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By MORTON R. COLVIN*

FEW fields of legal endeavor have amassed a larger body of appellate law in California than workmen's compensation.[1] Thus, after more than 50 years of experience with the Workmen's Compensation Act,[2] both bench and bar are addicted to the use of the phrase "well-settled" when speaking of the basic principles governing that law's application and interpretation. This springs from the fundamental desire and necessity that the law be certain so that parties may know their rights.[3]

In recent years, however, there have been dramatic changes in the appellate function in workmen's compensation matters. Court-

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1. *See* Comment, *Judicial Philanthropy Curbed: New Statutory Scheme for Cumulative Injury Awards*, 9 SANTA CLARA LAW. 156 (1968).

2. The original Workmen's Compensation Act was enacted in 1911. Cal. Stats. 1911, ch. 399, at 796. It was substantially revised in 1917 to approximate its present form. Workmen's Compensation, Insurance and Safety Act of 1917, Cal. Stats. 1917, ch. 586, at 831 (now CAL. LABOR CODE §§ 3200-6149).

3. *See* von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924): "[T]he rule of *stare decisis* is . . . intended to advance the general usefulness of the law and thus benefit the greatest number. It expedites the work of the courts by preventing the constant reconsideration of settled questions; it enables lawyers to advise their clients with a reasonable degree of certainty and safety; it assures individuals that, in so far as they act on authoritative rules of conduct, their contract and other rights will be protected in the courts; and, finally, it makes for equality of treatment of all men before the law and lends stability to the judicial arm of government." *See also* Kaufman, *A Defense of Stare Decisis*, 10 HASTINGS L.J. 283 (1959); Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CALIF. L. REV. 831 (1961). *But cf.* Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615 (1961).

The California Legislature has recognized the value of precedent-setting decisions in workmen's compensation matters by provision in CAL. LABOR CODE § 115 for en banc decisions by the Workmen's Compensation Appeals Board, "in order to achieve uniformity of decision, or in cases presenting novel issues." The board has frequently used this power for the purposes indicated in section 115.

made law has sometimes altered the very concept of industrial injury. Some conceptual changes have been so profound as to prompt the California Legislature to act with unprecedented dispatch in extraordinary session[4] "to nullify the effect upon the law of workmen's compensation" of specific appellate decisions.[5]

The meaning and nature of the new theories of appellate review that have evolved and are evolving is, of course, of prime interest to the Workmen's Compensation Appeals Board and to litigants who must deal with the practical application of these theories on a daily basis. But further than this, upon gaining an insight into the development of the broadening appellate function, it is evident that certain valid criticisms can be made, and that a reexamination of the appropriate scope of judicial review is in order.

4. Cal. Stats. 1969 (1st Extra. Sess. 1968), ch. 4, §§ 1, 2, 10 (now CAL. LABOR CODE §§ 3208.1-.2, 5303).

5. 1968 JOURNAL OF THE CALIFORNIA ASSEMBLY, Extra. Sess. 21-22. The pertinent portion of the legislation resulted in new CAL. LABOR CODE §§ 3208.1-.2 and an amendment to section 5303. With section 3208.1 the legislature, for the first time, defines a "cumulative" injury and distinguishes that type of injury from a "specific" injury. Under the new statutes a separate injury, either cumulative or specific, will arise whenever an employee's work activity causes disability or need for medical treatment. Further, when disability or need for treatment results from two or more such separate injuries, all questions are to be separately determined with respect to each such injury, and under the amended portion of section 5303 there can be no merger of the separate injuries as found. This approach is directly contrary to that taken by the court in the cases of DeLuna v. Workmen's Comp. App. Bd., 28 Cal. App. 2d 199, 65 Cal. Rptr. 421 (1968), and Miller v. Workmen's Comp. App. Bd., 258 Cal. App. 2d 490, 65 Cal. Rptr. 835 (1968), cited in the JOURNAL OF THE CALIFORNIA ASSEMBLY, *supra*,, as being "nullified." *See generally* Comment, *Judicial Philanthropy Curbed: New Statutory Scheme for Cumulative Injury Awards*, 9 SANTA CLARA LAW. 156 (1968).

