

JULY 2016

# CAAAmments

The Voice of the California Applicants' Attorneys Association

2066

LOOKING  
FORWARD TO  
**The Next  
Fifty Years**





# Inside:



## 10 The Marias Interview with Sue Borg

She's Sue Borg, one of the fiercest practitioners of workers' compensation law, a past President of the California Applicant's Attorneys Association, and the next recipient of the Eugene Marias Lifetime Achievement Award.



## 14 The Salas Dilemma

In 2014, employers again attempted to use IRCA to subvert existing law—this time to undercut the same state labor protections and remedies created in 2002.

JULY 2016

# CAAaments

The Voice of the California Applicants' Attorneys Association

### California Applicants' Attorneys Association

1303 J Street, Suite 420 | 916.444.5155 | caaa.org  
Sacramento, CA 95814 | 800.648.3132

#### Officers

**President** – Bert Arnold  
**President-Elect** – Christel Schoenfelder  
**Treasurer** – Jason Marcus  
**Secretary** – Robert McLaughlin

#### Committee Chairpersons

**863** – Diane Worley

**AMA Guides** – Todd McFaren

**Amicus Curiae** – Joseph Capurro, Bill Herreras

**Education** – Elliot Berkowitz, Russell Glauber, Alan Gurvey, Barry Gorelick, Art Johnson

**Ethics** – Jim Butler

**Labor** – Scott Ford, Steve Scardino, Sam Swift

**Latino Issues** – Bernardo de la Torre, Reuben Lucero, Samuel Salazar

**Legislative** – Bernardo de la Torre

**Management** – Lester Friedman, Bernard Katzman, Cheryl Wallach

**Communications** – Lilia Ballesteros, Tom Martin, Gil Stein

**Membership** – Lauren Belger, Brett Borah, Jack Goldfarb, Stan Levine, Sam Salazar, Alan Snitzer

**Political Action Committee** – Adam Dombchik, Michael Ozurovich, Gil Stein

**Strategic Planning** – Sue Borg, Brad Chalk, Mark Edelstein, Rick Wooley

**Technology** – Zach Frost

#### Executive Director

Karen Locke

#### Consultants

Mark Gerlach    Richie Ross  
Mike Herald     Diane Worley

#### CAAaments Editor

John de los Angeles

Union printed in the U.S.A.

©2016 CAAA. All rights reserved.

<b>5</b>	President's Message .....	Bert Arnold
<b>6</b>	Executive's Message .....	Karen Locke
<b>8</b>	Old Members, New Members, and Emerging Leaders.....	Lauren Belger
<b>10</b>	The Marias Interview with Sue Borg .....	CAAA Staff
<b>14</b>	The Salas Dilemma: A Human Rights Issue.....	Latino Caucus
<b>16</b>	Gender Bias: Another Year, Another Bill.....	Christel Schoenfelder
<b>19</b>	Supreme Court Looks at King .....	Julius Young
<b>22</b>	Pearls of the MTUS.....	Adam Dombchik, Jason Marcus
<b>24</b>	Legislative Update.....	Mike Herald
<b>26</b>	When Regulations Get it Wrong .....	Mark Gearheart, Robert McLaughlin
<b>30</b>	The Injured Worker Survey .....	Rick Meechan

## PRESIDENT'S MESSAGE

# Fighting the Spectre of Fraud

By Bert Arnold, President

**F**raud. It's becoming an all too familiar topic these days.

It's existed in workers' compensation for quite some time and it's nestled its way into all corners of our system at all levels. Fraud has become so deeply embedded, at such a large scale, that we can no longer hope to combat it by complying with the methods that got us here in the first place.

As an applicants' attorney, I'm tired of the never-ending cycles of stakeholder meetings, regulations, and commenting periods. I grow weary of reforms that seem to result in a reduced ability for those hurt on the job to heal and return to work due to draconian legislation that severely limit the ability to obtain quality medical care. I remember the day when laws were enacted to help injured workers recover from devastating effects of a work injury, not to find ways to deny care. We must look closer at reforms that throw out the baby with the bath water under the pretext of limiting the bad actors. We have laws against fraudulent practices and they should be better enforced by government. I also grow tired of statistics that tell us all is well with so called

"evidence based medicine." In the words of the great Mark Twain, there are three kinds of lies: Lies, damn lies and statistics.

As a Californian, I'm fed up with the so-called "reform" policies that are passed off as "fixes" that fail to address the exploitation of the people who make the now 6th largest economy in the world run.

As your President, I'm ready to help lawmakers move to put a stop to the abominations that have plagued our system before the year is through.

And as your leader, I'm committed to ensuring that Sacramento gets it right.

Keep up the fight. 



## EXECUTIVE'S MESSAGE



By Karen Locke, Executive Director

# The Next 50 Years



**W**hen I was asked to write this message, I was asked where I saw the California Applicants' Attorneys Association 50 years from now. In all honesty, it's hard to say. But I couldn't help but be reminded about the story of Admiral Jim Stockdale.

Admiral Stockdale was the highest-ranking United States military officer in the "Hanoi Hilton" prisoner-of-war camp during the height of the Vietnam War. Stockdale was imprisoned from 1965 to 1973. He lived out the war without any prisoner's rights, no set release date, and no certainty as to whether he would survive to see his family ever again. However, he was eventually released and he became the first three-star officer in the history of the navy to wear both aviator wings and the Congressional Medal of Honor.

When Admiral Stockdale was asked about how he dealt with the uncertainty and how he kept his will to carry on, he answered, "I never lost faith in the end of the story. I never doubted not only that I would get out, but also that I would prevail in

the end and turn the experience into the defining event of my life, which, in retrospect, I would not trade."

I like to think that our Association can learn something from Admiral Stockdale.

In the time that I've dedicated myself to this Association, we've witnessed workers' rights being held hostage in the form of so-called "reform" legislation.

In the time that I've dedicated myself to this Association, we've observed the continued mismanagement of California's workers' compensation system at the expense of our state's most vulnerable people.

In the time that I've dedicated myself to this Association, we've seen the devastating consequences that the perpetuation of a broken system can have on not just individuals and families, but on entire communities.



