CAIIA Status Report

JULY 2004

News of Members

The California Association of Independent Insurance Adjusters is pleased to welcome these new members.

MIKE MURPHY
521 E. Palm Avenue, #L • Burbank CA 91501
(818) 567-2525
murphy.mm@att.net

JOHN S. RICHERBY COMPANY
300 East Glenoaks 2nd Fl. • Glendale, CA 91207
(818) 507-7873
jscaul@sbcglobal.net

PREMIER CONSULTING & ADJUSTMENT INC.
3233 Grand Avenue, #N-402 • Chino Hills, CA 91709
(800) 295-3095
www.premieradjust.com

NORTH STATE INVESTIGATIONS
P.O. Box 491964 • Redding, CA 96049
(530) 221-0604
nsi@shasta.com

DAN POTTER ADJUSTING
1058 Fallon Woods Way • Rio Linda, CA 95673
(916) 991-4321
potteradjusting@comcast.net

If you see any of these folks, please give them a warm welcome!

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

***Status Report* Now Available by E-mail**

If you would like to receive the *Status Report* via e-mail please send your e-mail address to *info@caiia.org.*

CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX

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■ **California Association of Independent Insurance Adjusters, Inc**

PRESIDENT'S OFFICE
P.O. Box 619058
Roseville, CA 95661-9058
Email:info@caiia.org
www.caiia.org

PRESIDENT
Lee Collins
lee.collins@gbbragg.com

IMMEDIATE PAST PRESIDENT
Steve Tilghman
stilghman@aims4claims.com

PRESIDENT ELECT
Doug Jackson
scsdj@southwestclaims.com

VICE PRESIDENT
Steve Wakefield
boltadj@msn.com

SECRETARY TREASURER
Sharon Glenn
sglenn@johnglennadjusters.com

COUNSEL
Richard H. Caulfield
rcaulfield@cddlaw.com

ONE YEAR DIRECTORS
Sam Hooper
repooh@msn.com

Michael Kielty
michael.kielty@georgehills.com

Robert Lobato
rlobato.pioneer@verizon.com

TWO YEAR DIRECTORS
Pete Vaughan
pvaughan@pacbell.com

Jeff Queen
jeff@countylineclaims.com

Stu Ryland
s_ryland@malmgrengroup.com

■ PRESIDENT'S MESSAGE

As I watched much of the TV coverage of the memorial events following the death of former President Ronald Reagan during the 2nd week of June, I was struck by the willingness of most Americans to put aside partisan rancor for a time, to honor the passing of our 40th President. More than once, I felt my eyes filling with tears, as I watched the grandeur of many of the events.

No matter what one thinks of Ronald Reagan's legacy, and place in history, I suspect most of us were awed by the grand traditions, and respect for a fallen leader of this country. The position of President Of The United States is as close as America gets to royalty, and I agree with one newscaster who said, following the service in the National Cathedral, "There are no words to describe what we have just seen."

As a high school student, I watched similar events following the assassination of President Kennedy, although I am sure I was too young to appreciate the lasting impact of such scenes as John Jr. saluting his father's passing funeral cortege. How many times have we seen that same scene played repeatedly over the years? Perhaps the sight of Nancy Reagan kissing her husband's casket will similarly be a photo for the ages.

The sharp contrast, once the funeral events drew to a close, when the media once again turned their sights on the sometimes bitter 2004 Presidential campaign, and the mayhem and violence we see daily in Iraq, was remarkable. In some ways, in a short period of time, we have all seen the best and the worst of current events in the world we now live in.

There is no partisan rancor in the politics of the CAIIA, thankfully! In a few short months, the reigns of this all volunteer organization will be transferred to the President Elect, Doug Jackson, of Southwest Claims Service, in Simi Valley. My name will be added to the list of CAIIA Past Presidents - #57, if anyone is counting!

Doug tells me he is planning a great Fall Conference, to be held on October 13-15, at Disney's Grand Californian Hotel. By the way, Doug was one of those stopped on the freeway, when the Reagan funeral procession came back to Simi Valley. Did you see him wave? By the time we get to the middle of October, the Presidential campaign will be closing in on the finale – Election Day on November 2. No doubt we will all be glad to take a break from the constant political coverage. Mickey Mouse and Donald Duck are apolitical, they tell me!

Have a wonderful July 4th, everyone! God Bless America!

