JANUARY 2016

CAAAments

The Voice of the California Applicants' Attorneys Association

Celebrating Fifty Years of

Serving California's Injured Workers!

IMAGE TO COME

Inside:

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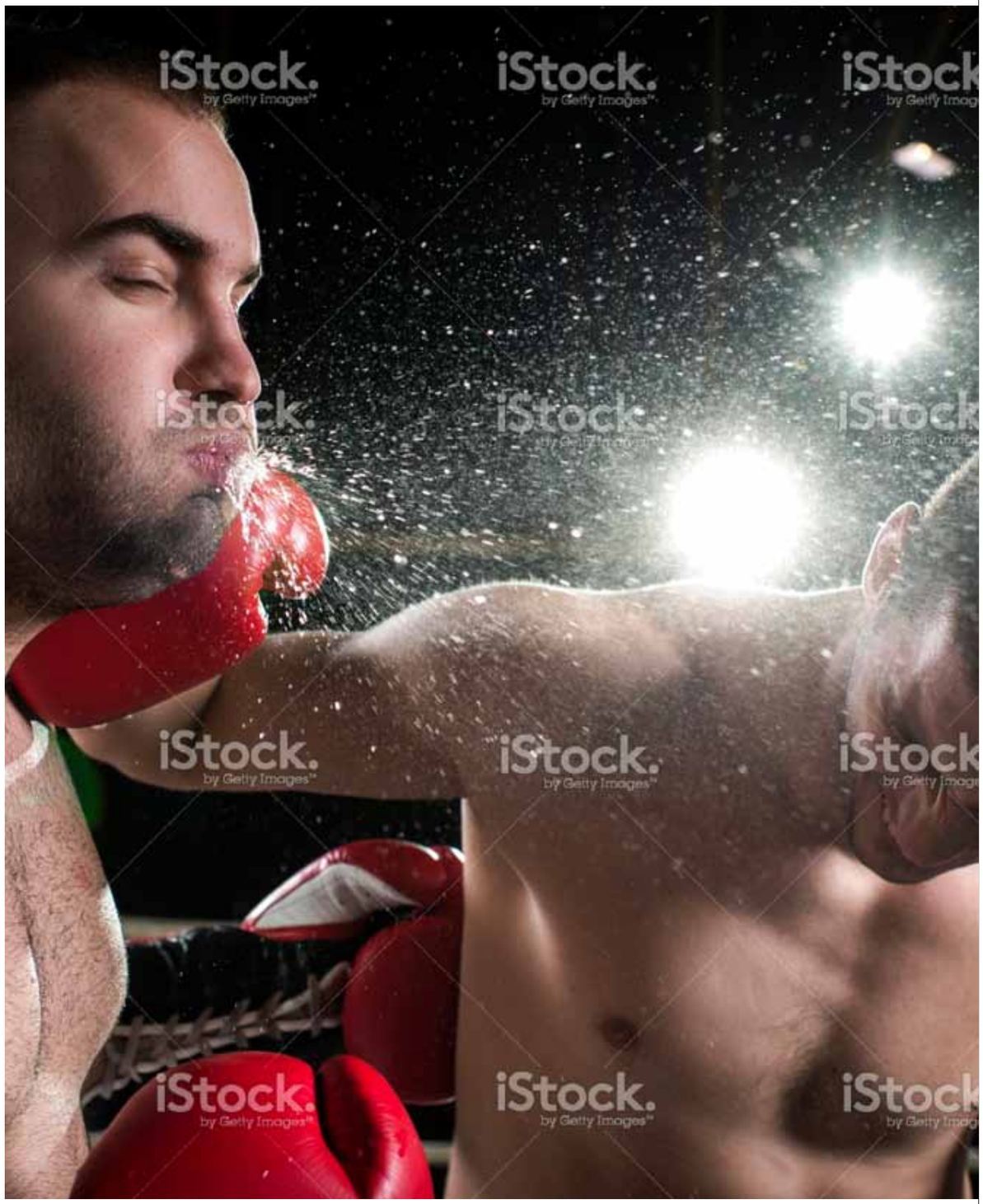


PRESIDENT'S MESSAGE

We're Punching Back...

By Bert Arnold, President of CAAA

Punching up our counterattacks to denial-of-care profiteers:
Maximus is a global profiteering corporation in the business of denying care. I have secured a copy of the Maximus contract with California. $60 million in two years. And contract provisions that look more than suspicious. I have formed a new committee and appointed myself as Chair. This Maximus accountable committee will bring sunshine to their darkest secrets.

Punching holes in phony statistics:
For the last two years, there has been nothing but noise about the rise in CT claims coming out of Southern California—all couched in terms suggesting illegitimacy.

Well, here are the facts: Latino workers account for 59% of all days missed at work caused by injury. And most Latinos live in Southern California. I have made the strengthening of CAAA's Latino community efforts my #1 priority as President.

Punching incompetent bureaucrats where it hurts:
I am directing our consultants, lobbyists and political strategists to focus their efforts on exposing the government bureaucracy that by either incompetence or willfulness is failing...

Failing to notify—because it took the bureaucracy nearly two and a half years to develop a simple application form for the Return to Work Fund, thousands of workers who were never informed of their rights will soon become ineligible.

Failing to translate—workers who don't speak English and don't have a lawyer are out of luck. California makes banks and realtors provide legal rights in multiple languages, but the state still won't meet that same standard.

Failing to tell the truth—the state bureaucrats mislead the Governor, mislead the Legislature, and mislead the press.

We are calling them out. Calling for accountability. And calling for consequences.

EXECUTIVE'S MESSAGE

Our founders had the foresight to understand that if they educate one another and fight the forces of evil through legislation and the judicial system that they had a better chance of protecting the rights and dignity of human beings injured on the job.

By Karen Locke, Executive DIrector of CAAA

I have to believe that the words in Senator Kennedy's quote and the words Elvis had recorded in 1968's "If I Dream" embodies the reason why the California Applicants' Attorneys Association was formed and why we fight with everything we have to this day.

What you do for a living every day is not easy, what they did everyday of their lives was not easy. What you do every day is hard and I believe it takes a special person to be a true applicant attorney and not give up this fight. You fight every day, just like the people mentioned above and like our founders did. Our founders did not give up and they dedicated every bit of their soul to the cause in which each of them believed in. Even when everything and everyone was against them.

I have so much respect for our founders. They realized the dream that if they put aside their fears, that if they joined together and shared information, that it could hurt their businesses and clients might leave them for other attorneys.

> The work goes on, the cause endures, the hope still lives and the dream shall never die.
> ***—Ted Kennedy***

> Deep in my heart there is a trembling question. Still I am sure that the answer is going to come somehow. Out there in the dark there's a beckoning candle and while I can think, while I can talk, while I can stand, while I can walk, while I can dream, please let my dream come true right now."
> ***—Elvis Presley***

But they saw past all of that and realized the dream of forming this organization to help the plight of California working men and women. Our founders had the foresight to understand that if they educate one another and fight the forces of evil through legislation and the judicial system that they had a better chance of protecting the rights and dignity of human beings injured on the job.

We have lived Senator Kennedy and Elvis's words for the last 50 years and it is my dream that the next generation will continue to realize the vision of our founders and continue living these words. CAAA

Welcome, New Members!

By Alan B. Snitzer

We're pleased to announce that the "CAAA year" that ended in September 2015 with the new Executive Board taking office, was another success in terms of our annual Membership Drive. Every year we seek at least 200 new members, both regular (applicants' attorneys) and associate members (everyone else), combined.

The Board approved a total of 187 new members for that period, including 155 regular members, and 55 associate members. To all of you who are new members of CAAA, welcome, and congratulations on joining the leading professional organization that is active in California's workers' compensation system!

The new CAAA year is already off to a good start, with 20 new regular members, and 7 new associate members already approved for membership, for a total of 27. But that means we're still looking for another 173 new members in the next 10 months!

The Membership Committee is always available to discuss membership options with prospective new members, as is our statewide Director of Membership Services, Andrea Robertson, who works out of our CAAA State Office in Sacramento.

