstances attendant to the referee selection process used by the individual retirement association.

The Board of Retirement, not the referee, is charged by statute with making the decision on applications for disability retirement. (Government Code §§ 31533 - 31534; 31725)

Gai v. City of Selma (1998) 68 Cal.App.4th 213, 233:

> Third, in *Andrews* the Supreme Court stated that "... the appearance of bias standard may be particularly untenable in certain administrative settings. For example, in an unfair labor practice proceeding the Board is the ultimate factfinder, not the [administrative law officer]." (*Andrews v. Agricultural Labor Relations Bd.*, *supra*, 28 Cal.3d at p. 794.) That comment applies to the instant case as well. The Commission's findings and recommendation were submitted to the Council, which was required to review them and either affirm, revoke or modify the action taken. The Commission served only as an advisory body to the Council which had ultimate authority in the matter.

Unlike the union personnel in *Chicago Teachers* who were obviously in a position contrary to that of the nonunion employee-plaintiffs, the Board of Retirement making the selection of referees is not made up of persons with interests opposed to applicants. The Board of Retirement consists of retired members, members elected by employees, those appointed by the Board of Supervisors, as well as the County's Treasurer. (Government Code §§ 31520 (five member board) and 31520.1 (nine member board)) Thus, applicants for disability retirement pensions have representation on the very board that selects the referees. Depending on the kind of referee selection process

utilized by a Board of Retirement (e.g., a blind rotation procedure is followed in selecting a referee), the same sort distinction can be made between the Deputy County Counsel in *Haas* who was acting in the role of a prosecutor while at the same time unilaterally selecting a hearing officer on an ad hoc basis and compensating the hearing officer, on the one hand, and the Board of Retirement.

Unlike the union personnel in *Chicago Teachers* who would select the hearing officer, the Board of Retirement is not an antagonist, but has a fiduciary relationship with its members.

Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 392:

> As a result, "[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits ... and the trustees must exercise their fiduciary trust in good faith and must deal fairly with the pensioners-beneficiaries. [Citations omitted.]"

The Board is authorized to have the administrative hearing held before itself. (Government Code §§ 31533 and 31534)

The Board of Retirement is authorized by statute to appoint a member of the State Bar, or one of the Board's own members, to preside at an administrative hearing. (Government Code § 31534)

The member applicant, applicants' attorney law firms and groups representing employees may have opportunities to present their views, including objections, to the appointment of an attorney to a panel of referees maintained by the retirement association.

Various Boards of Retirement have rules of procedure that permit peremptory disqualification of a referee and will hear claims that a referee should be disqualified for actual bias.

Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, et al., (1998) 62 Cal.App.4th 1123, 1142 (Petitioner asserted that he was denied a fair hearing because the final determination regarding this physician's removal would be made by the hospital which had a pecuniary interest in the matter):

> However, bias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient.

Andrews v. Agricultural Labor Relations Board (1981) 28 Cal.3d 781, 790-791:

> Petitioners revive the same discarded stereotype of bias relative to disqualifying a judicial officer that Judge Jerome Frank addressed many years ago: "Democracy

must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. ... Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference." (Citation omitted)

Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568, 582:

Rather, as in the federal courts, our Supreme Court requires a party seeking to show bias or prejudice on the part of an administrative decisionmaker (sic) to prove the same with concrete facts: "'Bias and prejudice are never implied and must be established by clear averments.' [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (Citations omitted)

Linney v. Turpen, et al., (1996) 42 Cal.App.4th 763, 770 - 771: Employee suspended for six months challenged the administrative hearing on due process grounds including (1) that the selection of the hearing officer by the employer city was an unfair "unrestricted" selection; (2) payment by the city creates a bias on the part of the hearing officer in his effort to encourage more case referrals. The hearing officer list was developed according to a civil service commission rule providing for the method of recruitment, qualifications of the candidates, notice to employer and employee groups and a means of submitting challenges to names on the list.