CAL. LABOR CODE § 3208.1 also provides that the date of a cumulative injury as defined "shall be the date of disability caused thereby." This is directly contrary to the interpretation given by the California Supreme Court of the phrase "date of injury," as respects a cumulative injury, in the case of Fruehauf Corp. v. Workmen's Comp. App. Bd., 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968). There the court held that for purposes of the statute of limitations the date of a cumulative injury was controlled by CAL. LABOR CODE § 5412. The latter section states: "The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment." The last sentence of section 3208.1 thus appears to overrule the supreme court's interpretation.

Because of the substantial changes in the substantive law effected by the new legislation, the Workmen's Compensation Appeals Board has recently ruled, in an en banc decision, that the legislation should be held to operate prospectively rather than retroactively. Gallentine v. Livingston Graham, Inc., 34 Cal. Comp. Cases 326 (1969); *accord*, Union Tribune Pub. Co. v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 286 (1969).

I. Traditional Scope of Appellate Review

Until recently, it was taken for granted that an appellate court, in reviewing decisions of the Workmen's Compensation Appeals Board, should not hold a trial de novo or make an independent evaluation of the evidence presented at trial;[6] the findings and conclusions of the appeals board on questions of fact were to be final and not subject to review.[7] The oft-repeated and seemingly firmly entrenched rule was that the findings of fact of the appeals board should not be disturbed on review where supported by substantial evidence. In 1957, the California Supreme Court[8] summarized the principle as follows:

> When a finding of fact of the Industrial Accident Commission is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.
>
> The findings of the Commission are not subject to review on this ground except insofar as they may have been made without *any evidence whatever in their support.*[9]

Thus, even though an appellate court, if cast in the role of fact-finder, might have drawn a different inference from the evidence, the court would refrain from exercising its independent judgment on the

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6. CAL. LABOR CODE § 5952 provides: "The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeal board, whether:

"(a) The appeals board acted without or in excess of its powers.

"(b) The order, decision, or award was procured by fraud.

"(c) The order, decision, or award was unreasonable.

"(d) The order, decision, or award was not supported by substantial evidence.

"(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

"Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

7. CAL. LABOR CODE § 5953 provides: "The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board. The appeals board and each party to the action or proceeding before the appeals board shall have the right to appear in the review proceeding. Upon the hearing, the court shall enter judgment either affirming or annulling the order, decision, or award, or the court may remand the case for further proceedings before the appeals board."

8. Douglas Aircraft, Inc., v. Industrial Acc. Comm'n, 47 Cal. 2d 903, 306 P.2d 425 (1957); *accord*, Argonaut Ins. Exch. v. Workmen's Comp. App. Bd., 49 Cal. 2d 706, 321 P.2d 460 (1958).

9. Douglas Aircraft, Inc. v. Industrial Acc. Comm'n, 47 Cal. 2d 903, 905, 306 P.2d 425, 426 (1957) (emphasis added).

evidence.[10] The supreme court[11] restated this rule in 1961:

> [W]here the evidence is in substantial conflict *or is susceptible of conflicting inferences*, the finding of the [appeals board], *whether for or against the applicant*, is final and it is our duty to uphold such finding. . . . [Q]uestions as to the weight of the evidence and the credibility of the witnesses are for the [appeals board] . . . if there is *any evidence*, whether *direct or by reasonable inference*, which will support the [appeals board's] finding . . . .[12]

As "well-settled" as this fundamental rule of appellate review seemed to be, the appellate courts have recently avoided adherence to it through a misapplication of the doctrine of "liberal construction," derived from California Labor Code section 3202.[13] This trend has resulted in appellate courts exercising their independent judgment on the evidence, even though that evidence is susceptible to opposing inferences.

II. Present Trends

A. Lundberg v. Workmen's Compensation Appeals Board

A leading example of the present trend is *Lundberg v. Workmen's Compensation Appeals Board*,[14] a decision which itself may be justified, but which seems to have been an invitation to other appellate tribunals to ignore basic restrictions on the scope of appellate review.

In the *Lundberg* case, the California Supreme Court ordered the annulment of a board decision involving a back injury wherein the board held that the employee did not sustain an injury arising out of and in the course of employment. On June 27, 1967, while working as a carpenter, Lundberg developed a pain in his back. He did not

10. *See* Foster v. Industrial Acc. Comm'n, 136 Cal. App. 2d 812, 815-16, 289 P.2d 253, 254-55 (1955).