**I never lost faith in the end of the story. I never doubted not only that I would get out, but also that I would prevail in the end and turn the experience into the defining event of my life, which, in retrospect, I would not trade."**

**—Admiral Jim Stockdale**



So where do I see our Association in 50 years?

I see our Association weathering the onslaught of attacks on workers' rights.

I see our Association facilitating the repair of the Golden State's system.

I see our Association reviving the fight for the welfare of all workers—regardless of race, gender, or national origin.

And most importantly, I see our Association prevailing for the sake of Californians everywhere.

Like Admiral Stockdale, I can't lose faith in the end of our story. We understand that change can happen because change must happen. And so, in 50 years, I see our Association being nothing short of triumphant.

Cheers to the next 50 years. 

# Membership Update

## Old Members, New Members, and Emerging Leaders

By Lauren Belger, Co-Chair of the CAAA Membership Committee

Just in time for CAAA's 50th Anniversary, the Membership Committee was pleased to roll out a new CAAA "longevity" pin at the winter convention in Rancho Mirage in January. The pins were issued in five year increments. We were able to honor Harold Wax as the member with the longest tenure as a Regular Member in the organization with an amazing 50 years!

Numerous other individuals were recognized for having over 40 years with the organization. The pins created quite a buzz during the convention and we hope members wear their pins proudly at their local Boards. For any Regular Member with more than five years of membership who may not already have their pin, contact CAAA's Director of Member Services, Andrea Robertson, at 800-648-3132.

In March, the Membership Committee was sad to say goodbye, at least temporarily, to long-term Co-Chair, Alan Snitzer. Alan was a tremendous asset to the Committee for a great number of years, offering the committee his wisdom and lively membership reports. Alan has been instrumental in working with the Emerging Leaders Committee in recruiting new members to the organization, members that will hopefully be interested in taking on leadership roles in the future within the organization. During CAAA's Lobby Day activities in March, we welcomed a number of these emerging leaders as they joined us in lobbying efforts at the Capitol.

Since the beginning of CAAA's fiscal year, which started in November of 2015, the organization has added 73 Regular members and 30 Associate members. This brings the number of Regular members to 835 for the organization and 160 Associate members, for a grand total of

995 members. We hope to gain more members, and to retain the ones we have, to keep our total membership number count well over 1000 for the remainder of the fiscal year.

At the summer convention in San Francisco,

the Membership Committee is planning to host a New Member/Emerging Leader event on Friday evening, July 1st, to welcome more new members to the fold and to introduce them to the excellent benefits associated with belonging to this wonderful organization. 



# The Marias Interview with Sue Borg

CAAA Staff

**A**t first glance, she seems reticent, timid, and introverted. But don't let her short stature fool you.

She's Sue Borg, one of the fiercest practitioners of workers' compensation law, a past President of the California Applicant's Attorneys Association, and the next recipient of the Eugene Marias Lifetime Achievement Award.

In May, Sue sat down with CAAA to discuss her involvement with the association and her perspective on the landscape that California's workers must navigate in 2016. What follows is a condensed transcript of that conversation:

**To the outside world, workers' compensation is somewhat mundane. How did you get into it?**

I think it's probably true that nobody grows up dreaming of being a workers' comp lawyer—not because there's anything wrong with it, but because nobody really knows anything about it.

What I did know was that I wanted to represent individuals—real people, not businesses—and

that I eventually wanted to be in my own practice. Workers' comp is perfectly suited to those things.

I feel very lucky to have “fallen into” this very comfortable niche. It led me to get involved with CAAA in the early '90s and I've been here ever since.

**There are other, larger associations out there. Why CAAA?**

Previously, I had been involved with a Bench Bar type of group, which was frustrating because you couldn't really be an advocate for anything with one faction or another objecting to everything. CAAA was different. I thought that CAAA would give me an opportunity to be an advocate for workers, which would help all of California.

**But advocacy can look like a lot of talk and no action—at least in the media. What kind of real change has CAAA been the catalyst for?**

Well, I joined CAAA's Executive Board in the smoky aftermath of SB 899. Those were dark days and it wouldn't be an overstatement to

say that we didn't know if we'd survive those changes—as individual practitioners and as an association.

In response, we reorganized and created committees to attack each and every aspect of the changes that were inflicted upon workers and we addressed all the legal and political challenges that we faced in representing these workers. It inspires me to this day how we came

**during your term as President of CAAA?**

By the time I became President, it was clear that the reorganization after SB 899 needed to be recreated in a way that was sustainable for the future. We needed to review every aspect of our Association and re-make ourselves to handle our new realities.

Eventually, we hired a new consulting team,



together in such difficult circumstances to take apart the AMA Guides, to develop arguments and protocols for getting the best results for workers, and how we drove these cases from local board offices statewide through the appellate courts to achieve results we couldn't have imagined on the day SB 899 passed.

**I know consistently producing change is something that's important to our members. Is that something you tried to focus on**

reorganized the way we created policy decisions and strategies, and changed the way we work to implement those strategies through everything we do.

**Has that work been completed today?**

It's an ongoing process. We'll never be finished with our self-assessment and we'll never be completely successful. But we've made amazing progress.

**Let's switch gears. Right now, we're fighting gender bias in the system—and you're one of the leaders. How far have women come in CAAA?**

I feel so proud—almost maternal—of how far the women of CAAA have come.

Christel Schoenfelder has grown into an amazing leader and soon to be President. She's led the Women's Caucus to become a fertile ground for our women members to gather, support each other, and take on unique challenges on behalf of us all. This work has enabled and empowered a larger cohort of women who will increasingly assume leadership roles as time goes on. They're a brilliant and passionate group.

Our numbers were small until recently and it was never easy to walk into a Board meeting where I was only one of two or three women amongst a room of fifty men. I'm not sure that too many of those men would've stayed if the opposite were true, but I'm confident that those days are behind us for good.

**What about the state of the "Grand Bargain" today in California? Nationally?**

I don't think that anybody can deny that the rights

of working men and women have been greatly diminished throughout the economy and this is no less true in the workers' compensation system in California and elsewhere.

So many injured workers are the same people who are victims of economic injustice for so many other reasons. An injury on the job and a disability accelerates the descent into poverty and a cycle that is almost impossible to break.



