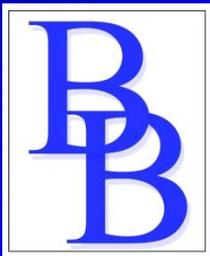


# Negotiation & Settlement Part I



By Donald Barthel  
Bradford & Barthel, LLP



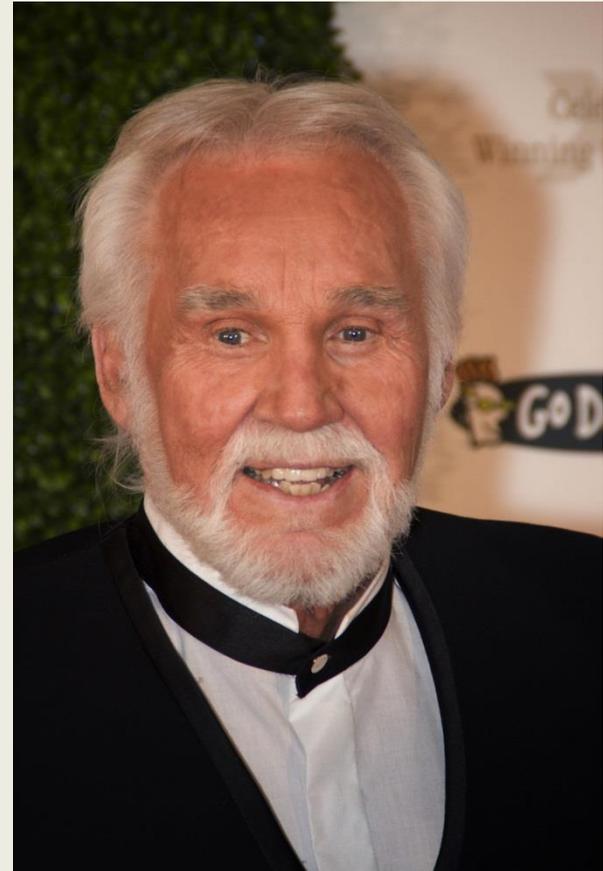


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# Negotiation & Settlement

- ▶ You've got to know when to hold 'em
- ▶ Know when to fold 'em
- ▶ Know when to walk away
- ▶ And know when to run



# How early is too early to discuss settlement?

- ▶ 99+% Never too early
- ▶ <1% No point!

A 3D rendering of the text '99%' in a bold, red, sans-serif font. The characters are thick and have a slight shadow beneath them, giving them a three-dimensional appearance. The percentage sign is also rendered in the same style.

# Too early to discuss settlement?



<1%

- a. you're fighting a policy battle:
  - some scenarios (non-profit) demand ZERO settlement authority
  
- b. you're fighting a political battle:
  - making case law
  
- c. you're drawing a line in the sand
  - large union lay-off
  - here comes 1st of dozens of IWs

# WHEN SHOULD YOU FIRST THINK ABOUT SETTLEMENT OF A CLAIM?



When injured worker is P&S or MMI? For all body parts?

Not necessarily...

When claim is denied? (“Nuisance value?”)

1. Consider SETTLEMENT AT EVERY STAGE IN CLAIMS HANDLING. If you don’t, you may miss settlement opportunities.
2. HURDLES to SETTLEMENT:
  - Injured worker/applicant’s attorney;
  - WCAB (judge, I&A officer)

“A Compromise and Release is less about the numbers, and more about who wants it more.”

Fletcher’s Rule



Can’t be forced to settle by C&R. Always by agreement of parties.

Valuing cases and negotiation of are an art, outside the scope of this seminar. Each party must determine if settlement is cost-effective in light of risk of proceeding to trial.

Identify areas of agreement, and areas of dispute. Weigh arguments of each party in areas of dispute to determine appropriate compromise of issues in dispute.

# Too early to discuss settlement?

99+%

Never too early

Consider every step of the way...

- ▶ Does IW need money FAST?
  - ex. facing 3rd strike
- ▶ Does AA need money FAST?
- ▶ YOU JUST NEVER, EVER KNOW  
(can't hurt trying to explore)



# Too early to discuss settlement?

Consider every step of the way:

1. first contact (esp w/AA)
2. Deposition
3. regular correspondence (phone calls, letters, emails, texts)
4. just before ML (thank you AMA Guides)
5. just after ML (thank you AMA Guides)
6. PTC
7. MSC
8. Trial (before? during? after? YES!)



# Too early to discuss settlement?

Consider every step of the way:

Don't forget to check your calendar....

- ▶ Christmas is coming!
- ▶ Kid's birthday is coming!
- ▶ Vacation time is coming!



# Consider every step of the way:

## 1. first contact (esp w/AA)

- Gives AA chance to let you know what s/he really thinks of IW
- Setting initial valuation parameters helps with:
  - getting authority...
  - determining extent of discovery



# Consider every step of the way:

## 2. Deposition

- pre-depo: IW/AA don't know what "secrets" you might otherwise learn
- AA's depo fees (potentially most valuable part of case) can be "negotiated"



# Consider every step of the way:

## 2. Deposition

### ▶ during depo:

- longer than IW expected?
- more detailed?
- more embarrassing?
- more adversarial?
- giving rise to "leads" that IW prefers you not follow?



Someone may cry "uncle"

# Consider every step of the way:

## 2. Deposition

Want to get psych component dismissed?

You can!

Here's yet another war story!



# Consider every step of the way:

3. regular correspondence (phone calls, letters, emails, texts)

Don't forget:

- ▶ *Rules of Professional Conduct*



## Rule 3–510 Communication of Settlement Offer

- ▶ (A) A member shall promptly communicate to the member's client:
- ▶ ...(2) All amounts, terms, and conditions of any written offer of settlement made to the client in all....matters.

# What does Rule 3-510 *really* mean?

AA must relay to IW any "significant" settlement offer

aka

You have innumerable opportunities to dangle  
the settlement "lure"

Concerned AA isn't relaying offers?  
Remind AA...

...in writing...

...of Rule 3-510

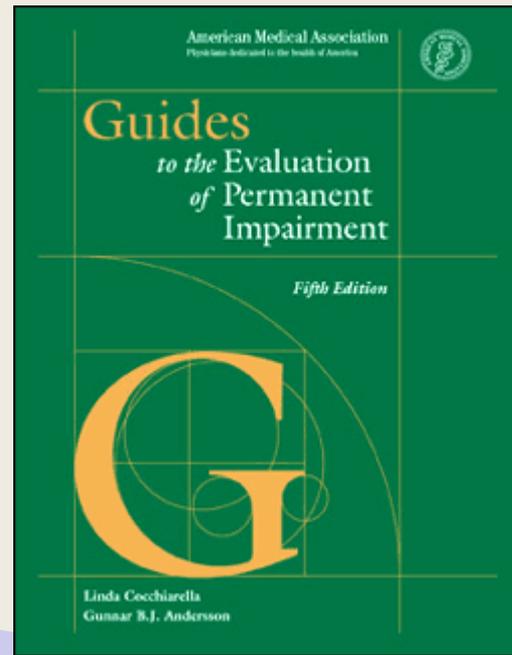


# Consider every step of the way:

4. just before ML

5. just after ML

Thank you AMA Guides



# Consider every step of the way:

6. PTC
7. MSC
8. Trial (before? during? after? YES!)
  - ▶ IW (and spouse/signif other) is likely present
  - ▶ Can "shuttle negotiate"
  - ▶ Can draft agreed upon settlement and get approved



# IW/AA holding out for unacceptable amt at MSC?

Don't be shy!

Set for trial!

Call their bluff!

Then diary to call AA a few days before trial...

- ▶ ...cold feet?
- ▶ ...rather see kid's recital than prepare for trial?
- ▶ ...calculating how much (per hour) AA's fee decreases if:
  - prepares for trial
  - goes to WCAB
  - waits around
  - get kicks to another date
  - etc., etc., etc.



# Consider every step of the way:

## 6. Trial

before?

YES! see above

during?

YES! ("Mr. Barthel, Does the defense remain ready to settle this matter?")

after?

YES! No one knows *for certain* the WCJ's decision

- ▶ Trial likely highlighted problems for BOTH sides!



# PD ADVANCES

Unless offer IW work or IW RTW [LC 4650(b)]

PD is payable know or should know  
PD exists



# But what about this...?



"Dear Adjuster,  
I know I've been aggressive and a pain in your neck, but my client wants a PD advance (got some really important expenses). He understands that this will be deducted from his award."



Time to write a check...  
(for benes not due and owing!)?

**NO!**

Time to think settlement?



# ABSOLUTELY!

(they have just "tipped their hand")



# Only saying "no" so you can get a quick settlement?

**NO!**

Paying out some/most/all PD will later:

- a. result in IW wanting more PD
- b. result in a lesser amt

=

IW less likely to settle  
(and more likely to demand more)



# AA's have a vested interest in settling via C&R

- ▶ How much do they make reviewing URs?
- ▶ How much do they make reviewing IMRs?
- ▶ How much do they make appealing IMRs?
- ▶ How much money do they make filing for Expediteds re treatment?



# When to C&R and When to Stip?

## ADVANTAGES OF C&R

### IW

1. Freedom to use lump sum (use for major expense: home down payment, payoff debts, purchase car...Christmas gifts!!!)
  - debts often grow while on disability
2. C&R total payout > periodic payments received from Stip
  - Reason: to settle disputed issues (future med, reopening rights, death)
3. Payment is NOT community property, but easier to avoid commingling lump sum than periodic payments
4. Can't/won't go back to work? lump sum can tide IW over during retraining/interviewing



# When to C&R and When to Stip?

## ADVANTAGES OF C&R ER

- ▶ File closed ("Closed file is a happy file")
- ▶ Risk of new and further is removed
- ▶ Uncertainty of fut med cost avoided
- ▶ Claim reserves closed out.
- ▶ Claims adjuster can retire (SURE!!!)
- ▶ Self-insured's security fund deposit can be reduced



# Advantages of C&R:

- ▶ Issues [such as penalties] resolved without admission of fault or liability



# BENEFITS WHICH CAN BE SETTLED BY COMPROMISE AND RELEASE (C&R):

1. TTD;
2. TPD (wage loss);
3. PD;
4. Life pension;
5. Future medical treatment;
6. Out of pocket medical expenses;
7. Penalties;
8. Interest on delayed payments;
9. VR, (under some circumstances; not applicable any more);
10. Supplemental job displacement benefits (voucher) for injuries prior to 1 / 1 / 13.