11. Keeley v. Industrial Acc. Comm'n, 55 Cal. 2d 261, 359 P.2d 34, 10 Cal. Rptr. 636 (1961).

12. *Id.* at 265, 359 P.2d at 36, 10 Cal. Rptr. at 638, *quoting* Mercer-Fraser Co. v. Industrial Acc. Comm'n, 40 Cal. 2d 102, 114, 251 P.2d 955, 961 (1953). *See also* Larsen v. Industrial Acc. Comm'n, 34 Cal. 2d 772, 775, 215 P.2d 16, 19 (1950) ("some evidence"); Pacific Indem. Co. v. Industrial Acc. Comm'n, 28 Cal. 2d 329, 339, 170 P.2d 18, 24 (1946); Pacific Lumber Co. v. Industrial Acc. Comm'n, 22 Cal. 2d 410, 422-23, 139 P.2d 892, 899 (1943); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 19 Cal. 2d 622, 627, 122 P.2d 570, 573 (1942); Pacific Elec. Ry. v. Industrial Acc. Comm'n, 96 Cal. App. 2d 651, 660, 216 P.2d 135, 150 (1950); United States Fid. & Guar. Co. v. Industrial Acc. Comm'n, 95 Cal. App. 186, 190, 272 P. 589, 590 (1928).

13. CAL. LABOR CODE § 3202 provides: "The provisions of Division 4 and Division 5 of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

14. 69 Cal. 2d 436, 445 P.2d 300, 71 Cal. Rptr. 684 (1968).

recall any specific accident or other incident causing the injury, although he did recall that the work had been heavier than usual. The pain continued in his back and leg until, on July 5, he left work and consulted a doctor. He told the doctor that his back and leg condition had developed as a result of his work, but he did not describe any particular incident. The doctor placed him in a hospital, where it was discovered that Lundberg had a herniated intervertebral disc, which was removed. The doctor then filed a report of industrial injury as required by California Labor Code section 6407. Prior to the employee's commencement of work, his back was asymptomatic except for some problems over a brief period in 1949. He claimed that he had fully recovered from his 1949 problems and had experienced no further symptoms until the June 1967 incident.

The employee was examined for the insurance carrier by another doctor who stated:

> I do not know what caused the 4th lumbar intervertebral disc to rupture. It is possible that applicant's work activity caused the injury, but equally possible that this would have occurred had he not been working at all.[15]

Dr. Portello, the employee's own doctor, merely repeated in his report the statements made to him by the employee concerning industrial causation. He did not say anything about the cause of the ruptured disc.

The appeals board thus was faced with a record in which only a speculative possibility of industrial connection was established by scientific evidence. The board had previously been directed that scientific evidence was essential to support a finding of an industrial connection between back disability and employment,[16] and that such evidence was required to be stated in terms of "probabilities" rather than "possibilities."[17] The board, in an effort to follow principles well-settled by appellate precedent, concluded: "We are of the opinion that the appli-

15. *Id.* at 438, 445 P.2d at 301, 71 Cal. Rptr. at 685.

16. Peter Kiewit Sons v. Industrial Acc. Comm'n, 234 Cal. App. 2d 831, 44 Cal. Rptr. 813 (1965); City & County of San Francisco v. Industrial Acc. Comm'n, 117 Cal. App. 2d 455, 256 P.2d 81 (1953); Guarantee Ins. Co. v. Industrial Acc. Comm'n, 88 Cal. App. 2d 410, 199 P.2d 12 (1948); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 47 Cal. App. 2d 494, 118 P.2d 334 (1941).

17. *See* Travelers Ins. Co. v. Industrial Acc. Comm'n, 33 Cal. 2d 684, 687, 203 P.2d 747, 748 (1949): "An award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained." *See also* Owings v. Industrial Acc. Comm'n, 31 Cal. 2d 689, 692, 192 P.2d 1, 3 (1948); City & County of San Francisco v. Industrial Acc. Comm'n, 117 Cal. App. 2d 455, 460, 256 P.2d 81, 84 (1953).

cant has not met his burden of proof to establish that his injury was industrially caused."[18]

The supreme court reversed the board, stating:

> The established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor [Labor Code section 3202], and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. This rule is binding on the board and on this court.
>
> Where the evidence shows that over a period of time an employee engaged in substantial lifting work, that while engaged in such work he developed back pain symptomatic of a ruptured disc, and such work could cause a ruptured disc, and there is no evidence of other injury or that there was a preexisting back injury, the plain inference is that the lifting in the course of employment resulted in a continuous cumulative traumatic injury and that the employment was at least a contributing factor in the injury. When there is no conflicting evidence and the inference is undisputed, the board in furtherance of the legislative command of liberal construction in favor of the workingman must find industrial causation.[19]

The supreme court in *Lundberg* thus appeared to extend the law by imbuing the lay opinion of the employee with the force of scientific evidence so as to satisfy the burden of proof on the issue of industrial causation. At least, this would seem to be one effect of the decision in light of judicial precedents requiring scientific proof of employment connection where disability is not obviously traceable to an employment incident or exposure.[20] In so doing, the court purported to apply California Labor Code section 3202. On the other hand, it could be said that the court did not exercise its independent judgment on the evidence; rather, it accepted the facts as found by the board, but concluded as a matter of law that under these facts, the applicant had established a prima facie case on the issue of industrial causation.[21]

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18. 69 Cal. 2d at 439, 445 P.2d at 301, 71 Cal. Rptr. at 685.

19. *Id.* (emphasis added) (citations omitted).

20. As observed in Peter Kiewit Sons v. Industrial Acc. Comm'n, 234 Cal. App. 2d 831, 44 Cal. Rptr. 813 (1965), the issue of industrial causation "may run a gamut from the blatantly obvious to the scientifically obscure. If a painter falls to the ground as the result of a scaffold collapse, breaking his leg, common sense dispenses with medical evidence of causation. Other courses of disability are less available to lay discernment . . . .

"Examples might be multiplied. They condense into the general proposition that the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." *Id.* at 839, 44 Cal. Rptr. at 818 (citations omitted).

21. This approach would jibe with the court's repeated rule that where there is no dispute in the evidence, the question of whether or not an industrial injury has

Reasonable minds may properly differ on whether the supreme court reached a just result in the *Lundberg* case. However, it is clear that once the supreme court establishes new legal principles to reach what it considers to be a just result in a particular case, it often starts a chain reaction that results in further changes unrelated to the facts or legal principles initially triggering the reaction.

B. Higel v. Workmen's Compensation Appeals Board

This process began less than two months after the *Lundberg* decision when the court of appeal issued its opinion in *Higel v. Workmen's Compensation Appeals Board.*[22]

In the *Higel* case, the deceased employee had worked for the Lord Menu-Printing Company for 40 years, during the last 10 of which he was plant superintendent. In this capacity he supervised 35 to 50 employees and was responsible for all production operations. He had no prescribed hours of work but was usually at the plant for about 12 hours during five days of the week. He usually worked on Saturdays and occasionally on Sundays. One Monday morning, about

occurred is one of law. Reinert v. Industrial Acc. Comm'n, 46 Cal. 2d 349, 294 P.2d 713 (1956); *cf.* State Comp. Ins. Fund. v. Workmen's Comp. App. Bd., 67 Cal. 2d 925, 434 P.2d 619, 64 Cal. Rptr. 323 (1967); Greydanus v. Industrial Acc. Comm'n, 63 Cal. 2d 490, 407 P.2d 296, 47 Cal. Rptr. 384 (1965); California Cas. Indem. Exch. v. Industrial Acc. Comm'n, 21 Cal. 2d 751, 135 P.2d 158 (1943); Western Greyhound Lines, Inc. v. Industrial Acc. Comm'n, 225 Cal. App. 2d 517, 37 Cal. Rptr. 580 (1964); Firemen's Fund Indem. Co. v. Industrial Acc. Comm'n, 93 Cal. App. 2d 244, 208 P.2d 1033 (1949). In all these cases the court accepted the findings of the appeals board, but in applying the law to those findings in the exercise of its appellate power, found that CAL. LABOR CODE § 3202 was applicable. In none of the cases, however, did the court direct that the trier of fact in the exercise of its factfinding function was bound by section 3202, for example, as to the issues of the credibility of witnesses and the weight of evidence.