LEE COLLINS, ARM
President - CAIIA 2003-2004

Going & Coming

Submitted by Knapp, Petersen & Clarke - Glendale, CA

As an employer, did you know that the payment of a car allowance to your employee, or a phone call to your employee to discuss business while in route to work in the morning, or even the implied requirement that the employee use his personal vehicle to fulfill his job duties puts what would otherwise be an ordinary commute outside the course and scope of employment within the course and scope of employment?

Generally, an ordinary commute to a fixed place at a fixed time is not in the course and scope of employment and, therefore, an employee injured during his ordinary commute is not entitled to workers' compensation benefits. This is commonly referred to as the going-and-coming rule. The test for determining if a trip is an "ordinary commute" is whether or not the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.

There are a number of exceptions to the going-and-coming rule that have been developed in workers' compensation cases. The exception that is the subject of this article, and is often overlooked by employers and lawyers alike, is where the employer either expressly or impliedly requires the employee to furnish a vehicle to be used on the job. This is commonly referred to as the vehicle use exception. Where an employee is required to use his personal vehicle on the job, the employer "will be conclusively presumed to benefit from employee action reasonably directed towards the execution of the employer's orders or requirements."

The three leading cases dealing with the vehicle use exception are, in chronological order: *Smith v. Workmen's Compensation Appeals Board*; *Hinojosa v. Workmen's Compensation Appeals Board*; and *Hinson v. Workmen's Compensation Appeals Board*. Each case helps define the scope of the vehicle use exception. *Smith* formed the

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You know you're living in 2004 when . . .

1. You accidentally enter your password on the microwave.
2. You haven't played solitaire with real cards in years.
3. You have a list of 15 phone numbers to reach your family of 3.
4. You e-mail your mate who works at the desk next to you
5. Your reason for not staying in touch with friends is that they do not have e-mail addresses.
6. When you go home after a long day at work you still answer the phone in a business manner.
7. When you make phone calls from home, you accidentally dial "0" or "9" to get an outside line.
8. You've sat at the same desk for four years and worked for three different companies.
10. You learn about your redundancy on the 11 o'clock news!
11. Your boss doesn't have the ability to do your job.
12. Contractors out number permanent staff and are more likely to get long service awards.

AND THE REAL CLINCHERS ARE:

13. You read this entire list, and kept nodding and smiling.
14. As you read this list, you think about forwarding it to your friends.
15. You got this email from a friend that never talks to you any more, except to send you jokes from the net.
16. You are too busy to notice there was no No. 9.
17. You actually scrolled back up to check that there wasn't a No. 9.
18. AND NOW U R LAUGHING ON YOUR STUPIDNESS . . . :-) …I fell for this one.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Insurance Broker Liability – Stipulated Judgment

Alma Valentine v. Membrila Insurance Services, Inc., Court of Appeal, Second District; May 10, 2004.

Stipulated judgments are used by insureds against an insurer who refused to defend its insured. This case considered whether that procedure may be used in a lawsuit against an insurance broker where it is claimed they failed to properly obtain insurance coverage.

Alma Valentine was shot and rendered a quadriplegic by a criminal assailant leaving a nightclub owned by Jose and Teresa Martinez. The nightclub had a security service, Metro Patrol Private Security. Valentine sued Martinez and Metro for her injuries. Both Martinez and Metro were insured under separate policies issued by Scottsdale Insurance Company. The policy insuring Martinez had been procured by their broker, Membrila Insurance Services, Inc. This policy contained a broad assault and battery exclusion, excluding coverage for negligence related to violent attacks. No such exclusion exited on the Metro policy. Scottsdale defended Metro, but not Martinez.

Valentine settled with Metro for $925,000 and thereafter agreed with Martinez to a stipulated judgment of $6 million, plus interest. In exchange, Martinez assigned to Valentine rights to sue Scottsdale and Membrila for the stipulated judgment. Valentine agreed not to execute on the judgment on any asset of the Martinezes. The Martinezes had incurred approximately $16,000 in attorneys' fees in defending themselves.

Martinez and Valentine then sued Scottsdale and Membrila. The claim against Scottsdale was settled for approximately $240,000. In a trial that followed against Membrila, the court found Membrila to be negligent in obtaining coverage and held their liability to be limited to the coverage limits of $1 million for the policy that was obtained, plus the costs of defense. Since the settlement with Scottsdale and Metro exceeded $1 million, the court entered a judgment of zero net recovery. Both parties appealed.