CAAA's work in protecting the rights and benefits of injured workers, is never done. This past year, we've seen some helpful results in case decisions handed down by the courts, (that were pursued by CAAA members), and also some disappointing decisions that went against the interests of our clients, like the Stevens case. Similarly, CAAA was able to help get several bills passed in the Legislature that would have promoted the cause of injured workers, and Governor Brown signed some of them, while, disappointingly, vetoing others that were important.

So, as usual, we have a "mixed bag" in terms of both judicial and legislative efforts to restore some fairness to the workers' compensation system.

That is precisely why membership in CAAA is nothing short of vital, if we are to ensure the very survival of the system itself! We're still fighting, every day, against the negative effects on our clients of the "reforms" of SB 899 and SB 863.

By supporting CAAA through your membership, you're helping to sustain efforts to support legislators who have shown that they are friends to the injured workers of this state. Your membership fees also support our experienced and dedicated team of legislative consultants, who are continually trying to "educate" members of the Legislature and administration on important issues, and bills, that can have a huge effect on the lives of everyday injured workers.
You're also supporting the best, cutting-edge, legal education in the comp. field in this state, offered at our 2 annual conventions, many seminars throughout the year, and right down to the chapter level, where even monthly meetings offer valuable educational insights.

So, if you're not yet a member, please join us! Even the defense bar has a vested interest in the work

of CAAA, in order to keep the system alive and viable, so we all continue to have a place in it, in order to make it work for injured workers. And if you're a defense attorney or a doctor (especially AME), who is concerned about your associate membership having an adverse affect on your business, don't worry: You can be kept out of the Membership Directory upon request!

As we reported in a recent issue of CAAAMents, some of the Membership Chairs, in association with CAAA Officer Jason Marcus of the Executive Board, are vigorously recruiting newer and/or younger members of CAAA who are willing to get deeply involved in CAAA early on, as a potential track to eventual leadership positions on the Board or E-Board.

This "Emerging Leadership Initiative" has already attracted almost 20 newer/younger members of CAAA, who are willing to demonstrate their commitment to the organization, and our cause, by joining committees on the Board of Directors, volunteering for special projects, and learning the inner workings of CAAA early in their membership or careers. We need this "new blood" to assure a smooth and seamless "transition", as much of the older, established leaders, retire or become less active in the organization they've served so well for decades.

If this sounds like something that appeals to you, and you'd like to roll up your sleeves and get to work with CAAA, contact Jason Marcus, Andrea Robertson, or me. As is often the case in life, you only get out of an organization, what you're willing to put into it, and that's true with CAAA, too!

To all our "new" members (both regular and associate), who have joined CAAA within the last year and have not yet attended a "New Members Luncheon," please join us right after the morning classes end on the Saturday of the Winter Convention in Rancho Mirage, to learn more about CAAA and what it can do for your practice; to meet some of the officers and Board members; and to get some valuable "welcome" gifts from CAAA! (There's also a pretty good "free lunch!")

Again, to all our "new" members, a warm CAAA "Welcome," and to our loyal, renewing members, thanks for your continued support, too; we couldn't do it without you!

Winter Convention: *A Primer*

By Alan Gurvey

This year CAAA celebrates its 50th anniversary serving California's injured workers. Yet, not only does CAAA do yeoman's work serving California's injured workers, it has a long outstanding history of educating attorneys, doctors, judges, and the defendants on the ever changing laws of workers' compensation. Now, more than ever, it is imperative that attorneys attend seminars, conferences and conventions to learn more about what is going on in the world of workers' compensation in the state of California. And, the best place to get the most information (all packaged into four days) from top notch sources is CAAA's Winter Convention, this year running from January 21st through January 24th, 2016.

The 2016 Winter Convention will not only be a celebration of 50 years of integral service to injured workers, but it also will be one of the most important educational programs that CAAA has ever presented. Anyone who practices in our arena cannot afford to miss education at its finest. During the past years, there have been continuous changes in the law, vis a vis precedential cases, legislation and regulations. It is often a challenge to know what the state of the law actually is concerning many different issues that permeate our practice, but, more than that, even if you know what the law is, understanding it and interpreting it becomes a greater challenge. This January, we are fortunate to have a "star-studded" lineup of speakers representing applicants, defendants, the WCAB and WCJs, and the medical profession. Thursday afternoon pops the cork on the convention with one of the most important issues all injured workers deal with—treatment. It all starts with attempts to obtain the necessary and reasonable treatment to address an applicant's work injuries. The problem is, if authorization for treatment is not immediately provided, what do you do? What do you tell your clients when you can't set an appointment on an accepted injury within the MPN because the doctor refuses to do so? What do you tell your clients when you can't obtain treatment on a lien? Our first panel will deal with the MPN "fiasco". You will hear from applicant attorneys, a defense attorney and a doctor, all of them discussing the practical strategies to navigate the MPN, and, importantly, what to do when you just can't seem to get an appointment set for an injured worker for much needed treatment.

The next panel follows up with the most en vogue topic in workers' compensation today, utilization review and independent medical review. Since the recent Stevens Court of Appeal decision indicating that IMR is apparently constitutional, the system remains in a complex labyrinth. Attorney for Frances Stevens, Joseph Waxman, joins Dr. Steven Feinberg and applicant attorney John Don on this panel to talk about how a denial of care that an injured worker experiences through the utilization review and independent medical review process impacts the system.

Following the discussion of the denial of treatment comes the next panel, which addresses how to obtain treatment for an injured worker when UR and IMR denies the request for treatment, and/or when appeals are pending. During this panel, attorney Charles Randeau will provide samples of IMR appeals so that everyone will have an opportunity to learn what is involved in appealing an IMR determination in light of the Stevens drama. Former CAAA President, Adam Dombchik, and future CAAA President, Jason Marcus, join the Honorable Scott Seiden discussing alternatives for injured workers when the workers' compensation system fails. This panel will also be a public forum where member of the audience will have the opportunity to ask questions and provide commentary on their experiences with treatment denials.

The day concludes with a discussion of the recently determined Dahl casre and where we go from here concerning diminished future earning capacity. Attorney Mark Gearheart leads the discussion on Dahl with panelists Robert McLaughlin and John Bloom providing important commentary.

Friday, January 22, will prove to be a most important day in the learning process for those practicing in the workers' compensation field. The day starts with a panel on the "120 Million Dollar Fund", the new PQME process and lien filings. The Honerable Judge William Carrero joins attorneys Jill Singer and Jill Rhoderick, and vocational expert , Hazel Ortega to review the newest regulations and protocol in these important areas of the system.

Then, the Commissioners take over. The WCAB Commissioners have been invited to provide a discussion of what the Commissioners deal with on a daily basis in this day and age of trials and tribulations. This panel is always a highlight, as Chairperson Ronnie Caplane moderates, providing insight and information you can only hear from the Commissioners mouths.

In the afternoon, attention is turned to the media, and the ProPublica/NPR investigative reports. As most people know, this past year, ProPublica and NPR have provided eye-opening investigative reporting about workers' compensation. Some of their findings have shocked many, as the workers' compensation system is seemingly shifting costs to the public, private and governmental sectors. The esteemed panel will talk about the reports and how they have affected change in the system. Attorneys Tom Martin and Keith More join the President of Workcompentral, David DePaolo, to wax poetic on what has now been widely written about workers' compensation as we know it today.

This year's CAAA Winter Convention runs from January 21 - 24th, 2016.

Following this panel comes, what is always considered a highlight of the CAAA convention, the Marvin Shapiro Memorial Most Important Cases panel. The esteemed panel will provide a critical review of the most important cases over the last six months. This is a session that simply should not be missed. In fact, many have said that this panel, in and of itself, is worth the price of admission for the entire convention.

Finally, the day concludes with a panel on employer fraud, specifically involving the misclassification of workers. Much has been in the news regarding the Uber/Lyft controversy. This panel will dissect the law that employers face when classifying workers, and how workers' compensation benefits are impacted.

Saturday morning starts off with an important panel both from a substantive perspective, and, of course, from an MCLE perspective. The panel, titled "Elimination of Bias", focuses on bias involving discovery and trial techniques, illuminating the protection of individual rights and the prevention of the abuse of privacy rights.

