BENTHALE, McKIBBIN & McKNIGHT

A Professional Law Corporation

EDWARD J. BENTHALE
MICHAEL K. McKIBBIN
E. H. McKNIGHT, JR.
ALAN L. GROSS
HAROLD Y. HATA
ANDREW K. BORG
THOMAS J. BELL
JOSEPH G. HIRSCH
JESSICA J. SNYDER
RYAN D. SUTHERLAND
E. SUSIE WENDORFF
ROBERT A. MATA
DANIEL E. HIBBARD
AKASH R. MULCHANDANI
Of Counsel GERARD R. DAGONESE

1450 IOWA AVENUE, SUITE 210 • RIVERSIDE, CA 92507-0508 • (951) 300-2140 • FAX (951) 300-2130 • www.benthalelaw.com

THE DEFENSE PERSPECTIVE AND OBSERVATIONS OF THE CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION 2012 SUMMER CONVENTION

LOS ANGELES
700 S. Flower St., #3380
Los Angeles, CA 90017-4113
(213) 427-7820

WESTLAKE VILLAGE
31255 Cedar Valley Drive, #303
Westlake Village, CA 91362-7126
(818) 338-3424

SANTA ANA
540 N. Golden Circle Dr., #305
Santa Ana, CA 92705-3914
(714) 972-8563

SACRAMENTO
4600 Northgate Blvd. #209
Sacramento, CA 95834-1103
(916) 564-8977

WALNUT CREEK
1700 N. Broadway, #350
Walnut Creek, CA 94596-4194
(510) 452-0636

2012 SUMMER CONVENTION OF THE
CALIFORNIA APPLICANTS= ATTORNEYS ASSOCIATION
June 28, 2012 through July 1, 2012

TABLE OF CONTENTS

INTRODUCTION

To our clients:

The California Applicants' Attorney Association Conference went forward during June, 2012. Our firm has a keen interest in participating in this conference in light of what is expected to be excellent presentations and an insight as to where the Applicants' Bar intends on taking workers' compensation law. We were not disappointed. All presenters brought forth the best of the best in legal analysis and issues of advocacy. We prepare this document in order to enlighten you as to the current trends, current law, and themes.

The pertinent subjects covered included: apportionment, loss of earning capacity under Ogilvie, AME/PQME communications, undocumented worker issues, and new case law. The consistent theme going forward is advocacy on behalf of the truly injured worker. The Applicants' Bar continues to recognize some limitations imposed upon them as the result of SB 899 and as a result of case law and respond by recognizing their role to take whatever measures are necessary to protect the interests of the truly injured worker. The Applicant's Bar would consider it their mission to take all action necessary to search for the truth in the case. A desire that all cases move expeditiously in order to ensure their injured worker receive all benefits due to them and in a timely process. A desire that no limitations be placed upon them that would prevent a medical expert and/or a judge from receiving all evidence necessary to render an opinion. As such, the Applicant's Bar expresses frustrations to any Law causing for a limitation upon communications with Panel Qualified Medical Examiners/Agreed Medical Examiners, Utilization Review decisions, limitations upon undocumented worker, and availability of true permanent disability indemnity when considering old schedule verses diminished earning capacity analysis. In an effort to accomplish their mission, the Applicant's Bar is urged to recognize the legitimacy of those portions of the AMA Guides that best benefit their truly injured workers. As such, orthopedic injuries may lead to the onset of internal injuries (medication) thus leading to sleep deprivation (due to pain), leading to psychiatric injuries (due to negative response), leading to dental trauma, etc., etc., etc.

We hope you find the following read enlightening. Please recognize while we may not agree with themes brought forward by the Applicants' Bar, we certainly grant them consideration in their commitment to their truly injured client. In response, however, we defendants will continue to advocate in the best interests of the defendants, with the mission, too, of searching for the truth.

