

# PSYCHIATRIC AND STRESS CLAIMS

## How Not To Go Crazy Just Because Your Employee Did

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crazy doesn't even  
begin to cover it.

# What is a Psychological Injury?

## ■ Emotional Conditions or Disabilities Resulting From Real or Imagined:

- Physical Injuries
- Verbal Assaultive or Demeaning Behavior
- Organic Changes Derivative from Injury/illness



They can Include: **Anxiety**, Depression, **Over/Under-Emotionality**, **Improper Behavioral Response**, Sleeplessness, Lack of Attention, **Anger**

# Why are Psychiatric Claims Difficult?

- ❑ There Are Often No Objective “Physical” External Signs
  - We Don’t “See” The Claimed Injury
- ❑ Stigma/Discomfort/Proof
  - Employees Don’t Want To Talk About Them
  - We Don’t Want To Ask About Them
  - Other Employees Are Skeptical They Exist
- ❑ Difficult To Value
  - Very Subjective – “Egg Shell” vs. “Hard Core” Claimants
- ❑ Often Lead To Other Problems/Costs
  - *Improper Handling Creates Other Claims*
  - *Improper Handling Can Increase Defense Costs*



# The Workers' Compensation Rules

- ❑ Purely Psychiatric - Mental - Emotional Injuries Can be Recognized If
  - They are the predominant cause of the Employee's Claim, and
  - They do not arise from a "good faith personnel action" (there often is deference to employer's action absent outrageous/illegal conduct)
- ❑ Psychiatric injuries can also result from a specific, traumatic event
  - Event Triggering PTSD (armed robbery/shooting/death of another)
- ❑ There is a serious physical disability and the worker has been on the job for at least six months.



# Compensability under the Labor Code

## ❑ Labor Code 4660.1 (DOI on of after 1-1-13)

- There can be no increase in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder arising from a compensable physical injury, although the Employee can obtain compensable medical care for such psychiatric conditions;

### unless

- The Employee has been the victim of a violent act or direct exposure to a significant violent act, or has been involved in a **catastrophic injury**, such as a loss of a limb, paralysis, severe burn, or severe head injury.

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ORDER

# The Financial Issues/TD – PD - Medical

- ❑ Applicant Is Arguably Entitled To TD Benefits As Result Of Both Mental-Mental And Mental-physical Claims
  - But, LC §4660 1(c), stating there shall be no increase in impairment ratings, does not expressly restrict TD for temporary psychological disability benefits.
  
- ❑ Applicant May Be Entitled To Future Medical Even In The Case Of Mental-Physical Claims
  - But, what constitutes a “catastrophic injury”
  - Do we look to the AMA/WPI ratings?
  - Do we look to situations like “chronic pain,” where the CCR Treatment Guidelines (9792.20 – 9792.26) recommend psychological evaluations and cognitive- based treatment



# In W/C – What are the Triggers of Investigation?

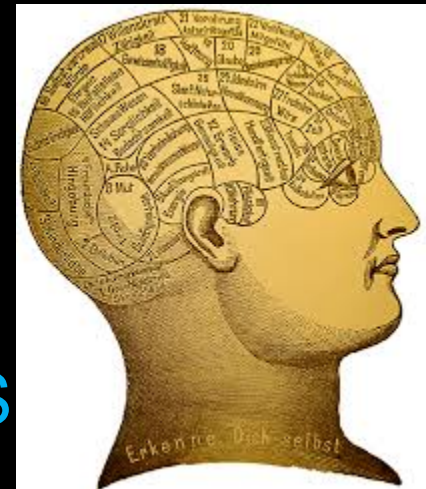
- ❑ Not Every Claim Triggers a “Psych Claim” Despite “Check the Box” Forms
  - Difference in Geography
  - Difference in Underlying Events
    - Election of Remedies
    - Interaction with Continuing Physical Injuries
- ❑ Discovery Responses



# Evaluating Psychological Claims in W/C

## Five of the Most Common Claims for Which Professional Evaluation is Often Needed:

- “Garden-variety” stress
- Personnel Action stress
- Post-Traumatic Stress Disorder (PTSD)
- Severe Injury with Psych Consequences
- Neuropsychological Cases





# How We Diagnose – Pick the Right Team

## Psychological Evaluation

- Psychologist/Psychiatrist – What are the Right Tests?

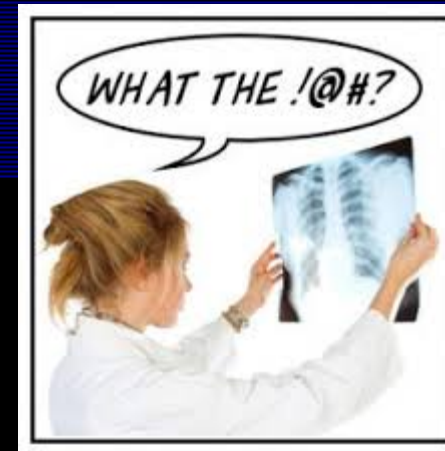
## Neurologic Evaluation

- Neurologist/Medical Doctor – What are the Right Tests?