The Saturday morning session concludes with a who's who on apportionment. Moderator Ajuna Fransworth directs the panel, which includes applicant attorney Robert Rassp, defense attorney Ray Correio, and former Chief Judge Mark Kahn. Again, this is a panel that should not be missed, not only for informational purposes, but also for entertainment value!

The last two panels that CAAA presents on Sunday feature SAWW and COLAs, and an important internal medicine primer on the AMA guides. Both of these panels will provide the audience with practical tips for their everyday practice. Too many people are confused by how SAWW is applied to calculations and how to sue COLAs in the calculations. Many attorneys are not maximizing their clients' benefits (and their fees) given a poor understanding of how to work with COLAs.

Moreover, internal medicine is a key area where whole person impairment lies in many cases. The internal medicine panel features doctors and lawyers discussing the AMA Guides and where to find internal medicine impairment. This is another imperative panel for anyone who wants to understand how to review medical reports, and how to approach doctor depositions in order to best serve their clients.

> **"The practical information that will be provided by an outstanding list of presenters will benefit everyone who practices workers' compensation law."**

Bottom line: the 2016 Winter Convention should simply not be missed. The practical information that will be provided by an outstanding list of presenters will benefit everyone who practices workers' compensation law. For the beginners all the way through the wily veterans, there will be fodder for application to your practices. In the past, many have concluded, "I can't afford to miss the convention". And, besides, where else can you obtain so many of your required MCLE credits in one weekend, where the information is all relevant to what you do everyday of your working life?

Historical Evolution:
California Applicants' Attorneys Association

By Rick Wooley

These are the memories of the founding fathers Buzz Airola and Victor Beauzay. On February 21, 1966 in San Francisco, an ad hoc committee of attorneys attempted to form a statewide organization. Sidney Carton observed, "These were the best of times; these were the worst of times." So was the atmosphere in the early 60's. Pat Brown was beginning his second term as governor of the state with a Republican-controlled legislature ignoring injured workers. California languished behind other industrial states in providing benefits to injured workers. Legislation was the product of luncheon discussions in smoke-filled rooms between organized labor and the employer community.

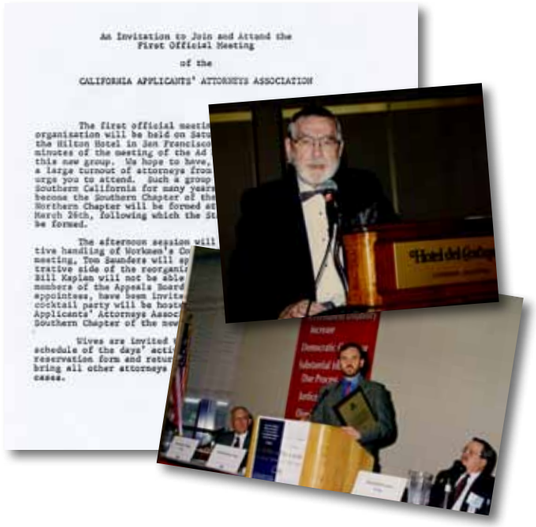
There was talk of reform, which was being advocated, but reform at that time was defined as improving the lot of the injured worker because of inadequate benefits. Arising out of the cries of reform in 1963, the legislature created a blue-ribbon study commission.

At this time, the profile of the applicants' attorney was somewhat provincial. Self interest and self-containment were the rule. The sharing of professional information was unheard of, and competition among the applicant's bar was fierce. Times were changing. The medical community was becoming more and more aware of the dangers of the workplace, and industrial medicine was becoming increasingly complicated.

Looking back at the late 50's would reflect that most of the appellate cases were instigated by defense firms. Applicant's counsel, if any, relied on the response of the Legal Bureau of the, then named, Industrial Accident Commission. But for the humanitarian views of Justice Jessie Carter and Raymond Peters, the courts would not have

recognized the needs of the injured worker as interpreted by the requirements of Labor Code Section 3202 and the California Constitution.

Formal education was unheard of in the area of workers' compensation. Law schools ignored it,


An Invitation to Join and Attend the
First Official Meeting
of the
CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION

and the only source of any continuing education was a rare program at a State Bar conference.

From this modest beginning, a statewide association was formed dedicated to improving the professionalism of attorneys representing injured workers, providing a voice in the state legislature and the State Bar, and providing a means for applicant's attorneys to join together to discuss and solve mutual problems and educate themselves and others in law and in medicine. As Bob Dylan noted, one didn't "have to be a weatherman / To know which way the wind blows." ....

Coming into the 70's, the public danced to a disco beat. Donna Summer urged everyone to hang out at MacArthur Park, and the Bee Gees recommended one consider "Staying Alive," an admonition still worthy of contemplation in the 90's. The war in Vietnam came to a "resolution" "with honor." In the world of workers' compensation, the California Applicants' Attorneys Association organized itself into a well-oiled legislative battle machine. We learned how to propose and pass legislation. We hired our own legislative council, and we approached the legislature bringing forth legislation ensuring that, after sixty years of medical impotency, the injured worker would have free choice of treating doctors. It was through the efforts of this organization that Ronald Reagan signed into law the requirement that employers provide vocational rehabilitation to bring the wounded back into the labor force where they might again be productive for society and themselves.

Come into the 80's, while Bruce Springstein's Vietnam-Vet anthem entreated listeners to consider the pain and pride in being born in the U.S.A., disco had given way to reggae; John Travolta's tight, white pants gave way at last, to dreadlocks. In 1982, the California Applicants' Attorneys Association doubled the benefits for injured workers. From 1984 on, the name of the game was defense. The insurance industry and the employer community had found a kindred soul sitting in the governor's chair at the end of the hall, and with the power of their efforts, both Governors Deukmejian and Wilson willed upon the public oppressive legislation, and for nine long years, the stop sign at the end of the road bore the initials C.A.A.A.

All was not legislation. The California Applicants' Attorneys Association and its members were constantly winning victories in the courts. For the first time in fifty years, in the case of County of Los Angeles vs. WCAB (Conroy) an individual working for welfare under a workfare program was considered an employee. The going and coming rules were expanded. In cases such as Hinojosa, teachers leaving school were protected, as they were subjected to greater risks than the public normally was exposed to in the Parks case.

In the 90's, Bill and Hillary moved into the White House. The use of computers and cell phones proliferated and, of course, the sports world started addressing the use of performance enhancement drugs. CAAA leadership was even invited to attend a brunch in California with the Clintons. But there were many that felt that the "Golden Age" of the California Applicants' Attorneys Association had passed.

The Workers' Compensation Appeals Board, through its rule-making process passed harmful rules limiting the availability of representation to injured workers. CAAA left the traditional area of the WCAB and the legislature and ventured to the Supreme Court, successfully, to attain reasonable venue rules. And, there was the "conclusive presumption," CHSWC, repeal of the insurance minimum rate law, and yet California still maintained its position as a leader in progressive legislation nationwide. However, toward the end of the 1990's, the electorate casted what we now recognize as a forewarning of a new legislative world, within which, CAAA was to remain a significant player. The advent of term limits signaled a very different atmosphere within which CAAA advocated for injured workers in the new century's legislation. CAAA hired its own group of talented legislative advocates and consultants to challenge the new legislative world.

The 21st Century evidenced a turn in the Sacramento's culture as it was reflective of an anti-employee national movement. The injured workers' statutory and historic mandate of workers' compensation "control" was dramatically undermined with the passage of Senate Bills 899 and 863. New regulations, onerous procedures, significant treatment limitations and the imposition of the AMA Guidelines marked a major and devastating series of "take-a-ways," for California's injured workers. It also found the membership of CAAA"s resiliency tested over and over again and the continuing challenge to the membership of creativity and innovation. Rising to the forefront of recognized state excellence was the organization's education programs. The semi-annual conventions were supplemented by the creation of a law school level program entitled "CAAA U". attorneys eager to learn the new reform law flocked to the educational programs, raving about the level of producing learning. CAAA's educational programs soared to the level of the nation's best, even in the face of painful "take-a-ways" injured workers faced in the new century.