# WHAT CAN'T BE SETTLED BY C&R?

1. Claims over which WCAB has no jurisdiction:

- Civil claims
- FEHA
- ADA
- Retirement issues

(Third party C&R settles WC claim in connection with civil third party settlement.)

2. “Unknown” claims;

3. VR/SJDB (voucher)

- Settlement of VR prohibited, unless “good faith” issue could defeat applicant’s claim. *Thomas v. Sports Chalet* (1977) 42 CCC 625
- Statutory prohibition against settlement of voucher for injuries on or after 1/1/13. LC 4658.7(g)



# WHEN NOT TO SETTLE BY COMPROMISE AND RELEASE:

1. Still on risk (C&R may duplicate settlement of future claims);
2. When a party is unwilling to settle future medical care (e.g., applicant concerned about ability to pay future medical, or defendant does not wish to fund MSA);
3. Other party objects (co-def; Death without Dependents Unit).



# SETTLEMENTS MUST BE APPROVED BY A WCJ. LC 5001

- ▶ Board Rule 10882 directs the Appeals Board to “inquire into adequacy” of C&R.





Q: Does this mean IW gets every benefit possible in record developed by the parties?

A: NO! Settlement must only be within range of potential outcomes.

See Board Rule 10870:

“agreements which provide for the payment of less than the full amount of compensation due or to become due, and which undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties, or that approval is in the best interests of the parties.”

# TOOLS USED BY WJC TO ASSESS ADEQUACY:

1. DEU (Disability Evaluation Unit);
2. I&A (Information and Assistance Officer)



# EXAMINER'S BEST TOOLS TO ESTABLISH ADEQUACY:

- ▶ Superior skill drafting C&R;
- ▶ Providing supporting documents;
- ▶ Explaining basis of settlement.



# UPON SUBMISSION OF SETTLEMENT JUDGE CAN:

1. Approve it
2. Suspend and make inquiries re basis of settlement or missing documents
3. Set hearing on adequacy, or
4. Disapprove settlement

The Judge CANNOT make unilateral changes to settlement documents.

*Burbank Studios v. WCAB (Yount)*, (1982) 47 CCC 832; *Hodgeman v WCAB*, (2007) 72 CCC 1202.

Each party represents that it has carefully read and understood the contents of this Agreement and acknowledges receipt of a copy hereof. Each person executing this Agreement on behalf of the party has the authority to enter into this Agreement on behalf of the party.

COMPANY	CONTRACTOR
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

**Sign Here**



# THE FORM:

DWC – CA FORM 10214(c) (The regulation which provides the form to the public). Required contents are provided in LC 5003–5004.

Two forms not discussed today:

- a. Death & Dependency Claim
- b. Third Party C&R



# CHARACTERISTICS OF STIP WITH REQUEST FOR AWARD

1. Admitting injury



2. Medical care typically left open

3. All payment periods and rates specified

4. Can be reopened w/in 5 yrs from DOI for “new and further”

# STIP WITH REQUEST FOR AWARD: THE FORM

- ▶ OCR form is similar to C&R form

## DIFFERENCES:

Page one requests venue info, (important when Stips act as App)

Party info (IW, ER, carrier and TPA) is essentially the same

Case info is also similar

**PAY SPECIAL ATTENTION TO DESCRIPTION OF  
INJURED BODY PARTS!**



# REMEMBER:

IN STIP'd AWARDS MEDICAL REMAINS OPEN FOR ALL INJURED BODY PARTS.

Stips are construed against ER. Be as narrow in description as possible.

Ex: “foot” instead of “lower extremity”, “low back” instead of “back” or “spine.”



# REAL EX:

- ▶ Stip to “internal injuries” construed to include fibromyalgia
- ▶ Language in box at bottom of page 5 will control (not body part codes listed in case info)



# Question...

Can you limit Future Medical to treatment recommended by AME or QME? No, in No Cal. Maybe, in So Cal.

BUT

BE CAREFUL WHAT YOU WISH FOR:

*Bertrand v. City of Orange* (2014), ADJ3135829, Board Panel held 2004 Stips with Request for Award in which “treatment disputes” were to be decided by AME = WAIVER of IMR.



# C&R with "open medical"?

- ▶ ER wants C&R
- ▶ EE refuses ("wants future med")
  - typical answer: stip
  - alternative: C&R with fut med left open



# C&R with "open medical"?

Potential upsides:

EE:

- ▶ retains fut med
- ▶ gets lump sum
- ▶ gets more \$ than stip (to buy-out other issues)



ER: avoids reopenings for new & further

- ▶ more TD
- ▶ more PD
- ▶ avoids added body parts

# C&R with "open medical"?

ER downside?



- ▶ Say "goodbye" to leverage for C&R (likely forever!)



# C&R with "open medical"?

Parameters limited only by imagination...



- ▶ ER may provide EE
  - future med for specified body part until a specific date

*Stevenson v. Karren's Auto Wrecking* (1941) 7  
CCC 165

# C&R with "open medical"?

Drafting carefully...

INSIST: C&R must recite that future injuries occurring while receiving med treatment are SETTLED BY C&R

*Camerena v. Vons Grocery*  
(1991) 56 CCC 589 (WCAB *en banc*)

WCAB req'd C&R and OA contain WCJ's finding that certain issues are settled, including:

- death benefits,
- VR (old school)
- fut "compensable consequence" injuries during VR



P3



Party with Pro Pers...NOT!

# IW must have an AA?

NOPE

"in *pro per*"

=

"in propria persona"

=

"in one's own person"

LC 5700



# What do they say about an atty



who has himself as a client?

# How to be PP?

1. stay unrep'd throughout
2. fire AA

note:

AA fired?

AA (more than one? all) may be entitled to fee for services rendered



*Hernandez v. WCAB* (1997) 62 CCC 811 (writ denied)

PP can retain AA anytime...

BUT – received comp ML (LC 4062.1),  
retaining AA later doesn't entitle  
IW to additional (LC 4062.1(e)) eval



# Be careful out there...



PP procees "at his/her own peril..."

(Just ask WCJ/I&A who suggest exploring AA options...and even have AAs tracked down in the hall!)

ER need not provide PP of notices/info beyond that normally req'd

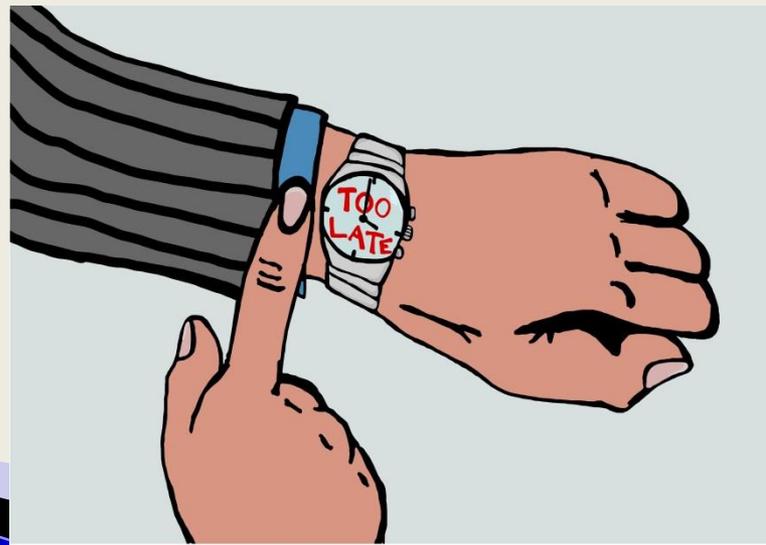
*Stephens v. WCAB* (2009) 74 CCC 885 (writ denied)

# *Duarte v. WCAB* (2008) 73 CCC 1447 (writ denied)

## FACTS:

PP failed to timely file Pet to Reopen claimed ER shd have advised her of her right to reopen w/in 5 years

HOLDING: ER not estopped to assert SOL



# PP need not be atty

## Soup to Nuts

May:

- ▶ perform services in a court of justice
- ▶ in any matter
- ▶ throughout its various stages
- ▶ in conformity with rules of procedure
- ▶ from beginning through end of appeals process



*Birbrower, Montalbano, Condon & Frank, P.C. v.  
Superior Court of Santa Clara County*(1998) 17 Cal.  
4th 119, 127-28

# PP can...

...file an App (LC 5501)

...request a medical eval to resolve a disputed issue (LC 4062.1)



# What else can PP do?

- ▶ represent self at conference
- ▶ represent self trial
- ▶ conduct discovery
- ▶ produce/cross-x Ws at trial



# What else can PP do?

Screw-up their own case

*Adams v. WCAB* (1979) 44 CCC 484 (writ denied)

## FACTS:

pro per

WCJ aided PP obtain docs from ER

permitted IW to:

1. produce Ws,
2. cross-x Ws,
3. Testify

failed to prove employment

PP appealed, claim denied due process

HOLDING: NOT



# What else can PP do?

- ...file a Recon
- ...file appeal DCA
- ...assert work product privilege\*



*\*Dowden v. Superior Court of Orange County (1999) 73 Cal. App. 4th 126.*

# What Can't PP do...?

...go to AME exam

...avoid QME panel process if ML is requested by either party



...arbitration:

LC 5270: This part shall not apply in cases where an injured employee or dependent is involved unless the employee or dependent is represented by an attorney.

NOTE: PP can't be rep'd by a non-atty

NOTE: disputes between co-defs (coverage, contrib) can go to arbitration (whether or not IW = PP)

# Settling with PP



Tough putt

WCAB is extra vigilant!