Appellant also argues that payment of the hearing officer by respondent renders the hearing officer biased, because the more cases he decides favorably to respondent, the more cases respondent will give him. While this is an interesting theory, appellant's failure to raise the issue below precluded the creation of a meaningful record on the point. (Footnote omitted)

In any event, we do not find the theory compelling as a matter of law. Due process does not require a perfectly impartial hearing officer for, indeed, there is no such thing. (*Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 790-791 [171 Cal.Rptr. 590, 623 P.2d 151] (hereafter *Andrews*).) Rather, and as the foregoing quotation from *Titus* suggests, the principle our Supreme Court has established is that due process in these circumstances requires only a "reasonably impartial, noninvolved reviewer." (*Williams v. County of Los Angele*s (1978) 22 Cal.3d 731, 737 [150

Cal.Rptr. 475, 586 P.2d 956], italics added (hereafter *Williams*).) This formulation of the rule has been quoted and followed not only in *Andrews* and *Titus* but in several other cases as well. (See, e.g., *Coleman v. Regents of University of California* (1979) 93 Cal.App.3d 521, 526 [155 Cal.Rptr. 589]; *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1227 [213 Cal.Rptr. 1]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581 [257 Cal.Rptr. 427].)

Gai v. City of Selma, supra, 68 Cal.App.4th, 228:

Of course, the above analysis in *Linney* is dicta. However, it is consistent with the holding in *Central* that something more than speculation as to a financial interest in the outcome of the proceeding is needed to find "probability or likelihood of actual bias" of the decision maker.

Central and West Basin Water Replenishment District, et al. v. Wong (1976) 55 Cal.App.3d 191, 194 (construing former Code of Civil Procedure § 170, subdivision 1, providing for the disqualification of judicial officers in cases in which they are interested):

The word "interested" has been said to embrace "only an interest that is direct, proximate, substantial, and certain, and does not embrace .... a remote, indirect, contingent, uncertain, and shadowy interest ...."

End of Text

VI. APPENDIX

A. Workers' Compensation Vernacular

"AOE-COE"	arising out of employment and in the course of employment.
"C.T."	cumulative trauma; used to designate cumulative trauma cause of action" as in "This is a CT from 1980 through 1990, not a specific injury.
"Comp"	compensation; used variously to refer to the workers' compensation law, compensation benefits generally or compensation payments.
"T.D."	used variously to mean temporary disability or temporary disability compensation, as "T.D. rate;" "T.D. period;" "He was T.D.;" "T.D. was paid."
"P.D."	permanent disability; used variously, as "P.D. compensation rate;" "P.D. rating;" "He has P.D.;" "P.D. was paid."
"P & S"	permanent and stationary; to determine when temporary disability ceases and permanent disability is ratable, as "His condition became P&S on June 1, 1982."
"Rehab"	vocational rehabilitation.
"Q.I.W."	"qualified injured worker," an injured employee who qualifies for vocational rehabilitation benefits.
"Q.R.R."	qualified rehabilitation representative; one qualified to prepare vocational rehabilitation plan.
"VRTD"	vocational rehabilitation temporary disability indemnity, i.e., rehabilitation temporary compensation.
"V.R.M.A."	vocational rehabilitation maintenance allowance.
"Standard"	P.D. rating before adjustment for age or occupation, as "The rating was a 30 percent standard," or "We settled for the standard P.D."
"Group" rating, as in "Group 1 is high for backs."	occupational group for adjustment, up or down, of standard P.D.

"new and further"	new and further disability, as "He petitioned for new and further."
"self-procured"	medical treatment obtained by applicant for which reimbursement is sought.
"medical-legal"	medical-legal costs for medical reports, tests, X-rays, testimony; to be distinguished from cost of medical treatment.
"C&R"	compromise and release agreement; settlement; used both as a noun and as a verb.
"Q.M.E."	Qualified medical evaluator, physician appointed to list of approved medical evaluators by the Industrial Medical Council. Note: A “QME” is not necessarily an “AME”. A “QME” may be a medical advocate for either the employer or the employee.
"A.M.E."	Agreed medical examiner, a physician agreed upon to act as an independent medical evaluator.
"F & A"	findings and award of workers' compensation judge, referee or Appeals Board
"F & O"	findings and order; usually in connection with a "take nothing" decision against applicant.
"Recon"	A petition for reconsideration; an appeal to Appeals Board to reverse the decision of its trial referee after an adverse decision by a workers’ compensation referee.
Writ"	writ of review; also the petition for a writ of review, the means to seek appellate review of a WCAB decision.
"W.C.A.B."	Workers' Compensation Appeals Board.
"W.C.J."	Workers' Compensation Judge.