Throughout the past 30 years, CAAA continued to honor the men and women who have shown outstanding leadership and commitment to the organization. CAAA bestowed its lifetime achievement award upon many who had through their professional career, achieved the highest standards of personal dedication to social justice and skill in representing California's injured and disabled. The first 50 years of this organization was just the start in identifying the energy and continuing commitment to attaining betterment for all working men and women in this state. As we embark upon the second 50 years, we ask, or

perhaps we know, that each of you will reaffirm the goals of our founding members. WE WILL NOT GIVE UP! The maintenance of the dignity and entitlement to benefits and rights for California's injured workers rests in the hands and the brains of each of you.
This January, we are fortunate to have a "star-studded" lineup of speakers representing applicants, defendants, the WCAB and WCJs, and the medical profession.

Workers' Compensation:
The New Latino Issue

By Bernardo de la Torre

When you think Los Angeles, thoughts of celebrities, sunny weather, and beautiful beaches often come to mind. However, when you think Workers' Compensation in Los Angeles, it's the specter of fraud that arises.

As a state, California's work injury and illness claim rate is at a 13-year low. Nevertheless, skeptics point to a higher frequency of indemnity claims and medical disputes in the greater Los Angeles area as evidence of fraud.

While a higher frequency does exist in the greater LA area, assuming that fraud is at the root of the issue simply fails to realize a larger phenomenon. As such, considering a few more trends might provide a clearer picture of what is actually taking place.

From 2000 to 2013, the Latino population of the greater LA area grew by a remarkable 1.79 million. That's a 27 percent increase, which is more than twice the overall growth rate of the region. More importantly, that's nearly a 60 percent increase of the region's Latino population.

Moreover, the Department of Industrial Relations reports that Latinos suffer workplace injuries and illnesses at a higher rate than every other demographic. Latinos accounted for 38 thousand reported cases in 2014, compared to 17 thousand for Whites, 4 thousand for Asians, and 3 thousand for Blacks. In other words, Latinos accounted for roughly 60 percent of California's workplace injuries this past year.

What is more, this problem isn't unique to the to the greater LA area like skeptics make it out to be. In fact, it was recently reported that there was a major increase in workplace injuries in New York City that disproportionately affected immigrants—which is a characteristic that many California Latinos share with New York City laborers. In construction this past year alone, the Big Apple saw a 52 percent increase in workplace injuries.

Couple these findings with the higher frequency of indemnity claims and medical disputes in the greater LA area and it's no mystery why we've seen such trends.

So when you think of Workers' Compensation, you need not think that a rise in claims and disputes is necessarily a fraud issue. When you think of Workers' Compensation, you need to understand that it is a Latino issue.

One Small Step for Man, *One Giant Leap for Women.*

By Christel Schoenfelder

We are women, hear us ROAR! CAAA's Women's Caucus just commemorated its 3rd Anniversary. We're very proud that we've made progress taking CAAA's message outside the organization and highlighting gender bias within California's workers' compensation system. Last year's events—obtaining passage on the California Democratic Party Convention floor of a Resolution denouncing gender bias in workers' compensation and the Legislature's passage of AB 305—would not have been possible without the fearless leadership and bold actions of Assemblywoman Lorena Gonzalez and California Democratic Party Women's Caucus Chair Christine Pelosi. Although the bill was vetoed by Governor Brown, the fight will continue.

The partnerships with Assemblywoman Gonzalez and Chair Pelosi provided CAAA and the Women's Caucus far-reaching exposure. A press conference, local and national news articles, and discussions on social media served as springboards to get the message to people outside the workers' compensation system. Attending the California Democratic Party Convention was a unique opportunity to engage with people from across the state and discuss various problems with California's workers' compensation system including the temporary disability cap, low permanent disability compensation awards, and the barriers in getting prompt and proper medical treatment due to the utilization review and independent medical review procedures.

We know there is more work to do—both outside and within the organization. We will continue to use the women's issues platform to raise awareness of gender discrepancies in workers' compensation as well as discuss the plight of all injured workers. And looking back at the organization's last fifty years, we note and applaud the fairly recent changing of the guard with the inclusion of more women and minorities.

Internally, the Women's Caucus has advocated for more female speakers at CAAA's Conventions and seminars. CAAA's Education Committee has consciously made an effort to place more women on speaking panels and is always looking for volunteer speakers. Additionally, CAAA has increased the number of women serving on the Board of Directors. And the Women's Caucus has taken an active role in retaining women on the Board. Women members are encouraged to serve as an officer within their local chapter. Multiple new chapter presidents are women and the Board looks forward to their service in 2016.

One of the bright spots for CAAA's Women's Caucus committee has been the camaraderie amongst members. Committee members have shared an ever-strengthening bond with their service and, through this experience, the Mentor-Mentee Program was born. The program is open to CAAA Regular female members only and the goal is to partner geographically-located veteran and new attorneys. The Women's Caucus will hold a special event at the January Convention for participants in the Mentor-Mentee Program and will have quarterly conference calls to discuss issues beyond the technical practice of law, such as handling work-life balance. If you are interested in participating in the Mentor-Mentee Program, please contact Andrea Robertson at the CAAA office.

Thank you to the Board members, consultants, and CAAA staff for making 2015 such a successful year for the Women's Caucus. More to come in 2016...

FOR THE RECORD

By The Public Safety Committee

News organizations, including the L.A. Times, routinely report on workers' compensation in California. However, the stories frequently focus on examples of an employee caught in some scheme to defraud the employer.

A recent LA Times article contained what the author described as examples of employee abuse of the Injury On Duty (IOD) pay system for public safety personnel. IOD benefits are equivalent to full salary for a police officer or firefighter while off duty recuperating from an injury sustained in the line of duty.

But IOD benefits are only paid if there is reliable proof the injured employee needs care and time off to heal. The employer does not need to agree that the IOD pay is owed and may refuse to pay provided they have a legal basis to do so. The suggestion that injured worker abuse is the sole culprit in increased workers' compensation costs is simply untrue. The bureaucrats responsible for supervising the government's administration should be more active in managing these costs and focus on their administrative responsibilities to do so.

In most cases when an injured officer or firefighter is determined medically incapable of working and is recuperating from an injury, the police or fire department may offer light duty. If the employee can perform the light work, the injured worker must return to work at the alternative assignment. If the employee refuses the light duty, no compensation is paid. Rather than claim widespread abuse by public safety personnel recuperating from their injuries, employers may want to concentrate more energy on developing realistic light duty programs that offer meaningful work to the injured worker while providing a tangible benefit to the employer. Such programs would certainly result in reduced workers' compensation costs to employers.

> **"No one condones abuse or fraud but as statistics bear out, most claims by workers are legitimate."**

L.A. Times reporter Jack Dolan wrote about firefighters who claimed an injury sustained while playing a game of basketball. There is longstanding law in California that prevents claims for off duty recreational or athletic activities unless they are sanctioned and or required by the department to keep public safety personnel in top physical condition. Certainly, the Los Angeles City

Fire Department is aware of this law and can easily remedy this alleged “abuse” by taking steps they feel are required.

Employee fraud accounts for 1.4% of all workers’ compensation claims. But employers have an absolute right to challenge the validity of any case before they pay a dime to the injured worker. Most reporters fail to mention the employer’s legal remedies in these types of cases and imply such claims are paid simply because they are filed. An employer can deny the claim and support the denial with reliable persuasive evidence. The employer is not a hapless victim. They have legitimate proven remedies against abuses. They simply need to exercise those remedies.

No one condones abuse or fraud but as statistics bear out, most claims by workers are legitimate. Ordinary Californians who get hurt at work simply want to get treatment, get well and get back to work.

I would suggest devoting more news coverage to how poorly government officials have designed and operate the system.

Instead of accepting responsibility for the problems they create - failure to make information available in different languages, failure to eliminate gender bias, racist applications of African American genetics, and contracting out medical second opinions to doctors who don’t hold a California medical license and never examine an injured worker before rendering a second opinion - these bureaucrats cast themselves as referees among competing interests. That isn’t true.