Be sure to closely follow WCAB's Policy and Procedural Manual

Submit settlement docs with...

1. all relevant medical reports (treating doctors, QMEs) in chronological order (most recent on top)
2. basis of settlement;
3. ratings of all P&S reports (DEU, a private rater and/or adjuster)
  - multiple body parts? nonscheduled ratings? use DEU
4. basis, calculation of AWW (if less than max)

# Settling with PP

Submit settlement docs with...



5. all notices sent to PP re settlement
6. all letters advising PP re QME process
7. printout of all benefits paid
8. proof of service of settlement, supporting docs, filed med reports, on
  - a. lien claimants
  - b. PP

# Settling with PP



OLD SCHOOL:

Former CCR 10890(h):

if settlement walked-through, PP must be present when settlement docs went to WCJ, unless already reviewed by I&A with PP

Do it anyway!?!?

# Settling with PP



CCR 9927(d):

C&R, Stips with PP filed with appeals board (other than those presented at or subsequent to a trial), settlement goes to I&A, who

1. reviews settlement
2. contacts parties if needed
3. coordinate w/other units with/in DWC;
4. confirms IW understands agreement; and
5. makes recommendations to PP, Def, WCJ.

# Dealing with PP

Everyone is Equal  
(but some—PPs—are more "equal" than others)

PPs are (allegedly) held to same rules of procedure  
as atty accept risk of proceeding w/out AA...

...you're stuck with the result

*Burnete v. La Casa Dana Apartments* (2007) 148  
Cal. App. 4th 1262, 1267.

BUT...



# Dealing with PP

WC procedures are informal

WCAB can make sure things are fair...



# Settling with PP



5708. All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the **substantial rights of the parties and carry out justly the spirit** and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand

Meaning...? WCJs tend to be more lenient to PPs

# Dealing with PP



Pleading requirements frequently are relaxed

See, for example, *Los Angeles County Metropolitan Transit Authority v. WCAB (Hicks)* (2006) 71 CCC 641 (writ denied); *Fisher Ranch v. WCAB (Ramirez)* (1984) 49 CCC 701 (writ denied); *Maloney v. Boise Cascade Corp.* (1988) 17 CWCR 44 (panel decision)

PP's "lack advice as to procedural niceties."

*Beveridge v. IAC* (1959) 24 CCC 274, 279; *Bland v. WCAB* (1970) 35 CCC 513, 519

# Dealing with PP

"We do not believe that awkwardness in allegations should constrict a worker's right to compensation," and that applicants are "entitled to adjudication upon the substance rather than upon formality of statement."

*Beveridge v. IAC* (1959) 24 CCC 274, 279



# Dealing with PP

## How Lenient?

### FACTS:

PP failed to submit evidence at/before MSC  
submitted after MSC

### ISSUE:

really!?!?!?



# Dealing with PP

HELD: yes

Reasoning: PP has a "fundamental misunderstanding of the trial process"

Isn't that why AAs are for!?!?!?



*Holland v. Crossmark Holdings, Inc.*, 2014 Cal. Wrk.  
Comp. P.D. LEXIS 458

# Dealing with PP

WCJs often (always) help PPs:  
\*inform re right to counsel  
\*refer to an I&A officer\*



\*DWC/WCAB Policy and Procedural Manual  
2013 Revision, Section 1.93

# Dealing with PP

WCJs often (always) help PPs:

- ▶ point out problems re claim
- ▶ recommend entering into settlement
- ▶ warn of downsides to a settlement
- ▶ refer both parties to I&A\*

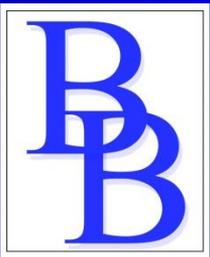


*\*Yee-Sanchez v. Permanente Medical Group (2003) 68 CCC 637, 644-45 (significant panel decision)*

**DISCIPLINE AGAINST UNREPRESENTED EMPLOYEES**



# MEDICARE



# Old school...



## Who cares?

## Helped us settle future med!

# NO MORE!



## AUTHORITY OF MEDICARE

Medicare (1965) nat'l fed health ins program

Title XVIII SSA: provide med to US citizens

Medicare Set-Asides (MSA)

overseen by

Centers for Medicare & Medicaid Services (CMS)



"Do you feel lucky, punk?  
Well...do ya?"



**FUN FACT:** neither Medicare Secondary Payment Act (MSPA) nor the Code of Federal Regulations (CFR) require using MSAs

It's all about CMS memos:  
<http://www.medicareapproval.com/resourceshtm>.

42 CFR 411.46: requires all WC settlements adequately consider Medicare's interests

# What's a "secondary payer"?

Ex. Medicare (thru CMS) is not primarily responsible for aoe/coe medical care

- only pays in certain situations
- ignores w/c settlements if its interests aren't "consider[ed]"

## CMS options:

- demand reimbursement, or
- w/hold care



# Hold harmless?

NOPE!

ALL parties potentially liable can:

- a. consider def as primary payor, or
- b. w/hold treatment



# SOLUTION?



## Medicare Set-Asides (MSA)

- ▶ Objective: preserve Medicare's status as secondary payor
- ▶ Interpretation: Medicare liable for medical bills only when no other payor is responsible

# ELIGIBLE CLAIMS

CMS requires MSAs?

Nope!  
Never!



Do you drive without a safety belt?

CMS does not consider all MSAs  
for approval

"eligible claim"

=

"qualified claimant"

=

potentially eligible for Medicare

- ▶ unqualified claimants?
  - illegal immigrants
  - legal foreign nationals on temp work visa



# "qualified claimants"

## Class I:

- enrolled or eligible for Medicare at time of settlement
  - need MSA regardless of settlement amt
  - Total settlement \$25,000 or less?
    - Need not submit to CMS for approval
- ▶ eligible for Medicare?
1. EE is 65 or older
  2. 24 months post-entitlement to SSD



# Class II:

1. has "reasonable expectation" to enroll in Medicare w/in 30 months of settlement, and (not "or")
2. total settlement amt expected to be > \$250,000



# "reasonable expectation" of potential enrollment w/in 30 months

Any of these:

- a. applied for SS disability benefits;
- b. denied SS disability benefits; anticipates appealing;
- c. in process of appealing and/or re-filing;
- d. 62 years and 6 months (may be eligible for Medicare based on age within 30 months); or
- e. end stage renal disease (ESRD) but does not yet qualify for Medicare based on it



# C&R w/Open Medical

= MSA?

NOPE...

Why?



# Ready to C&R



Some medical care projected  
(but not likely)?

Too Bad!

# not Class 1 and not Class 2...

Settling future med?

Include in C&R:

- a. amt of med care reasonably anticipated and
- b. basis for that conclusion and
- c. if appropriate, reason for belief Medicare will have no liability

Got a dollar figure? Include it



# How much Medicare protection req'd?

I DON'T KNOW!



Rule of thumb:

- ▶ larger settlements = likelihood Medicare will require more
- ▶ consider neutral, objective 3rd party analysis

# How large a settlement triggers appropriate consideration?

What is:

- ▶ your comfort with risk?
- ▶ seriousness of injury?
- ▶ anything else?

EXIT STRATEGY:

- ▶ large self-insured ERs/public agencies providing lifelong health care regardless of aoe/coe
- ▶ typical: group health-care plan (see ERISA)

Know what ERISA stands for?  
I learned at UCLAW



# How do I create an MSA?



Need money set aside ("allocation") to pay for future:

- treatment
- meds

...that Medicare would otherwise pay

Who calculates "allocation"?

"allocator"

# What's the "allocation"?

- ▶ proposed MSA submitted to Medicare for review/approval

Where do we stick the MSA allocation?

Careful There!

Get rid of those NAUGHTY thoughts!

C&R addendum



# Who does the math?

Lots of vendors!!!!!!!!!!!!!!!!!!!!!!

They:

- a. review of all medical evidence in a file (don't hold back)
- b. calculate allocation:
  1. not too expensive (kill settlement)
  2. not too cheap (acceptable to Medicare)
  3. "just right"



# Included Care

General Rule:

report says "possibility" or "maybe future med"

=

CMS treats as CERTAINTY

PTPs

QMEs

AMEs

None need to agree with other(s)

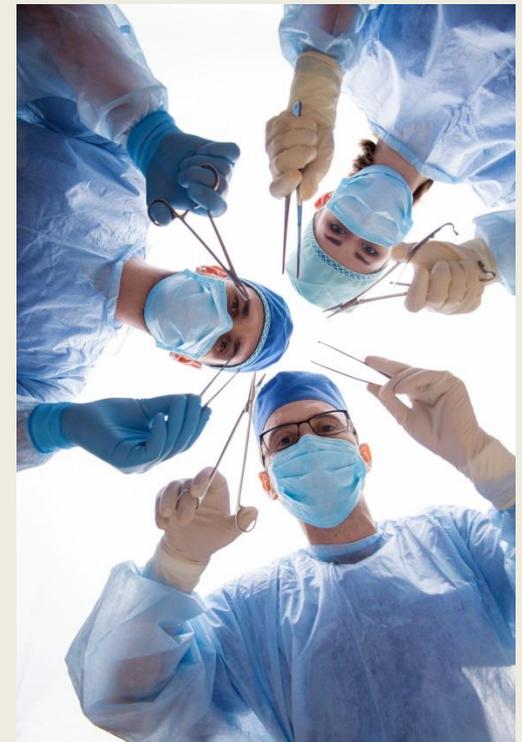
PTP: = "A will be needed"

QME: "B may be needed"

AME: "C could possibly be needed"

A, B & C go into allocation

WARNING: be careful selecting doctors...