TOPIC 1: APPORTIONMENT

Apportionment is recognized by the Applicants' Bar as being an opportunity for defendants to reduce benefits to their injured client. As such, a theme going forward was to utilize apportionment in the form of a knight utilizing his sword. Applicants' attorneys are encouraged to analyze in detail opinions expressed by a medical practitioner with regard to apportionment. In that the burden of proof for apportionment to non-industrial conditions is the burden of the defendants, the applicants' attorneys are driven to question the medical practitioner's opinion regarding apportionment. Is the opinion based upon substantial medical evidence? Does the doctor explain in detail how and why they reached their opinion of apportionment? More importantly, how does a degenerative condition of the spine cause the current level of disability? For guidance the applicants' attorneys directed their attention to Ashley v. Workers' Compensation Appeals Board (1995), 37 Cal.App. 4th 320/326 wherein, **"Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to non-industrial factors."**

The applicants look to Supreme Court case Stan Brodie v. WCAB/Kenneth D. Welcher v. WCAB (2006), 71 CCC 1007, for guidance. As to apportionment, the court reasoned Senate Bill 899 as follows, **"The history behind them reflect a clear intent to charge employers only with that percentage of permanent disability directly caused by the current industrial injury." "The changes wrought by Senate Bill 899 affect how one goes about identifying the percentage of permanent disability an employer is responsible for, but not how one calculates the compensation due for the disability once the percentage is determined."** The court reconciles between the plain language of current sections Labor Code §§4663 and 4664 to indicate the new regime for apportionment is based upon causation.

Applicants' Bar intends on challenging apportionment conclusions reached by those physicians offering psychiatric opinions. We all know the majority of psychiatric practitioners issue opinions on apportionment based upon the apportionment conclusions reached by the orthopedic specialists. These reports will be challenged. The Applicants' Bar would suggest the psychiatric specialist is simply reaching a conclusion and not addressing issues of causation. Their goal would be to demonstrate while there may be non industrial apportionment on orthopedic findings there is 100% industrial apportionment psychiatrically. **We would recommend all defense practitioners identify on their outline letter to the psychiatric specialist a request that apportionment be addressed based upon causation. Simply relying on the orthopedic specialist opinion regarding apportionment may be considered conclusionary and may be challenged.**

Another significant theme regarding apportionment is whether an apportionment argument can be raised when there is a conclusion applicant's disability is based upon diminished earning capacity. In Cordova v. Garaventa Ent., 39 CWCR 291, the commissioners concluded the evidence demonstrated that applicant's pre-injury characteristics (apportionment) did not preclude him from regular work and earnings and that many workers with similar characteristics have been successful in getting back to work and, therefore, the applicant's sole cause of permanent disability was his medical condition. The trial judge relied upon the provisions of Labor Code §4662 which addresses permanent total disability, as opposed to Labor Code §4660 which addresses permanent partial disability. In the Cordova case, the trial judge noted the Agreed Medical Examiner in orthopedics had apportioned 10% of applicant's orthopedic injury to non-industrial factors. Based upon this decision the DEU rated the applicant as having 94% whole person impairment. The commissioners concluded the trial judge relied upon that language in Labor Code §4662, **"in all other cases, permanent and total disability shall be determined in accordance with the facts".** Those facts indicated applicant losing 100% of his **ability for earning capacity**. Therefore, in that there was a total loss of earning capacity, there was no basis to apportion the extent of whole person impairment to non-industrial factors. The applicant was deemed 100% disabled even though the AME suggested 10% disability to non industrial factors.

Finally, the Applicants' Bar is excited about the Workers' Compensation Judge's decision (San Bernardino Venue) rendered in April, 2011 wherein the injured worker was awarded a 100% disability in internal injury and a separate and distinct 35% award in orthopedics. The Applicants' Bar will rely upon Labor Code §4664 as amended by Senate Bill 899. The amendment now provides for seven regions of the body to be taken into account when determining apportionment between injuries. The Bar recognizes the only caveat with regard to the provision is that the percentage of disability in each region shall not exceed a lifetime value to exceed 100%, and that a single injury cannot exceed 100% disability.

