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Charles Lawrence Swezey

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*By* CHARLES LAWRENCE SWEZEY*

AN industrial accident is commonly conceived of as a single traumatic incident, such as a fall or blow, resulting in physical injury. The California workmen's compensation law, however, refers to injury rather than accident,[1] and the injury may be an accident, a disease,[2] an emotional disorder,[3] or a series of unnoticed minor traumatic insults that become cumulative in effect and cause disability. Cases involving the latter type of injury have special problems not ordinarily encountered in an uncomplicated accident case. Among them are pleading, marshalling the requisite proof, ascertaining the date of injury, handling multiple defendants and predicting the decision of appellate courts on unresolved questions of law. Exploration of the cases concerned with industrial injuries resulting from repetitive trauma reveals certain basic principles and facilitates an understanding of the questions that are yet to be settled by the courts.

**Definition**

California Labor Code section 3208 defines injury as including any injury or disease arising out of the employment. In 1968, section 3208.1 was added to the Labor Code to further define an injury as being either specific or cumulative, and to describe a cumulative injury as "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment."[4]

The above type of injury, given legislative acknowledgment in 1968, has long been recognized in California compensation cases. For

* A.B., 1943, Cornell University; LL.B., 1948, Stanford University; Referee, Workmen's Compensation Appeals Board.

1. CAL. LABOR CODE § 3600.

2. *Id.* § 3208; Swezey, *Disease as an Industrial Injury in California,* 7 SANTA CLARA LAW. 205 (1967).

3. Swezey, *Emotional Disorders as Industrial Injury in California,* 3 LINCOLN L. REV. 112 (1968).

4. CAL. LABOR CODE § 3208.1.

example, as early as 1920, a hernia resulting from the continued heavy strains involved in the arduous physical work of an oil truck driver was held to be compensable.[5] In 1934, a telephone dispatcher was awarded benefits for disability caused by continual pressure on his elbow;[6] 12 years later, bursitis resulting from repeated motions of hand and arm while sewing heavy carpets was recognized as a compensable injury.[7] In 1952, Justice Spence of the California Supreme Court observed that "[s]eparately one day's strain may be slight, but when added to the strains which have preceded, it becomes a destructive force," and concluded that the disability which follows is "the result of one continuous, cumulative injury."[8]

In *Beveridge v. Industrial Accident Commission*,[9] decided in 1958, Justice Tobriner restated Justice Spence's description of the cumulative injury process as follows:

> We think the proposition irrefutable that while a succession of slight injuries in the course of employment may not in themselves be disabling, their cumulative effect in work effort may become a destructive force. The fact that a single but slight work strain may not be disabling does not destroy its causative effect, if in combination with other such strains, it produces a subsequent disability. The single strand, entwined with others, makes up the rope of causation.
>
> The fragmentation of injury, the splintering of symptoms, into small pieces, the atomization of pain into minor twinges, the piecemeal contribution of work-effort to final collapse, does not negate injury. The injury is still there, even if manifested in disintegrated rather than in total, single impact.[10]

This decision was the genesis of a renewed interest in cumulative injury cases, and compensation lawyers now frequently refer to them as "*Beveridge* cases." Larson calls them "gradual injuries."[11] Hanna refers to them variously as "wear and tear injuries,"[12] "continuous injuries,"[13] and, of course, by the statutory term, "cumulative injury."[14]

The minor strains that contribute to a cumulative injury are some-

5. Grigsby v. State Comp. Ins. Fund, 7 I.A.C. 187 (1920).
6. Searle v. Bay Cities Transp. Co., 20 I.A.C. 42 (1934).
7. Pullman Co. v. Industrial Acc. Comm'n, 28 Cal. 2d 379, 170 P.2d 10 (1946).
8. Fireman's Fund Indem. Co. v. Industrial Acc. Comm'n, 39 Cal. 2d 831, 834, 250 P.2d 148, 150 (1952).
9. 175 Cal. App. 2d 592, 346 P.2d 545 (1959).
10. *Id.* at 594, 346 P.2d at 547.
11. 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 39 (1967).
12. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 8.03(6)(f) (2d ed. 1968).
13. *Id.* § 11.01(2)(c).
14. *Id.* § 18.03(7).

times denominated "microtraumata."[15] A cumulative injury may consist of a series of specific incidents coupled with daily strains of continuous heavy work as well as an aggravating effect of repetitive work strains on preexisting pathology or a specific injury.[16]

**Evidence**

Since a cumulative injury cannot be established when based upon a mere claim thereof,[17] its definition is of only academic interest to the practicing lawyer until he has sufficient concrete evidence to establish its existence. In order to recover benefits for a cumulative injury, the injured employee must prove a case against the employer or employers he elects[18] to proceed against.[19] Proof of a series of specific work injuries will not establish, of itself, a cumulative injury,[20] nor does the fact that disability has its onset while an employee is at work necessarily mean that the disability arises out of, or because of, his employment.[21]

