Santa Clara Law Review

Volume 9 | Number 1 Article 8

1-1-1969

Judicial Philanthropy Curbed: A New Statutory Scheme for Cumulative Injury Awards

Louis A. Basile

JUDICIAL PHILANTHROPY CURBED: A NEW STATUTORY SCHEME FOR CUMULATIVE INJURY AWARDS

While California courts have long harbored a penchant for reviewing workmen's compensation cases,[1] the current generation of decisions indicates that the acknowledged liberal trend is rapidly accelerating. In the eight year period 1960–67, for example, the Supreme Court of California reviewed twenty-six claims for compensation and favored the employee in twenty decisions.[2] The courts' "incredible liberality of interpreting and applying the fair provisions of a well-written statute" has often resulted in nullifying legislative intent and granting the claimant the benefit of every possible doubt about the facts.[3] Perhaps the best example of the courts' philanthropic interpretations is a recent series of "cumulative injury" cases.[4] Collectively these decisions have classified similar physical harms as either specific injuries,[5] cumulative injuries,[6] or occupational diseases[7] in the attempt to avoid the lapse of the limitations period[8] or to qualify for subsequent injury benefits.[9] In-

---

[1] A noted commentator has remarked that, although California has enacted the most restrictive workmen's compensation statutes in the country, its court decisions on compensability are more liberal than any of the other states. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 8.03(3) (1967). In the thirteen years from 1941 to 1953, the courts issued seventy-six opinions of which only twenty-one ran against the employee. *Id.* at § 8.03(1) n.2.

[2] *See, e.g.*, Zeeb v. WCAB, 67 Cal. 2d 496, 432 P.2d 361 (1967); McCoy v. IAC, 64 Cal. 2d 82, 410 P.2d 362 (1966); Walters v. IAC, 57 Cal. 2d 387, 369 P.2d 703 (1962); Fibreboard Paper Corp. v. IAC, 57 Cal. 2d 844, 372 P.2d 321 (1962); *contra*, Argonaut Ins. Co. v. IAC, 54 Cal. 2d 740, 356 P.2d 182 (1960).

[3] Hanna, *California Workmen's Compensation 1918-1968: A Brief Review and Evaluation*, 3 LINCOLN LAW REV. 89, 96-97 (1967).

[4] Dow Chemical Co. v. WCAB, 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967); De Luna v. WCAB, 258 A.C.A. 271, 65 Cal. Rptr. 421 (1968); Miller v. WCAB, 258 A.C.A. 589, 65 Cal. Rptr. 835 (1968); Fruehauf Corp. v. WCAB, 68 A.C. 591, 440 P.2d 236, 68 Cal. Rptr. 164 (1968).

[5] For purposes of workmen's compensation law a specific injury was unclassified as such. An injury is defined as any injury or disease arising out of the employment. CAL. LAB. CODE § 3208 (West 1955).

[6] An authority in the field of workmen's compensation has defined a cumulative injury as that which may result from the accumulated effects of overwork or from long-continued exposure to tension and strain. Where there is such an extended exposure, the result is regarded as one continuous cumulative injury. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 11.01 (2)(c) (1967).

[7] Although no concrete definition has ever existed for occupational disease, it is generally considered to be any disease arising out of and occurring in the course of employment and caused by the employment. CALIFORNIA CONTINUING EDUCATION OF THE BAR, WORKMEN'S COMPENSATION 171 (1963).

[8] In California, a disabled employee must file all claims for compensation within one year from: The date of injury, the expiration of any period in which he received disability payments, or the last furnishing of any benefits provided by way of medical

dividually the courts have held: First, a cumulative injury occurs subsequent to a previous, fully compensated specific injury, even though the extent of the cumulative injury was, in fact, determined prior to the specific injury;[10] second, a specific injury is just "a mere exacerbation" indicative of a later cumulative injury and is submerged in the cumulative injury;[11] lastly, a series of back strains caused by heavy lifting is an occupational disease and the limitations period does not commence until the claimant realizes the industrial origin of his "disease."[12]

In swift riposte the legislature passed three statutes[13] reversing these recent cumulative injury and occupational disease cases.[14] Unfortunately, both the court of appeal and the legislature appear to have misinterpreted the first case[15] handed down by the supreme court. Thus, some ambiguity may remain despite the legislative effort. However, the statutory clarification may be welcomed solely for its apparent declaration of legislative policy.