TOPIC 2: PANEL QUALIFIED MEDICAL EXAMINER ADVOCACY LETTERS

There was much discussion regarding rules and regulations, as well as case law, as it pertains to advocacy letters sent to the Qualified Medical Examiner. Applicants' Bar recognizes the provisions of a Panel decision rendered in Manuel Ferniza v. Rent-A-Center, Inc.; Specialty Risk Services (ADJ1644999) filed on December 27, 2010. This was a split Panel decision, with the majority holding that pursuant to Labor Code §4062.3, both medical and non-medical records are considered information forwarded on to the Panel Qualified Medical Examiner. The court stated, **"We also construe medical and non-medical records to encompass letters from attorneys that discuss medical and non-medical information, particularly where the letter engages in advocacy. This construction is consistent with Rule 35 para. A, which includes among the information to be provided to an evaluator a 'letter outlining the issues the evaluator is requested to address in the evaluation'. " The court further recognized pursuant to Labor Code §4062.3(b) the letter is to be served upon the opposing party 20 days before the information is provided to the Panel Qualified Medical Examiner. Opposing party has 10 days to object to non-medical records being submitted."**

Northern California attorneys, as opposed to southern California attorneys, routinely forward separate and distinct advocacy letters onto the AME's/PQME's. In an effort "to get to the truth" Applicants' Bar would suggest their unlimited ability to forward correspondence onto the AME's/PQME's for purposes of advocating on behalf of their client. We would hope to challenge by relying upon Labor Code §4062.3(b) and Rule 35(c) and (d). If an opposing party objects to the attorney's proposed letter, the party cannot send the letter to the PQME absent an Order from the Workers' Compensation Judge. One attorney on the Panel is now awaiting a response to petition for reconsideration where the issue being whether the outlining letter can contain a number of panel decisions for review by the Panel Qualified Medical Examiner. Of interest, the defendants in the matter did not issue a timely objection but did raise the objection at the time of trial. The trial attorney is hoping for opinion that follows the reasoning of the dissenting commissioners in the Ferniza case. The dissenting opinion as follows:

"The fact that there are two different subsections addressing what may be sent to the evaluating physician, one for non-medical records and one for communications, shows the legislator intended there to be separate procedures for each period. For non-medical records under subsection (b), either party may object to the proffered documents and thereby prevent them from being provided to the physician. Subsection (e) though does not give the parties the ability to prevent a proposed communication from being sent by lodging an objection. Subsection (e) is there for a purpose; it is contemplated that some form of communication can be sent to an AME or Panel QME, even over the party's objection, provided the other side has been served a copy twenty days in advance."

Without a doubt there are compelling interests with regard to this issue; interest no. 1 being moving quickly to obtain injured workers their benefits; and no. 2, need to advocate within a timely fashion. Yes, we defendants would like nothing more than to be able to present our opinions regarding the injured workers' case. Yes, too, we will advocate on behalf of our client. In the interim, however, defendants' letters will typically state forth appropriate facts, set forth the appropriate evidence and request an opinion consistent with both. In addition, we defendants must be on guard to enter timely objections to applicant's advocacy letters that clearly overreach.

TOPIC 3: OGILVIE III

As is common knowledge, prevalent opinion amongst those on the Applicants' Bar is that the permanent disability rating schedule is not accurate as to an injured worker's true level of disability and, therefore, not accurate for the calculation of benefits. The legal opinions as set forth in the line of Ogilvie cases certainly substantiate this opinion. As such, much discussion was granted on this topic. The Applicants' Bar reminded all participants of the findings of Ogilvie v. WCAB (2011) 197 Cal.App. 4th 1262, 76 CCC 624. The Court of Appeals adopted applicant's position that where a scheduled permanent disability rating does not reflect an employee's diminished future earning capacity, and such finding is based upon substantial evidence, the diminished future earning capacity rebuts the permanent disability indemnity schedule and in effect becomes the new rating. The core specific language is as follows:

> **"Thus, we conclude that an employee may challenge the presumptive schedule percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in a rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to the industrial injury, the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating."**

Keeping the Ogilvie opinion in perspective, Applicants' Bar is driven to identify those cases that fit within the parameters of an Ogilvie, and furthermore, systematically conduct themselves in a manner to attain an Ogilvie result. The factors to be considered are:

A. Is the injured worker precluded from the usual and customary work as a result of the injury?

B. Is the scheduled rating consistent with the extent of disability. Does the scheduled rating take into consideration an Almaraz-Guzman analysis?

B. Does the scheduled rating take into consideration the applicant's pre-injury earning capacity?

D. If deemed an Ogilvie case, hire a vocational expert. Face to face discussions with the injured worker are necessary for the report to be considered admissible and substantial medical evidence. **(This goes for the defendants as well.)** Of note, vocational experts will be relying on the injured worker's loss of residual functional capacity in completing their analysis. They must rely upon data provided by RAND. The data takes into consideration one injury, one body part, and earnings data for similarly situated employee's pre-injury.