# SUBMISSION & APPROVAL

1. Allocation submitted for approval
2. Case # assigned
3. Receipt received (approx 45 days)



# SUBMISSION & APPROVAL

4. Allocation docs reviewed include:
  - a) total allocation amt
  - b) itemized work-up sheet supporting allocation
  - c) records of med bill payment
  - d) proposed w/c settlement
  - e) last 2 yrs' med reports (including meds)
5. Incomplete or more info needed?
  - CMS goes to submitting party
6. Medication no longer being prescribed?
  - CMS wants letter signed by EE confirming



# CMS options



1. approve
2. ask for clarification from doctor
3. find allocation inadequate
4. if inadequate, revise allocation and provide "conditional approval" for amt deemed sufficient

## What do with revised allocation?

1. agree to it
2. w/draw from w/c settlement or
3. settle with fut med left open

# Waiting on an answer...

- ▶ takes 2–4 months



## Take away?

1. start set-aside process early as possible
2. submit to CMS before settlement is made

Settlement negotiations with MSA in hand

=

expedited resolution

# AA says,

"Let' speed this along.

Just agree to indemnify my  
client against a CMS increase  
get WCJ approval pending  
CMS response"



**NO!**

no signing "blank check"

Get CMS approval, THEN submit to WCJ

# COMPLETING SETTLEMENT AFTER MSA APPROVAL

Attached MSA docs to C&R for WCJ

Do not submit C&R for OA before CMS approval

R:

- ▶ CMS may req more
- ▶ ER may be req'd to fund MSA (even if unreasonable)
- ▶ Awaiting approval allows ER to w/draw from agreement if needed



# CA is Getting Into the Act!



Eff 9/30/10:

138.7(b)(1)(B)(i) The State Department of Health Care Services may use individually identifiable information for purposes of seeking recovery of Medi-Cal costs incurred by the state for treatment provided to injured workers that should have been incurred by employers and insurance carriers pursuant to Article 3.5 (commencing with Section 14124.70) of Chapter 7 of Part 3 of Division 9 of the

How does CA find out what we're doing?

DIR is authorized to give claims info to Dept of Health Care Services

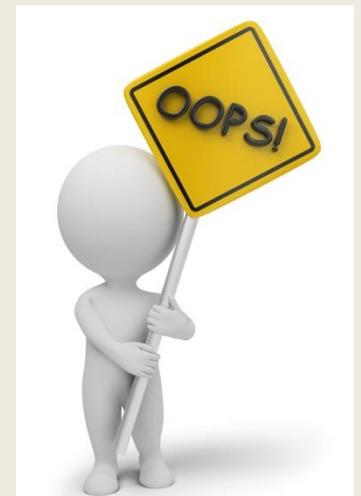
Watch Out!



# *Alvarenga v. Scope Industries, et. al., (6/16) WCAB #ADJ8733556*

## Facts:

- ▶ OA C&R = 3/17/16
- ▶ IW, a Medicare beneficiary, agreed to lump settlement: \$39,000
  - (PD, atty fees, costs)
  - net= \$22,110
- ▶ MSA vendor says, "Need a \$24,079.23 set aside"



# *Alvarenga*

WCJ told ER approval was not necessary MSA =  
below CMS review threshold

WRONG!



Reason: total value (not net)

- ▶ ER learns of mistake post-OA; files petition to set aside for "mutual mistake"

# *Alvarenga*

Holding #1 (WCAB):

–no mutual mistake

Reason: CMS does not require  
review/submission of MSAs (voluntary)



# *Alvarenga*

Holding #2: good cause to set-aside the C&R

Reasons:

1. net settlement inadequate to fund MSA by nearly \$2k
2. IW was not properly informed of the consequences to him when CMS is not asked to approve MSA





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# Negotiation & Settlement Part II



By Donald Barthel  
Bradford & Barthel, LLP

# C&Rs & Structured Settlements

## HIGHLIGHTS



- ▶ IW gets more money vs lump sum
- ▶ ER saves money (purchasing structure costs less than lump sum)

# C&Rs & Structured Settlements

## HIGHLIGHTS



- ▶ used for large-value cases
- ▶ often funded via ins annuity policy (pays periodic, tax-free benes over IW's lifetime)
- ▶ "structured settlements", "annuities"

# How It Works

- ▶ Structureds/annuities = ins policies (sold by life ins comp)
- ▶ Middleman: licensed broker (who receives commission)
- ▶ Annuity pays IW ("annuitant") tax-free benefits periodically (usually monthly)
- ▶ Lump sum payments may issue at predetermined times (ex. for college when annuitant's child turns 18)



# What IW Likes....



- ▶ guaranteed payments for "X" number of years (regardless of whether IW dies)
  - contrast: Stip & Award
- ▶ benefits may continue for specified period to named beneficiaries (helps plan for spouse, kids)
- ▶ protects against inflation: inflation factor can provide COLA

# What ER Likes...



- ▶ protects against IW's premature death
  - Paid \$500k for annuity?
  - IW dies next week?
  - Out \$500K?

NO!

ER can be co-beneficiary!

# What ER Likes...

- ▶ rated life-expectancy used to calculate premiums can provide HUGE discount



# NOTE

W/C structured settlement payments  
canNOT  
be assigned to 3rd party for a lump sum  
payment

LC 4900 "No claim for compensation ... is  
assignable before payment"



# Structured Settlement Guarantees

WCJ reviewing C&R asks,

"What if annuity company goes BK?"

Can WCJ insist ER guarantee payments?

YES!

Fair?

NO!

could pay settlement twice:

- 1) annuity company
- 2) IW



# How To Avoid Double Jeopardy

ER insured for w/c?

W/C carrier buys annuity from CA  
admitted, A+ rated life ins carrier (primary)

+

buy low cost "assignment" to second  
CA admitted carrier

=

if primary goes belly-up, second carrier is responsible

1st and 2nd ins companies gone?

CIGA steps in!

(not true if ER didn't buy "assignment")

<http://www.califega.org/>



# How To Avoid Double Jeopardy

ER self-insured?

Use same structure procedure as insured ER (including assignment)

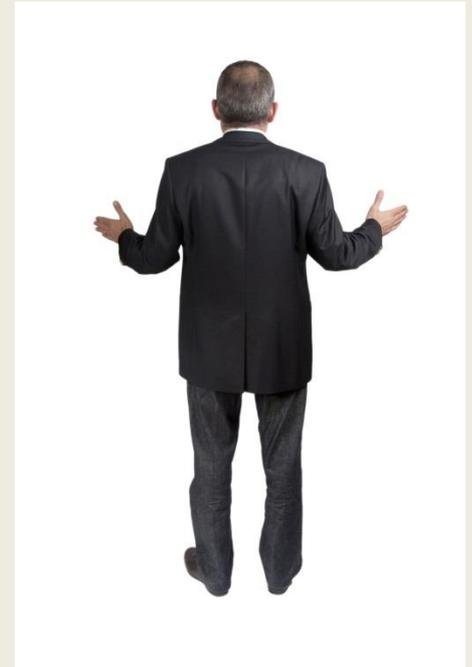
3 Levels of Protection:

- a. life ins carrier
- b. assignment comp., and
- c. CIGA...?

NOT

SISF instead: Self-Insurers' Security Fund

<http://www.securityfund.org/>

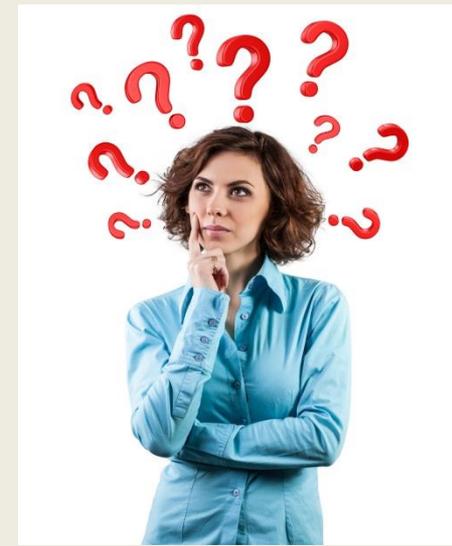


# Evaluating FMT cost for settlement

## Reserves

- ▶ sufficient funds for a buy-out?
- ▶ AA/IW made a demand? (aka "The Ceiling"!)
- ▶ Demand within reserves?
- ▶ If not, what's needed to increase reserves?
- ▶ Reject demand and make offer?
- ▶ Make a "take it or leave it" offer?
- ▶ Go into "nickel and dime" mode to get settlement w/in reserve amount?

Many questions  
Fewer answers



# Evaluating FMT cost for settlement

## Professional Relationships

- ▶ Do parties know each other?
- ▶ Good working relationship between opponents?
- ▶ Professional respect?

Most important info....

Are you dealing with good, tough, well-respected AA  
or  
a “bottom feeder”?

If you don't know, ask other adjusters, attorneys, etc.

AA's "style" should influence  
most/all  
of your settlement negotiations



# Evaluating FMT cost for settlement

## Costs if File Remains Open

- ▶ What allocated costs incurred if stays open?
- ▶ AA likely to amend/petition to increase costs?
- ▶ Can you get Stip language limiting FMT?



# Evaluating FMT cost for settlement

## Life Expectancy

- ▶ How long are you REALLY going to be "on risk"?



# Evaluating FMT cost for settlement

"As Time Goes Buy..."



AA intransigent?

C&R not an option?

Stip'd 1,2, 3+ years ago?

# Establishing Settlement Range: What to Consider



# 1. Client Objectives



- ▶ Quick settlement?
- ▶ Complete case development?
- ▶ Scorched earth: "making an example"?

## 2. Client Comfort with Risk

Risk adverse?



# 3. Math!



Chances of success

▶ Likely Trial Liability Outcome

GOOD STARTING POINT

# 4. Applicant's Atty

- ▶ Aggressive?
- ▶ True believer?
- ▶ Churn & Burn?
- ▶ Financial straights?



# 5. WCJ



# 6. Cards Dealt

Royal Flush?



Pair of Two's



# 7. Best, Worse, Most Likely Trial Result



# Revisit C&R!

Why hope for change in IW's attitude?