B. County Retirement Associations operating under the County Employees Retirement Law of 1937

County Employees Retirement Associations	Address and telephone number	Web address
Alameda	475 14th Street, Suite 1000 Oakland, CA 94612-1900 Voice: (510) 628-3000 FAX: (510) 268-9574	www.acera.org
Contra Costa	1355 Willow Way, Suite 221 Concord, CA 94520 V: (925) 946-5741 F: (925) 646-5747	www.co.contra-costa.ca.us www.CCCERA.org
Fresno	P.O. Box 911 Fresno, CA 93714-0911 V: (559) 488-3486 F: (559) 488-3493	No separate web site. www.fresno.ca.gov
Imperial	940 W. Main Street, Suite 105 El Centro, CA 92243 V: (760) 482-4483 F: (760) 482-4494	www.icers.info
Kern	1115 Truxtun Avenue Bakersfield, CA 93301-4639 V: (661) 868-3790 F: (661) 868-3779	www.kcera.org
Los Angeles	300 North Lake Avenue, Suite 820 Pasadena, CA 91101-4199 V: (626) 564-6000 F: (626) 564-6190 (Executive Office)	www.lacera.com
Marin	3501 Civic Center Drive, Suite 408 San Rafael, CA 94903 V: (415) 499-6147 F: (415) 499-3612	www.mcera.com
Mendocino	501 Low Gap Road, Room 1060 Ukiah, CA 95482 V: (707) 463-4328 F: (707) 463-4166	No separate web site. www.co.mendocino.ca.us
Merced	3199 M. Street Merced, CA 95348 V: (209) 725-3636 F: (209) 725-3637	No separate web site. www.co.merced.ca.us/retirement/index.html
Orange	2223 Wellington Avenue Santa Ana, CA 92701 V: (714) 558-6200	www.ocers.org

	F: (714) 558-6232	
Sacramento	980 9th Street, Suite 750 Sacramento, CA 95814 P.O. Box 0627 Sacramento, CA 95812-0627 V: (916) 874-9119 F: (916) 874-6060	www.co.sacramento.ca.us/retirement
San Bernardino	348 Hospitality Lane, Third Floor San Bernardino, CA 92415-0014 V: (909) 885-7980 F: (909) 885-7446	www.sbcera.org
San Diego	401 West “A” Street, Suite 1300 San Diego, CA 92101-7906 V: (619) 515-0130 F: (619) 515-0177	www.sdcera.org
San Joaquin	6 South El Dorado Street, Suite 700 Stockton, CA 95202 V: (209) 468-2163 F: (209) 468-0480	www.sjcera.org
San Mateo	702 Marshall Suite 280 Redwood City, CA 94063 V: (650) 363-4581 F: (650) 261-9028	www.samcera.org
Santa Barbara	3916 State Street, Suite 210 Santa Barbara, CA 93105 V: (805) 568-2998 F: (805) 560-1086	No separate web site. http://www.countyofsb.org/sbcers/
Sonoma	433 Aviation Boulevard Santa Rosa, CA 95409 V: (707) 565-8100 F: (707) 565-1721	www.scretire.com
Stanislaus	1010 10th Street, Suite 5800 Modesto, CA 95354 Mail: P.O. Box 3150 Modesto, CA 95353-3150 V: (209) 525-6393 F: (209) 525-4334	www.stancera.org
Tulare	136 N. Akers Street Visalia, CA 93291 V: (559) 733-6576 F: (559) 730-2631	www.tcera.org
Ventura	1190 Victoria Avenue, Suite 200 Ventura, CA 93003 V: (805) 339-4250 F: (805) 339-4269	www.ventura.org/vcera