The panel reviewed a number of unpublished cases (primarily findings and awards at trial level) that strengthened their position. An example of those findings is as follows:

Injured worker earned $648.00 per week based upon 60 hour work week. Applicant sustained a 37% permanent disability indemnity pursuant to the 2005 Rating Schedule. The applicant's vocational expert opined applicant to have a 70% diminished earning capacity. The defendants' vocational expert opined applicant to have a 57% diminished earning capacity. The evidence suggested applicant was only able to work 24 hours per week following the injury as opposed to a 60 hour pre-injury capacity. The judge found applicant to have a 70% permanent disability indemnity based upon loss of earning capacity. The Rating Schedule was therefore rebutted in that applicant could no longer complete a 60 hour work week.

Finally, there was much discussion granted to Labor Code §§4660 and 4662. Labor Code §4662 stands for the presumptions of permanent and total disability. Labor Code §4660 addresses issues involving temporary partial disability. Under Ogilvie, the Board panel opined there is no meaningful difference between ability to compete in an open labor market or diminished future earning capacity. If you lost all of your earning capacity, you are totally disabled. If you are unable to compete in the open labor market, you are totally disabled. Both findings are individualized and in many cases will require expert vocational evidence.

The panel also granted some discussion to applicant's potential claim under the California Department of Fair Employment and Housing Act. An injured worker who has substantial loss of earning capacity most likely has an inability to return back to work for the employer. Therein the potential claim for discrimination by the employer. We recommend all defendants be on alert as to any potential for an injured worker to bring a claim as against the employer under the California Department of Fair Employment and Housing Act. Facts suggestive of a claim would be where an employer fails to take reasonable acts to provide reasonable accommodations accommodating of the disability. Employers are required to engage in good faith, timely interactive processes with the employee to determine what modifications and reasonable accommodations can be made in the functions of a job. Employer has a duty to consider other vacant positions which the disabled employee may be qualified to perform.

Finally, there was a passionate plea by the vocational expert on the panel to be paid for their services. Typically the defendant's vocational experts are paid within thirty days of service. The applicant's vocational experts are typically paid at the conclusion of the case. At that point there is an attempt by defendants to negotiate the fee. We will expect applicant's attorney to take aggressive actions on behalf of their vocational experts. They will be preparing notifications to defendants of their willingness to utilize an agreed vocational expert. Absent response, defendants are notified of their intent to hire their own vocational expert. Absent payment, their intent to seek an order against defendants to

compensate the vocational expert. They will rely upon Labor Code §5811 specifically to that language stating **"in all proceedings under this division before the Appeals Board, costs as between the parties may be allowed by the Appeals Board."**

In summary we recommend all cases be considered for an Ogilvie analysis. We conclude the majority of cases will settle and/or be resolved on the 2005 Permanent Disability Schedule. However, there will be exceptions and these exceptions are certainly fact sensitive. In most cases we recommend the hiring of vocational experts, that the vocational expert have face to face discussions with the injured worker, and that the case proceed accordingly. In the alternative, consideration can always be given by the defendants to **voluntarily** provide the injured worker with a vocational rehabilitation plan with the stipulated agreement the defendants would incur no further liability under an Ogilvie analysis. (Hmmm. Thought provoking.)

TOPIC 4: MOST IMPORTANT CASES

The panel granted discussions to a number of decisions entered in 2012. The topics involved attorney's fees, MPN issues, flexibility under Labor Code §3208.3, and serious and willful claims. A number of the cases were favorable to the Applicants' Bar while a number were not. The following is a summary:

MPN Issues: Valdez v. WCAB/Warehouse Demo Services (2011), 76 CCC 970, Valdez suffered industrial injury October 7, 2009. Initial treatment was within employer's medical provider network. Valdez stepped outside the defendant's MPN and moved towards primary treating physician outside MPN. The defendants terminated applicant's entitlement to temporary total disability indemnity. The matter moved to Expedited Hearing on the issue of temporary total disability indemnity. The WCJ granted an award of temporary total disability indemnity based upon the findings of the non MPN primary treating physician. Furthermore the issue of applicant's treatment outside the MPN not to be relevant on the issue of temporary total disability indemnity. On reconsideration, an en banc decision held, the non MPN primary treating physician's report as being inadmissible and furthermore defendants would not incur any costs associated with the non MPN physician and their reports. The Second District Court of Appeal granted review of this case and issued their decision reversing the WCAB and holding that **"the rule of exclusion of the PTP reports laid down by §4616.6 applies only when there has been an independent medical review performed under the authority of §4616.4."** The District Court of Appeal relied on the viability of Labor Code §4605 which states, **"Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physician whom he desires"**. The District Court of Appeal opined the prior en banc decision to be based upon erroneous interpretation indicated in the case of Tenet/Centinela Hospital.Medical Center.vs. Workers' Compensation Appeals Board 2080 Cal.App. 4th 1041. The DCA concluded "Tenet does not announce such a rule of exclusion, but instead only held that the physician selected by the employee could not be substituted by the WCJ for the duly serving PTP." The court

held under Labor Code §4605, PTP reports are to be admitted into evidence. Finally, the District Court of Appeal opined if the legislator intended to exclude all non-MPN medical reports, the legislator could have said so, it did not. Therefore defendants must be mindful of the fact non MPN reports are admissible on the issue of medical disputes.

"Attorney's Fees" Abernathy vs. Whitwood Baptist Church, 40 CWCR 39 (order denying reconsideration).

The Board affirmed a penalty and awarded the applicant's attorney fees under §5814.5 in the underlying case, due to the fact defendants had failed to adhere to an agreement and order issued in 1993 with regard to providing injured worker home healthcare. Defendants terminated the arrangement in 2007. The matter came on for trial in the state of Oregon in the year 2010. The WCJ awarded the applicant benefits as previously agreed to. The judge awarded the attorney $112,948.00 in fees based upon Labor Code §5814. Of note, the panel observed a $400.00 per hour fee charged by the attorney. The Board reasoned the WCJ must have discretion in determining fees and the amount of penalty. Furthermore, that §5814.5 penalties encourage attorneys to continue to provide post-award representation if payment of the award is either delayed or refused. Furthermore, that this section allowing for an attorney fee simply compensates for the additional expenses incurred by an injured worker when the defendant delays payment of an award.

Clearly, a favorable case for the Applicants' Bar. No doubt an excitement over the awarded fee at $400.00 per hour. The fee recognized the attending attorney to be well-experienced and board certified.

"Good faith personnel bar" §3208.3, County of San Bernardino vs. WCAB, (McCoy) (2011) 77 CCC 4,203 Cal.App. 4th 1469.

A positive case for the defendants. At the trial level, the WCJ ruled against the applicant on the ground that the psychiatric injury was caused by a lawful, non-discriminatory and good faith personnel action under Labor Code §3208.3(h). The applicant sought reconsideration on the basis that at the time of trial the claim had been amended to include the physical injury of migraine headaches. The WCAB on petition reversed the WCJ's finding and ruled that §3208.3(h) does not preclude compensation for migraine headaches. The Court of Appeal denied review of the case. The Supreme Court took the case up. The Supreme Court concluded that good faith personnel action defense precludes recovery for psychiatric injuries which result in psychological manifestations solely caused by the stress of the personnel action. In that the migraine headache was the result of the alleged psychiatric claim, there could be no finding of compensability with regard to the migraine headache.

A good case for the defendants. Applicants' Bar was clearly incensed by this narrow ruling. They consider this to be a bad set of facts leading to bad case law.

"Sudden and extraordinary" psychiatric injury. State Compensation Insurance Fund v. WCAB (Garcia) (File 32812), 40 CWCR 63.

In this case, after but two months of employment with the defendant, applicant sustained catastrophic injury as a result of a fall from ladder. Applicant was an avocado picker. There were significant catastrophic head injuries together with a claim for psychiatric injury. Defendants admitted liability for the physical injuries but denied liability for the psychiatric injury under Labor Code §3208.3(d) due to applicant's employment less than six months. The single issue at trial was whether applicant's psychiatric injury could be deemed compensable on the basis of the sudden and extraordinary exception. The WCJ ruled the injury was in fact sudden and extraordinary and therefore found the psychiatric claim to be compensable. The defendants petitioned for reconsideration. The WCAB issued a split decision affirming the trial judge's findings that there was not much in the way of evidence presented by the defendants regarding the issue of extraordinary. Fortunately, the Court of Appeal disagreed with the WCAB and relied upon the plain

language of Labor Code §3208.3. The appellate court concluded an avocado worker falling from a tree was not uncommon, unusual and totally unexpected.