Insurance companies, lawyers, doctors, unions, businesses didn’t design the workers’ compensation system. The State of California did. Newspaper articles on workers’ compensation legitimately expose examples of fraud and abuse. But without telling the entire story, the public is led to believe that all costs and claims are illegitimate. This creates a political permission structure that allows the government to simply allow legitimate claims to go unpaid and their own failures to go unnoticed.

Indeed, the state has now become so fixated on avoiding blame for instances of fraud that their system is spending more money trying to deny claims than it spends on medical care.

That’s a story we all deserve to read on the front page of the LA Times.

The Mobile Revolution

By John de los Angeles

The late and great Gil Scott-Heron once told the world that “the revolution will not be televised.” He was partially correct because it’s far more likely these days to be texted, e-mailed, Tweeted, Instagrammed, Snapchatted, and Facebooked on a mobile phone near you.

And just in case you missed it, “the revolution is here”—and it’s a mobile communications one. Failing to get with it likely means fading into irrelevancy like a forgotten negative on an aged roll of Kodak film. In any case, the mobile revolution is a force to be reckoned with and one would be wise to tap into it to harness its potential.

In the US, the mobile revolution has already deeply embedded itself in human behavior. Google has even begun studying the topic. In fact, they found that nearly two-thirds of Americans own not just a internet every day from their device. Even more interesting, a whopping 82 percent of those smartphone users multitask with their device while doing other things both in public and at home. Google even found that 94 percent of these smartphone users search for local information on their phone and 84 percent take action as a result.[1]

It’s no surprise that the private sector has begun to invest in infrastructure to expand the already enormous mobile communications network. Cumulative private sector investment has reached $2 trillion in the last four years alone, with another $4 trillion expected over the next six years. That type of capital investment puts mobile infrastructure spending in the same league as global infrastructure spending on water, energy, and transportation.[2]

So what do these things tell us? They tell us that mobile phones are an effective means for interacting with the masses, delivering messages with ease, and mobilizing people for action. If you combine these findings with a carefully crafted and executed narrative, mobile communications can become a very powerful agent for change.

Just take a look at the success of Bernie Sanders’s fundraising efforts if you need an example. The Vermont Senator pulled in $1.3 million—much of it coming in from mobile phone donations—in the four hours after sending an e-mail during the October 13th Democratic debate. Utilizing this mobile-phone-centric grassroots model has allowed Sanders to raise $26 million in the quarter that ended September 30th, only $2 million shy of the brand-name front runner Hillary Clinton.[3]

There’s no longer any doubt that the focus of the communications campaign terrain has shifted from print, radio, and television to mobile phones—and it’s happened with good reason. When you connect with people on their mobile phones, you can reach them wherever they are and take advantage of the moment they are in. But the key to that is a mobile presence, the foundation of which should be a mobile-friendly website.

And so, to credit the legendary poet, Gil Scott-Heron got it right when he added that “the revolution will be live.” He just left out that the revolution will be live...on your smartphone.

1. https://think.withgoogle.com/databoard/media/pdfs/US_OurMobilePlanet_Research_English_2013_2.pdf

2. http://www.forbes.com/sites/markpmills/2015/01/19/the-mobile-revolution-has-only-just-begun/print/

3. http://www.bloomberg.com/politics/articles/2015-10-14/how bernie-sanders-raised-1-3-million-in-four-hours

Enduring Excellence

By Tom Martin

The year 1966 was an exciting time. The Beatles' Revolver took the top spot on the Billboard charts, the Supreme Court handed down the decision that led to Miranda Rights becoming routine police procedure, and Sandy Koufax pitched his third 300 strikeout season.

But the year 1966 is significant to our organizations for other reasons. It was the year of the first California Applicants' Attorneys Association seminar at the Hilton Hotel in San Francisco.

In the 50 years since that first seminar, attorneys, physicians, legislators, celebrities, and even Supreme Court justices have been among the thousands of attendees at the hundreds of CAAA events and meetings aimed at empowering individuals in their effort to advocate for working Californians.

But what explains CAAA's enduring success? What sets CAAA apart from all other educational outlets in the workers' compensation community? Why does CAAA continue to be the foremost thought and education leader in the field?

The answer is dedication and it can be best understood by appreciating the depth and breadth of CAAA's daily efforts to protect the rights of working Californians.

Every one of CAAA's educational programs is rooted in the organization's disciplined practice of participating in every dimension of the workers' compensation system—from the writing of legislation to the Supreme Court's interpretation of the law. CAAA's analysis of purposed legislation and its participation in the shaping of laws provides CAAA with intimate knowledge on a law's intended purpose and, thus, a unique insight into how that law should be interpreted. As a result, every educational event CAAA presents is enhanced by the knowledge gained from these practices.

CAAA is dedicated to providing the constant vigilance that is necessary to assure that regulations are promulgated to reflect the goals of the legislation and not distorted to serve different agendas. CAAA's Amicus Committee even routinely participates in reviewing courts by filing "friend of the court" briefs that allow CAAA to weigh in on issues that are important to working Californians.

And that's not all. Every week of the year, CAAA's various committees discuss how the laws, regulations, and cases can be effectively applied in individual cases to protect California workers.

Attendees of CAAA's educational events have been direct beneficiaries of this network of activities—providing the ability to quickly adapt to the ever changing system, to thoroughly learn practical information, and to effectively apply CAAA's unique understanding of the system to daily practice.

These enduring qualities explain why CAAA's educational efforts have been a singular success in the workers' compensation community.

In light of this rich history of education and excellence, CAAA's first seminar should (without a doubt) be included on the list of noteworthy events from 1966. And as we celebrate the 50th anniversary milestone, we should look forward to the continued success of CAAA's robust educational efforts for decades to come.

What the Police Officers' Bill of Rights Doesn't Do

By The Public Safety Committee

There are literally thousands of reasons why the Police Officer Bill of Rights is an important law. Cops do hard jobs. And by the very nature of those jobs their daily work life is filled with unpredictability.

Law enforcement has an obligation to safeguard the due process rights of anyone accused of a crime. Those due process rights carry through an arrest, investigation, trial and throughout incarceration.

The Police Officers' Bill of Rights give frontline cops their own set of due process rights to protect them from false accusations made by criminals or zealots who hate cops.

What if I told you that police officers have no due process rights when they get injured during a struggle with a criminal? This is a true story: A Gulf War vetern becomes a police officer in his California hometown. He hurts his nect and shoulder taking

down a criminal. His worker' compensation doctor prescribes physical therapy, but it makes his pain worse, so he has to stop it. After the doctor ordered surgery, the insurance bureaucrats denied it because the police officer didn't finish physical therapy.

To get back to the job he loves, he went to the VA and got his operation done.

California's bureaucrats have designed a system where a doctor that is selected by your employer to examine you after an injury can have his diagnosis and prescribed treatment overturned...by a doctor working under a state contract who never examines the injured officer.

It gets worse...you have no right to appeal.

For years, the California Applicants' Attorneys Association has been working to get this issue in front of the Supreme Court. We expect a decision in the next several months.

California's no-appeal, no-due process system must be changed. Together we can demand that the legislature correct what the bureaucrats have put in place.

If you know of any officer who has been denied their due process rights in Workers Compensation, please forward their story to Diane Worley, Policy Director, California Applicants' Attorneys Association (diane@caaa.org). We want to make sure that every officer's story is shared with the Legislature.

The Regulations Continue:

Where does CAAA go from here?

By Mark Gearheart and Robert McLaughlin, Co-Chairs of CAAA's Regulations Committee

Since SB 863 was passed in 2012, CAAA's regulations committee members have spent hundreds of hours participating in committee phone calls, drafting and reviewing written comments on thousands of pages of proposed regulations, attending stakeholder meetings and DWC public hearings, and speaking with other like-minded groups who share in the desire to make California's workers' compensation system fair and just for injured workers.

Constant vigilance is necessary to assure that regulations are promulgated that reflect not only the goals of SB 863 but to also preserve the basic rights of injured workers, and not allow distortion to serve a different agenda.