The approach taken by the California Supreme Court, however, would not seem consistent with the notion once espoused by reviewing courts that in workmen's compensation matters the applicant has the burden of establishing his claim. In 1929, the supreme court in Newton v. Industrial Acc. Comm'n, 204 Cal. 185, 267 P. 542 (1929), stated: "In the first place, the burden of proof is upon the applicant to prove that the injury received was one which would sustain an award. 'It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of employment; and that there is no presumption, as contended by respondents, that because an injury occurs in the course of employment it arises out of or because of that employment.'" *Id.* at 188, 267 P. at 543 (citations omitted); *accord,* Associated Indem. Co. v. Industrial Acc. Comm'n, 120 Cal. App. 2d 423, 426, 261 P.2d 25, 27 (1953); O'Hare v. Industrial Acc. Comm'n, 44 Cal. App. 2d 629, 112 P.2d 918 (1941); *see* Bethlehem Steel Co. v. Industrial Acc. Comm'n, 21 Cal. 2d 742, 744, 135 P.2d 153, 154 (1943).

22. 33 Cal. Comp. Cases 753 (Ct. App. 1968), *petition for hearing denied,* 70 A.C., No. 5, Minutes, at 4 (Jan. 22, 1969).

11 A.M., while sitting at his desk at work, Higel suddenly slumped over; he died shortly thereafter. The autopsy report and the certificate of death ascribed the employee's death to acute coronary thrombosis due to artherosclerotic heart disease.

During the course of proceedings instituted by the widow for workmen's compensation death benefits, a conflict of medical opinion developed concerning the cause of the decedent's condition. One doctor reported on the basis of information supplied by the widow's attorney that it was his firm opinion that the decedent's work was at least contributory to, and may have been wholly responsible for, his fatal heart attack. On the other hand, defendant's doctor, Dr. Allenstein, who had reviewed the deposition of the employer's general manager, the testimony concerning the stressful work conditions, and the decedent's medical record, evaluated the combined effect of the various work conditions on the decedent's temperament. He concluded:

> I do not believe that we can show any causality in the death of Mr. Higel which is related to his employment. The amount of physical labor which he performed was mild to moderate, occasionally lifting loads approximately 50 to 60 pounds . . . . The work that Mr. Higel performed was not in excess of the usual work he had been performing for years.
>
> The role of mental stress as a related agent in the causation of myocardial infarctions has been debated and is rather ill defined. What is mental stress to one individual may be unnoticed by another . . . . An occupation that causes mental stress related to myocardial infarction is exemplified by accountants at tax report time. Here there is concentration over prolonged hours of continued mental pressures of intensified degree. This type of pressure did not apply to Mr. Higel. Although he apparently spent long hours at his work, he loved his work; this, his wife asserted . . . .[23]

When cross-examined on this report, Dr. Allenstein testified that the decedent was more prone to develop coronary disease. He stated:

> He was a stressed individual. . . . who had a drive, a compulsion; *therefore he was a more prone individual to develop coronary artery disease* [*even*] *if he had nothing to do, regardless of his employment* . . . . The whole field of emotional stress is highly controversial and uncertain, and it is undoubtedly the least substantiated factor in the causation [of heart diseases].[24]

After weighing the evidence, the trial referee found the case to be compensable. On reconsideration, however, the appeals board reversed this determination and concluded that on the basis of the testimony

23. Quoted directly from the medical report of Dr. Bertran J. Allenstein, dated Oct. 7, 1967, referred to by the court in 33 Cal. Comp. Cases at 755-56.

24. Quoted from Transcript of Proceedings of Nov. 22, 1967, Higel v. Workmen's Comp. App. Board, 33 Cal. Comp. Cases 753 (Ct. App. 1968).

given by defendant's doctor, the heart condition did not arise out of or in the course of employment.[25]

The court of appeal, in reversing the board, discussed the reports and testimony of the two doctors and then stated:

> Under the legislative mandate of liberal construction in favor of compensability found in Labor Code section 3202, all reasonable doubts, as to whether an injury arose out of employment are to be resolved in favor of compensability of the injury. [Citation to *Lundberg v. Workmen's Compensation Appeals Board*].[26]

Commenting upon the opinions expressed by Dr. Allenstein, the court concluded that his opinion was "patently both absurd and incredible and also at variance with the doctor's own testimony that emotional stress is the reaction of some individuals to their jobs."[27] The court then noted:

> Nevertheless, we are bound to affirm the board's order annulling death benefits in this case if those findings are supported by substantial evidence. . . . Their only support, however, lies in the statements and conclusions of Dr. Allenstein, to which we have already alluded. Substantial evidence is evidence that reasonably inspires confidence and is of "solid value."[28]

The manner in which the court reached its conclusion that the doctor's medical opinion was of no substantive weight is noteworthy. At first, the court acknowledged that the board complied with the requirements of Labor Code section 5908.5 by setting forth the evidence relied upon and specifying in detail the reasons for its decision.[29] The

25. Higel v. Workmen's Comp. App. Bd., 33 Cal. Comp. Cases 753, 755 (Ct. App. 1968).

26. *Id.*

27. *Id.* at 757.