- ▶ on to more important things?
- ▶ tired of dealing with "insurance carrier doctors"?
- ▶ tired of UR/IMR?
- ▶ want to control own treatment?
- ▶ newly obtained med ins (new job!)?
- ▶ not using open FMT often?
- ▶ new (aka "expensive") hobby?



# Evaluating FMT cost for settlement

## Other considerations: "Mission Impossible"

Important info to predict (but you can't!):

- ▶ rising/lowering of treatment costs
  - more advanced (but expensive) surgery
  - generics or OTC alternatives
- ▶ keeping/changing/scrapping UR
- ▶ keeping/changing/scrapping IMR
- ▶ IW "escaping" UR/IMR
- ▶ Etc



Good Luck With That!!!

# Got a deal (in theory)? Need authority?

- ▶ How to approach ER/Adjuster/Broker/Etc
- ▶ ESSENTIAL: Know what the holder of the purse strings (HPS) wants/needs!

Do NOT assume it mirrors yours



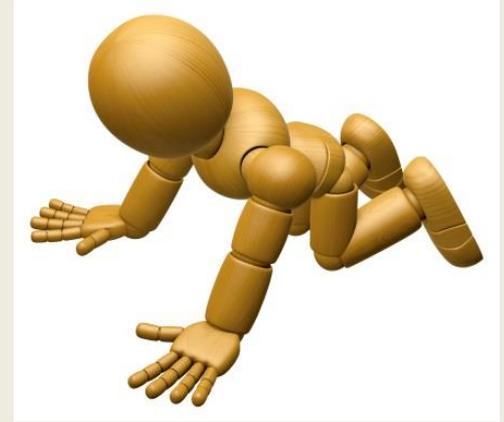
# Got a deal (in theory)? Need authority?

You likely want (in order of importance)

- ▶ file closed
- ▶ reasonable amt of effort & money used

HPS may want:

- ▶ case closed
- ▶ case NEVER closed
- ▶ make example (of IW, AA, DA, WCJ, you!!!!)
- ▶ avoid labor problems
- ▶ please folks related, tangentially related or not at all related to proceedings



You may NEVER know all the variables  
BUT you won't know any until you ask



# Got a deal (in theory)? Need authority?

Why ask for HPS's priorities?

- ▶ so that you can factor them into your work
- ▶ so that you can demonstrate your interest in HPS's needs
- ▶ so that you don't work at cross-purposes



# Got a deal (in theory)? Need authority?

You assume they (like you) want expeditious,  
economical settlement

You relay a settlement opportunity that  
will get things done...  
cheap, Cheap, CHEAP  
&  
fast, Fast, FAST

GOOD NEWS?



# Got a deal (in theory)? Need authority?

BAD NEWS!

HPS wants to “make case law”

Instead of accolades, you get called on the carpet

What happened?

You blew it! You forgot the most important thing...

HPS's desires!

Now HPS thinks (correctly) you "don't get it"!



# Got a deal (in theory)? Need authority?

Able to resolve matter in accord with HPS's desires?

Great!

Can't?

Uh oh!



Options?

# How hard it is to quickly turn a ship!

Educate, instruct, teach, school, tutor, train....

- ▶ Slowly
- ▶ Subtly
- ▶ Continually



...documenting all the while....

- ▶ Without debate...teach HPS why his/her needs are best addressed via means they might detest

# Keep HPS updated!

Surprises are not welcome!



Event (MSC) where there are many?

Give HPS the...

- ▶ best case scenario
- ▶ heads up that you'll be calling for their input
  1. avoids surprises
  2. avoids suspicion that you're "keeping something from them"
  3. allows them:
    - time to s/w their "people" (supervisor, client, etc.)
    - consider options
    - make sure they "look good"

# Keep HPS updated!

Surprises are not welcome!

Upcoming event (MSC) where there are many possible results?

Give HPS the...

- ▶ time
- ▶ date
- ▶ likely options
- ▶ worst case scenario



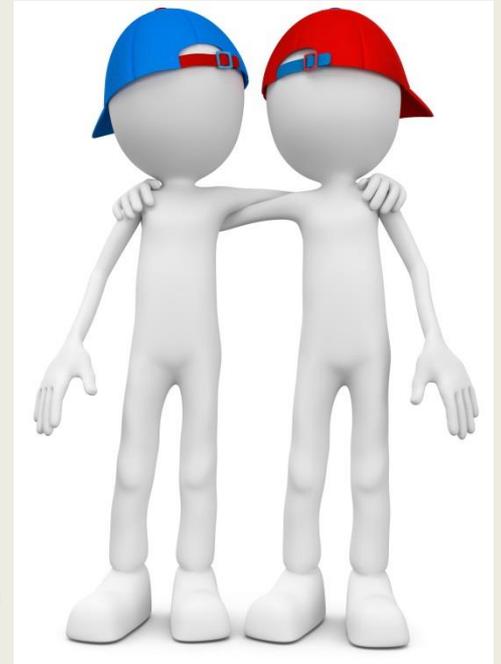
# Not a one-time-only HPS?

Get to know them!

- Phone calls
- Lunches
- Dinners
- Birthday cards

Remind them you're on their side...

...not the enemy!



# Using PD Advisory Ratings to Settle

Trying to figure out PD value?

Several options!



- 1) Pull out your PDRS (1997, 2005, 2013)
  - figure out: DFEC/modifier
  - Age
  - occupation (often several options)
  - ascertain whether *AMA Guides* was properly applied

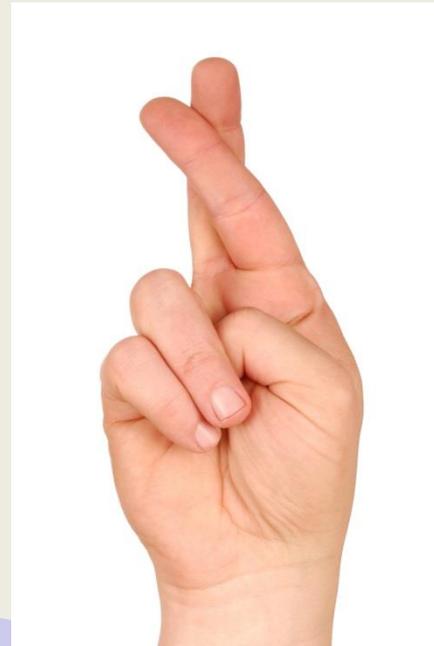
You've got NOTHING better to do, right?

# Trying to figure out PD value?

Several options!

## 2. Rating MSC

- Have rater provide advisory rating
- Hope rater is correct *AND Guides* has been properly applied (Good luck)



# Trying to figure out PD value?

Several options!



3. Retain 3rd Party to determine:
  - whether *Guides* was properly applied
  - if not, what...
    - additional info is needed
    - changes need to be made
    - should be done (fix report, attack report, etc.)
  - apportionment

# Rating MSC

## Purpose:

- ▶ ascertain amt/existence of PD
- ▶ via informal DEU ratings
- ▶ when only unresolved issues are:
  - PD
  - Fut Med

(CCR 10301(gg), CCR 10205(ee))

# Want rating MSC?

1. File all ratable medical reports (PTP, QME, AME) not previously filed
2. File DOR (form DWC 10250.1)



# Informal DEU Rating

## Problems:

- ▶ not available until others issues resolved
- ▶ requires all parties go to WCAB
- ▶ DEU provides minimal analysis—if any—of shortcomings in doctor's use of *AMA Guides*

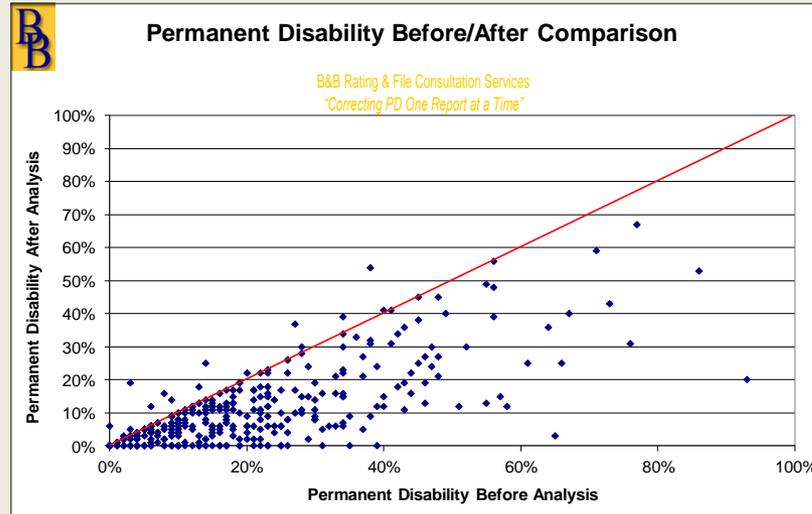


# 3rd Party PD/AMA *Guides* Professional?

I've got a suggestion...



# Misapply the AMA *Guides* for “Fun & Profit”



- ▶ Over 20,000 reports analyzed
- ▶ Statewide
- ▶ Dossier maintained
- ▶ Quick turn-around



# Credentials

✓ National  
Training  
including...