The employee has the burden of proving a causal relationship between his work and his disability.[22] To sustain this burden he must produce competent medical evidence connecting an established period of cumulative employment exposure with the disability.[23] A medical

15. Peter Kiewit Sons v. Industrial Acc. Comm'n, 234 Cal. App. 2d 831, 836, 44 Cal. Rptr. 813, 816 (1965). Note that under the definition of cumulative injury in *Beveridge*, the microtraumata can be either active or passive, but that CAL. LABOR CODE § 3208.1 refers to "traumatic activities." *Quaere*: Did section 3208.1 intend to exclude passive strains such as the repetitive jarring which frequently injures the spines of tractor operators? Probably not since it also refers to "mental" trauma, which is generally passive. The use of the word "activities" is unfortunate.

16. Burris v. Southern Cal. Rapid Transit Dist., 33 Cal. Comp. Cases 419, 433-34 (1968) (en banc).

17. *Id.* at 431.

18. See discussion of multiple employment in text accompanying notes 80-88 *infra*. It should be noted that if the employer is insured, as most are, the insurance carrier steps into the shoes of the employer. Thus, whenever this article refers to the liability of an employer it means the liability of the employer or his insurance carrier as the case may be.

19. Reidell v. Industrial Acc. Comm'n, 30 Cal. Comp. Cases 184, 185 (1965).

20. Burris v. Southern Cal. Rapid Transit Dist., 33 Cal. Comp. Cases 419, 434 (1968).

21. City & County of San Francisco v. Industrial Acc. Comm'n, 117 Cal. App. 2d 455, 458, 256 P.2d 81, 83 (1953), *quoting* George L. Eastman Co. v. Industrial Acc. Comm'n, 186 Cal. 587, 593, 200 P. 17, 19 (1921).

22. Lundberg v. Workmen's Comp. App. Bd., 69 Cal. 2d 436, 439, 445 P.2d 300, 301, 71 Cal. Rptr. 684, 685 (1968); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 19 Cal. 2d 622, 628, 122 P.2d 570, 573 (1942); Newton v. Industrial Acc. Comm'n, 204 Cal. 185, 188-89, 267 P. 542, 543 (1928).

23. In Peter Kiewit Sons v. Industrial Acc. Comm'n, 234 Cal. App. 2d 831, 44 Cal. Rptr. 813 (1965), the court, perhaps with tongue in cheek, said: "Back dis-

opinion on this issue lacks probative value unless its author is acquainted with the essential facts.[24] Moreover, the mere legal conclusion of a doctor does not furnish a basis for a finding of fact,[25] nor is an expert opinion any better than the reasons given in support of it.[26] The requisite proof of a cumulative injury, therefore, would seem to be lay evidence that the applicant was doing a certain type of work or was exposed to certain stresses and strains, plus well-reasoned medical opinion to the effect that this work or these stresses and strains caused disability.

Evidence tending to prove only a possibility of industrial causation, being conjectural, will not support a finding.[27] In addition, lay testimony does not meet the requisite standard of substantial evidence when the issue is exclusively a matter of medical knowledge.[28] However, where, for example, the evidence shows that over a period of time an employee's work involved substantial lifting, that while engaged in this work he developed back pain symptomatic of a ruptured disc, and that such work could cause a ruptured disc, and where there is no evidence of any other injury, the plain inferences are that the lifting was a continuing, cumulative trauma and that the employment was a contribu-

abilities in particular shout loudly for expert advice. No human ailment has produced more medico-legal headaches than the aching back. This delicately articulated structure of nodulated bones, cushioned by cartilaginous bodies and gelatinous material, interlaced by the complex and sensitive fibers of the cerebrospinal nervous system and held in array by strands and cords of muscular and ligamentous tissue, is vulnerable to a vast and bewildering variety of traumatic, pathological, deteriorative ailments and neurotic manifestations, singly and in diverse combinations. Precise diagnosis often baffles neurologists and orthopedists. In assessing the respective roles of trauma and predisposing conditions and of objective and subjective complaints, subtle value judgments may be unavoidable. In the face of this anatomical, physiological and psychological intricacy, semantically dubious, pseudo-medical jargon infiltrates the conflux of medicine and jurisprudence. Whiplash, traumatic arthritis, traumatic neurasthenia, and railroad spine are solecisms in current or past fashion. These verbal conveniences tempt the medically untrained into complacement substitution of simplicity for complexity. In a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation." *Id.* at 839-40, 44 Cal. Rptr. at 818-19 (footnotes omitted).