This comment will examine the recent case and statutory law involving cumulative injuries and analyze the clash between judicial and legislative policy. Whether the legislature's apparent policy declaration will dampen the liberal spirit of the courts remains to be seen.

JUDICIAL PHILANTHROPY: RECENT CUMULATIVE INJURY CASES

While the "continuous cumulative" or "repetitive trauma" injury has long been recognized in California,[16] this problematical

---

or hospital treatment. CAL. LAB. CODE § 5405 (West 1955). The date of injury is that date on which occurred the incident or exposure for which the employee seeks compensation. CAL. LAB. CODE § 5411 (West 1955). In cases of occupational disease, the date of injury is the date when the employee first suffers disability and knows or should know that his disability was caused by his employment. CAL. LAB. CODE § 5412 (West 1955). The case law has added the further stipulation that in the event that an injury is cumulative in nature, the date of injury is deemed to be the date of last exposure, that is, the last day of work or the last day the employee was exposed to the elements causing the injury. Firemen's Fund Indem. Co. v. IAC, 39 Cal. 2d 831, 250 P.2d 148 (1952); Beveridge v. IAC, 175 Cal. App. 2d 592, 346 P.2d 545 (1959).

[9] CAL. LAB. CODE § 4750 (West 1955), CAL. LAB. CODE § 4751 (West Supp. 1967).

[10] Dow Chemical Co. v. WCAB, 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967).

[11] De Luna v. WCAB, 258 A.C.A. 271, 65 Cal. Rptr. 421 (1968); Miller v. WCAB, 258 A.C.A. 589, 65 Cal. Rptr. 835 (1968).

[12] Fruehauf Corp. v. WCAB, 68 A.C. 591, 440 P.2d 236, 68 Cal. Rptr. 164 (1968).

[13] CAL. LAB. CODE §§ 0000, 0000, 0000 (1968), *as amended*, A.B. 1, 1968 Cal. Stats. 1st Extra. Sess. 1. (Hereinafter, CAL. LAB. CODE §§ 3208.1-2, 5303 (new).)

[14] [1968] ASSEMBLY JOUR. 1st Extra. Sess. 11.

[15] Dow Chemical Co. v. WCAB, 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967).

[16] *See* Swezey, *Disease as Industrial Injury in California*, 7 SANTA CLARA LAW. 205, 215 (1967).

area was revived in *Beveridge v. Industrial Accident Commission*[17] where the court attempted to put to rest the issue of when the so-called "cumulative injury" occurred for purposes of the statute of limitations. The case held that a cumulative injury, for example, a series of minor back strains symptomatic of and resulting in a disabling back injury, occurs on the date of last exposure, when the cumulative effect causes disability.[18]

Dow Chemical

In *Dow Chemical Company v. Workmen's Compensation Appeals Board*,[19] the claimant suffered back pains caused by lifting heavy equipment. He had suffered specific injuries in 1949, 1960, and 1961, which had left him partially disabled. After leaving his employment on January 2, 1964 because of the severity of his back injury, he filed claims for disability benefits for the 1949, 1960, and 1961 injuries. This claim was filed April 22, 1965. Claimant, on September 17, 1965, filed another claim alleging permanent disability caused by repetitive trauma from the day he began work in 1946 to January, 1964. The appeals board held: Claimant was not entitled to an award for the 1949 injury; the 1960 injury constituted 10% of his permanent disability which totalled 75%, hence 7½% of the permanent disability; the 1961 injury also constituted 10% of claimant's total disability of 75%, hence 7½% permanent disability; and finally, the cumulative injury constituted 80% of the total disability of 75% and that this equaled 60% of the permanent disability. The board measured the cumulative injury from 1946 to 1960. It then granted a rehearing on the cumulative injury and held that the 15% permanent disability due to the combined effect of the 1960 and 1961 injuries and the 60% permanent disability due to the cumulative injury entitled claimant to the weekly life pension provided by section 4658 of the Labor Code since his total disability exceeded 70%.[20] On appeal, the supreme court annulled the board's decision and held that the 1960 and 1961 specific injuries could not be submerged into the 1946–60 cumulative injury since awards had already been made for the specific injuries at the first hearing, thus rendering their compensability res judicata. However, the court further decided that, although the cumulative injury was measured from 1946 to 1960, the date of that injury for pur-

---

17 175 Cal. App. 2d 592, 346 P.2d 545 (1959).