20<sup>th</sup> Century Fox  
Administrative Paralegal Services  
ACWA/JPIA  
AIG  
A. Teichert & Son, Inc.  
Alternative Service Concepts  
American Building Supply  
Aramark  
Argonaut Insurance Services  
Arthur J. Gallagher & Co  
Assoc. of Workers' Compensation Professionals  
Association of Hearing Representatives  
Bell-Carter Olive Company  
Berkshire Hathaway Home State  
Broadspire  
Brownell Law Corporation  
Buckeye Claims  
Butte County Office of Education  
California Self-Insurers Association  
Cal Insurance & Associates  
Cambridge Integrated Services Group, Inc.  
Canelo, Wilson, Wallace & Padron  
ChevronTexaco Corporation  
City & County of San Francisco  
City of Los Angeles  
City of Modesto  
City of Sacramento  
City of Santa Ana  
City of Santa Monica  
ClaimQuest, Inc.  
Claims Management, Inc.  
Coca-Cola Enterprises Inc.  
Colen and Lee  
County of Riverside  
County of Sacramento  
Crawford & Co.  
Crum & Forster U.S. Fire Insurance Co.  
CTB/McGraw-Hill  
Cypress Insurance Company  
Disney Worldwide Services, Inc.  
Dynamic Claims Services  
Employers Insurance Group  
Everest National Insurance Company  
FARA/F.A. Richard & Associates  
Farmers Insurance  
Fireman's Fund  
Foster Farms  
Gallagher Bassett Services  
Gates McDonald  
Graiver & Kaplan  
Grancell, Lebovitz, Stander, Barnes & Reubens  
Gregory Bragg & Associates  
GuideOne Insurance  
Hanna, Brophy, MacLean, McAleer & Jensen, LLP  
Hedrick & Associates  
Hewlett-Packard  
Insurance Company of the West  
Insurance Educational Association  
Intercare Insurance Services

Interwest Insurance Services  
Intracorp  
Kaiser Permanente  
Laughlin, Falbo, Levy and Moresi  
Law Offices of Richard L. Moser  
Law Offices of Samuel G. Grader  
Law Offices of Phillip A. Cooke  
Law Offices of Timothy H. Huber  
Law Offices of W. Lance Russum  
Life Chiropractic College  
L.A. County Employees Retirement Ass.  
Lundberg Family Farms  
Majestic Insurance  
Maloof Sports & Entertainment  
Metropolitan Transit Authority - Los Angeles  
Michael J. Skala, Jr., Attorney at Law  
Midwest Insurance Company  
Morse, Giesler & Callister  
Murphy & Beane, Inc.  
National Business Institute  
Nickerson Insurance Services  
North Bay Workers' Comp. Professionals  
Northrup Grumman  
Oak River Insurance  
Octagon Risk Services, Inc.  
OneBeacon Insurance  
Pacific Gas & Electric Company  
Pegasus Risk Management, Inc  
Pirahna Produce  
PPG Industries  
PRG Insurance Staffing  
Preferred Employers Insurance Company  
Redwood Empire Insurance Group  
Republic Indemnity Company  
Risk Enterprise Management Limited  
Riveroak Center for Children  
Rockwell Collins  
Safeco Insurance Company  
San Diego Gas & Electric  
Schiffrin, Gagnon & Dickey, Inc.  
SeaBright Insurance Company  
Sedgwick CMS  
Silverado Resort  
Southern California Edison Company  
Southern California Risk Management Ass.  
Specialty Risk Services  
Springfield Insurance Company  
State Compensation Insurance Fund  
State Farm  
Steve Ballard, Attorney at Law  
St. Paul Travelers Insurance  
Sutter Health  
The Hartford  
The Select Group of Companies, Ltd.  
Tokio Marine Management, Inc.  
Tristar Risk Management  
ULICO  
WCCA  
Wiggins, Richard & Romani, LLP  
World Financial Group  
Zenith Insurance Company  
Zurich North America

# Credentials

✓ Thousands of Reports Analyzed



# Credentials

✓ MILLIONS in savings ID'd

Examples:

70% to 13% \$107+K\*

100% to 12% \$1.8+ Million \* \*

Can you afford to trust Panels, QME, AME

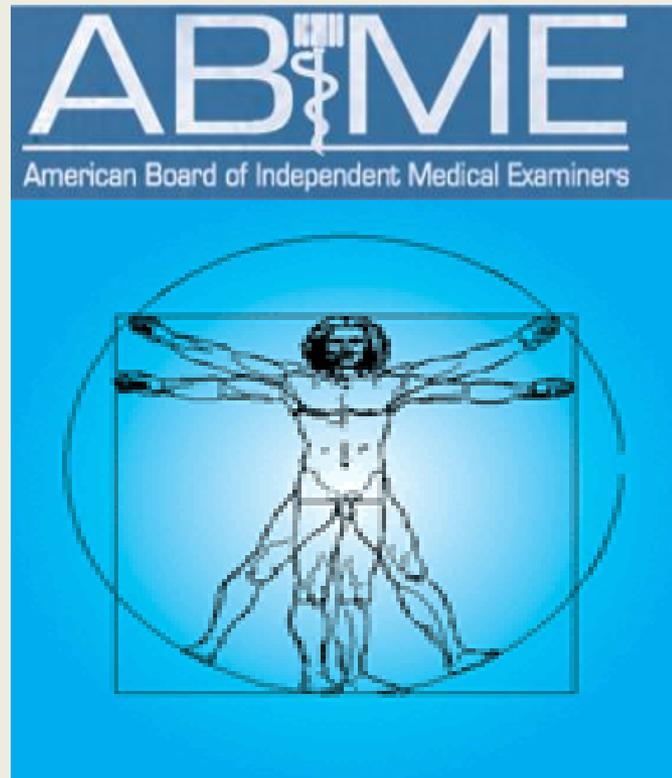
\*Excludes life pension

\*\* assumes 40 y/o female



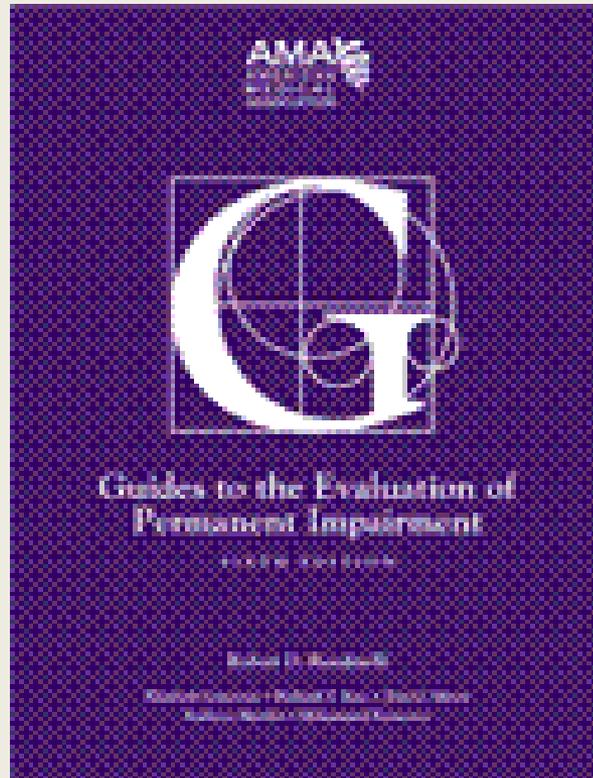
# Credentials

- ✓ Only non-physician on ABIME Board



# Credentials

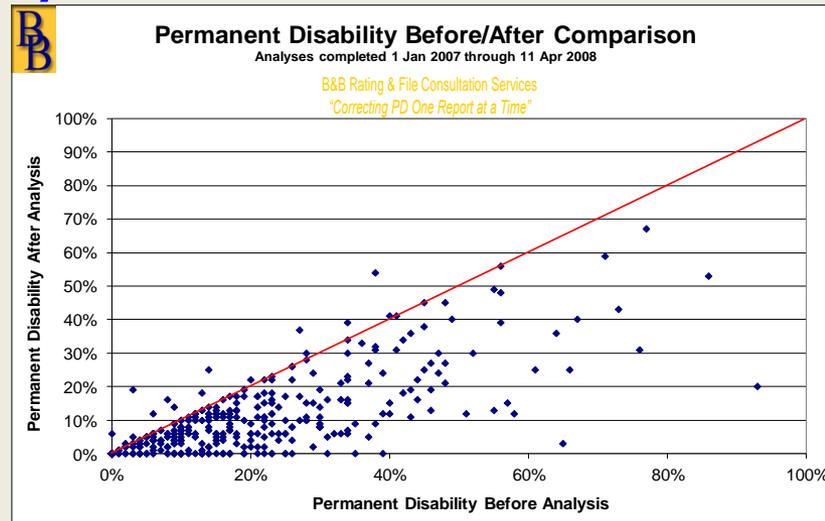
✓ Reviewer: AMA Guides (6<sup>th</sup> Edition)



# Credentials



## Credibility



Pay what you owe:  
no more...  
no less...

# RATING COMMENTS

“I just wanted to let you know that I am very happy with the results that I am receiving from B&B. With the reports you provide us, I am able to go back to the doctor to address issues that I may not of picked up on. Also your reports have shown me that the majority of the time the doctor’s aren’t reporting correctly, which without your review, we might have paid to much PD on some of these claims”



Sometimes you can trust a judge...



**“You may not want to rely on the DEU  
to provide your ratings”**

Judge Paige Levy, WCJ (Marina Del Rey)  
“Real World Application of AMA Guides”  
CAAA 2008 Winter Convention

# Sometimes you can trust the DEU...



B&B Rating	=	12% or \$8,415.00
SDO DEU Rating	=	42% or \$47,300.00
Difference	=	30% or \$38,885.00

# Sometimes you can trust the DEU...

B&B cross-exam: “ Madam Rater?”



DEU Rater: “The B&B analysis appears accurate, *but* it is more complex than I’m trained to handle.”

# Sometimes you can trust the DEU...

B&B cross-exam:



DEU Rater: “I merely accept what the doctor says, unless it’s completely out of line and rate accordingly.”

# Sometimes you can trust the DEU...

B&B cross-exam: “Say what?!?!”

DEU Rater: “Send the [B&B] analysis to the doctor for his comments and correction.”



# Cross Examining Rater: OLD SCHOOL?



## Still an option...

1. Formal rating issues and is served
2. Party objects (usually about rater's interpretation of WCJ's instructions)  
(w/in 7 days of rating being served)
3. Cross-ex requested
  - no formal procedure (other than request must be written)
  - file DOR
    - a) delivered to office of WCJ, or
    - b) by mail to personal attention of WCJ
4. after time for objection, WCJ schedules

# Not allowed to cross-x rater?

=  
deprivation of due process  
+  
annulment of award



# Cross Examining Rater: A Thing of the Past?

Rarely is the "battle" over rating instructions,  
etc!