24. Bussa v. Workmen's Comp. App. Bd., 259 Cal. App. 2d 261, 267, 66 Cal. Rptr. 204, 208 (1968).

25. Granado v. Workmen's Comp. App. Bd., 69 Cal. 2d 399, 407, 445 P.2d 294, 300, 71 Cal. Rptr. 678, 684 (1968).

26. Higel v. Workmen's Comp. App. Bd., 33 Cal. Comp. Cases 753, 757 (Ct. App. 1968).

27. Travelers Ins. Co. v. Industrial Acc. Comm'n, 33 Cal. 2d 685, 687, 203 P.2d 747, 748 (1949).

28. City and County of San Francisco v. Industrial Acc. Comm'n, 117 Cal. App. 2d 455, 459-60, 256 P.2d 81, 84 (1953).

ting factor to the disability.[29] The employment need not be the sole cause of the disability; it is sufficient to establish that it is a substantial contributing cause.[30]

**Date of Injury**

Since a specific injury occurs as the result of a single incident or exposure, the date of injury is obviously the date of the incident. A cumulative injury, however, extends over a period of time, and a question arises of when the injury occurs. Ascertaining the date of injury can be important in a given case since it affects the time within which the action must be filed, the amount of the recovery, the liability, if any, of the Subsequent Injuries Fund, and the jurisdiction of the Workmen's Compensation Appeals Board.[31] Furthermore, because the law in force at the time of injury determines the extent and nature of the benefits to which an injured employee is entitled,[32] a problem arises where there is a change in the law during the period of exposure.[33] Temporary disability indemnity is payable only during the five years immediately following the injury.[34] If an employee has a preexisting disability on the date of injury, he may be entitled to additional statutory benefits.[35] The Workmen's Compensation Appeals Board lacks jurisdiction to amend, alter or rescind its awards unless a petition for such relief is filed within five years from the date of injury.[36]

Labor Code section 3208.1, which became effective January 1, 1969, provides that "the date of cumulative injury shall be the date of disability caused thereby." At first blush, this section would appear to conclusively define the date of a cumulative injury, thereby settling

29. Lundberg v. Workmen's Comp. App. Bd., 69 Cal. 2d 436, 439, 455 P.2d 300, 302, 71 Cal. Rptr. 684, 686 (1968).

30. State Comp. Ins. Fund v. Industrial Acc. Comm'n, 176 Cal. App. 2d 10, 18, 1 Cal. Rptr. 73, 79 (1959).

31. Since January 15, 1966, the judicial power of the Industrial Accident Commission has been vested in the Workmen's Compensation Appeals Board. CAL. LABOR CODE § 111.

32. Aetna Cas. & Sur. Co. v. Industrial Acc. Comm'n, 30 Cal. 2d 388, 182 P.2d 159 (1947).

33. *Cf.* Argonaut Mining Co. v. Industrial Acc. Comm'n, 104 Cal. App. 2d 27, 230 P.2d 637 (1951) (increase in the amount of death benefit after exposure to mine dust); Associated Indem. Co. v. Industrial Acc. Comm'n, 9 Cal. Comp. Cases 244 (Dist. Ct. App. 1944) (increase in the maximum rate for temporary disability indemnity after contraction of dermatitis).

34. CAL. LABOR CODE § 4656.

35. *Id.* §§ 4751-55; *see* Dow Chem. Co. v. Workmen's Comp. App. Bd., 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967).

36. CAL. LABOR CODE § 5804.

the matter. However, since the section has yet to be interpreted by the appellate courts and since it is probably not retroactive,[37] a brief review of the prior case law is warranted.

Prior to 1947, it was held that the date of injury in cumulative injury cases was the date on which (1) the repetitive trauma culminated in incapacity for work and (2) the employee knew, or with ordinary care should have known, that his disability was caused by his work.[38] The definition of the date of injury as the day on which disability and actual or constructive knowledge of its industrial causation coincide is frequently referred to as the *Marsh* rule.[39]

In 1947, there were added to the chapter of the Labor Code concerned with limitations of proceedings two new sections which limited the *Marsh* rule to occupational disease cases and provided that in all other cases the date of injury was the date of the incident or exposure.[40] Pursuant to this change in the law, the supreme court, in *Fireman's Fund Indemnity Co. v. Industrial Accident Commission*,[41] stated that in the case of a continuous injury the limitations period runs from the time of the last exposure.

In *Beveridge v. Industrial Accident Commission*,[42] as frequently occurs, the date of last exposure and the first day of disability coincided. This coincidence led the court to say, in reference to the statute of limitations:

> In reality the only moment when such injury can be visualized as taking compensative form is the date of last exposure, when the cumulative effect causes disability.[43]

Within the context of the facts, of course, this was a correct statement of the rule announced in *Fireman's Fund Indemnity Co. v. Industrial Accident Commission*. However, the court's language was subsequently taken out of context and used to support what became the commonly accepted view that the date of a cumulative injury was the date of the last exposure, *or* if disability did not appear until later, the first day of

37. Union Tribune Pub. Co. v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 286, 287 (1969).

38. Pullman Co. v. Industrial Acc. Comm'n, 28 Cal. 2d 379, 383-84, 170 P.2d 10, 13 (1946).

39. Marsh v. Industrial Acc. Comm'n, 217 Cal. 338, 18 P.2d 933 (1933) (occupational disease case holding that the statute of limitations commences running when disability and knowledge of industrial causation coincide).