18 *Id.* at 595, 346 P.2d at 547.

19 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967).

20 CAL. LAB. CODE § 4658 (West Supp. 1967). Any injury causing permanent disability of 70% or more entitles the injured employee to a life pension based on a percentage of his weekly earnings prior to such injury.

poses of the subsequent injury statutes[21] must be 1964. The court rationalized that any other result would be unfair to the claimant, since the evidence showed that 50% of his total disability occurred prior to 1960, and that by deducting this 50% and the 15% due to the 1960 and 1961 injuries, only 10% of the permanent disability would have been caused by subsequent injury. Hence, the claimant would not have been entitled to the section 4751 life pension.

The significance of *Dow Chemical* is that for purposes of the subsequent injuries statutes, the court will apply the principle of *Beveridge*, that a cumulative injury is deemed to have occurred on the date of disability (here 1964) although, in reality, it occurred prior to such disability (here 1946 to 1960). The court specifically declined to merge the 1960 and 1961 specific injuries into the cumulative injury. *Dow Chemical* apparently stands for a simple extension of the *Beveridge* principle in subsequent injury cases. Yet later cases cite *Dow Chemical* as authority for conclusions inconsistent with the *Dow* rationale. Such authority is more imaginary than real.

De Luna and Miller

In *De Luna v. Workmen's Compensation Appeals Board*,[22] the employee suffered a specific injury on July 16, 1962. In 1966, he filed for compensation alleging the specific injury of 1962 and a cumulative injury dating from 1960 to 1966. The appeals board held that the specific injury suffered by the claimant was barred by the statute of limitations.[23] The court of appeals vacated the board's decision and held that the specific injury of 1962 should have been considered an integral part of the cumulative injury claim.[24] Moreover, the court held that since the employee filed his claim for cumulative injury within the time allowable, that is, within one year from the date of disability,[25] the statute of limitations did not bar his claim.

The court's interpretation of the specific injury in *De Luna* has a two-fold effect: First, by holding that the specific injury of 1962 was an integral part of the cumulative injury, the court allowed litigation on a claim which would have been barred by the statute of limitations; second, by holding that the 1962 claim was not barred, the court allowed the claimant, upon rehearing, the possibility of recovering compensation above that which he would have

---

21 CAL. LAB. CODE § 4750 (West 1955), CAL. LAB. CODE § 4751 (West Supp. 1967).
22 258 A.C.A. 271, 65 Cal. Rptr. 421 (1968).
23 CAL. LAB. CODE § 5405 (West 1955). *See* note 8 *supra*.
24 De Luna v. WCAB, 258 A.C.A. 271, 276, 65 Cal. Rptr. 421, 425 (1968).
25 CAL. LAB. CODE § 5405 (West 1955).

received, had only the cumulative injury been litigated. The very essence of the *De Luna* holding is that the court has allowed the specific injury of 1962 to be merged into the cumulative injury of 1966—a result emphatically rejected by the supreme court in *Dow Chemical.*

In *Miller v. Workmen's Compensation Appeals Board*,[26] the claimant alleged that he suffered injuries from slipping on a piece of wet steel in 1956, lifting a 100 gallon tank in 1957, handling large boilers in 1958, stepping in a hole in 1960, and handling fifty gallon boilers in 1965 which increased the pain in his back. The claimant filed two claims on April 27, 1966: One alleging a hip and back injury in 1956; the other alleging a back injury in 1957 and that the date of treatment for such injury was May 11, 1966. On June 16, 1966, he filed two additional claims: One alleging cumulative injury from September 24, 1957 through June 10, 1966; the other alleging a back injury between May 20 and May 25, 1965. After reconsideration, the appeals board held: The 1956 injury was not disabling; the 1957 injury was barred by the statute of limitations; and the cumulative injury did not exist. However, it issued an award for the 1965 injury based on 6% total disability.