28. *Id.* (citations omitted).

29. *See* Evans v. Workmen's Comp. App. Bd., 68 Cal. 2d 753, 441 P.2d 633, 68 Cal. Rptr. 825 (1968). In *Evans*, the supreme court held that it would require the appeals board to strictly comply with CAL. LABOR CODE § 5908.5, which provides that the appeals board shall "state the evidence relied upon and specify in detail the reasons for the decision." Unfortunately, some reviewing courts have used the rule of the *Evans* case as a means to reweigh evidence and to reach an independent judgment on the evidence contrary to the specific prohibitions against such practices under CAL. LABOR CODE §§ 5952-53. See notes 6 & 7 *supra*. The process operates when the courts disagree with the reasons specified by the board for the board's conclusions, and hold in reevaluating the evidence that the board's reasons are insufficient as a matter of law, requiring annulment of the board's decision.

A striking example of this process occurred in Lund v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 227 (Ct. App. 1969), wherein the board had found that the employee's injury to his back caused a period of temporary disability but no permanent disability. The board relied on the report of a Dr. Adams, who concluded as follows: "Based on our present examination and the available medical information we find no permanent disability that could be attributed to his work efforts of November

court did not conclude, nor was any contention made, that Dr. Allenstein was not an expert in the field of cardiology,[30] that he had expressed a legal conclusion rather than a medical opinion,[31] that he had relied on an erroneous record,[32] or that he did not consider all the material components of the record in rendering his opinion.[33] Nevertheless, the court did conclude that his opinion failed to meet the test of "*sub-*

7, 1967, which were merely a temporary aggravating factor from which he has recovered.

"In the interest of terminating the case we would allow a temporary period of disability of six to eight weeks to recover from the temporary aggravation resulting from his work efforts." *Id.* at 229. The court rejected the board's contention that Dr. Adams' report should be read in its entirety so as to resolve the conflict in the evidence in favor of the board's finding, reweighed Dr. Adams' opinion and held that the opinion did not constitute substantial evidence in light of the fact that the employee had worked for over 20 months prior to his injury doing heavy work without incident. The court observed that this latter fact would be difficult to reconcile with the doctor's conclusion that petitioner's disability was not attributable to the November 1967 injury. *Id.* at 230-31.

The court, in rejecting Dr. Adams' opinion in favor of two other reporting physicians, overlooked that portion of section 4660 of the Labor Code which defines permanent disability as a "diminished ability to compete in an open labor market." CAL. LABOR CODE § 4660(a). Dr. Adams' report, taken by its four corners, concluded simply that Lund, prior to the incident of November 1967, was an individual with a handicap, consisting of back disability, who should not perform strenuous physical activity. This, then, was a preexisting permanent disability, the existence of which was confirmed by the fact that the performance of such strenuous physical activity in November, 1967, produced severe temporary symptoms. In Dr. Adams' opinion, however, after the temporary aggravative symptoms had subsided, the employee's condition reverted to that which had preexisted the November 1967 incident; that is, the handicap precluded the employee from engaging in strenuous physical activity.

Other courts also seem to be employing the same device of reweighing the evidence in order to reach an independent judgment in conflict with the factual findings of the board. *See* Cal-Nat Airways, Inc. v. Workmen's Comp. App. Bd., 268 Cal. App. 2d 93, 73 Cal. Rptr. 815 (1968); Peck v. Workmen's Comp. App. Bd., 267 Cal. 2d 448, 72 Cal. Rptr. 904 (1968); B.L. Ranch, Inc. v. Workmen's Comp. App. Bd., 266 Cal. App. 2d 192, 73 Cal. Rptr. 124 (1968); Holcomb v. Workmen's Comp. App. Bd., 266 Cal App. 2d 108, 71 Cal. Rptr. 874 (1968); Brady v. Workmen's Comp. App. Bd., 34 Cal. Comp. Cases 41 (Ct. App. 1969).