40. CAL. LABOR CODE §§ 5411, 5412.

41. 39 Cal. 2d 831, 250 P.2d 148 (1952).

42. 175 Cal. App. 2d 592, 346 P.2d 545 (1959).

43. *Id.* at 594, 346 P.2d at 547.

disability.[44]

To add to the confusion, in 1968, the supreme court, in *Fruehauf Corp. v. Workmen's Compensation Appeals Board*,[45] reapplied the *Marsh* rule to cumulative injuries by construing the 1947 legislation to include cumulative injuries within the term occupational disease. It was in response to this decision that the legislature enacted section 3208.1 of the Labor Code. Although the legislature clearly intended to overrule *Fruehauf*, there are at least two technicalities that may preclude this result. One is that section 3208.1 is not included in the chapter on limitations of proceedings, as is the definition of date of injury for occupational diseases, and it is therefore arguable that at least for the purposes of the statute of limitations, the *Marsh* rule, as resurrected by the *Fruehauf* case, is still applicable.[46] The other is that a statement of legislative intent reciting that section 3208.1 was intended to nullify the decision in *Fruehauf*, erroneously cited the superseded court of appeal decision, which had held the date of injury to be the date of last exposure.[47]

A third possible basis for a varied interpretation is the section 3208.1 definition of cumulative injury as the effect of "traumatic activities." If this definition is interpreted to be narrower than the *Beveridge* definition,[48] any cumulative injuries not included within section 3208.1 would continue to be occupational diseases and their date of injury would be established by the *Marsh* rule. Since the precise distinction between certain cumulative injuries and seemingly similar occupational diseases has never been clear,[49] the language of section 3208.1 makes it possible to construe borderline cumulative injuries as occupational diseases.

It will ultimately be necessary, moreover, to define the word disa-

44. *E.g.*, Dow Chem. Co. v. Workmen's Comp. App. Bd., 67 Cal. 2d 483, 493, 432 P.2d 365, 372, 62 Cal. Rptr. 757, 764 (1967) (date for purposes of Subsequent Injuries Fund); State Comp. Ins. Fund v. Industrial Acc. Comm'n, 29 Cal. Comp. Cases 184, 186 (Ct. App. 1964) (date for purposes of statute of limitations).

45. 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968).

46. *Cf.* Argonaut Mining Co. v. Industrial Acc. Comm'n, 104 Cal. App. 2d 27, 30-31, 230 P.2d 637, 639 (1951).

47. 1968 JOURNAL OF THE CALIFORNIA ASSEMBLY, 1st Extra. Sess., at 21.

48. See note 15 & accompanying text *supra*.

49. Swezey, *Disease as Industrial Injury in California*, 7 SANTA CLARA LAW. 205, 215 (1967). A hearing loss caused by the repetitive trauma of sound waves beating on the ear drums was considered an occupational disease in Argonaut Ins. Co. v. Industrial Acc. Comm'n, 29 Cal. Comp. Cases 390 (1964), at the same time that an injury from repetitive insults to the spine from the jarring of a bus was treated as a cumulative injury in Jenkins v. Industrial Acc. Comm'n, 29 Cal. Comp. Cases 126 (1964).

bility as used in section 3208.1. Does it mean actual incapacity for work,[50] prospective loss of earning power,[51] or simply sufficient physical harm or symptoms to require medical treatment? On principle, the injury should be held to have occurred whenever the employee's physical well-being is sufficiently impaired to entitle him to an award of disability indemnity or medical treatment. The rationale of the *Marsh* rule is that an injured employee's rights should not be barred before they accrue. That is, he has not suffered an injury in the legal sense until he is entitled to some benefits.[52] The converse would seem to be equally true. Once the employee becomes entitled to some benefits, the injury has occurred.[53] Such a rule would avoid the anomalous result, frequently encountered under the *Marsh* rule, of awarding benefits for a period prior to the date of injury.

In the final analysis, it can safely be said that how disability is defined will in large measure be determined by the particular factual situation involved when the matter is presented to the courts, since limitations provisions in the workmen's compensation law must be liberally construed in favor of the employee.[54]

**Pleading**

The appropriate manner of pleading a cumulative injury is to allege that the employee during a particular period of employment was subjected to described stresses and strains, which became cumulative in effect and resulted in a described disability on a certain date.[55]

Careless pleading, however, has not been an obstacle to recovery in cumulative injury cases. An injured workman is entitled to an adjudication upon substance rather than upon formality of statement, and awkwardness in allegation may not be used to preclude his right to compen-

50. Pullman Co. v. Industrial Acc. Comm'n, 28 Cal. 2d 379, 383, 170 P.2d 10, 13 (1946); Argonaut Ins. Co. v. Industrial Acc. Comm'n, 29 Cal. Comp. Cases 390, 391 (1964) ("actual loss in earning power"); Kaiser Steel Corp. v. Industrial Acc. Comm'n, 28 Cal. Comp. Cases 175 (1963) ("incapacity to pursue one's regular job").