The court of appeal annulled the appeals board's decision and held:

> [T]hat under the rationale of *Beveridge* and *Dow Chemical* the board should have viewed the specific injury of September 19, 1957 as the first of the many exacerbations causing the cumulative injury, and should have taken that injury into consideration in determining whether the applicant sustained a cumulative injury which had its inception on that date.[27]

The court employed the *Beveridge* principle in finding that the claimant suffered a cumulative injury, and also relied on *Dow Chemical* in determining that the claimant suffered a cumulative injury commencing on September 19, 1957.[28] To support the latter conclusion, the court relied on the following language in *Dow Chemical*: "If the board is permitted to carve up the cumulative injury into segments the results would be unfair."[29] The *Dow Chemical* court did not use this argument for the premise that a specific injury should be considered one of many exacerbations causing a cumulative injury.[30] That court clearly stated that "[a]ny

---

[26] 258 A.C.A. 589, 65 Cal. Rptr. 835 (1968).

[27] *Id.* at 596, 65 Cal. Rptr. at 839.

[28] *Id.* at 594-95, 65 Cal. Rptr. at 838.

[29] *Id.* at 595, 65 Cal. Rptr. at 839.

[30] *Dow Chemical* held that to allow the cumulative injury to be carved up into segments would have deprived the claimant of recovery under the subsequent injury statutes.

injury which in itself produces a definable disability should not be submerged into a series of injuries with an award granted for repetitive trauma."[31] Here the injury of 1957 was a definable disability since both the appeals board and the court recognized it as such.[32]

Consequently, it seems that the court in *Miller* misunderstood the language of *Dow Chemical*. More significant is the fact that the supreme court seems satisfied with this interpretation of *Dow Chemical*, since it denied hearing the *Miller* case.[33]

The court of appeal also found error in apportioning disability for the 1965 injury at 6%. This figure, based upon the first finding of the appeals board, was adopted by the referee during reconsideration by the board and an award was made accordingly. In declaring this award to be error, the court reasoned that in considering claims for cumulative injury which overlap claims of specific injuries, all claims must be considered as one cause of action and must be determined during one proceeding.

In summary, *Miller*, like *De Luna*, held that a series of injuries suffered by an employee can merge into one continuous cumulative injury; and the date of such cumulative injury shall be the date the employee was disabled. *Miller* further held that all questions of disability apportionment resulting from each injury and contributing to the cumulative injury are to be considered as one cause of action during one proceeding.

Fruehauf

The *Fruehauf Corporation v. Workmen's Compensation Appeals Board*[34] case also presents a problem in applying the statute of limitations and determining the relevant date of injury. During the period of his employment, from July 21, 1962 to July 5, 1964, the claimant was required to lift heavy weights up to 80 pounds. In September 1963 he began to experience pains in his back, and thereafter left work for one month pursuant to his doctor's recommendation. On July 2, 1964 he consulted another doctor who recommended his hospitalization. Subsequently, doctors performed an operation on his back which required the removal of intervertebral discs. The doctor informed the claimant in October 1964 that his disability resulted from his work. The claimant filed for compensation benefits on July 12, 1965, more than one year from the date

---

[31] Dow Chemical Co. v. WCAB, 67 Cal. 2d 483, 492, 432 P.2d 365, 371, 62 Cal. Rptr. 757, 763 (1967), quoting James v. Republic Indem. Co., 28 CCC 28, 31 (1963).

[32] Miller v. WCAB, 258 A.C.A. 589, 596, 65 Cal. Rptr. 835, 839 (1968).

[33] The supreme court denied hearing on the *Miller* case April 10, 1968. Miller v. WCAB, 258 A.C.A. 589, 65 Cal. Rptr. 835 (1968).