30. Compare Peter Kiewit Sons v. Industrial Acc. Comm'n, 234 Cal. App. 2d 831, 44 Cal. Rptr. 813 (1965); Pacific Employers Co. v. Industrial Acc. Comm'n, 47 Cal. App. 2d 494, 118 P.2d 334 (1941); Simpson Constr. Co. v. Industrial Acc. Comm'n, 74 Cal. App. 2d 239, 240 P. 58 (1925).

31. Compare Zemke v. Workmen's Comp. App. Bd., 68 Cal. 2d 794, 441 P.2d 928, 69 Cal. Rptr. 88 (1968).

32. Compare Blankenfeld v. Industrial Acc. Comm'n, 36 Cal. App. 2d 690, 98 P.2d 584 (1940); Mark v. Industrial Acc. Comm'n, 29 Cal. App. 2d 495, 500, 84 P.2d 1071, 1074 (1938); Gamberg v. Industrial Acc. Comm'n, 138 Cal. App. 424, 427, 32 P.2d 413, 415 (1934).

33. Compare Winthrop v. Industrial Acc. Comm'n, 213 Cal. 351, 2 P.2d 142 (1931).

stantial evidence."[34]

The court in *Higel* thus applied the rule of the *Lundberg* case to a factual situation that bore no relationship to *Lundberg*. In *Lundberg*, the record contained "no conflicting evidence" and the inference of industrial causation was undisputed;[35] whereas in *Higel* there was a clear conflict in the medical record. The apparent reason for the illogic of the *Higel* case is a misapplication of section 3202. The section contains a legislative mandate, addressed to the courts, to liberally interpret workmen's compensation laws, "with the purpose of extending their benefits for the protection of persons injured in the course of their employment."[36]

The scope of appellate court review is limited to questions of law.[37] Section 3202, by its express language, does not and cannot extend to the manner in which factual issues are resolved. The fact-finding function is exclusively the province of the appeals board.[38] The court in *Lundberg* applied section 3202 to the undisputed facts as found by the board and concluded that as a matter of law those facts established industrial causation.[39] In *Higel*, on the other hand, the court disagreed with the board's finding that the decedent's work activity did not contribute to his death.[40] By citing *Lundberg* as authority, the *Higel* court read into section 3202 the requirement that the *board* must liberally resolve conflicts in the evidence in favor of compensability when a "reasonable doubt" about compensability exists.[41] In applying the rule in *Lundberg*, the court overlooked the fact that the supreme court specifically noted that it was not reweighing the evidence but accepting the facts as found by the board. The supreme court in *Lundberg* limited its application of section 3202 by stating:

> When there is no conflicting evidence and the inference is undisputed, the board in furtherance of the legislative command of liberal construction in favor of the workingman must find industrial causation.[42]

The medical record in the *Higel* case, including the reports and

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

35. 69 Cal. 2d at 439, 445 P.2d at 302, 71 Cal. Rptr. at 686.

36. CAL. LABOR CODE § 3202; see note 13 *supra*.

37. *See* CAL. LABOR CODE §§ 5952-53; see notes 6 & 7 *supra* and cases cited in text accompanying notes 9 & 10 *supra*.

38. See cases cited note 12 *supra* & accompanying text.

39. 69 Cal. 2d at 439, 445 P.2d at 302, 71 Cal. Rptr. at 686.

40. 33 Cal. Comp. Cases at 757.

41. *Id.* at 756.

42. 69 Cal. 2d at 439, 445 P.2d at 302, 71 Cal. Rptr. at 757.

testimony of the doctors for both parties presented what would seem to be a common example of conflicting evidence, quite typical of records before the appeals board.[43] The inference of industrial causation was anything but undisputed. The only manner in which the *Higel* court could reach such a conclusion was to characterize the opinion of defendant's doctor as not constituting "substantial evidence."