51. Subsequent Injuries Fund v. Industrial Acc. Comm'n, 30 Cal. Comp. Cases, 258 (1965); Swezey, *Disease as Industrial Injury in California*, 7 SANTA CLARA LAW. 205, 218 (1967).

52. Fruehauf Corp. v. Industrial Acc. Comm'n, 68 Cal. 2d 569, 573, 440 P.2d 236, 238, 68 Cal. Rptr. 164, 166 (1968).

53. Note, however, that CAL. LABOR CODE § 3208.1 itself treats disability and need for medical treatment in the disjunctive.

54. Fruehauf Corp. v. Industrial Acc. Comm'n, 68 Cal. 2d 569, 577, 440 P.2d 236, 241, 68 Cal. Rptr. 164, 169 (1968).

55. *Cf.* Fireman's Fund Indem. Co. v. Industrial Acc. Comm'n, 39 Cal. 2d 831, 250 P.2d 148 (1952).

sation.[56] Thus, an allegation of a specific date of injury is not fatal to a finding of cumulative injury.[57] Where an application originally alleges specific injury but the proved facts support a finding of repetitive trauma, amendment of the application to conform to such proof neither constitutes a new cause of action nor results in prejudice to the defendant.[58] This is apparently true even though the original allegations lull the defendant into waiving a valid defense.[59]

**Merger**

As has been mentioned above,[60] a cumulative injury may consist of the aggravating effects of continued employment activity following a specific injury or it may involve a series of specific incidents coupled with daily work strains. When the cumulative injury is a result of the latter situation, the question arises whether separate applications[61] must be filed for the specific injuries or whether they can be included in the application for the cumulative injury. For injuries occurring subsequent to January 1, 1969, it is clear that no award based on a cumulative injury may include disability caused by a specific injury or by another cumulative injury.[62] In addition, where disability or need for medical treatment results from the combined effects of specific and cumulative injuries, all issues must be separately determined with respect to each injury.[63] It necessarily follows that each injury should be separately pleaded.

If the date of the cumulative injury[64] is prior to 1969, an entirely different set of rules may apply. Despite earlier clear statements by the Industrial Accident Commission,[65] and the supreme court in *Dow*

56. Beveridge v. Industrial Acc. Comm'n, 175 Cal. App. 2d 592, 598, 346 P.2d 545, 550 (1959).

57. California Cas. Indem. Exch. v. Workmen's Comp. App. Bd., 31 Cal. Comp. Cases 261, 263 (1966).

58. State Comp. Ins. Fund v. Industrial Acc. Comm'n, 29 Cal. Comp. Cases 184, 186-87 (Ct. App. 1964).

59. Guigneaux v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 302 (Ct. App. 1969).

60. See note 16 *supra.*

61. The initial pleading in a compensation case is called the application. CAL. LABOR CODE § 5500. All subsequent pleadings seeking affirmative relief are called petitions.

62. *Id.* § 5303.

63. *Id.* § 3208.2.

64. See discussion of date of injury at text accompanying notes 31-54 *supra.*

65. James v. Vanion, 28 Cal. Comp. Cases 28, 31 (1963).

*Chemical Co. v. Workmen's Compensation Appeals Board*[66] that a specific injury which caused definable disability should not be submerged in a repetitive trauma claim, a division of the court of appeal held in *DeLuna v. Workmen's Compensation Appeals Board*,[67] that specific injuries occurring during the period of a cumulative injury become a part of the cumulative injury. Furthermore, the court held that although an applicant's filing of a claim of specific injury and a claim of cumulative injury covering the same period of time was not objectionable, he could not recover an award on both claims. A week later the same division held in *Miller v. Workmen's Compensation Appeals Board*,[68] that a specific injury which would otherwise have been barred by the statute of limitations was merely the first of many exacerbations contributing to a cumulative injury having its inception on that date. The supreme court denied a hearing in each case. Thereafter, the appeals board considered it to be the law that any specific injury occurring at the beginning of, during, or at the end of a period of cumulative injury merges into the cumulative injury and, therefore, a separate application filed for the specific injury should be dismissed.[69]

The legislative response to the *Miller* and *DeLuna* cases was prompt.[70] Within a year, section 3208.2 was added to the Labor Code to provide:

> When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury . . . .

Labor Code section 5303 was amended by adding the words:

> [P]rovided, however, that no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability . . . .

Although these amendments would appear to be procedural,[71] and although the supreme court, when squarely faced with the inconsistency

66. 67 Cal. 2d 483, 492, 432 P.2d 365, 371, 62 Cal. Rptr. 757, 763 (1967), *quoting* James v. Vanion, 28 Cal. Comp. Cases 28 (1963).