[34] 68 A.C. 591, 440 P.2d 236, 68 Cal. Rptr. 164 (1968).

of his disability, which the court recognized to have occurred on July 2, 1964.[35] In affirming the decision of the appeals board, the supreme court decided that the claimant was suffering from an occupational disease. Furthermore, it found that the claim was filed within one year from both the date when the disability occurred, and the time when the claimant learned that the disability was caused by his employment. The date of injury was determined by applying the rule in *Marsh v. Industrial Accident Commission*,[36] which was later codified in section 5412 of the Labor Code.[37]

Although the court applied the date of injury for occupational disease, it recognized that the injury resulted from continuous cumulative traumatic injuries. There is substantial authority concerning the classification of occupational diseases and cumulative injuries.[38] However, the guidelines used to distinguish the two are quite vague. Despite the equivocal definitions of the authorities, the court in *Fruehauf* flatly stated, "[I]t was the legislature's intention to classify injuries resulting from continuous cumulative traumas which are minor in themselves but eventually result in disability as occupational diseases."[39] The court then cited *Dow Chemical* for the proposition that the earliest date on which the limitations period could commence was the date of disability in the case where the employee suffers injury from cumulative traumas or exposures. Finally, the court added the *Marsh* doctrine to this, and concluded that before the statute of limitations can run, the employee must be aware that his disability was of industrial origin.[40]

The end result of *Fruehauf* indicates that the court allowed recovery for an injury not unlike those injuries in *Dow Chemical* and *Miller*, that is, injuries caused by continually lifting heavy equipment. But here, the injury was classified as an occupational disease. Had the court found that this injury was a cumulative injury, as in *Dow Chemical* and *Miller*, the claimant would not have recovered. The court's intent to decide in the employee's favor at any cost seems incredibly clear.

LEGISLATIVE REACTION: 1968 LABOR CODE AMENDMENTS

While the overall impact of the 1968 statutory changes on judicial policy appears uncertain, nevertheless the legislature's de-

---

35 *Id.* at 594, 440 P.2d at 238.

36 217 Cal. 338, 18 P.2d 933 (1933).

37 CAL. LAB. CODE § 5412 (West 1955). *See* note 8 *supra.*

38 *See* Swezey, *Disease as Industrial Injury in California*, 7 SANTA CLARA LAW. 205, 215 (1967).

39 Fruehauf Corp. v. WCAB, 68 A.C. 591, 598, 440 P.2d 236, 240, 68 Cal. Rptr. 164, 168 (1968).

40 *Id.* at 599, 440 P.2d at 241, 68 Cal. Rptr. at 169 (1968).

sire to overrule the *Dow* quartet is definite.[41] Although the ultimate concern of those cases was preventing the limitations period from running, the new statutes are directed toward eliminating the theories which implemented that concern.

Classification of Injuries

Effective January 1, 1969, an injury arising out of an employment will be either specific or cumulative. Under Labor Code section 3208.1, an injury is specific when it results from one incident or exposure causing either disability or need for medical treatment;[42] the injury is cumulative when it occurs as a result of mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of cumulative injury shall be the date of disability caused thereby.[43] Labor Code section 3208.2 provides that, when disability, need for medical treatment, or death results from the combined effect of two or more injuries, all questions of fact and law are to be determined separately with respect to each injury, including apportionment between such injuries, liability for disability benefits, and costs of medical treatment.[44] The effect of these new statutes is to extend and clarify section 3208 of the Labor Code, which defines "injury" to be any injury or disease arising out of the employment.[45]

Reading section 3208.1 (a) in the light of section 5411, the date of specific injury has not changed.[46] The "incident or exposure" causing injury remains the criterion for the date of injury. However, the "incident or exposure" criterion is now qualified in that it must be such as to cause disability or result in need for medical treatment. Taking alone the qualification of disability, the "incident or exposure" causing such disability should depend on interpretation of established definitions of disability. One authority has defined disability as "an impairment of bodily function caused by industrial injury," and it also requires the impairment of earning capacity to be compensable.[47] As for the qualification that the "incident or exposure" must result in need for medical treatment, this is apparently

---

41 [1968] ASSEMBLY JOUR. 1st Extra. Sess. 11.