**So many injured workers are the same people who are victims of economic injustice for so many other reasons. An injury on the job and a disability accelerates the descent into poverty and a cycle that is almost impossible to break.**



civil lawsuits and working men and women get a lifetime of low wages and/or poverty and an inability to get quality medical care following an injury.

Not much of a bargain in my mind.

**There's been a lot of talk about individual workers assuming more risk while corporate**

When I started this practice, insurance companies and adjusters understood that their job was to deliver benefits. Now, it almost seems that there's a presumption that you don't need the medical treatment that even the insurance company doctor is recommending.

I can't imagine that this state of affairs was contemplated when the so-called "Grand Bargain" was created. Employers get protection from

**and government shock absorbers such as workers' compensation are being weakened. Should we be working to mitigate these changes in our system or working to make our system more flexible to the new economy?**

I think our economy and our workforce has always been dynamic. Certainly, the industrial revolution created circumstances that required adjustment in our laws and policies, which gave rise to workers' compensation systems. The same is true now.

Some changes must be fought and others must be accommodated with the right type of social safety nets that protect people who are inevitably left behind in the rapidly changing world.

I also think that some changes are not as new as they are often described. The rise of contract workers and freelancers may be somewhat new in the contexts that we now see them, but employers and businesses have always found ways to lower costs by exploiting workers.

When you see Uber drivers indebted to Uber for the loan on their car and, at the same time, subject to the whim of the company with their rates being arbitrarily lowered, you can see the way a particular worker can become stuck in a situation with few rights and recourse.

That's not to say that there can't be rules and regulations about how an agreement might be achieved and how these workers can be organized to collectively bargain for rights.

All this is possible and must be achieved. Our country has always been at its best when we have invested in our workforce.

**What about Governor Jerry Brown? What do you want to see before his time in office expires?**

I would love to see Governor Brown acknowledge that on his watch working men and women who become sick or disabled at work are delayed and denied quality medical care, that his administration has failed to fix it, and that, in many respects, has made the situation worse.

I would love to see Governor Brown address the examples of gender bias that are imbedded in the workers' compensation system and to apologize for the nonsensical veto message he gave to a bill that would've addressed the problem.

I would like to see this administration fix the Return-to-Work Fund, which is still inaccessible for the vast majority of workers who need it, despite the Legislature's intent to provide this benefit.

I would like to see this administration do its job in auditing and penalizing insurance companies and large employers for their ubiquitous failures to do what they are required by law.

I could go on but, suffice it to say, that this administration has been a complete failure in protecting the rights and dignity of men and women who become ill or injured at work.

We must do better.

**Before we end this conversation, if you could offer advice to the next generation of applicants' attorneys, what would it be?**

This is important work and workers need us. Don't shy away from taking on this practice because the rewards are great and the opportunity for professional growth is limitless. Getting involved with the work of CAAA is the best way that you can turn a tough job into a calling by joining forces with the most brilliant and passionate lawyers you can ever hope to meet. You'll be so much better for doing so. 

# The Salas Dilemma: *A Human Rights Issue*

By CAAA Latino Caucus

Not many would think to put California in the category of Human Rights Violators.

That's because human rights violations are typically thought of as unsophisticated and blatant acts of persecution. However, similar to the primitive origins of today's complex economy, so too have our human rights violations evolved.

Pope Francis said, "Human rights are not only violated by terrorism, repression, or assassination, but also by unfair economic structures that create huge inequalities." He couldn't be more right. In the last century, we've moved from glaring and unashamed prejudice to subversive and systematic discrimination.

That's not to say that we haven't come a long way in the fight for human rights, because we have. From federal laws like the Fair Labor Standards Act of 1938 and the Civil Rights Act of 1964 to state laws like California's Fair Employment and Housing Act and the Unruh Civil Rights Act, there's evidence of our progress. But the devil is in the details and vestiges of persecution have slipped through loopholes to embed themselves in our societal institutions. And there's no group



at greater risk than the Golden State's fastest growing demographic: Latinos.

It's estimated that 79 percent of the nation's undocumented immigrants are Latino<sup>1</sup>, with 2.4 million (22%) in California alone<sup>2</sup>. With regards to California's workforce, it's estimated that about one in ten workers is undocumented<sup>3</sup>. But here's where the risk becomes apparent: Latinos accounted for over half (59.4%) of workplace injuries<sup>4</sup> and over a third (37.8%) of workplace deaths in 2014<sup>5</sup>.

Many undocumented workers flee their home countries to escape various human rights violations. Ironically, they arrive in the U.S. only to be forced into using false documents as a result of existing unfair economic structures, which has

the effect of imposing a second-class judicial system.

As a state with a rich progressive history that was formerly a Mexican territory, we've prided ourselves as Californians on a culture of taking equality and fairness to new heights. In fact, when employers used the federal Immigration Reform and Control Act (IRCA) to undercut the federal

labor protections and remedies of the National Labor Relations Act in 2002<sup>6</sup>, California acted to strengthen state labor protections and remedies in an effort to keep the human rights of the undocumented intact<sup>7</sup>.

But the devilish details have snaked their way into yet another loophole.

In 2014, employers again attempted to use IRCA to subvert existing law—this time to undercut

the same state labor protections and remedies created in 2002. While the California Supreme Court ruled with the decision in *Vicente Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407 that an undocumented worker's discrimination claim could proceed, they would not go so far as to permit a back pay award for any time after the worker's undocumented status was discovered. Thus, while undocumented California workers are permitted to bring discrimination claims against their employers pursuant to state law, employers are not required to pay damages on those claims under federal immigration law after an employee's undocumented status is discovered. This precedent was even taken one step further in *Maria Salas v. IDS USA West, Inc., Mitsui Sumitomo Insurance Company of America* (2014) Cal. Wrk. Comp. P.D. LEXIS 364 when the court used IRCA to rescind an award of increased permanent disability indemnity benefits based on immigration status.

Allowing such precedents to stand presents a dilemma that will erode California's culture of equality and fairness and violate human rights by allowing malicious employers to subject the undocumented to discrimination, harassment, underpayment, and unsafe working conditions without any consequence.

Human rights are not privileges for the few, but indispensable liberties for all. And California shouldn't tarnish its Golden State reputation by allowing itself to be put in the category of Human Rights Violators. 