67. 258 Cal. App. 2d 199, 65 Cal. Rptr. 421 (1968).

68. 258 Cal. App. 2d 490, 65 Cal. Rptr. 835 (1968).

69. Liberty Mut. Ins. Co. v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 90 (1969).

70. 9 SANTA CLARA LAW. 156, 157 (1968).

71. Statutes effecting changes in procedure or remedy may validly be applied retroactively, but a statute generally will not be construed to have retrospective effect unless the legislative intention to give it such effect clearly appears. Tevis v.

between the *Dow Chemical* case[72] and the *Miller* and *DeLuna* cases, may well disapprove the latter,[73] it has been held that the amendments are not retroactive and that the *Miller* and *DeLuna* doctrine of merger is applicable to all cumulative injuries occurring before 1969.[74]

The doctrine of res judicata prevents a specific injury for which benefits have been awarded in an earlier proceeding[75] or which has been the basis for an approved compromise and release[76] from merging into a cumulative injury. The appeals board, moreover, has taken the position that merger will not serve to resurrect stale claims for temporary disability indemnity and past medical treatment arising out of a specific injury.[77] This is not to say, however, that temporary disability and need for medical treatment caused by a cumulative injury prior to the date of injury is not compensable. It is apparent that under the *Marsh* rule, and possibly under Labor Code section 3208.1, substantial medical expense could be incurred prior to the "date of injury." The victim of a cumulative injury may recover temporary disability indemnity and medical expense accrued prior to the date of injury from any employer whose employment contributed to the disability.[78]

A single incident that does not rise to the dignity of a specific injury may still become a part of a cumulative injury. Labor Code

City & County of San Francisco, 43 Cal. 2d 190, 195, 272 P.2d 757, 760 (1954). The latter rule of construction, however, will not be followed blindly in complete disregard of factors which may give a clue to the legislative intent. *In re* Estrada, 63 Cal. 2d 740, 746, 408 P.2d 948, 952, 48 Cal. Rptr. 172, 176 (1965).

72. See note 66 *supra.*

73. See 9 SANTA CLARA LAW. 156 (1968) for an analysis of the three cases and the legislation which they fostered.

74. State Comp. Ins. Fund v. Workmen's Comp. App. Bd., 1 Cal. App. 3d 812, 82 Cal. Rptr. 102 (1969); Union Tribune Pub. Co. v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 286 (1969). In Gallentine v. Argonaut Ins. Co., 34 Cal. Comp. Cases 326 (1969), the appeals board held that although sections 3208.1 and 3208.2 and the amendment to section 5303 may be procedural in form, they could not be applied retroactively because they had a substantive effect upon the employee's rights and the employer's liability—*e.g.*, an employee can no longer collect on specific injury claims which would be barred by the statute of limitations but for the fact that they merged into a cumulative injury claim that was not barred.

75. Dow Chem. Co. v. Workmen's Comp. App. Bd., 67 Cal. 2d 843, 432 P.2d 365, 62 Cal. Rptr. 757 (1967).

76. Burris v. Southern Cal. Rapid Transit Dist., 33 Cal. Comp. Cases 419, 430 (1968), contains an extensive discussion of some of the problems raised by the merger rule. This case was affirmed in all but one minor respect in State Comp. Ins. Fund v. Workmen's Comp. App. Bd., 1 Cal. App. 3d 812, 82 Cal. Rptr. 102 (1969).

77. 33 Cal. Comp. Cases at 427.

78. *Id.* at 426, 434-35; *cf.* Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n, 21 Cal. Comp. Cases 117 (1956). See State Comp. Ins. Fund v. Workmen's Comp. App. Bd., 1 Cal. App. 3d 812, 82 Cal. Rptr. 102 (1969), for an example of the problems that arise when the claim for past temporary disability is stale.

sections 3208.2 and 5303 do not require separate findings for every twinge of pain but only for specific injuries. An incident is not an injury unless it causes disability or need for medical treatment.[79]

**Multiple Employments**

It is not uncommon for a construction laborer to have worked for scores of different employers during the course of the activity causing a cumulative injury. In such a case, the employee may elect to recover full compensation benefits from any employer in the chain of causation. The liability is later apportioned among the successive employers in a supplemental proceeding.[80]

Section 5500.5 of the Labor Code sets forth an elaborate procedure for election and subsequent apportionment. Although by its terms section 5500.5 is applicable only to occupational diseases, the procedure has by analogy been recognized as appropriate in cumulative injury cases.[81] Briefly, the application should name all employers, and if it does not, any interested party may request the joinder of additional defendants. The applicant may elect to proceed against any one or more of the employers named. If he establishes a case against two or more employers, he is entitled to a joint and several award. Within one year after the filing of the award, any employer held liable may institute proceedings for apportioning the liability and determining the right of contribution from the other employers. The rights of the employee are not affected by the supplemental proceeding. There are, then, two proceedings: one in which the applicant completely litigates his case against the defendant or defendants of his choice; and a second in which the defendants litigate their relative rights and liabilities.[82]