While we must often participate in an environment governed by a bureaucracy who ignores the plight of injured workers, we will never hesitate to provide insightful comments to the DWC on proposed regulations that provide protections to our clients and a practical point of view.

CAAA has had a few successes during the regulatory process required to implement SB 863 and seen some changes made to proposed regulations based on our recommendations (like repeatedly demanding that the new Benefit Notice Manual be fully translated into Spanish before it becomes effective January 1, 2016 and it finally happened), but more often what we offer as a practical solution that protects the injured worker's rights is ignored.

We proposed shortly after SB 863 that Independent Medical Review (IMR) could only work effectively if there was a thorough overhaul of, and review of the significant problems created by the current Utilization Review (UR) process. We proposed recommended regulatory changes which we believed would objectively improve the UR process by enhancing communication between the UR reviewer and the treating physician, assuring that all relevant medical records are sent to the UR reviewer so that they have all information needed to make a decision, and reducing the number of treatment requests being referred to UR. These recommendations were ignored.

We also proposed that a simple process be implemented for applying for the Return to Work Fund Supplement Payment so that expeditious payments could be made to all eligible injured workers. This would have included simply requiring that a copy of the Supplemental Job Displacement Voucher be provided to the DIR's Return to Work Fund unit by the claims administrator at the time it issued, on all post 1/1/2013 injuries. Subsequently, payment could promptly be made without any dispute with regard to eligibility in the application process. These recommendations were ignored. Where does CAAA go from here? We continue to fully participate in the DWC's regulatory process with anticipated home health care fee and interpreter fee schedule changes on the horizon. We also anticipate further updates to the Medical Treatment Utilization Schedule (MTUS) in 2016, including the implementation of a formulary for pharmaceutical drugs. Moreover, the age and occupational modifiers of the PDRS are due to be updated.

Learn about current and pending regulations including how to apply for the Return to Work Supplement Fund and the new Panel QME process on Friday, January 22 at CAAA's Winter Convention in Rancho Mirage.

If anyone is interested in joining CAAA's regulations committee we can always use the help. Being involved in the committee is a great way to learn the strengths and weaknesses of the regulations from the ground up. Such knowledge will benefit you in your practice and always put you ahead of the crowd.

Constant vigilance is necessary to assure that regulations are promulgated that reflect not only the goals of SB 863 but to also preserve the basic rights of injured workers.

Effectuating Change:
CAAA's 50 Year Legislative Legacy

By Lloyd Rowe, CAAA President ('92-'93), Legislative Chair ('93-'94, '98-'99), '08 CAAA Marias Award Recipient

For most of the 1950's and early 1960's, the lot of injured workers in California was bleak. Benefits were lower than in most industrialized states. Decisions favorable to injured workers were appealed by employer or insurance carrier representatives and were generally decided in their favor by employer friendly courts. There was fierce competition between the firms and attorneys who represented injured workers and virtually no cooperation or sharing of information to advance the cause of the injured workers or better the system.

In 1965, a massive reform of the workers' compensation system, AB 2023, was passed by the Legislature. Among other things, this Bill, effective January 15, 1966, replaced the Industrial Accident Commission with the Department of Workers' Compensation and Workers' Compensation Appeals Board system which exists today. It also made significant changes to the Schedule for Rating Permanent Disability and included the initial language establishing vocational rehabilitation (L/C 139.5).

Following the enactment of AB 2023, a forward looking group of prominent applicant attorneys had come to believe that a more cooperative and unified approach was needed to deal with the Legislature and better represent injured workers. This group, which included individuals from most of the major firms that represented injured workers at that time, first met in San Francisco on February 21, 1966 with the goal of forming a statewide organization of attorneys specializing in the representation of injured employees.

Those known to have been present at the meeting were Yank Marcus, Kenneth Larson, Ernest Norback, Lawrence Blunt, Joseph Smith, Edward Farrell, Nicholas Byhower, Gerald Tiernan, Lewis Garrett, Abe Levy, Stuart Dougherty, Richard Heath, Henry Nelson, and George DeRoy. The group elected Steve Roseman as temporary chairman and Lowell Airola as temporary secretary.

The name selected for the statewide organization was California Applicants' Attorneys Association and its stated purpose was twofold: to assist the injured employees in obtaining full and just benefits under the Workmen's Compensation law; and to improve the advocacy, promote the skill and preserve the high standards of ethics of attorneys representing injured workers. The first year, dues were $10.00. And so it began.

Other developments in 1966 were the election of Ronald Reagan as Governor and passage of Proposition 1A by the voters. This governmental reform measure changed the previously part-time Legislature into the full-time Legislature we now have. As a result of the increased legislative activity, it became progressively more difficult for the volunteer CAAA officers and leaders to be in Sacramento to deal with Legislators and legislation as it arose and a full-time Legislative Advocate, Donald Green, was retained in 1972. His loyal service to the organization, along with that of later additions Doug Kim and Mark Gerlach, produced an effective legislative team for more than 30 years.

Since its founding, CAAA has been the pre-eminent source of advocacy and education programs for not only the attorneys representing injured workers but also the Judiciary and other members of the Workers' Compensation community. CAAA has also been the leading, and sometimes the only, organization assisting injured employees in obtaining full and just benefits under the law.

Some of CAAA's success in advancing the cause of injured workers has been through direct or Amicus participation in appellate court cases and some has come through careful attention to the Regulations adopted pursuant to legislative enactments. But much of the success has been through CAAA's active and forceful advocacy on behalf of injured workers in the Legislature.

Among the notable legislative achievements over the years have been:

1. Obtaining attorney fees for Applicant's depositions and an increase in P.D. benefits from $52.50 to $70.00 per week in 1972.

2. Establishment of mandatory vocational rehabilitation in 1974.

3. Provision for Applicant to have free choice of a physician in 1975.

4. Doubling of P.D. benefits from $70.00 to $140.00 per week in 1982.

5. T.D. increased to $336.00 per week in 1989.

6. Effort to repeal L/C 3202 and require predominant cause standard for C.T. injuries defeated in 1994.

7. Second effort to repeal L/C 3202 and require predominant cause standard for all injuries defeated in 1995.

8. Expansion of privatization to manufacturing industry defeated in 1997.

9. Cancer presumption expanded to include leukemia and statute of limitations extended to one year from date of death for HIV related disease in 1999.

10. Bill to preclude receipt of SDI benefits if any benefits had been paid by Workers' Comp defeated in 2000.

11. T.T.D., P.D., and death benefits all significantly

increased in 2002 and a COLA attached to Life Pension benefits.

12. Major changes to the system, grossly unfavorable to injured workers and vigorously opposed by CAAA, were enacted in 2003 and 2004 after labor joined with employers in supporting the "reforms."

13. Further changes unfavorable to workers were enacted in 2012 when labor again joined with employers in supporting the "reforms" but CAAA was able to secure creation of the "Return to Work Fund" in direct, last minute, negotiations with the President Pro Tem of the Senate.

As may be seen from the legislative record above, CAAA's legislative successes have been fewer in recent years. This is due in part to term limits which produced Legislators who were unfamiliar with workers' compensation and did not have sufficient time to learn the nuances of the very complex system. Term limits also made it more important for Legislators to raise funds from large self-insured and industry donors for campaigns for another elected office and likely contributed to a decline in concern for less fortunate individuals.

Although the Legislature may be less concerned with the needs of injured workers than it was in the past, the primary hurdle faced by any effort to enact pro-worker legislation or defeat pro-business legislation have been the anti-worker, pro-business positions taken by the Governor's office over the past 12 years. First, there was the openly hostile reign of Arnold Schwarzenegger, who proudly claimed Workers' Compensation deform to be his greatest accomplishment during his time in office from 2003 through 2011. He was followed by Jerry Brown who, although denominated a Democrat, is only slightly less hostile to injured workers, and particularly the attorneys who represent them, than his predecessor.

While there may be less success in the legislature, CAAA is continuing to make every effort to fulfill the original mission – to assist the injured employees in obtaining full and just benefits under the Workmen's Compensation law. In furtherance of this, new strategies on educating Legislators about Workers' Comp are being tried. The Association has become an Affiliate Member of the Teamsters Union in an effort to strengthen the relationship with labor. CAAA is also writing, sponsoring or supporting Bills that are not strictly related to Workers' Comp but are of interest to groups with which we have common interests and who we hope will join in supporting our legislation in the future.