<sup>1</sup>[http://www.ppic.org/main/publication\\_show.asp?i=818](http://www.ppic.org/main/publication_show.asp?i=818)

<sup>2</sup><http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/>

<sup>3</sup>FIGURE 1.4 <http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/>

<sup>4</sup>TABLE 1 <http://www.dir.ca.gov/OPRL/Injuries/Demographics/2014/Menu.htm>

<sup>5</sup>TABLE A-7 [http://www.dir.ca.gov/OPRL/CFOI/cfoi\\_2014/index.htm](http://www.dir.ca.gov/OPRL/CFOI/cfoi_2014/index.htm)

<sup>6</sup>*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)

<sup>7</sup>Senate Bill 1818 (Romero, 2002)

# Gender Bias: Another Year, Another Bill



By Christel Schoenfelder, President-Elect

Another year, another bill to eliminate gender bias in California's workers' compensation system.

Although AB 305 successfully passed the Assembly and Senate last year with bipartisan support, the Governor vetoed the bill. The Governor's veto message indicated the bill was a misunderstanding of the AMA Guides.

As a direct result of that veto message, author of AB 305 Assemblywoman Lorena Gonzalez—who also chairs the Assembly Select Committee on Women in the Workplace—held a hearing at the Capitol earlier this year to evaluate the scientific basis for breast cancer ratings under the AMA Guides. And what a hearing it was to challenge the veto message!

The committee learned from Julius Young about the unscientific basis for breast cancer ratings in the AMA Guides. A moving discussion about the

physical, emotional and sexual consequences of breast cancer were vividly discussed by psychologist and breast cancer survivor support facilitator Cass Brown Capel and internist and head of a Breast Clinic in the Kaiser Surgery Department Claudia De Young. Most notably, veterans attorney Katrina Eagle provided a revealing story about the current breast cancer rating in the VA system. She indicated the VA took a closer look at breast cancer ratings for veterans when men developed breast cancer at Fort Lejeune due to water contamination. Under the VA system, breast cancer is 100% disability while the cancer is active, then a single radical mastectomy is rated at 50% disability and bilateral radical mastectomies are rated at 80% disability. Sue Borg, her client who is a breast cancer survivor, and I then explained the paltry breast cancer



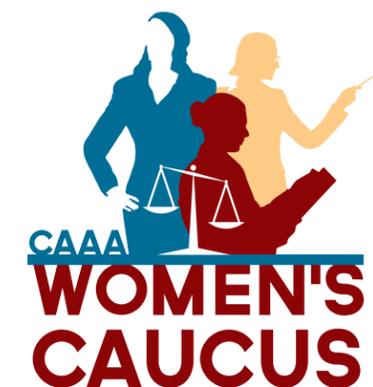
ratings of 0%-5% whole person impairment under the AMA Guides and the lengthy process to try to obtain a higher rating utilizing Almaraz and Guzman principles.

After the hearing, as part of **Women in the Workplace Day**, legislative staffers heard a presentation from the highly acclaimed, and largest pro bono law firm in the nation, Public Counsel regarding apparent constitutional violations in California's workers' compensation system. Since that presentation, Public Counsel has sent a letter to the Department of Industrial Relations outlining gender discrimination issues and demanding the State cease unlawful practices and policies that violate the Equal Protection Clause of the U.S. Constitution and California Constitution as well as California Government Code § 11135.

And with the new legislative session, women's

rights crusader Assemblywoman Lorena Gonzalez has introduced AB 1643 to again try to eliminate gender discrimination in the state's workers' compensation system. AB 1643 differs slightly from last year's bill since it now includes prohibition of apportionment for the overwhelmingly female gender conditions of carpal tunnel syndrome and osteoporosis. CAAA Women's Caucus member Laura Rosenthal testified about one of her clients at the Assembly Insurance Committee hearing. AB 1643 passed out of the Insurance Committee and is now with the Appropriations Committee.

CAAA is hopeful AB 1643 will again pass the Assembly and Senate with bipartisan support . . . and this year Governor Brown will see the importance of ensuring California's working women are treated fairly and equally in the state's workers' compensation system. 



## Supreme Court Looks at King

By Julius Young

Could utilization review physicians and UR provider companies face liability lawsuits filed by injured workers alleging they were damaged by the administration of the UR process?

Perhaps.

That appears to be possible under certain circumstances after a 2016 decision by the California Court of Appeal 4th District, *Kirk King v. CompPartners*, (2016) 243 Cal. App. 4th 685; 81 Cal. Comp. Cases 10.

Applicant attorneys were elated when the King decision came down. This was seen by many as a much-needed incentive for UR providers to clean up their act. The threat of monetary liability would cause UR doctors to look more carefully at the serious potential health ramifications of their decisions.

A frequent complaint about UR is that UR doctors don't look at the big picture context of the worker's situation and how the UR decision will play out in managing the workers' health.

In King, Kirk King had been receiving Klonopin on an industrial basis. But Dr. Sharma, a UR doctor, determined the drug was unnecessary

and decertified it. King was not advised of the dangers of withdrawing from the drug suddenly. As the court noted, "Typically, a person withdraws from Klonopin gradually by slowly reducing the dosage. Due to sudden cessation of Klonopin, Kirk suffered four seizures, resulting in additional physical injuries."

In argument at the trial court on the motion to dismiss, King argued that he was not contesting the UR decision itself but rather the UR decision to stop the Klonopin rather than gradually stop the Klonopin.

Cold turkey versus gradually .

Kirk lost at the trial court level. His lawsuit was dismissed.

On appeal, King noted that he was alleging two options for how the UR doctor harmed him:

"The first option is that Sharma harmed Kirk by not informing Kirk of the possible consequences of abruptly ceasing Klonopin. This option involves a second step in the utilization review process: Sharma determines the drug is medically unnecessary and then must warn Kirk of the possible consequences of that decision. The



FACTS NOT FRICTION

©Med-Legal, LLC

second option is that Sharma harmed Kirk by incorrectly determining Klonopin was medically unnecessary, because the drug was medically necessary until Kirk was properly weaned from it.”

The Court found that option one was not preempted by the California workers’ comp law but that option two was preempted.