State Association of County Retirement Systems	Strategic Local Government Services 1414 K Street, Suite 300 Sacramento, CA 95814 V: (916) 441-1850 F: (916) 441-6178	www.SLGS.org

Word 97 and Word 2000:
Resource for modifications 4 30 04.doc

Adobe Acrobat 5.1:
Adobe DisabilityRetirementLaw.pdf

C. Formatting Information for Word 97 copy

The Microsoft Word version of the Resource was prepared using Word 2000 with the printer setting set at HP 5N. The Adobe Acrobat version was prepared using the printer setting at Acrobat Distiller. Your printer setting should not alter the Adobe version. When using the Word version, you may use any printer setting other than HP 5N but if you do use another printer setting, it is recommended that you regenerate the tables of contents and authorities.

Document formats prepared using Word are not stable. When opening the document, you may lose the paragraph numbering associated with the "styles" used to identify the headings. If this happens, place the cursor on the first heading that fails to show a heading number or letter and then, using the style menu on the Formatting tool bar, apply the heading style for that heading again. Then check the document. You may find that all headings have been reset.

Basic formatting information is contained in the format windows on the following page.

To reestablish the original formatting, use the following formatting information:

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Font for Quotations (Body Text 2) CG Times 13. Indenting for style at .25".

Headings are coded with Styles as follows:

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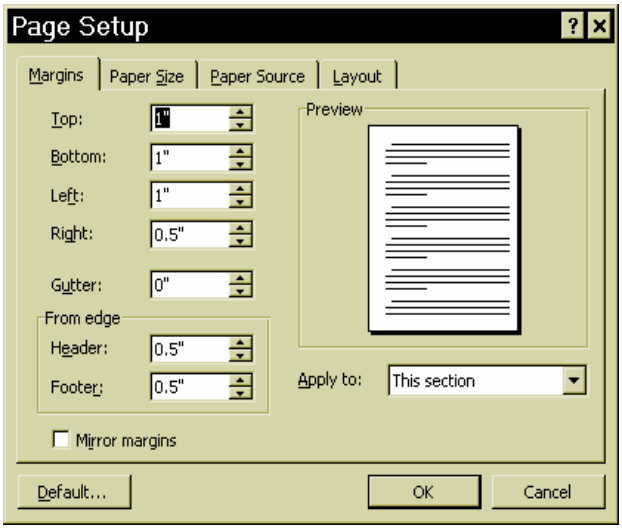
Heading 6	1.25	.25	1.5
Heading 7	1.5	.25	1.75
Heading 8	1.75	.25	2.0
Heading 9	2.0	.25	2.25

Associations' and Applicants' comments: Style 1.

To re-establish a heading, go to Format, click Styles, click Modify, click Paragraph, and enter the numbers in the appropriate boxes. Then click Tabs on the Paragraph formatting window. Clear all tabs except the Left tab number that corresponds with the Heading you wish to apply. Click OK until you are back to the Styles menu and click Apply.