In 2015, these new strategies and alliances, implemented by CAAA leadership and our present Consultants, Richie Ross, Diane Worley, and Mike Herald, resulted in passage of the CAAA sponsored

Bills, SB 623, which extended eligibility for SIF and UEBTF benefits to undocumented workers and AB 438, which requires the DIR and DWC to translate various documents and fact sheets into several languages. Both of these Bills were signed by the Governor. Another CAAA sponsored Bill, AB 305, intended to eliminate gender bias in apportionment of permanent disability, was passed by the Legislature but vetoed by the Governor.

Through 50 years, the legislative history of CAAA has had ups and downs but we are still here and still representing injured employees in all areas – legislative, regulatory, and legal – and, with the continued support of those concerned and forward looking Attorneys that are the California Applicants' Attorneys Association, we look forward to Serving The Injured Workers of The State of California for another 50 years.

THE ESSENCE OF COMMUNICATIONS

Dear Applicants' Attorneys:

We are attorney-advocates. We help hard working Californians who get injured on the job receive the care they need to heal, get back to work, and keep the world's 8th largest economy strong.

Too few people know who we are or what we do. But we're working on that. And with our association celebrating its golden anniversary, there can't be a better time to try new things.

The communications landscape of today is changing at a pace never before seen. It's vital that we actively search for new and different opportunities to engage audiences with messages that combine the timelessness of justice with the timeliness demanded by a new generation. In just five years, 50% of the American workforce will be Millennials.

CAAA has created an in-house staff position dedicated to navigating the ever-changing communications landscape. However, media outlets are only one arena and we must move on multiple fronts.

With that in mind, we shouldn't forget that the essence of communications remains human interaction. And there is no substitute for in-person, face-to-face contact.

As an association, if we are to engage and recruit a larger and younger membership while effectuating change, we must have a strong physical community presence in addition to our media visibility efforts. Engaging our membership in a public speaking effort would be an effective means of doing so.

Over the last several years, CAAA's Communications Committee has advocated for such efforts—a Speaker's Bureau of sorts. However, we cannot accomplish such a goal without you.

So consider this a call to arms in the sense that **we must be on the front lines of human contact battling to shape and frame the debate around Workers' Compensation. Consider this a call to arms in the sense that we must be fighting to dispel the onslaught of false and onerous arguments.** Consider this a call to arms in the sense that we must do away with the insidious assertion that hard working Californians who get hurt on the job are fraudulent money-seekers lying about and exaggerating their injuries.

Let's get out there into the public and remind people of who we are.

Join the fight. The application period is now officially open.

Sincerely,

The Communications Committee
California Applicants' Attorneys Association

Frances Stevens Goes to Appellate Court

By Joe Capurro, CAAA Amicus Counsel

On September 30, 2015, a panel of justices from the California Court of Appeal, First Appellate District, consisting of Justice Hume, Margulies and Dandero heard oral argument in the matter of Stevens v. WCAB commonly referred to as the constitutional challenge to the IMR process. Some of the key elements to the challenge included the lack of due process present in the IMR process, the hidden identity of the IMR consultant, the infringement upon the role of the Courts under the separation of powers clause of the constitution, and that the Legislature exceeded its' grant of power under Article XIV section 4 of the California Constitution when it created a dispute resolution system other than the three mechanisms set forth in that article. Those mechanisms are arbitration, an industrial accident commission (now the WCAB), or the Courts, being the only specified three avenues for resolution of Workers' Compensation matters. In addition, Article XIV section 4 of the California Constitution provides that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.

As applicant was the moving party in the matter, Applicant's Attorney Joseph Waxman, a CAAA member began oral argument. He was quickly confronted with questions from the panel and particularly Justices Hume and Margulies regarding the scope of plenary power of the Legislature granted under Article XIV section 4 of the California Constitution. Mr. Waxman did an excellent job highlighting significant issues with the process and responding to the difficult questions focusing particularly on the scope of plenary power and the apparent due process protections of the UR/IMR process. Mr. Waxman kindly agreed to share time with CAAA at the argument and I had the privilege of arguing on behalf of this organization.

It was clear that our arguments regarding the secretive nature of the IMR process had the greatest impact with the Court and the due process concerns possibly the least. The Court clearly lacked an understanding that the Utilization Review process was exclusively a claims process without any input from the injured worker.

Attorney Kim Card argued on behalf of the Administrative Director and presented their position in a clear and concise manner. However she deflected without a direct answer questioning from Justice Dondero regarding how one could obtain review on issues of fraud, conflict of interest and bias if the identity of the IMR consultant is unknown. Earlier in my remarks I had compared the IMR process to the Wizard of Oz with the cloaked man behind a screen pulling levers and issuing degrees. Justice Dandero reminded Ms Card that in the movie when revealed the wizard turned out to be a traveling medicine man who did not really have the answers to Dorothy's problems. There was significant discussion by the attorney for the Administrative Director of the importance of keeping the review away from all the influence of the various interest groups who currently unduly influence treating doctors, Qmes, Ames, workers' compensation judges and even the Courts. There were assertions that despite the adoption of evidence based medicine as the standard of care, all those participants have steadfastly refused to enforce that standard. Attorney William Anderson argued for SCIF and Outspoken Enterprises focusing again on the purpose behind keeping the identity of the IMR reviewer secret.

It was clear that all of the Justices had concerns with the IMR process, some favoring some of our positions and some clearly in opposition.

On October 28 the First Appellate District issued its much anticipated decision in Stevens affirming the constitutionality of the legislative scheme. Although we did not obtain the outcome we wanted with the Court of Appeal, Applicant is seeking review with the California Supreme Court and it is possible that we will know whether the Court has taken up the matter by the time of CAAA's Winter Convention.

FILL HERE

Obtaining a Treating Physician Medical Legal Report

To Rebut Unfavorable AME and/or QME Opinion

By Art Johnson

We are often faced with poorly reasoned or often times downright incorrect medical findings, particularly Panel QMEs, particularly from the Fresno area, but sometimes also AMEs.

What to do?

We can turn to the treating physician for medical-legal reports and rebuttal. Those reports will carry "great weight" with the trial judge, particularly as to a QME rebuttal. Case law holds that the treating doctor medical legal report is of equal weight to a Panel QME. There are also panel decisions holding that the WCAB should give "great weight" to the opinions of an AME, but not "controlling weight", and that the trial judge is not "bound" by the AME's findings. Thus even with an AME, we can utilize a well reasoned treating physician medical legal rebuttal report, which will often "carry the day." Particularly if the applicant has had a long standing relationship with the treating doctor, the workers' comp judge is going to understand that the treater has seen and evaluated the claimant over a much longer time span than either the AME or QME, and if well reasoned, the judge is likely to follow the treating physician's better reasoned report.

Warren Brower v. State Compensation Insurance Fund 79 CCC 550 (2014)

The right of applicant to obtain, at defendant's expense, a treating physician medical legal report was clearly spelled out in the recent 2014 en banc decision of Brower v. State Compensation Insurance Fund (ADJ802221), cited at 79 CCC 550 (2014).

The following quotes are pertinent from the Brower case:

1. "The workers' compensation administrative law judge found that applicant's admitted 12/20/05 injury to his low back, psyche, and right knee caused...permanent total disability (100%.)"

2. "The WCJ also ordered defendant to reimburse applicant $600.00 for the medicallegal report from his treating physician, Dr. Russell."

3. " Defendant...contends the WCJ erred in ordering defendant to reimburse applicant $600.00 for Dr. Russell's medical-legal report, arguing that

applicant should not be allowed to obtain a medical-legal report from a treating physician when there is an agreed medical evaluator (AME) in the relevant specialty."