<b>Pre-Event History</b>	<b>Post-Event History</b>
<i>Pre-Event History Medical Records Review</i>	<i>Post-Event History/Change or Increase in Care</i>
<i>Family/Friend Interviews or Depositions</i>	<i>Reactions/Interactions with Friends and Co-Workers</i>
<i>Social Media</i>	<i>Social Media</i>

# The Diagnosis/Diagnostic Report

- Write what we know
- Write what we don't know (and why)
- Identify how an absence of documents/records/diagnostic evaluations impacts conclusions
- Recognize that 51% (or any amount) in a W/C report still harms Civil
- Consider impact on ongoing employment situations (findings can relate to “fitness for duty”)
- “Good Faith Personnel Action” is still one of the best defenses – Does it Fit the “Diagnosis”



## QMEs Are Supposed To Conclude Cases ...

- Financial Incentives May Prolong Case
- There Is A Scarcity Of Qualified/Capable Psychological Injury Evaluators/Treater
- Payments To Treaters Are Restricted
- Future Medical Can Be Provided Without Treatment Being “Completed” So Case Can Settle



# How Civil Claims Differ (DFEH)

- No Requirement of Physical Injury
  - “Negligent” and “Intentional” Infliction of Emotional Distress
  - Emotional Distress as a Result of Illegal Workplace Conduct (Discrimination/Retaliation/**Harassment**)
- No Requirement of Predominant Injury
  - Requires only “Serious” Emotional Distress

# How the W/C Claim can Hurt a Civil Claim

- Focusing on the 51% Rule can harm the Civil Case
  - Can confirm the existence of legally viable damages claim by a defense-related expert
    - (i.e., a 33% rating still fulfills civil damages standard)
  - Can confirm a causal link between employment-related activities and the employee's Injury

Can you find the  
the **mistake?**

1 2 3 4 5 6 7 8 9

THE  
SETUP



## CALL TO DUTY BOOTS ON THE GROUND™

- ❑ Can lead to knowledge of a separate obligation to accommodate within the workplace ADA/FEHA
  - Return to Work Issues May not involve just “Physical” Issues
  - Return to Work Failing to Take Into Account Psychological/Emotional “Disabilities”
  - “Considered” as “Disabled”
- ❑ We – as Employers – Have Knowledge
  - Direct – What we Learn from the Employee
  - Indirect – “Hearsay” -

# Differing Medical Evaluations – DFEH v. Civil?

$$\frac{\text{Number of favorable outcomes}}{\text{Number of possible outcomes}}$$

- Theoretically – The Evaluations Should be the Same

BUT

- The “Claim” Issues can/will be framed differently
  - Because not all “Psychiatric” Claims are covered by W/C, you can have different/multiple “Psychiatric” issues in a “dual” Claim, requiring different evaluations
  - Timing – Civil can often “lag” W/C, so the “timing” of the Claims can affect scope/purpose/intent of the Evaluations

# Pulling this Together - “Hypothetical” – Part I

- ❑ Employee suffers non-confirmed “cardiac” problems (most likely “stress”) – tells fellow employees (heard by supervisor) about his concerns
- ❑ Employer Knows of Multiple Known Visits to Doctors – Multiple Absences, but no express reason given to employer - receives attendance disciplinary warnings
- ❑ After 4-Day Hospitalization, he’s fired (for not calling in:
  - Wrongful Termination/Disability Discrimination
  - Workers’ Compensation/Stress-Psychiatric





# Where Did Employer #1 Go Wrong

- ❑ Knowledge of “Something,” but took no action to investigate potential FMLA/Disability Issues
- ❑ No Medical Evaluations/Expert Opinions
- ❑ Treating Everything as “Disciplinary” Issue
- ❑ Action Taken at the “Wrong” Time; Without Explanation; No Remedial Response

## So What Happens:

1. Loses Civil Action
  2. Loses WCAB Action
  3. Forced Rehire
- \*\* Lots of Money/Costs

# Hypothetical – Part 2

## □ Reintegrating Employee Back into the Workplace

- Management of “Stress”
- Management of how other Employees View/Interact with Him
- Management of Actual Productivity/Workplace Absences/”Mistakes”



- And then, he's laid off as part of broader corporate RIF (They learned; this was done right)

# Hypothetical – Part 3

## □ Then the **New Employer Comes Along**

- No Employee Disclosures of Prior Events
- Pre-Employment Medical Evaluation - Clear
- “Egg Shell” Employee –
  - Knowledge of Ongoing Initial Workers’ Compensation Medical Appointment
  - Called in – Gone to Hospital
  - Mental Breakdown – Separation from Wife
  - Fired 11 weeks into position; separation made after 3 day absence

# SO, WHAT DID HE GET THIS TIME?

- ❑ Six Figures .... But no Reemployment
- ❑ A Mediator Who Was Sympathetic but said  
“You Get What You Get ... and You’re Screwed”

## WHY

- No Medical Evaluation of Substance
- No objective Personnel File Information on Failure of Work Performance (but is was the probation period)
- Prior Issues not Relevant to “Current” Workplace

# Tips for Valuing and Reserving



- Early Determination: Physical or Psychological
  - Will they actually pursue/support the claim?
  - What medical support exists – Pro & Con?
  - Do you have a civil claim pending/ threatened?
  - What are the actual skills/impairments (just “distress” or actual impairments)
  - “I’m a Plaintiff” syndrome/External Influences
  - Workplace Dynamics ....



# Tips for Settling/Defending

## □ The “Presentation” of the Dirty Details

- Polarizing Presentation vs. Successful Presentation
- Right Medical Evaluator/Presenter – Make the Claimant concerned

## □ Have the right Mediator and Counsel

- Fewer Mediators Willing to Work on Certain Cases
- Common “Complaints” on “Delayed” Mediations



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