AMA *Guides* and moving away from 1997 PDRS  
(obj, subj, work restrictions)

GREATLY SIMPLIFIED Rating

BIG ISSUE: Get AMA *Guides* properly applied



# You've determined the report is WRONG!

Uncorrected, it rates...



# Correctly applied AMA *Guides*

It rates...



# What are your options

- ▶ Supplemental?
- ▶ Deposition?
- ▶ DEU?

...it depends!



# Option 1: Supplemental Report

Dealing with Dr.  
Friendly?



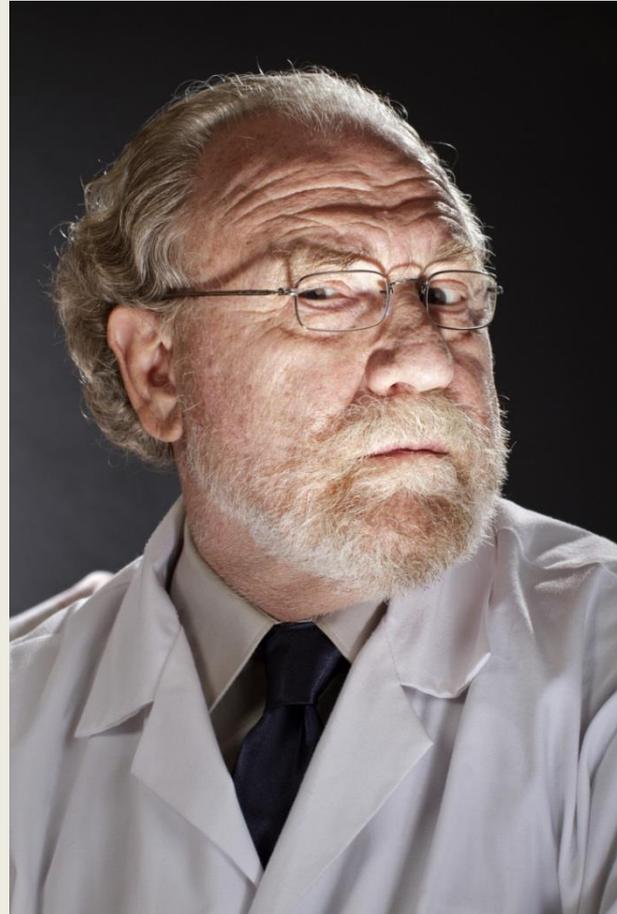
Example: MPN doc  
willing to listen?

Cut and paste your [B&B...hint, hint] reviewer's analysis and forward to Dr. Friendly for commentary



OR...

# Doctor “Know It All”...



...OR

A doctor whose qualifications are suspect...



# In these cases, a supplemental is

- ▶ An expense magnifier
- ▶ An opportunity for doctor to
  - justify indefensible positions
  - muddy the waters
- ▶ A certain delay (without obvious benefits)

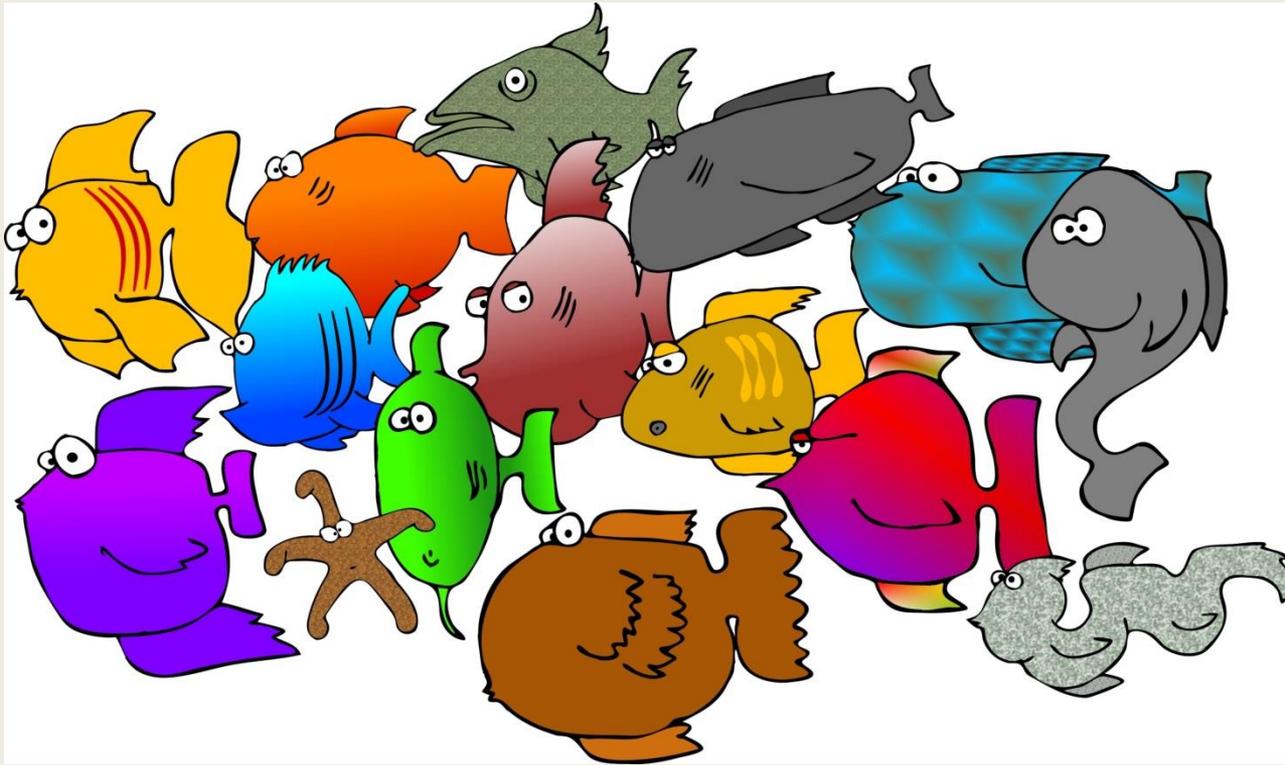
# Cross-examination?

- ▶ Dr. Friendly  
...a sure bet
- ▶ Dr. Know It All/Suspect  
...two potential results



# What happens when you lead a horse to water....?





He “swims with the fishes”  
Can you say “insubstantial evidence

# EXAMPLE

## Facts:

- ▶ pro per
  - ▶ Panel QME...DC ☹️
- Uncorrected = 64% PD  
= \$40,000+
- Corrected = 19% PD  
= \$7,000
- At issue = **\$33,000**



# EXAMPLE (cont'd)

Supplemental Request Response:

“With all due respect, you are not a doctor”

What do they say about  
people who live in glass houses?



com

# DEU weighs in

Not 64%

Not 19%

▶ Answer: 22% (\$9,000)

▶ Savings: \$31,000



# DRAFT THAT C&R!

# APPROVED!



# Other Uses

- ▶ Educate WCJ
- ▶ Educate DEU
- ▶ Educate AA (P&A)

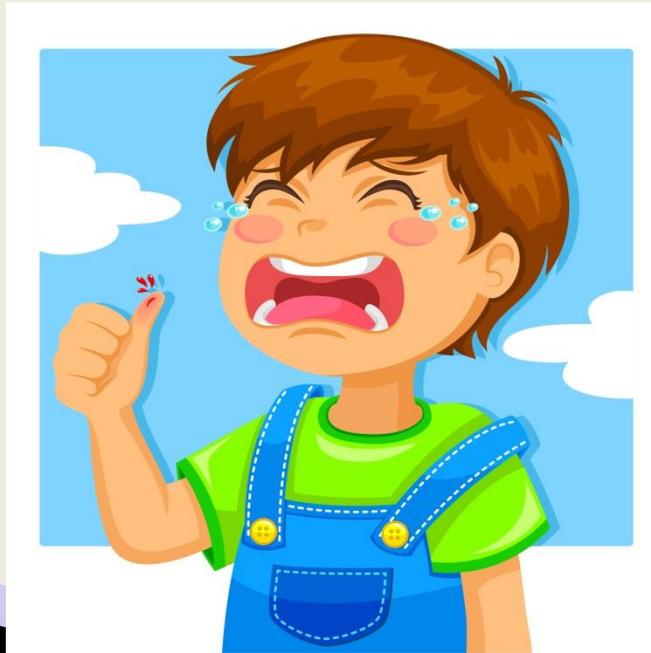


# Monday Morning Quarterbacking



How do QMEs enjoy having their work reviewed...

“California Society of Industrial Medicine & Surgery (CSIMS) sent a three–page letter...the Division of Workers’ Compensation...asking for guidance about the review practice...”



# Is the DWC sympathetic?

**NO!**

Susan Gard, DWC spokesperson says:



“The simple answer is we don’t think we have authority to prohibit a defense strategy.”

“If a secondary evaluation shows problems in an [AME’s] or [QME’s] report, that’s something they should correct...”

“If the purpose is to get an inaccurate report corrected, they (the defense) should do that...”

“[I]t’s the right of the insurers to look for evidence that strengthens their case...”

Source: Workcompcentral

“Reviews of Med–Legal Reports Have Docs Wary” (10/19/06)



# Naughty PP?



PP not subject to State Bar discipline by the state Bar

*Dowden v. Superior Court of Orange County* (1999) 73 Cal. App. 4th  
126, 135

Still not allowed to be naughty

Contempt for abusive/disobedient conduct (LC 134)  
Bad-faith actions (frivolous/solely intended to cause  
unnecessary delay (LC 5813:

Vexatious Litigant: can't file docs...  
without AA, or  
w/out PJ's permission



# VEXATIOUS LITIGANT RULE



"A growing number of self-represented parties and lien claimants repeatedly file petitions or other papers with the WCAB that not only fail to comply with the requirements set forth in the Labor Code and the Rules, but that have no effective purpose in moving their cases forward. Recognizing the impediment to expeditious justice and the burden to the WCAB and other parties presented by those repetitive, meritless, and ineffectual filings, the Appeals Board proposed a rule for declaring vexatious litigants in workers' compensation proceedings."