A key component of the Court of Appeal decision is the holding that under California case law a utilization review doctor does have a doctor-patient relationship with the person whose records are being reviewed. The court notes that “Because there is a doctor-patient relationship, Sharma owed Kirk a duty of care.”

The Court of Appeal remanded the case to the trial court which allowed Kirk King to amend his complaint to clarify the factual allegations related to the alleged duty.

This decision caused a great stir among UR provider companies and many in the insurance industry.

There is continuing debate over how much UR is done (the stats may look different depending on whether one is focusing on treatment for older, chronic injuries or whether recent and no-loss time injuries are in the mix). And there

are nascent discussions about reducing UR in certain selected circumstances. But UR remains popular with carriers as a way to control medical costs.

Many see *King v. CompPartners* as a threat to that. Among the heavy hitter groups that filed a request for depublication are the following: California Workers’ Compensation Institute, California Chamber of Commerce, ExamWorks, Coventry, Grimmway Farms, Schools Insurance

Authority, the County of Los Angeles, Albertsons Safeway, the California Association of Joint Powers, the American Insurance Association, California Self-Insurers Association, and the California Landscape Contractors Association.

In case you are wondering, lots of people see this as a big deal issue.

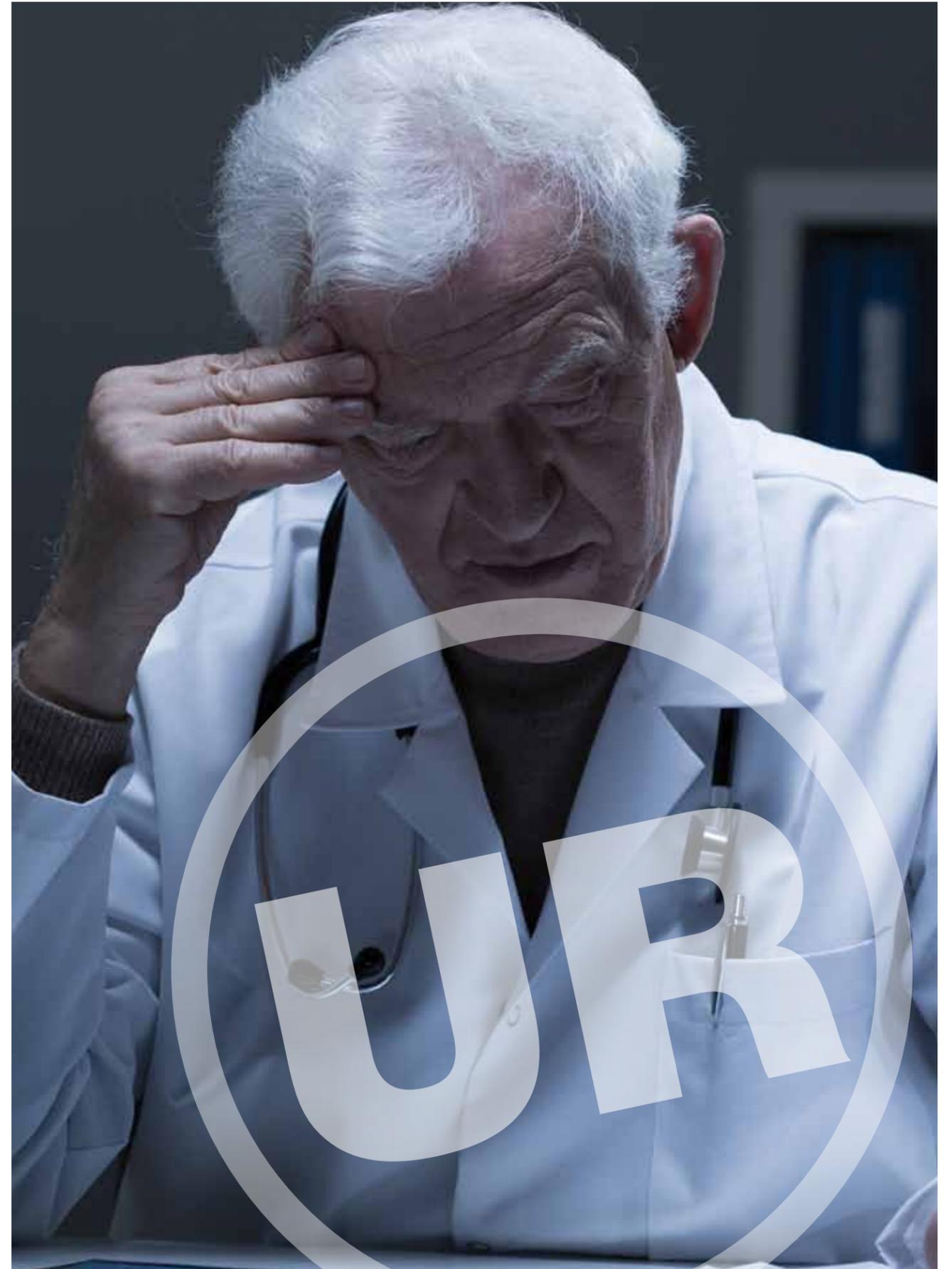
The California Supreme Court has now decided to hear the case.

It’s not clear whether the Supreme Court is agreeing to hear the case because there is so much interest by major groups or whether they have already flagged the Court of Appeals decision as problematic.

We shall see. Stay tuned. 

© Copyright 2015 Julius Young, Esq. All rights reserved.  
Reprinted with permission.  
[www.boxerlaw.com](http://www.boxerlaw.com)  
[www.workerscompzone.com](http://www.workerscompzone.com)

“  
**A key component of the Court of Appeal decision is the holding that under California case law a utilization review doctor does have a doctor-patient relationship with the person whose records are being reviewed.**  
”



# Pearls of the MTUS

By Adam Dombchik and Jason Marcus

*pearl /'pɪrəl/ (n.) a morsel of information intended to highlight a legal or medical point to help insure injured workers receive necessary medical treatment to cure and/or relieve of the effects of their injuries.*

Since 2004, CAAA has been disseminating Pearls related to impairment analyses and interpretation of the AMA Guides 5th Edition by way of educational events, practice tips, and ultimately by creation and distribution of the eBook through Apple's iBook Store, Pearls of the AMA Guides, 5th Edition. CAAA is now embarking in a new pearls mission: Pearls of the MTUS. The goal is to share pearls designed to educate the workers' compensation community on the use of the Medical Treatment Utilization Schedule (MTUS) in the Utilization

Review (UR) and Independent Medical Review (IMR) processes.