42 CAL. LAB. CODE § 3208.1(a) (New).

43 CAL. LAB. CODE § 3208.1(b) (New).

44 CAL. LAB. CODE § 3208.2 (New).

45 CAL. LAB. CODE § 3208 (West 1955).

46 The reason is that under § 3208.1(a) a specific injury is the result of one "incident or exposure" causing the disability, and under § 5411 the date of injury is the date of the alleged "incident or exposure" for the consequences of which compensation is claimed.

47 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 13.01(1) (1967).

a question of fact. Whether one is in need of medical treatment is a question which could better be answered by doctors or specialists, after reviewing the facts of a given injury and observing the extent of the injury.[48]

The *Fruehauf* case dealt basically with the problem of classifying an injury. The court recognized that the injury resulted from continuous cumulative traumatic incidents, and decided that the legislature's intention was to classify such injuries as occupational diseases.[49] Although the courts should liberally construe workmen's compensation law in favor of the employee,[50] it would appear that the *Fruehauf* court broke all precedent in stretching this policy of liberal construction to find that the claimant's injury was an occupational disease.[51]

Section 3208.1 (b) should preclude a decision such as *Fruehauf*. Analyzing the statutory definition of cumulative injuries,[52] there are three requirements which must be met for cumulative injury to occur: First, there must be a mentally or physically traumatic activity; second, it must extend over a period of time; and finally, it must result in disability or need for medical treatment. In *Fruehauf*, the activities complained of extended over the period of time in which he was employed, from July 21, 1962 to July 5, 1964. Furthermore, the claimant suffered a disability which did require medical treatment—the operation requiring the removal of three intervertebral discs. The first requirement of traumatic activity suggests an intention to create a technical definition.[53] Trauma is defined as "an injury or wound to a living body caused by the application of external force or violence."[54] Apparently the tension and strain involved in lifting heavy weights results from the external application of force on the human body. Therefore, the lifting itself

---

48 The limitations period would then commence after the last furnishing of medical treatment. CAL. LAB. CODE § 5405 (West 1955).

49 Fruehauf Corp. v. WCAB, 68 A.C. 591, 598, 440 P.2d 236, 240, 68 Cal. Rptr. 164, 168 (1968).

50 CAL. LAB. CODE § 3202 (West 1955).

51 In the case of Argonaut Ins. Co. v. IAC, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628 (1964), a factual situation is presented not unlike the facts in *Fruehauf*. There the claimant was a construction worker who engaged in labor which demanded lifting heavy equipment. The injury he suffered required an operation in which two intervertebral discs were removed from his back. The court affirmed the determination of the IAC which held such disability of the claimant to be a cumulative injury. Yet in the face of the *Argonaut* case and others quite similar, the *Fruehauf* court held that the claimant's injury was an occupational disease.

52 CAL. LAB. CODE § 3208.1(b) (New).

53 Warren Hanna notes that the only distinction is in the pathology involved. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 11.01(2)(c) n.18 (1967).

54 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2432 (1966).

is a traumatic activity. It follows that under section 3208.1 the injury in *Fruehauf* must be considered a cumulative injury. This construction would have compelled the court to apply the date of cumulative injury which is now the date of disability.[55] Since the date of disability occurred on July 2, 1964, the statute of limitations would have run out on July 2, 1965. Hence, the claim filed on July 5, 1965 would have been barred.

The Last Exposure Rule

The new statutes distinguish the cumulative injury from the specific injury in that the former occurs as mentally or physically traumatic activities extending over a period of time. Although the test of possible compensability in each type of injury is still whether it causes disability or results in need for medical treatment, the date of cumulative injury is different than the date of specific injury.

Formerly, the date of injury for a cumulative injury was the date of last exposure,[56] which courts have sometimes interpreted to mean the date of disability.[57] Under the new statute, the date of cumulative injury will be the date of disability exclusively. The last exposure rule appears to be no longer applicable as a device to ascertain the date of injury. In most situations the date of last exposure and the date of disability will concur.