While the meaning of the term "substantial evidence" has not been specifically defined in a workmen's compensation case, the term as applied to appellate review generally has been defined as

> 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 mind might accept as adequate to support a conclusion."[44]

It is difficult to discern any reason why this definition should not apply in workmen's compensation matters. Although Labor Code section 5952 provides that appellate review "be based on the entire record," the section cannot mean that an appellate court is authorized to re-evaluate the whole record. Rather, the appellate function should be to look to the record to ascertain whether there exists substantial evidence to support the finding in question. The rule has been held to be that the appellate courts will review the entire record for *supporting* evidence, but that conflicting evidence will be ignored.[45]

In ignoring this rule, the court in the *Higel* case exercised its own judgment on the evidence and selected that portion of the evidence it found most persuasive. By doing this and rejecting the report and testimony of defendant's doctor as "insubstantial evidence," the court reached the conclusion that as a matter of law, long hours of enjoyable work by an employee who was more prone to develop coronary artery disease if he had nothing to do will contribute to the occurrence of a myocardial infarction. Such a holding is difficult to defend, either empirically or on the basis of long established authority. Unfortunately, the approach taken on appellate review in the *Higel* case is becoming increasingly and alarmingly more familiar.[46]

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43. *E.g.*, Foster v. Industrial Acc. Comm'n, 136 Cal. App. 2d 812, 289 P.2d 253 (1955).

44. Estate of Teed, 112 Cal. App. 2d 638, 644, 247 P.2d 54, 58 (1952), *citing* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). *See also* Dyer v. Knue, 186 Cal. App. 2d 348, 8 Cal. Rptr. 753 (1960), 1 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION §§ 10.08 [1]-[3] (2d ed. 1968).

45. *See, e.g.*, Argonaut Ins. Co. v. Industrial Acc. Comm'n, 49 Cal. 2d 706, 321 P.2d 460 (1958).

46. See discussion in note 29 *supra*.

III. Conclusion

It would be folly to look upon the workmen's compensation law as a sterile field. Accommodation must always be made for change; the law is a living body and from time to time must adjust to its changing environment. But where change does occur, as it did in *Lundberg*, it is vital that the courts understand the true nature of that change. Misapplication of a rule of law results not in adjustment to a changing environment, but in a change of the environment itself.

The misapplication of the *Lundberg* holding by the *Higel* court could well lead to a material alteration of the traditional function of appellate review, with a concomitant emasculation of the factfinding powers of the judicial tribunal charged with adjudication of workmen's compensation cases. To avoid this result and to restore a proper separation of the factfinding function and appellate review, the legislative mandate contained in section 3202 for liberal construction of the law must be carefully distinguished from the legislative command contained in sections 5952 and 5953 delimiting the boundaries of appellate review. Otherwise the appellate court would improperly become the trier of fact. Hearings before the board would then be almost superfluous, especially if all conflicts in evidence had to be resolved in favor of compensability, as they would under the *Higel* application of section 3202. Determination of facts by the appellate court would effectively repeal sections 5952 and 5953.

If "substantial evidence" means, as indicated in *Higel*, that evidence supportive of a finding of fact must be something more than competent legal evidence and must somehow *inspire* the members of the appellate bench in accordance with their own views respecting the factual issue to be decided, then we have reached a judicial abrogation of the clear legislative intent that board findings on issues of fact are conclusive. It may be well to ponder Justice Burke's remarks in a dissenting opinion in a recent case:

> [T]he majority opinion has reweighed the evidence, attempting to reconcile the testimony which conflicts with the "conclusion" it announces, and has usurped the role of fact-finder contrary to fundamental rules governing the functions of this court.[47]

Whether the test of "substantial evidence" as applied in *Higel* will find permanent acceptance, or will ultimately be rejected as a judicial misadventure, remains to be seen. The answer will in large measure turn on whether courts will reexamine the meaning and intent of Cali-

47. Smith v. Workmen's Comp. App. Bd., 69 Cal. 2d 814, 826, 447 P.2d 365, 373, 73 Cal. Rptr. 253, 261 (1968).

fornia Labor Code section 3202 and confine its application to questions of law, thus leaving to the appeals board the function of determining findings and conclusions on questions of fact, despite the court's own inclination to draw inferences from the evidence varying from those drawn by the appeals board. If the essence of judicial statesmanship is judicial restraint, the scope of appellate review will become settled and will not vary according to the facts in particular cases. Perhaps it is time to hearken to the words of Judge Learned Hand: "[I]t is more important that the law should be certain than that ideal justice should be done . . . .[48]

48. Guidise v. Island Refining Corp., 291 F. 922, 923 (S.D.N.Y. 1923). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921), where the eminent jurist states that a judge should "draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' "