Understanding the MTUS is the key for practitioners and physicians to get treatment approved for injured workers. Understanding the

MTUS is also the key for self-insured employers and insurance companies to comply with the law and understand what treatment recommendations are evidence based and require authorization. By understanding the important public policy behind creating the need for evidence based medical treatment recommendations, understanding the need to ensure that injured workers are prescribed safe medical treatment protocols, and understanding the need to ensure prompt delivery of medical benefits to help reduce temporary disability and increase return to work rates,

**The goal is to share pearls designed to educate the workers' compensation community on the use of the Medical Treatment Utilization Schedule....**

we believe this endeavor will benefit the entire community.

Lead by Executive Board member Jason Marcus, a committee has been formed of some of CAAA's youngest and brightest attorneys who have committed to work on this project. The roll out of these pearls will initially come in the form of practice tips. The first will be a tip on the ability to resubmit an RFA based on a "change of material facts" and avoid the "12-month" rule of Labor Code Section 4610(g)(6). Subsequent tips will include analyses of specific provisions of the MTUS for some of the most commonly recommended treatment modalities, analyses of the MTUS based on diagnostic testing,

evaluating and rebutting the MTUS based on strength of evidence, and identifying and addressing untimely Utilization Review and IMR determinations, to name just some of the committee's work.

A number of these Pearls will be presented in an educational format at the January 2017 convention in San Diego. The Association hopes to ultimately issue an eBook similar to the one previously issued dealing with AMA Guides issues. If you wish to participate in the committee, or have ideas or case examples for the committee to put into this format and disseminate to the community, please do not hesitate to contact the CAAA office. We look forward to sharing these Pearls of the MTUS with you! 





## 2016: Trends Clarifying

By Mike Herald, CAAA Legislative Advocate

**A**s the Legislature nears the halfway point of the 2016 session some trends are becoming clear.

At the beginning of the year it looked like Governor Brown's Administration and the Legislature would tackle the issues of abusive Utilization Review (UR) denials and denial of medical treatment by Independent Medical Review (IMR). The Administration was meeting with stakeholders to discuss options for fixing UR and legislators were pondering bills. By March though only one bill had been introduced, Senate Bill 1160 (Mendoza), and the only UR "reform" in the bill was a requirement that UR companies should meet national licensing standards for UR companies. Even this bill, however, was opposed by the Administration as too costly. The Administration though was rumored to be

preparing its own package of reform proposals for introduction later in the session. In April the Center for Investigatory Reporting released a three-part series on fraud in California's workers' compensation system. The series was built off several criminal cases that had been recently filed, mostly against doctors who were accused of bilking the system. What the articles showed though was that the state lacked a systematic approach to identifying, tracking and prosecuting workers' compensation fraud. In particular, it portrayed a system where a doctor could be suspended from participating in MediCare or Medicaid due to fraud but still be able to participate in and commit fraud in the workers' compensation system. The system appeared to be asleep at the wheel.

With these disclosures, the focus shifted away

“

**While CAAA has been and continues to be committed to eliminating fraud in workers' compensation, there is a danger that the corruption may lead to solutions that harm injured workers more than it harms those committing fraud.**

”

from reforming UR and IMR. Assembly member Adam Gray quickly introduced AB 1244 to prohibit doctors who were suspended for fraud in MediCare or Medicaid from participating in workers' compensation. Insurance Committee Chair, Assembly member Tom Daly, proposed that the State Auditor look into how effectively the state was coordinating its' anti-fraud efforts. The Administration appeared to be shifting its' focus to bringing forth proposals intended to root out fraud, particularly related to the filing of liens for services on denied cases.

While CAAA has been and continues to be committed to eliminating fraud in workers' compensation, there is a danger that the corruption may lead to solutions that harm injured workers more than it harms those committing fraud. In 2016, CAAA believes it is critical that legislators focus on and approve measures addressing large-scale fraud and be cautious of not harming innocent injured workers who have already been left behind by the system. [CAA](#)

## When Regulations Get It Wrong

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

**D**uring the public regulatory rulemaking process on the Return to Work Fund, CAAA proposed a simple application process be implemented for applying for the Return to Work Fund Supplement Payment to insure that expeditious payments could be made to all eligible injured workers. This recommendation included simply requiring that a copy of the Supplemental Job Displacement Voucher be provided to the Department of Industrial Relation'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 or defects in notice to the injured worker.

The administration did not adopt CAAA's recommendations. Instead they opted for an online application process requiring a computer, a scanner, or travel to the local Board if one was not fortunate enough to own a computer in their home. However, the success of this application process was all based on an assumption that proper notice of eligibility to apply to the fund would be sent to injured workers. Unfortunately, in the majority of cases, this assumption has proven to be untrue.

The DIR rules for the Return to Work program launched April 13, 2015. The rules required injured workers to apply for payment from the fund within one year of the effective date of the rules or one year of receiving the Supplemental Job Displacement Benefit educational voucher and notice of the program.

It quickly became apparent that something was wrong. Only a quarter of the 24,000 injured workers expected to be eligible for supplemental payments from the \$120 million return to work fund created by Senate Bill 863 applied for the benefit during the first year of the program. It is clear that one of the main reasons that the number of applications is so low is because eligible workers aren't receiving notice of their right to apply.

Bert Arnold, CAAA president said in an April article in Work Comp Central "I think you have to start with the basic premise that anybody on the planet offered \$5,000 is going to want it, but they need to know about it."

On February 12, CAAA filed a petition to modify regulation 17304 to extend the deadline to apply for the Return to Work Supplement benefit with a concern that many workers would be barred from



applying after April 13, 2016, even though they never received notice of the program.

On April 15, a public hearing was held on CAAA's petition, and no opposition was presented.

CAAA has been told by the administration that the regulations will be modified based on our petition. The administration is well aware of the significant defects in notice of the program being provided to injured workers as we have provided several examples. It is June and we are still waiting for notice of these proposed modifications to the Return to Work regulations. Meanwhile many injured workers Return to Work Fund applications have been denied as they were filed past the regulatory deadline.