Again, a good case for the defendants. However, we would recommend attention to underlying facts when applicant attempts to invoke the exception to Labor Code §3208.3. In addition, although there be a finding that the applicant's claim of psychiatric injury be barred, the defendants still may incur liability for psychiatric treatment if deemed necessary to cure the effects of the other injuries. (Orthopedic, internal, etc.).

"Serious and willful claim" C.C. Meyers, Inc. v. WCAB (Lockwood, Bruce), 77 Cal.Comp. 129, unpublished Court of Appeal decision.

Applicant, Bruce Lockwood was successful in obtaining serious and willful benefits as against defendant C.C. Meyers. Applicant suffered catastrophic injury when an excavator operated by co-worker struck him. The injury was reported to OSHA but no citation was issued. Court of Appeal reasoned a serious and willful claim attached based upon the underlying facts of the case. The court recognized the leading standard for serious and willful misconduct cases and as set forth in Mercer-Frasier Company v. Industrial Accident.com (1953) 40 Cal.2d 102, 18 Cal.Comp case 3, wherein the court **stated "something much more than mere negligence, or even gross or culpable negligence, and as involving conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in a serious injury or with a wanton and reckless disregard of its possible consequences**." In the Lockwood case the court reasoned the absence of an OSHA citation was not a fatal flaw to the claim. This case turned on the facts and the unsafe working environment caused by the employer.

A review of this case sets forth all of the elements necessary to prove or disprove a serious and willful case. Truly a fact-sensitive issue.

"Dual purpose doctrine" Warner v. WCAB (122711 2d App. Dist. Div. 5, certified for non-notification) 40 CWCR 1, 77 CCC 9.

In this case the Court of Appeal ruled 2-1 to reverse a WCAB decision that held that a dual purpose doctrine was applicable. Applicant, a firefighter located on Catalina Island, was trimming a wisteria bush at the request of his wife, and suffered injury. At the time he was on call by the fire department. The underlying facts indicated applicant lived at his home rather than at a fire station, which inured to the benefit of the fire department. Applicant received stipends for living on Catalina Island, and furthermore was on call 24/7. The court held that an employee who combines his own business by attending both to his employment and his personal surroundings benefit the employer either directly or indirectly.

A non-citable decision but ought to be highly recognized by the defendants when similar facts arise.

TOPIC 5: UNDOCUMENTED WORKERS

The Panel brought forth a rather spirited discussion on the plight of the injured undocumented worker. Heightened sensitivity was granted to the subject, in light of the recent Supreme Court case involving Arizona immigration law, as well as the fact that an undocumented worker was detained recently at the Los Angeles Workers' Compensation Appeals Board just prior to trial. The Panel brought forth their legal reasoning as it pertains to the rights of undocumented workers.

In general, all undocumented workers enjoy the same workers' compensation rights as those of documented injured workers. In an effort to protect their clients, Applicants' Bar is now typically filing Applications for Adjudication of Claims without identification of a Social Security number. In addition, they are hopeful their clients' treating doctors will deem them to be temporarily totally disabled and not temporarily partially disabled during the pending claim. An employer who provides an injured worker an opportunity to return back to work in a modified capacity, then deems the injured worker unable to return back to work due to undocumented status does not render the injured worker entitlement to temporarily totally disability indemnity benefits. Finally, there is a constant reminder the Board does not have jurisdiction over constitutional issues. Finally, during discovery, particularly at the time of defendants' depositions, injured workers will be advised not to respond to questions regarding legal status.

We defendants routinely confront the issues of undocumented legal status when conducting discovery. While we give credence to the plight of the Applicants' Bar, there was no discussion regarding the injured workers' misrepresentations at the time of job placement, and no discussion regarding the credibility of the injured worker. These are fact sensitive scenarios and must be addressed on a case-by-case basis.

TOPIC 6: DENTAL AND FACIAL INJURIES

A most interesting Panel brought forth by the dental community. Frankly, an excellent presentation for purposes of enlightening the Applicants' Bar as to how to recognize both dental and facial injuries and, furthermore, how to utilize the AMA Guides to bring forth findings of whole person impairment.