The applicant, however, must prove a case against at least one of the defendants against whom he elects to proceed, or he may not recover.[83] The appeals board may not award compensation against a defendant whose employment has not caused or contributed to the disability or need for medical treatment,[84] but the employment need not be

79. CAL. LABOR CODE § 3208.1.

80. Royal Globe Ins. Co. v. Industrial Acc. Comm'n, 63 Cal. 2d 60, 62-63, 403 P.2d 129, 132, 45 Cal. Rptr. 1, 4 (1965).

81. *Id.*; Raischell & Cottrell, Inc. v. Workmen's Comp. App. Bd., 249 Cal. App. 2d 991, 995, 58 Cal. Rptr. 159, 162 (1967).

82. Raischell & Cottrell, Inc. v. Workmen's Comp. App. Bd., 249 Cal. App. 2d 991, 58 Cal. Rptr. 159 (1967); Guarantee Ins. Co. v. Workmen's Comp. App. Bd., 21 Cal. Comp. Cases 118 (1956).

83. Reidell v. Industrial Acc. Comm'n, 30 Cal. Comp. Cases 184 (1965).

84. Burris v. Southern Cal. Rapid Transit Dist., 33 Cal. Comp. Cases 419, 435 (1968).

the sole cause; it is enough if it substantially and proximately contributed to the injury.[85] Where the award is joint and several, the appeals board will generally designate either the last employer[86] or the employer with the largest exposure[87] to be primarily responsible for providing benefits.

For an applicant who makes an intelligent election, trial and recovery in a cumulative injury claim against multiple employers should not differ from prosecution of a case where all the repetitive trauma occurred in a single employment. Attorneys are often reluctant to make an election either because of the risk of failure of proof or because of the hope of coercing a settlement. In the absence of an election, a trial becomes cumbersome.

It is not an easy task to make an apportionment among the various employments where an applicant has worked for several employers and engaged in varying degrees of employment activity. In the absence of facts making it appear unreasonable, apportionment of liability in proportion to the duration of each employment exposure is generally upheld.[88]

**Apportionment**

The foregoing discussion relates to apportionment of liability among defendants who are jointly and severally liable. The term apportionment is also used in connection with another separate and distinct principle.[89] Much of the confusion surrounding this latter type of apportionment can be avoided if the principle is discussed in terms of liability.

Simply stated, the principle is that an employer is not liable for any disability that his employment neither caused nor contributed to. Thus, he is neither liable for permanent disability that existed prior to the injury[90] nor for any permanent disability resulting from the normal progression of a preexisting condition apart from the effects of the in-

85. Colonial Ins. Co. v. Industrial Acc. Comm'n, 29 Cal. 2d 79, 172 P.2d 884 (1946).

86. Burris v. Southern Cal. Rapid Transit Dist., 33 Cal. Comp. Cases 419, 435 (1968).

87. Liberty Mut. Ins. Co. v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 90-92 (1969).

88. State Comp. Ins. Fund v. Industrial Acc. Comm'n, 125 Cal. App. 2d 201, 204, 270 P.2d 55, 57 (1954); Zenith Nat'l Ins. Co. v. Workmen's Comp. App. Bd., 31 Cal. Comp. Cases 295 (1966).

89. Granado v. Workmen's Comp. App. Bd., 69 Cal. 2d 399, 402-03, 445 P.2d 294, 296-97, 71 Cal. Rptr. 678, 680-81 (1968); *see* Royal Globe Ins. Co. v. Industrial Acc. Comm'n, 63 Cal. 2d 60, 403 P.2d 129, 45 Cal. Rptr. 1 (1965).

90. CAL. LABOR CODE § 4750.

jury.[91]

The employer, of course, is liable for all of the direct effects of an industrial injury. If, moreover, the disability results from the lighting up or aggravation of a preexisting condition by the industrial exposure, the employer is required to compensate for the entire disability even though the employment activity might have caused little or no disability in a healthier individual.[92] This rule is often reduced to the maxim: "Industry takes the employee as he is at the time of his employment";[93] the effect of the employment activity is sometimes referred to as "the straw that broke the camel's back."

Since the employment activity need not be the sole cause, but merely a contributing cause, of the injury,[94] it logically follows that the employer is liable for all the temporary disability and medical treatment resulting from an injury.[95]

Application of these principles can be illustrated by imagining a workman who suffered tuberculosis of the spine as a child, which left him partially disabled. Repetitive bending and lifting in the course of his employment causes an intervertebral disc to rupture and aggravates the preexisting tuberculosis. Since the employment activity substantially contributed to the temporary disability and need for medical treatment, the employer is liable for the full amount of the temporary disability indemnity and medical expense.