Where does CAAA go from here? We continue to fully participate in the DWC's regulatory process with recent comments submitted on proposed revisions to the home health care fee schedule and interpreter fee schedule changes on the horizon. We also anticipate further updates to the Medical Treatment Utilization Schedule (MTUS) later this year, including the implementation of a formulary for pharmaceutical drugs.

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. [CAA](#)

More Info at **CAAA.ORG**

February 12, 2016

Christine Baker  
 Department of Industrial Relations  
 Office of the Director  
 P.O. Box 420603  
 San Francisco, CA 94142-0603

Dear Director Baker:

As President of the California Applicants Attorneys Association, I am writing on behalf of injured workers to petition for an amendment to Regulation section 17304 regarding the deadline for filing an Application for the Return-to-Work Supplement.

This petition is made pursuant to the Administrative Procedure Act sections 11340.6 and 11340.7. The authority for the Department of Industrial Relations to take this action is set forth in Labor Code 139.48(b) which provides, "Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director."

Existing regulation section 17304 provides that an application for the Return-to-Work Supplement must be received by the Return-to-Work Supplement Program within one year from the date the Voucher was served on the individual or within one year from the effective date of the regulations, whichever is later.

The regulations implemented for the Return-to-Work Supplement Program became effective April 13, 2015. Therefore, injured workers who received a voucher on or before April 13, 2015, will no longer be able to apply after April 13, 2016. This is although these individuals did not receive notice of their eligibility to apply for the program when they received their voucher. In fact, the

# PETITION

## Regarding the Return-to-Work Supplement Fund

Supplemental Job Displacement Voucher form was not updated with a notice of eligibility for the Return-to-Work Supplement Program until December 1, 2015.

CAAA believes that the low number of applicants to the Return-to-Work Supplement program in 2015 (less than 4,000 when at least 24,000 were projected by the Rand study commissioned by CHSWC) is most likely due to this lack of notice of eligibility, as well as some difficulties in using the online application process.

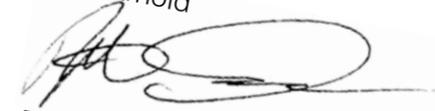
Therefore, we propose the following amendments to section 17304.

### 17304. Deadline for Application

An application for the Return-to-Work Supplement must be received by the Return-to-Work Supplement Program within one year from the date the updated Voucher form containing notice was served on the individual, or one year from the effective date of this amendment to the regulations for those individuals who received vouchers before December 1, 2015.

CAAA supports this amendment to section 17304 as a fair remedy to allow all eligible injured workers the opportunity to apply for the Return-to-Work Supplement payment.

Sincerely,  
 Bert Arnold



President, California Applicants' Attorney's Association

Cc: George Parisotto, Acting Administrative Director

2015 - 2016  
 EXECUTIVE BOARD

Bert S. Arnold, President  
 Christel Schoenfelder, President-Elect  
 Robert A. McLaughlin, Jr., Secretary  
 Jason M. Marcus, Treasurer  
 Bernardo de la Torre, Legislative Chair  
 1303 J STREET, SUITE 420, SACRAMENTO, CA 95814 | 916.444.5155 | CAAA.ORG

## Calling All Applicants:

# The Injured Worker Survey

By Richard Meechan

*"When I use a word, it means just what I choose it to mean—neither more nor less."*  
-Lewis Carroll

If you are having these feelings, you may be sitting in the Committee on Health and Safety and Workers' Compensation. Nothing makes sense—up is down and they have graphs and charts to back it up.

In multiple public meetings, we have been told that 95 percent of medical requests were approved and that injured workers were satisfied with their medical treatment. I remain skeptical.

CAAA's committee on Health and Safety knows we have to respond. Our committee brainstormed for an appropriate way to respond to these tales. We enlisted Diane Worley, Sue Borg and Richie Ross to help our committee. We came up with the idea of doing our own survey but money is scarce and we needed to use our resources wisely.

We decided to publish it on Survey Monkey. Their services are relatively inexpensive. They

also allow us to get a break down of the data we receive in order to get a real picture about how the system is working for our clients. We designed the survey so that we could see how the system is working for the most seriously injured workers. That would be workers that were out of work for more a year, our clients, to be more exact.

However, the trouble is that we need more data.

We have had 3,792 English speakers take the survey and only 33 of those respondents were out of work for more than a year. Twenty Spanish speakers have taken the survey and 6 of these have been out for more than a year. One hundred responses is the gold standard for surveys and we are short. We need more injured workers to take this survey.

Who has contact with severely injured workers? We do of course, and we need your help in driving our numbers. Here is what we have so far and how you can help.

For English speaking workers out more than

# WAS YOUR CLIENT INJURED ON THE JOB?



WORKING FOR AN UNLICENSED CONTRACTOR OR HOMEOWNER?

INJURED BY ANOTHER COMPANY'S EMPLOYEE?

CALL US. YOU MAY HAVE A VALUABLE 3RD PARTY CLAIM.

UP TO 50% REFERRAL FEES PAID  
OVER **\$240 MILLION** RECOVERED FOR OUR CLIENTS

# BD&J

Banafsheh, Danesh & Javid, PC

800.820.1111

bdjlawfirm.com

KEVIN DANESH IS RESPONSIBLE FOR THIS AD

SERVING THE ENTIRE STATE OF CALIFORNIA

a year, 54 percent rated their experience with workers' compensation poor or very poor. Thirty percent rated medical care in the same category. Twenty-seven percent said their medical care was delayed a little while 45 percent said it was delayed a lot. Fifty-one percent reported that the medical delays affected their healing or their ability to return to work and more than 50 percent had to seek care outside of the workers' compensation system.

Spanish speaking workers had an even worse experience. Every Spanish speaking worker who took the survey reported a delay in treatment and 83 percent of them said that it slowed their return to work.

These figures are no surprise because we see this every day.

The trouble with our survey is that we have not obtained enough input. We would like to see how 100 people who have been out for more than a year take our survey. We believe these numbers will hold up, but to peddle this to CHSWC or the assembly/senate, or the Governor, we need more data.