Dental injuries are defined as either the result of macrotrauma or microtrauma. Macrotrauma is a direct injury to the dental region. Microtrauma is the result of bruxism, which is the result of ongoing stressful and/or grinding of teeth condition. As to microtrauma, the treating dentists will enter a diagnosis based upon a number of factors to include symptoms, joint noise (clicking, popping), range of motion in opening of the mouth, tooth damage, tooth decay, tissue damage, and imaging studies. The doctor will focus on a finding of myofascial pain, which is an indication of general muscle pain. Any positive findings would suggest a clinical diagnosis of bruxism.

As defined by the Panel, bruxism is the agitation of the brain that translates to the clenching of the jaw. Other causes include the extended use of anti-depressant and orthopedic medications. The common clinical finding is xerostomia or, in common terms, dry mouth. The finding of xerostomia causes for acid changes in the saliva causing for bacteria changes in the oral region causing for the onset of both dental and tissue decay. A dental diagnosis suggesting industrial causation brings forth high-degree of probability defendants will incur the costs of dental repair. While there will be significant issues of apportionment to preexisting dental decay, the defendants are not in a position to apportion treatment

As to facial injuries, the most common finding is compromise on the temporomandibular joint (TMJ). The TMJ joint is the most complicated joint of the human body. The joint is compromised by onset of stressful and anxiety states of mind. In the

alternative, a physical trauma involving the TMJ joint. Diagnosis is usually concluded by way of imaging studies. The condition leads to advanced levels of treatment to cure the symptoms.

Of significance, the Panel indicated there to be a high cure rate for all symptoms involving both dental and facial injuries. However, with a high cure rate there is a likelihood of 0% Whole Person Impairment. Of course, those cure rates come at a substantial cost to the defendants. Ultimately if there is a determination of Whole Person Impairment, both the Agreed Medical Examiner and the Panel Qualified Medical Examiner will rely upon chapters 11, paragraphs 11 through 7 at page 262, paragraphs 11 through 5, page 256, paragraphs 11 through 13, page 331 of the AMA Guides.

TOPIC 7: STATE OF THE STATE

Christine Baker, Director of Department of Industrial Relations, Rosa Moran, Administrative Director of the California Division of Workers' Compensation, Attorney S. Bradley Chalk provided an excellent synopsis of current trends at the administrator level. Several topics were discussed to include lien litigation, Industrial Medical Council response to the request for Panels, budgetary constraints, and petitions versus motions.

The administrative director is considering and will be implementing new lien regulations. The goal is to rapidly litigate the ever-increasing backlog of lien claims. As such, the current proposal is to set aside two weeks in the month of October to allow Boards only to litigate lien claims. This would be a Southern California activity only.

Administrative director took positive steps to remedy the issue of wait periods for issuance of Panels. On represented cases, the Industrial Medical Council is now issuing Panels no later than 28 days from request.

Although the WCAB has been hampered by budgetary constraints, the administrative director was able to take action and appoint 35 new judges in Southern California during this past year. While this is positive for the system, there are but five commissioners appointed to review Petitions for Reconsiderations. They are seeing anywhere from 280 to 300 petitions per month.

Questions were presented by the audience as to when would the Board take action on the FEC modifier. The response was an affirmative yes that action would be taken.

Finally, a comment was made as to acts taken by attorneys in the form of either a petition and/or a motion before the court. A helpful hint was granted to all parties by indicating all motions should be in the form of a petition and not a motion in that the system recognizes a petition as a matter only for a judge. A petition brought forth in the form of a motion will not expeditiously make its way to a judge's desk.

CONCLUSIONS

We are hopeful you found the following read to be thought-provoking and helpful. We are grateful the California Applicants' Attorney Association allows for the attendance of defense practitioners. In so doing, all are afforded an opportunity to better appreciate and understand the current trends and laws as it relates to Workers' Compensation. The gathering of such information enables the defense practitioners to better advocate on behalf of their clients. The information provided herein is designed to assist in that endeavor.

We at Benthale, McKibbin, and McKnight remain available for any questions you may have regarding this analysis or any other matters involving the defense of Workers' Compensation claims.

Very truly yours,

BENTHALE, McKIBBIN & McKNIGHT

By: EDWARD J. BENTHALE
For the Firm