The Court of Appeal affirmed. The Court noted that no evidence was presented on the issue of damages. Rather, the parties took the position that the stipulated judgment was conclusive proof of the measure of damages. The trial court accepted the proposition that the stipulated judgment was presumptive evidence of damages unless it was shown to be fraudulent or collusive.

This Court noted that the rule regarding stipulated judgments has been developed in cases against insurance companies. These cases hold that where an insurance company has breached its duty to defend, a stipulated judgment entered against the insured is considered conclusive on the issue of liability and damages absent proof of fraud or collusion.

This Court could find no authority that applied that same principle to claims of broker negligence. The Court stated that the use of stipulated judgments outside the context of the insurer-insured relationship has generally been rejected. The reason is because no other relationship is truly analogous, and use of a stipulated judgment would be unfair.

The Court noted that an insurance broker has no duty to provide a defense to its client. Further, it was impossible to say when such a theoretical duty would have arisen. In the insurer cases, the city arises upon tender of the defense. It was impossible to state in this context when Membrila allegedly violated that duty.

The duties imposed upon insurers exist because of their unequal bargaining power over the insured. The same could not be said of the bargaining strength between a broker and its clients. The Court also noted the proper method of calculating damages for professional negligence was the amount of the actual damages sustained. Where the client has been made whole, the client may not maintain an action for professional negligence. Assuming there was a breach of duty, the costs of defense was the only loss. However, the settlements with Scottsdale more than reimburse Martinez for those costs. There was no trial in the underlying action, and thus, no damages were awarded against Martinez. The covenant not to execute excused Martinez from bearing any actual liability to Valentine. Since the damages were limited to the $16,000 in defense costs and the offset for the settlement from Scottsdale more than exceeded it, a net recovery of zero was thus warranted. The judgment was affirmed.

COMMENT

This opinion clearly shows the reluctance of courts to extend the doctrine of stipulated judgments for failure to defend by an insurer to other situations. In this case, the Court refused to extend that doctrine to a client-broker relationship.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Duty to Defend – Contribution Between Insurers

Travelers Casualty & Surety Company v. Century Surety Company, Court of Appeal, Fourth District; May 21, 2004.

Contribution arguments between insurers in construction defect litigation commonly involve disputes over the manner in which to share defense indemnification. This cases addresses that issue.

Standard Wood Structures, Inc., a framing contractor, performed carpentry and framing work on Canyon Estates between 1987 and 1990. In 1998, the homeowners association filed a lawsuit contending that there was continuing damage to their properties caused by defective construction work. Standard was named as a defendant.

Standard tendered to Travelers Casualty & Surety Company, which insured Standard between 1988 and 1993. Standard also tendered to Century Surety Company, which insured Standard between September 1996 and September 1997, and CNA, whose policy period was not stated in the opinion. Al three insurers provided Standard with a defense. Century later withdrew. Travelers and CNA settled the claims. Travelers then sued Century for contribution. The trial court granted Travelers' motion for summary adjudication, finding Century had a duty to defend and also finding that Century had a duty to contribute to settlement represented by its time on the risk. Judgment was entered accordingly. Century appealed.

The Court of Appeal affirmed the judgment. It noted that both insurers provided primary insurance to Standard. Century contended that its "other insurance" provision controlled because the Travelers policy contained a pro rata "other insurance" clause, whereas its policy contained an excess insurance clause over any other primary insurance. The Court noted that both policies provided primary insurance for different periods of time. During the time period each policy was in effect, there was no other insurance. The Court noted that where two policies provide primary insurance to the same insured for the same risk and have conflicting "other insurance" clauses, the modern trend of decisions is to prorate the coverage. This includes policies which provide that they are excess over any other available insurance. The Court noted that to honor the excess clause would impose the entire burden on the insurer which provided for pro rata coverage and would result in all insurers providing excess "other insurance" clauses to avoid being stuck with the entire burden.

Here, both policies covered the same loss. They provided insurance during different periods of time. Giving effect to the "other insurance" clause of Century would impose the entire burden on Travelers. This the Court felt to be unfair.

The Court noted that the California Supreme Court had not yet addressed this question. The Court noted that while the terms of an insurance policy are generally honored, equitable considerations are used to spread the cost among insurers in the absence of any language decreeing otherwise, As such, the Court felt it would be inequitable in this situation to honor the defendant's excess "other insurance" clause. The judgment was thus affirmed.