### Help us help you.

Many of us advertise through the internet. Google search criteria drive how our sites are rated. The more connects we have to other organizations,

other points of interest, the higher our Google rating. Higher Google ratings make you show up higher on your search page and allows you to look at more cases.

We have two such connects that you can add to your website now. We have a tab for both the English survey and Spanish that you can download from the CAAA Facebook page.

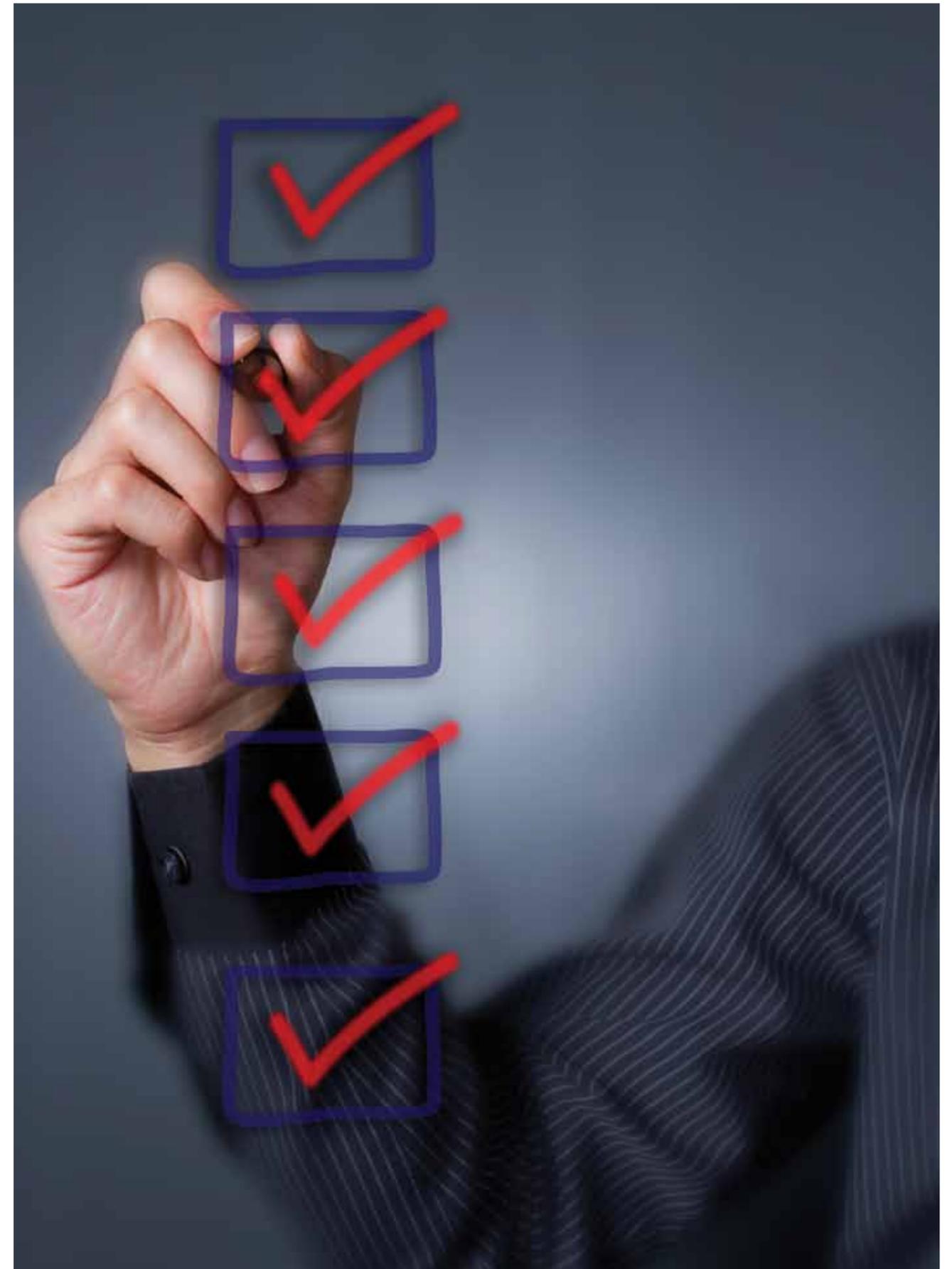
Our clients are always asking what they can do to help. Those clients can be sent a card directing them to our surveys. We have them both in English and Spanish mailers for your clients. Anything you can do to help get the word out will ultimately help our clients.

In a world where up is down and our clients are receiving "science based" medicine, the truth needs to be told. We cannot count on CHSWC to tell the truth and we know that we must do better. We have friends in labor and the legislature and they need tools to protect the rights of injured workers. Carpe Diem.

Carpe Diem. 



**Who has contact with severely injured workers? We do of course, and we need your help in driving our numbers. Here is what we have so far and how you can help.**



SEPTEMBER 17, 2016

9 am - 1 pm

**A SPECIALIZED LAW OFFICE MANAGEMENT SEMINAR  
WHAT THEY DIDN'T TEACH YOU IN LAW SCHOOL**

- \* What makes a successful and effective Workers Compensation Attorney?
- \* Getting in: Starting a practice; Joining a practice; Ethically building a practice
- \* Getting out: How to protect your clients and your practice in case of retirement, death, disability or dissolution
- \* Retirement planning

Four Points LAX, Los Angeles  
Claremont Hotel, Berkeley



REGISTRATION OPENING SOON

*Save the Date*  
**October 13, 2016**

THE GREATER INLAND EMPIRE CHAPTER  
**HALL OF FAME**

Inducting the following recipients:

- Ron Miller
- Art Todd
- Larry Lerner
- Felix Smith
- Honorable Phil Mark, Ret.
- Jerome Wall, MD
- Eloise Gomez Reyes
- George Ramirez
- Jim Tobin
- Connie Moore

Upcoming  
**EVENTS**

SAN DIEGO CHAPTER PRESENTS  
**5TH ANNUAL DEL MAR PACIFIC CLASSIC**

SATURDAY, AUGUST 21, 2016

FRIDAY, AUGUST 26, 2016  
DODGERS VS. CUBS

PRESENTED BY  
LAVAAA CHAPTER



# Best. Decision. Ever.

No contracts. No fees. No worries.  
Just guaranteed results for you and your team.