The Integration Theory

Under section 5303 of the Labor Code, only one cause of action can exist for each injury. However, any or all claims arising from that injury may be joined in the same proceeding.[58] The legislature has added to this section the stipulation that no injury shall merge into or form part of another. Also, no award for a cumulative injury can include disability caused by any other injury which causes or contributes to the existing disability.[59]

This addition to section 5303 appears to be a direct legislative attack on the *Miller* and *De Luna* cases. In *De Luna* the court ruled that the specific injury of July 16, 1962 should have been considered as an integral part of the claim for cumulative injuries.[60] This ruling could not stand under the new statutes. Since the injury of 1962 was

---

55 CAL. LAB. CODE § 3208.1(b) (New).
56 Firemen's Fund Indemn. Co. v. IAC, 39 Cal. 2d 831, 250 P.2d 148 (1952).
57 Beveridge v. IAC, 175 Cal. App. 2d 592, 346 P.2d 545 (1959).
58 CAL. LAB. CODE § 5303 (West Supp. 1967).
59 CAL. LAB. CODE § 5303 (New).
60 De Luna v. WCAB, 258 A.C.A. 271, 276, 65 Cal. Rptr. 421, 425 (1968).

an incident or exposure causing the need for medical treatment,[61] and since it did not appear to result from repetitive mentally or physically traumatic activities,[62] the injury *must* now be classified as specific.[63] The treatment which the claimant received for that injury lasted for one month, ending August 16, 1962. By application of the one year statute of limitations,[64] the time period within which he could have filed for compensation pertaining to that specific injury could not have exceeded August 16, 1963. Thus the claim filed in 1966 would have been barred.

Nothwithstanding the bar of that claim, the argument remains that the injury itself could still be considered as an integral part of the cumulative injury claim.[65] However, section 3208.2 requires that all questions of fact and law be separately determined with respect to each injury. As a question of law, the injury of July 16, 1962 is a specific injury within the meaning of section 3208.1 (a). Determining that injury separately, the statute of limitations bars that claim. Any award granted to the claimant for the cumulative injury cannot take into consideration disability caused by the specific injury. Furthermore, section 5303 provides that one injury cannot merge into or form part of a cumulative injury; hence, the incident causing the specific injury of 1962 cannot be considered an integral part of the cumulative injury. Therefore, under the *De Luna* facts, a claimant could now recover an award based solely on the cumulative injury of 1966, and that award would require the exclusion of any disability caused by the barred specific injury of 1962.

In *Miller,* the court's finding was two-fold. First, the alleged specific injuries of 1957 and 1965 contributed to one cumulative injury beginning in 1957. Second, the date of the alleged cumulative injury is the date on which the claimant last received treatment, 1966. The court then ordered the appeals board to "redetermine the three claims involved in one proceeding as a claim for disability benefits for cumulative injury commencing September 19, 1957."[66]

The findings of fact as stated by the referee are that those injuries contributing to disability were the injury of 1957, rated at 21½% permanent disability, the injury of 1965, rated at 6% permanent disability, and cumulative injury rated at 12¼% permanent

---

61 CAL. LAB. CODE § 3208.1(a) (New).

62 CAL. LAB. CODE § 3208.1(b) (New).

63 CAL. LAB. CODE § 3208.1(a) (New).

64 CAL. LAB. CODE § 5405 (West 1955).

65 De Luna v. WCAB, 258 A.C.A. 271, 274, 65 Cal. Rptr. 421, 423 (1968). This was the reasoning used by the court to grant recovery to the claimant for the specific injury.

66 Miller v. WCAB, 258 A.C.A. 589, 596, 65 Cal. Rptr. 835, 839 (1968).

disability. The court, by holding that the 1957 and 1965 injuries contributed to the cumulative injury, allowed the appeals board to consider the 21½% and 6% permanent disability from those injuries as a further basis for an award for the cumulative injury, which was only rated at 12¼% permanent disability. The result would be that the claimant's award for cumulative injury could conceivably be based on 39¾% permanent disability.

Today, such a decision could not stand. Section 5303 expressly forbids any such merger of injuries for purposes of determining awards. Also, since the injuries of 1957 and 1965 each caused disability to the employee, 21½% and 6% respectively, each is a specific injury within section 3208.1. Finally, by the force of section 3208.2, any award for the cumulative injury in this case must be founded upon evidence independent of the specific injuries of 1957 and 1965. Thus, the specific injury of 1957 would be barred by the statute of limitations. The specific injury of 1965 would be compensable since treatment for that injury extended to June 10, 1966, and the claimant filed for compensation within one year from that date.[67] And of course the cumulative injury claim would be compensable, but limited to its own facts.