COMMENT

This case is consistent with the recent trend of cases to prorate policies in continuous loss cases where one has an excess clause and one has a prorate clause. This approach of the courts is an attempt to even out the burden on each of the insurers.

CAIIA *Calendar*

CAIIA Annual Conference

October 13, 14, & 15, 2004

The Disney Grand Californian, Disneyland Resort

Anaheim, CA

Contact: Doug Jackson, 805-584-3494, ext. 11

Claims Conference of Northern California

September 14 & 15, 2004

The Doubletree Hotel, Sacramento, CA

Contact Barbara Prosch, 530-626-1676

HRB Insurance Law Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Haynes v. Farmers Insurance Exchange, California Supreme Court; Case No. S104851; Filed May 17, 2004.

The California Supreme Court held that an endorsement to an automobile insurance policy which limited coverage for permissive users of the insured vehicle was not enforceable because it was not "sufficiently conspicuous, plain and clear."

This case arose when the plaintiff was injured in a car accident that occurred when Farmer's insured lent the insured vehicle to a third party. In defense of the plaintiff's action, Farmers asserted that the coverage under the policy for the plaintiff's accident is defined not by the "coverages" of $250,000/$500,000/$100,000 listed on the policy declarations page, but by the language in an endorsement limiting permissive user coverage to $15,000/$30,000/$5,000. The California Supreme Court rejected Farmer's claim, holding that "any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' " The court found that the permissive user limitation in the endorsement was not conspicuous, plain and clear based on numerous factors, including, but not limited to: the fact that it was listed on the declarations page only by its numeric designation, along with 10 other endorsements; the limiting language was "not bolded, italicized, enlarged, underlined, in different font, capitalized, boxed, set apart, or in any other was distinguished from the rest of the fine print"; the term permissive user was not defined; and the limitation contained confusing cross-references to other insurance policies.

In reaching its decision, the California Supreme court recognized that insurers may rely on endorsements to modify printed terms of a form policy but found that in this case the permissive user coverage limitation contained in the endorsement on page 24 of the policy did not adequately alert the insured to the reduction in coverage because it was not "conspicuous, plain and clear".

Newell v. State Farm General Insurance Co., California Court of Appeal, Second District; Case No. B157114; Filed May 21, 2004.

The California Court of Appeal held that certification of a class action against insurance carriers was inappropriate because the plaintiffs could not satisfy the community of interest requirement for class certification and class treatment was not the superior method for resolving the litigation.

This case arose when proposed class representatives filed a class action complaint against homeowners' insurance carriers regarding claims for policy benefits for damages incurred by the Northridge earthquake. The named plaintiffs alleged that they and members of the class they proposed to represent were wrongfully denied policy benefits for damage caused to their homes by the Northridge earthquake. State Farm filed a demurrer to the class action allegations, contending plaintiffs could not satisfy the commonality or superiority requirements for certification. The trial court sustained the demurrer without leave to amend. The California Court of Appeal agreed with and affirmed the trial court's decision. The Court of Appeal held that common questions of law and fact did not predominate because even if it was proven that the insurers used improper claims practices to adjust Northridge earthquake claims, each putative class member still could recover breach of contract and bad faith only by proving his or her individual claim was wrongfully denied and the insurer's action in doing so was unreasonable. Thus, each class member's right to recover depends on the facts particular to his or her case. The court of Appeal also agreed that a class action was not the superior means to resolve the Northridge earthquake coverage litigation. The court said that each class member has a strong interest in controlling his or her own case and that the class members may have faced different types of alleged wrongdoing. The Court of Appeal also said that allowing the case to proceed as a class action would contravene Code of Civil Procedure section 340.9 because it would permit insureds who chose not to avail themselves of the limited statute of limitations revival period in section 340.9 (one year) to nevertheless pursue a claim against their carrier.

In reaching its decision, the Court of Appeal relied on *Basurco v. 21st Century Ins. Co.*, 108 Cal.App.4th 100 (2003).

Going & Coming

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bright-line test for the inapplicability of the going-and-coming rule and the applicability of the vehicle use exception, when the use of an employee's personal vehicle is an express condition of employment. *Hinojosa* extended the *Smith* holding to apply to a situation where the nature of the job impliedly required, instead of expressly required, the employee to arrange for his own transportation on the job in order to accomplish the purpose of the job. In contrast, the *Hinson* court found the vehicle use exception inapplicable where the use of the employee's car on the job was a matter of mutual convenience rather than for the particular advantage or benefit of the employer or as an accommodation to the employer.