If your printer setting is not HP 5N, you may find that the page numbers in the indexes show incorrect page numbers. You may either change the printer setting to HP 5N or keep your printer setting and rerun the table of contents and table of authorities programs to establish correct page numbering using your printer setting.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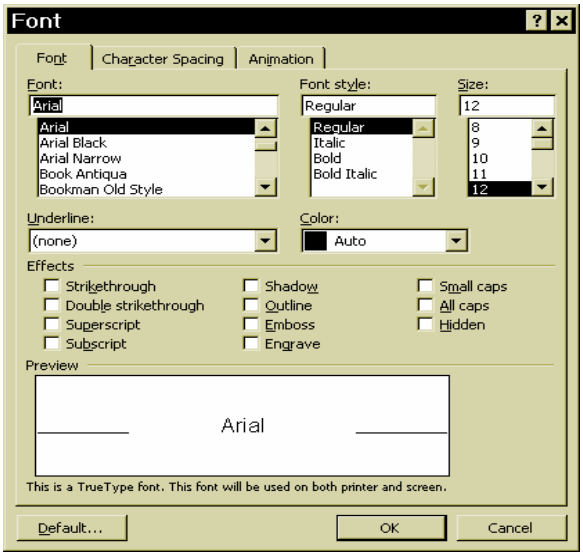
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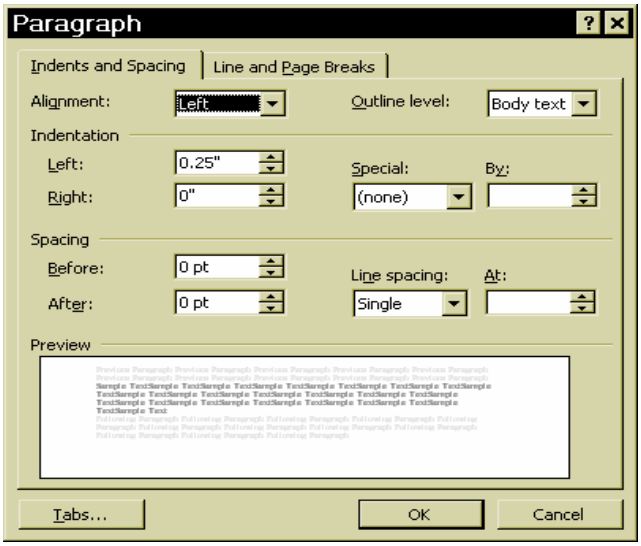
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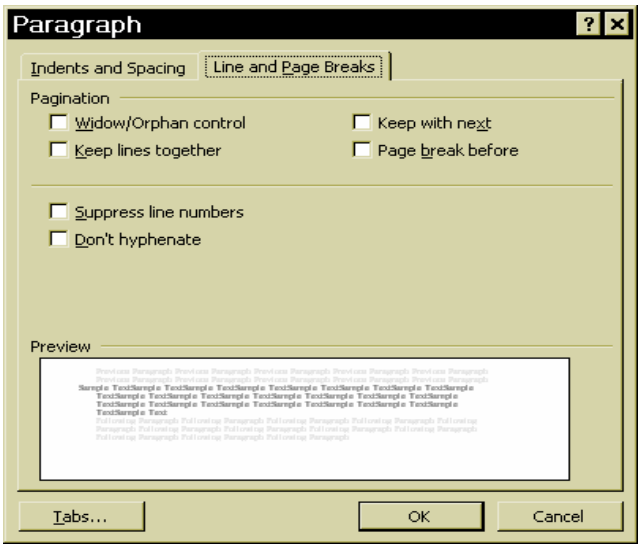
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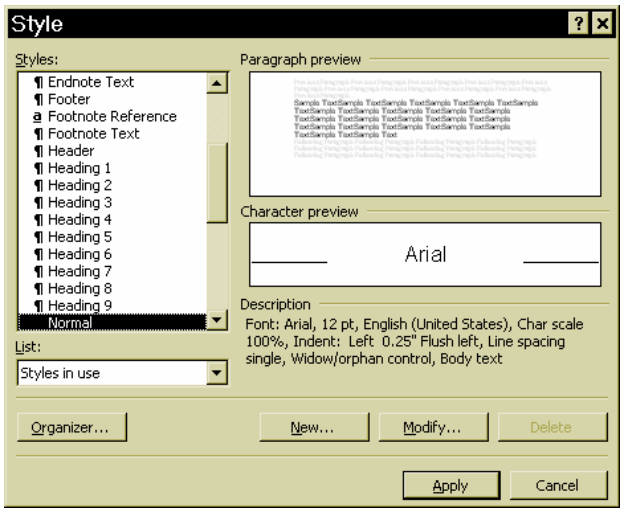
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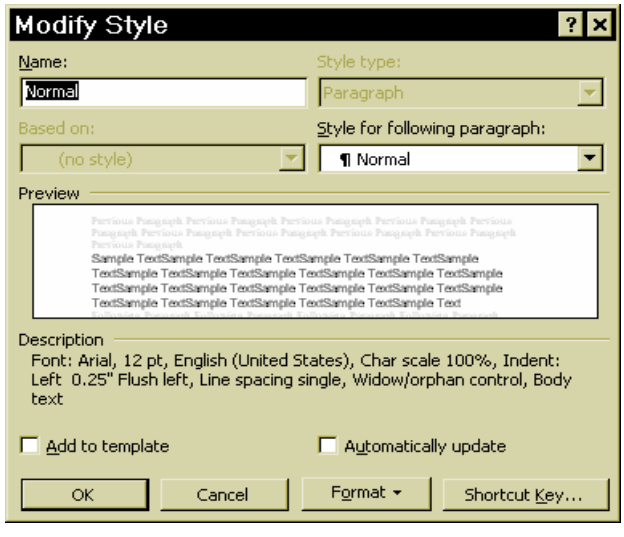
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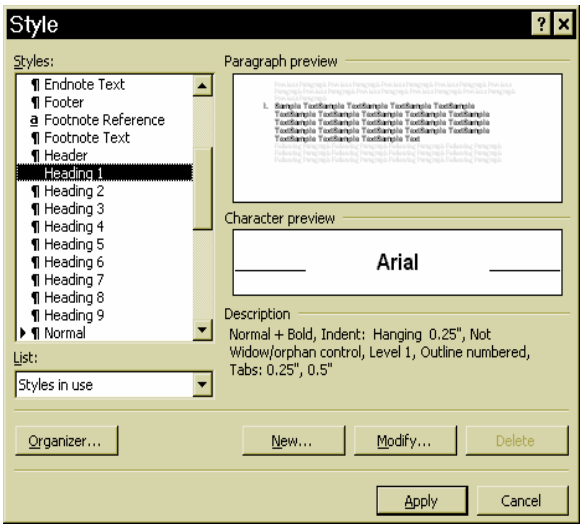