When the healing period is over, our hypothetical workman may be left with permanent disability consisting of the following: (1) the preexisting disability; (2) disability resulting from the normal progress of the tuberculosis apart from the effects of the injury; (3) the disability directly caused by the bending and lifting; and (4) the disability caused by the injury's aggravation of the preexisting disease. The employer is not liable for the first[96] and second[97] disabilities because the employment activity neither caused nor contributed to them. He is liable for the third and fourth[98] because the lifting and bending either caused or contributed to them.

91. Bowler v. Industrial Acc. Comm'n, 135 Cal. App. 2d 534, 287 P.2d 562 (1955).

92. Tannenbaum v. Industrial Acc. Comm'n, 4 Cal. 2d 615, 617-18, 52 P.2d 215, 216 (1935).

93. *See id.*

94. See note 30 *supra.*

95. Granado v. Workmen's Comp. App. Bd., 69 Cal. 2d 399, 445 P.2d 294, 71 Cal. Rptr. 678 (1968).

96. CAL. LABOR CODE § 4750.

97. *Id.* § 4663.

98 See cases cited notes 30 & 92 *supra.*

**Choice of Theory**

A medical witness may find it more comfortable to testify that a particular disability was caused by strenuous repetitive activity[99] than to say that it was "caused" by a relatively minor trauma which acted as "the straw that broke the camel's back." The doctor, looking at the latter situation, is likely to feel that the major cause was the preexisting vulnerability. There is, nonetheless, an injury, and if the minor trauma arises out of the employment, the ensuing disability is compensable.[100]

Being concerned only with legal causation, attorneys representing injured workmen have traditionally preferred to proceed on the basis of a specific injury and have resorted to the repetitive trauma theory only when compelled by the medical evidence or where the factual basis for a specific injury claim is lacking. The chances of obtaining a prompt decision are much greater when the case involves one defendant and a single point in time than when it becomes necessary to explore activities extending over a prolonged period. The latter situation will probably be subject to the objections and tactics of a battery of defense lawyers, each of whom is intent on placing full liability on the others. Administrative problems, from increased paper work to waste of valuable professional time, are also multiplied if the latter remedy is employed.

The theory of repetitive trauma also suffers from the appeals board's historical adherence to the belief that the legislative scheme coupled with common sense necessitated a decision based upon a specific injury whenever a single incident legally caused a definable disability.[101] This policy does not harm the insurance carriers because, although a carrier may pay more than seemed warranted by "medical causation" in one case, it will escape liability in another. A rough apportionment will take place over a period of time by the operation of actuarial principles.[102]

99. *E.g.*, Fidelity & Cas. Co. v. Industrial Acc. Comm'n, 9 Cal. Comp. Cases 294 (1944), where a medical expert said of a nurse's constant lifting of an aged patient, "numerous sprains of the back were suffered. . . . Each sprain was at first minor . . . until the frequently repeated lifting with a back gradually rendered more and more vulnerable became so much of an injury and caused so much pain she had to quit." *Id.*

100. The acceleration, aggravation, or lighting up of a preexisting condition is an injury in the employment causing it. Fred Gledhill Chevrolet Co. v. Industrial Acc. Comm'n, 62 Cal. 2d 59, 61, 396 P.2d 586, 588, 41 Cal. Rptr. 170, 172 (1964); see note 92 *supra.*

101. Burris v. Southern Cal. Rapid Transit Dist., 33 Cal. Comp. Cases 419, 423 (1968).

102. A "blue ribbon" commission, appointed by the governor with the approval of the Senate in 1963 to study and report on the workmen's compensation system in California, considered the consequences of permitting apportionment of liability on the

The advent of the doctrine of merger,[103] however, stimulated the use of cumulative injury claims since they provided a vehicle for recovering permanent disability indemnity for injuries for which the period of limitations had long since expired. The demise of the merger doctrine will undoubtedly be accompanied by a decreased interest in cumulative injury claims.

**Conclusion**

In summary, the proposition that an employer should be as liable for disability resulting from the cumulative effect of microtraumata as for the specific effect of a single accident is medically sound and well-established in the law.

Recent legislation has given statutory recognition to the cumulative injury, has established the procedure to be followed where the victim of a cumulative injury has also suffered a specific injury, and theoretically at least, has defined the date of a cumulative injury with some degree of finality. Evaluation of the effectiveness of the date-of-injury definition, however, must await judicial interpretation of the terms "disability" and "traumatic activities" as used in section 3208.1 of the Labor Code, and of the significance of that section's placement in the code.

The cumulative injury claim will continue to be an appropriate vehicle for obtaining substantial justice where employment exposure has caused traumatic injury without a specific accident. Its effectiveness as a device to resurrect stale claims, however, will be markedly reduced.

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basis of medical causation, but except for heart cases, made no recommendations on the subject. REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION 119 (April 1965).

103. See text accompanying notes 60-79 *supra.*