These three leading cases on the vehicle use exception – *Smith*, *Hinojosa*, and *Hinson* - were analyzed and applied in the more recent case *of County of Tulare v. Workers' Compensation Appeals Board*. In *County of Tulare*, the Court of Appeal affirmed the Workers' Compensation Appeals Board award of benefits to a County employee for an injury she sustained while driving her car from home to work.

The employee was a supervisory secretary and division head for the County's building and planning department. The evidence established that the employee used her personal vehicle to fulfill her job responsibilities on an as-needed, but regular, basis and included procuring coffee supplies for the office, purchasing film, going to the post office to mail something or buy stamps, delivering reports to the board of supervisors' offices and taking material to the City of Farmersville. The employee was reimbursed for mileage, but she did not always submit reimbursement requests. Although the County had two vehicles available for its employees' use, they were usually being used by other employees and, therefore, unavailable to this particular employee. The county carpool was also available, but a reservation had to be made at least one day in advance in order to arrange the use of a carpool. The use of employees' cars to run errands was an acceptable alternative to the use of carpools and, in fact, was encouraged be the County for short trips because it cost the County less than it would to use a carpool.

Added to this formulation is the reimbursement of the employee for mileage on the job and the fact that the use of the employee's vehicle is to the economic advantage of the employer. Under such a state of facts, the employee is performing services growing out of, and incidental to, his employment when he brings his car to work and makes it available for use on a regular bases. Accordingly, injuries suffered in the car while in transit to and from work are compensable.

Today, employers often benefit from the use of an employee's vehicle to fulfill the employee's job duties and all too often do not realize this puts the employee's commute within the purview of the course and scope of employment. For example, litigation attorneys are constantly driving to court, mediations, or to meet clients. Thus, it seems that the use of the attorney's vehicle is an implied condition of employment, and any injury occurring while driving to and from work is compensable under workers' compensation.

THE CONVENTION IS COMING!!!

The annual meeting of the
California Association of Independent Insurance Adjusters
is being held on **October 13, 14 and 15, 2004** at the **Disneyland Resort in Anaheim.**
We have very low room rates and a price to attend the convention that hasn't been this low in years. Plan on attending and see what the Association is doing for you.

Next month we will have the application to reserve your space for the convention.
The board looks forward to having all of you there.

EXECUTIVE OFFICE DUTY DISTRIBUTION AND COMMITTEES

Status Report	Sterrett Harper, RPA	818-953-9200	harperclaims@hotmail.com
Grievance	Steve Tilghman, RPA	916-563-1900	stilghman@aims4claims.com
Directory	Lee Collins	916-783-0100	lee.collins@gbbragg.com
Education	Steve Wakefield, RPA	559-485-0441	boltadj@msn.com
	Steve Tilghman	916-563-1900	stilghman@aims4claims.com
Finances/Budget	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
Exhibit Booth	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
By-Laws	Steve Wakefield	559-485-0441	boltadj@msn.com
Meeting Minutes	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
Legislation	Sam Hooper	562-802-7822	repooh@msn.com
	Pete Schifrin	818-909-9090	pschifrin@sgdinc.com
Status Report Sponsorship	Jeff Queen	818-707-1770	jeff@countylineclaims.com
Web-site Master	Pete Vaughan, RPA	707-745-2462	pvaughan@pacbell.net
New Membership	Sam Hooper	562-802-7822	repooh@msn.com
Membership/Renewals	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
Public Relations	Stu Ryland	916-641-5452	s_ryland@malmgrengroup.com
Mid-term Convention, 2004	Lee Collins	916-783-0100	lee.collins@gbbragg.com
	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
Fall Convention, 2004	Doug Jackson	805-584-3493	scsdj@southwestclaims.com
	Lee Collins	916-783-0100	lee.collins@gbbragg.com
Fall Convention Sponsors	Mike Kielty	510-465-1314	michael.kielty@georgehills.com
Internal Management	Robert Lobato	909-694-8330	rlobato.pioneer@verizon.net
Re-Certification Seminar	Pete Schifrin	818-909-9090	pschifrin@sgdinc.com