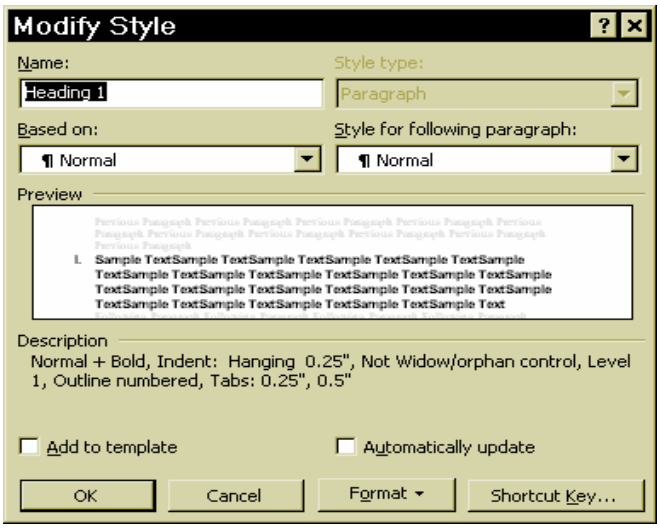
Format
Shortcut Key...


Style
Styles:
¶ Endnote Text
¶ Footer
a Footnote Reference
¶ Footnote Text
¶ Header
Heading 1
¶ Heading 2
¶ Heading 3
¶ Heading 4
¶ Heading 5
¶ Heading 6
¶ Heading 7
¶ Heading 8
¶ Heading 9
¶ Normal
List:
Styles in use
Paragraph preview
Character preview
Arial
Description
Normal + Bold, Indent: Hanging 0.25", Not Widow/orphan control, Level 1, Outline numbered, Tabs: 0.25", 0.5"
Organizer...
New...
Modify...
Delete
Apply
Cancel


Modify Style
Name:
Heading 1
Style type:
Paragraph
Based on:
¶ Normal
Style for following paragraph:
¶ Normal
Preview
Description
Normal + Bold, Indent: Hanging 0.25", Not Widow/orphan control, Level 1, Outline numbered, Tabs: 0.25", 0.5"
Add to template
Automatically update
OK
Cancel
Format
Shortcut Key...