*Seabrooks v. BFI Medical Waste Systems*, 2009 Cal. Wrk. Comp. P.D. LEXIS 324; *Brown v. Port of Oakland*, 2009 Cal. Wrk. Comp. P.D. LEXIS 491



# VEXATIOUS LITIGANT RULE

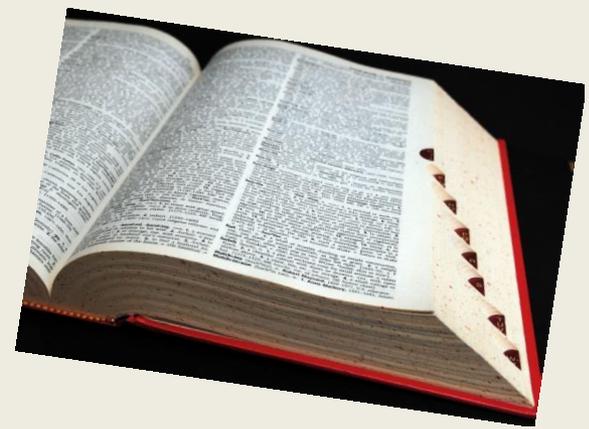


According to the final statement of reasons for CCR 10782: "There is a compelling need for a vexatious litigant rule for workers' compensation proceedings to address the problem of self-represented injured employees, lien claimants, and others who persistently or obsessively attempt to re-litigate an issue of law or fact that has been finally determined against them. As in the civil courts, these vexatious litigants unreasonably or frivolously tie up the time and resources of the WCAB, thereby delaying the cases of other litigants, and they impose serious financial burdens on the unfortunate objects of their attacks; therefore, there is a need to restrain their misuse of the workers' compensation adjudication system."

See [http://www.dir.ca.gov/WCAB/WCABProposedRegulations/WCAB\\_RulesofPracticeandProcedure/WCAB\\_FSOR.doc](http://www.dir.ca.gov/WCAB/WCABProposedRegulations/WCAB_RulesofPracticeandProcedure/WCAB_FSOR.doc)



# DEFINITION

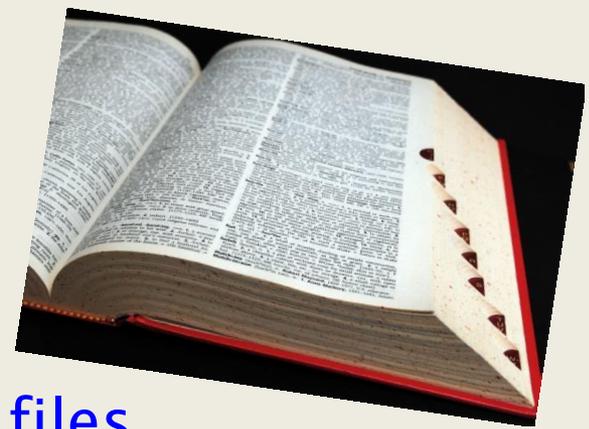


Party or lien claimant who:

1. while acting in *pro per* repeatedly re-litigates (or attempts to) an issue of law or fact that has been finally determined\* against that party or lien claimant by WCAB or DCA

"finally determined" means: (1) that all appeals have been exhausted or the time for seeking appellate review has expired; and (2) the time for reopening under LC 5410 or LC 5803 and LC 5804 has passed or, although the time for reopening under those statutes has not passed, there is no good-faith and nonfrivolous basis for reopening.

# DEFINITION



2. while acting in *pro per*, repeatedly files unmeritorious motions, pleadings, etc, repeatedly conducts or attempts to conduct unnecessary discovery or repeatedly engages in bad faith tactics that are frivolous or are solely intended to cause harassment or unnecessary delay;
3. has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction(s) or occurrence(s) that are the subject, in whole or in substantial part, of the party or lien claimant's workers' compensation case.

# VEXATIOUS LITIGANT



## FACTS:

PP filed multiple petitions to reopen an award even though barred by SOL

- ✓ filed various petitions alleging ER fraud (even though considered meritless)
- ✓ multiple petitions alleging illegal, outrageous conduct by WCJ

## HOLDING:

WCAB issued notice of intent to declare VL

*Seabrooks v. BFI Medical Waste Systems*, 2009 Cal. Wrk. Comp. P.D. LEXIS 324

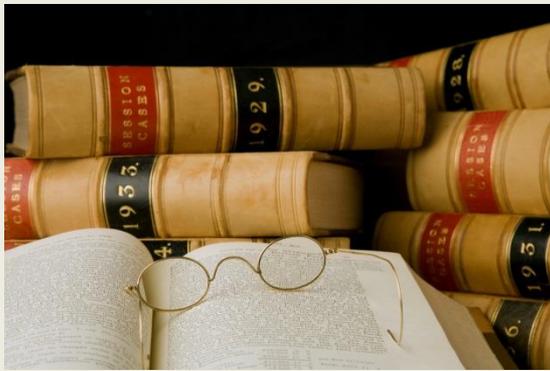
# FACTS:



- ▶ requested hearing, then refused to testify
- ▶ prepared Recon in improper form
- ▶ raised contentions nearly impossible to decipher
- ▶ complained about matters not subject to the order at issue

HOLDING: declared a vexatious litigant

*Von Ritzhoff v. Ogden Entertainment Services*, 2010 Cal. Wrk. Comp. P.D. LEXIS 159



- ▶ See also *Pineda v. California State University*, 2010 Cal. Wrk. Comp. P.D. LEXIS 64
  - 6 frivolous recons even though there was no final order issued
- ▶ *Brown v. Port of Oakland*, 2009 Cal. Wrk. Comp. P.D. LEXIS 491
  - repeated attempts to re-litigate issues that have been finally determined
- ▶ *Santos v. WCAB* (2011) 76 CCC 1105 (writ denied)
  - repeatedly filing unmeritorious motions, pleadings and other documents
- ▶ *Simon v. WCAB* (2015) 80 CCC 1380 (writ denied)
  - filing successive petitions for reconsideration and repeatedly trying to relitigate decided issues).

# VL PROCEDURE



opposing party or lien claimant may initiate proceedings

Petition must:

- ▶ cite reasons why should be declared VK
- ▶ include along supporting evidence

Alleged VL must be given notice/opp. to be heard

# VL PROCEDURE



If hearing requested, PJ or WCAB has discretion to

- ▶ take and consider both oral evidence
- ▶ take and consider documentary evidence, or
- ▶ take and consider solely documentary evidence

(including affidavits, written declarations made under penalty of perjury)

CCR 10782(c)



# Point?



Party does not have a "right" to make an oral argument

"Opportunity to be heard only requires party have opportunity to file written answer"

*Yeressian v. WCAB* (2010) 75 CCC 1048, 1050  
(writ denied)

# What happens?



Declared a VL?

- ▶ PJ/WCAB may enter a "prefiling order"

Prohibits VL from filing, in *pro per*,

- +any application
- +DOR
- +petition\* or
- +other request for action by WCAB...

...w/out obtaining leave of PJ



- ▶ "petition" includes, but not be limited to, a petition to reopen under LC 5410, LC 5803 and LC 5804, a petition to enforce a medical treatment award, a penalty petition or any other petition seeking to enforce or expand the vexatious litigant's previously determined rights

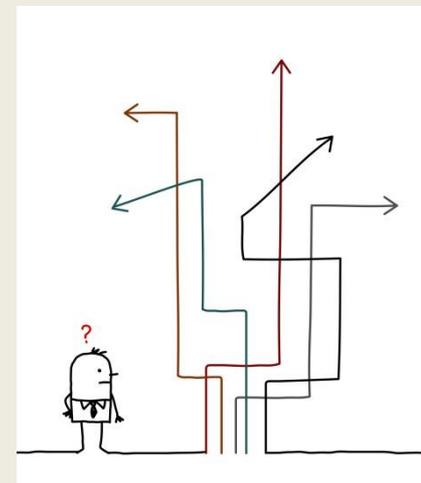
# Why PJ "leave"?



- ▶ to determine if pleading is legally appropriate before hearings are set
- ▶ VL only restricts ability to generate legally inappropriate
- ▶ still allowed to have any *potentially meritorious* filings considered

*Yeressian v. WCAB* (2010) 75 CCC 1048, 1050  
(writ denied)

# Where?



prefiling order issued by PJ/WCAB must be submitted to:

Secretary\* of the appeals board

secretary:

1. maintains a record of vexatious litigants
2. annually disseminate list to all PJs (CCR 10782(g))

\*WCAB Chairman appoints secretary and 2 ass't secretaries (attorneys)

–can authorize to be deputy appeals board members

# FILINGS AFTER PREFILING ORDER

If VL proposes a pro per filing...it is:

"conditionally filed"

WCJ/WCAB will review

"Properly filed"

=

appears request doesn't CCR 10782(a)

That is:

1. doesn't seek to re-litigate issues
2. not unmeritorious
3. not in bad faith, frivolous or solely intended to cause harassment or unnecessary delay



# FILINGS AFTER PREFILING ORDER

PJ/WCAB will consider

- ▶ whether there has been a significant change in circumstances...
  - new or newly discovered evidence?
- ▶ ...might materially affect an issue of fact or law previously finally determined against VL (CCR 10782(e))



# VL's filing inadvertently accepted in violation of prefiling order?

Party/lien claimant may file notice stating filing is being submitted by a VL



But be careful...

- ▶ must be concurrently served on VL
- ▶ must be concurrently served on any affected parties, lien claimants
- ▶ Notice automatically stays VL's filing until determined whether it is "properly filed"
- ▶ Notice unsupported by reasonable justification?

LC 5813 sanctions may apply\*

\*See *Sconiers v. Coleman & Horowitz, LLP* 2007 Cal. Wrk. Comp. P.D. LEXIS 87



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