A Note on Dow Chemical

While the legislative reaction to the *Miller*, *De Luna*, and *Fruehauf* cases appears to be well-founded, the attack on *Dow Chemical* seems to be misdirected. Although *Miller* and *De Luna* purport to find approbation for the "integration theory" in *Dow Chemical*, that case specifically disapproved such theory.[68] On the one hand, the cumulative injury measured as occurring between 1946 and 1960 was treated as occurring in 1964 so as to make it subsequent to the 1960 and 1961 specific injuries.[69] On the other hand, the merger theory was specifically rejected.[70] Thus a literal interpretation of section 5303 of the Labor Code would not reverse *Dow Chemical*.[71] It might be argued that the court must have con-

---

67 CAL. LAB. CODE § 5405 (West 1955).

68 *See* note 30 *supra* and accompanying text.

69 The court appears to adopt the *Beveridge* rule of last exposure. It fixes "[W]hat is by necessity a constructive date on which, for the purposes of the subsequent injury statutes, a cumulative injury will be deemed to have occurred. That date is the last day of the period in which the WCAB finds that cumulative injury was received by repetitive exposure to stress or other cause; or if disability does not appear until yet a later date, the time when the employee becomes disabled." Dow Chemical Co. v. WCAB, 67 Cal. 2d 483, 493, 432 P.2d 365, 372, 62 Cal. Rptr. 757, 764 (1968). The court reasoned that the foregoing would be most fair to the employee for purposes of the subsequent injury statutes.

70 *See* note 30 *supra* and accompanying text.

71 "[P]rovided, however, that no injury, whether specific or cumulative, shall,

sidered the 1960 and 1961 injuries as contributing to the cumulative injury of 1964, otherwise the injury would not be repetitive under the meaning of section 3208.1 (b).[72] However, the court seems to divorce its consideration of the specific injuries from its treatment of the cumulative injury.[73] Thus *Dow Chemical*, at most, appears to be a simple avoidance of the limitations period in cases involving the subsequent injuries statutes.

CONCLUSION

Relative to the liberal construction of the judiciary, the legislature has effectively shortened the limitations period for claiming workmen's compensation for some injuries. Although the calender period itself has not been shortened, the legislature has forced the employee to diagnose the industrial origin of his injuries at the time when he immediately needs compensation. Previously, the liberal judiciary allowed medical costs to accumulate for a long period of time until the claimant discovered his compensation claim and filed for relief. Although it may seem to be a burden on the employee in forcing him to diagnose his injury, this duty has long been recognized by the courts. As early as 1941, the courts urged that, if there were any doubts as to compensability, the injured employee should protect himself from the running of the statute of limitations by filing for benefits.[74]

Although the courts may continue to review the same volume of workmen's compensation cases, the liberality of their decisions appears to be effectively collared in regard to the area of the statute of limitations.

Louis A. Basile

---

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, need for medical treatment or death." CAL. LAB. CODE § 5303 (New).

[72] The examining doctor in *Dow Chemical* testified that, "[A]fter the 1949 incident the exacerbations to the [back] condition were too numerous to identify, and that the 1960 and 1961 strains were simply two of the more severe incidents of exacerbation." Dow Chemical Co. v. WCAB, 67 Cal. 2d 483, 486, 432 P.2d 365, 367, 62 Cal. Rptr. 757, 759 (1967).

[73] The court recognized the individuality of the two specific injuries in that the board was precluded "from treating these two injuries as simply two incidents contributing to the cumulative injury. Instead they are to be deemed as separately compensable injuries." *Id.* at 494 n.8, 432 P.2d at 373 n.8, 62 Cal. Rptr. at 765 n.8 (1967).

[74] Freire v. Matson Nav. Co., 19 Cal. 2d 8, 10, 118 P.2d 809, 810 (1941), quoting Schumacker v. IAC, 46 Cal. App. 2d 95, 115 P.2d 571 (1941).