4. "The parties selected Robert Perez, Ph.D. as the AME in psychology. ...Dr. Perez opined that applicant...had 0% whole person impairment as a result of his psychiatric injury.Constitution when it created a dispute resolution system other than the three mechanisms set forth in that article. Those mechanisms are arbitration, an industrial accident commission (now the WCAB), or the Courts, being the only specified three avenues for resolution of Workers' Compensation matters. In addition, Article XIV section 4 of the California Constitution provides that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.

5. "Applicant's treating psychologist, Peter R. Russell, Ph.D. disagreed with Dr. Perez' assessment of applicant's whole person impairment... (Dr. Perez stated): Therefore I believe that a GAF of 41 would reflect Mr. Brower on one of his better days."

6. "The WCJ awarded permanent total disability "based upon the AME reports of Dr. Newton (neurologist) and upon the reports of the treating psychologist, Dr. Russell (treating psychologist)."

7. "With respect to defendant's contention that it should not be required to reimburse applicant's costs for Dr. Russell's report, defendant offered no legal authority for the proposition that applicant was not entitled to request a medical - legal report from his treating psychologist. Moreover, a medical-legal expense is ordinarily allowable if it is capable of proving or disproving a contested claim, if the expense was reasonably necessary at the time incurred, and if the cost incurred was reasonable (Labor Code Section 4620 et seq, 4307.6). The mere fact that the parties had agreed to an AME in that particular specialty does not mean that a party cannot reasonably obtain a comprehensive medical-legal report from a treating physician in the same or similar specialty. We recognize that the WCAB will ordinarily follow the opinion of the AME because it is presumed the AME was chosen by the parties because of her expertise and neutrality. Nevertheless, it is the WCAB, and not the AME, that is the ultimate trier of fact. Therefore, the WCAB is not bound by the opinion of an AME; rather its only obligation is to give consideration to the AMEs opinion and the WCAB may decline to follow an AMEs opinion if it finds the opinion to be unpersuasive. Accordingly, we affirm the WCJ's award of the medical-legal expense."

> **The Brower case has wide ranging effect on our practices. We can explain the case law to the treating physician.**

Practical Effect of Brower

The Brower case has wide ranging effect on our practices. We can explain the case law to the treating physician. We can analyze the flawed reasoning of an AME or QME, and explain that to the treating physician. We can go to a treating

physician appointment with our injured worker, so that the injured worker can make an offer of proof, that this is what he would testify to at trial, to likely refute incorrect statements or incorrect history or incorrect reasoning by an AME/QME.

Treating physician reports may be particularly helpful with the following issues:

1. Causation of injury (particularly cumulative injury over time.)

2. “Causation of Injury” v. “Causation of Disability.” For apportionment purposes, only causation of disability is appropriate.

3. Determination of overall total disability status (often times AMEs or QMEs will only provide WPIs, which will never add up to total. If the treating physician has supported a grant of social security disability, and then is approached on whether the claimant is totally disabled, and the claimant legitimately is totally disabled, the treater is highly likely to so find. Then you can add the factors of disability necessary under Labor Code 4662 to prove up the “fact” of total disability.)

4. If there is going to be apportionment, better apportionment off of 100%, based on the opinion of the treating physician, than apportionment off of WPIs per the AME/QME. Additionally, it can be explained to the treating physician evaluator, what evidentiary facts are necessary to set forth to prove the “how and why” of the treater’s opinions. If there is a properly documented treater opinion, evidentiary based, and it is put up against an opinion from an AME or treater, with no evidentiary support for the opinion, the treater’s opinion is highly likely to carry the day.

5. Finally, if you have multiple specialties, and/or a vocational expert, but nobody has tied all of the specialty reports together (orthopedic, internal medicine, pain medicine, psychiatric) the treater can review all of those reports, review the applicant vocational expert’s report, and synthesize all of those doctor’s findings and the vocational finding. Witness the Brower case where that happened.

Payment for the Treating Physician Medical-Legal Report

The easiest way to obtain the treating physician medical legal report, is to pay for it yourself as was done by the attorney in the Brower case, with the payment of $600.00 “up front” to the treating physician.

Most treating physicians are going to be quite reluctant to spend a lot of time answering detailed questions, reading through AME and QME reports, to determine the relevant medical legal issues, and spend time issuing a well reasoned medical-legal report, without some guarantee of payment. Most judges will order reimbursement at the time of trial or settlement for a treating doctor medical-legal report, and the Brower case supports that.

As to reimbursement, a petition for reimbursement of medical-legal costs based on the Brower case would be quite persuasive . In fact, my trial judge in the Brower case, told me that if I had petitioned for penalties, he would have ordered penalties paid, including attorney’s fees for having spent time “chasing” the defendant to obtain repayment of my $600.00 expense.

If you need statutory authority, please refer to the following sections of the Labor Code:

1. Labor Code 4064(a): “The employer shall be liable for the cost of each reasonable and necessary comprehensive medical-legal evaluation obtained by the employee.”

2. Labor Code 4064(b): “No party is prohibited from obtaining any medical evaluation or consultation at the party’s own expense.”

3. Labor Code 5307.6 - Director to adopt fee schedule for medical-legal expenses.

4. Regulation Section 9795-“Comprehensive, follow up or supplemental medical legal evaluations by treating or consulting physicians shall not be billedaccording to the official medical fee schedule, but rather shall be reimbursed pursuant to Regulation Section 9794 (reimbursement of medical-legal expenses).”

5. Regulation Section 9795 provides reimbursement codes for medical legal evaluation reports.

6. Regulation Section 9795(d) states that for treating physician medical-legal reports a modifier of minus 92 is applicable but provides “this modifier is added solely for identification purposes, and does not change the normal value of the service.”

Thus the treating medical-legal evaluation report is to be billed the same as a Panel QME report, and coded the same, except with a different descriptive modifier (-92).

If the doctor spends more time, energy, and effort than covered by your “advance payment”, he can certainly bill for the differential, and you can either pay that differential yourself and seek reimbursement from defendants, or you can send the bill on to defendants for payment. If not paid promptly, seek interest, late charges, penalties, and attorney’s fees for nonpayment as a valid cost incurred - pursuant to the Brower case.

My own practice is to pay the doctor upon receipt of billing, so long as it is in compliance with the medical-legal fee schedule, and then seek reimbursement from defendants.

Conclusion

The take away from the Brower case is that we are not “stuck” with unfavorable medical- legal reports, that make no sense. We can return to the treating physician to obtain rebuttal medical- legal reports at the expense of the defendant. If those reports from the treating physicians make more sense than the AME or QME reports, then, as per the Brower case, you are highly likely to carry the day in court. Particularly if the doctor gets the sense that the QME or AME has “shortchanged” the applicant in an unfair way, that doctor is likely to want to go to bat for your client and will appreciate you asking for the appropriate medical report to document the reality of your client’s medical-legal circumstances.

“The take away from the Brower case is that we are not “stuck” with unfavorable medical-legal reports, that make no sense.”

It takes a little extra effort to do all of this. It takes a little extra up-front money to do all of this. As to the results, however, for your client particularly, and you as a subsidiary contingent beneficiary, those efforts will pay big dividends.

16TH ANNUAL CAAA SPINDEL GOLF CLASSIC

Dear Friends:

I want to cordially invite you to the California Applicants' Attorneys Association's 16th Annual Spindel Golf Classic at the prestigious Valencia Country Club in the beautiful city of Santa Clarita on April 16th, 2016. The day will be filled with food, sun, drinks, and fun. The tournament will be played in scramble format, so all golfers are welcome.

The day will begin with breakfast, goodie bags, use of the Valencia Country Club's practice facilities, and a friendly Putting Contest. Once the tournament begins, each hole will be hosted by a sponsor and offer snacks, libations, and friendly conversations. Lunch will be provided and after the tournament, you'll be invited to join us for cocktails and cigars. We will end the day with a buffet dinner, a raffle, and an award presentation for our tournament's top performers.

Our annual golf tournament offers many networking and sponsorship opportunities that go fast. So sign up early by contacting Caitlin Shields at Caitlin@caaa.org.

I look forward to seeing you all there!

Sincerely,

Alan J. Wax
Golf Chairman

P.S. Early bird sponsors will be discounted 10% if you sign up before January 31st, 2016!

FACTS NOT FRICTION