

JEDI MINDTRICKS

HOW NOT TO GO CRAZY JUST BECAUSE YOUR EMPLOYEE
DID (OR, IS JUST A GREAT “ACTOR”)

Presented by:

Robert Cutbirth – Freeman Mathis & Gary LLP

Brian Paul Jacks, M.D.

Marc Leibowitz – Laughlin, Falbo, Levy & Moresi LLP



THE REASON FOR THIS PANEL

- In Civil and W/C Claims, “Psychological” Issues are Becoming More Challenging
 - **In Civil Cases**
 - “General” Psychological Distress – and IMEs in Response
 - The “Psychological” Disability and the ADA/FEHA
 - **In W/C Cases**
 - GAF Scores – Higher PD awards
 - Fewer Treater and AME doctors
 - QME’s may be unknown in local communities
 - **For Physicians**
 - Substantial evidence
 - Severity of trauma should fit the resulting psychological injury



WHAT IS A PSYCHOLOGICAL INJURY?

- Emotional Conditions or Disabilities – Real, Imagined, or “Assumed”

That Can Arise From

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



Manifestations can Include:

Anxiety Depression Over/Under-Emotionality, Improper Behavioral
Response, Memory/Recall Issues Sleeplessness, Lack of Attention, Anger

WHY ARE PSYCHIATRIC CLAIMS DIFFERENT/DIFFICULT?

- There Are Often No **Objective** “Physical” External Signs
 - We Can’t – Usually - “See” The Claimed Injury
- Stigma/Discomfort/Proof
 - Employees Don’t Want To Talk About These Issues
 - We Don’t Want To Ask About Them
 - Other Employees Are Skeptical – As Our Claims Personnel!
- Difficult To Value
 - Very Subjective – “Egg Shell” vs. “Hard Core” Claimants therefore need to consider objective evidence like psychological tests, time off work and psychological treatments
- Often Lead To Other Problems/Costs
 - *Other Claims / Increases Costs / Increased “Accommodation” Duties*



THE WORKERS' COMPENSATION RULES

- Purely Psychiatric - Mental - Emotional Injuries Can *Trigger* an Investigation for Compensability *If*
 - They are the predominant cause of the Employee's Claim, and
 - There are Issues of good faith, lawful, non-discriminatory personnel actions
 - ROLDA v. PITNEY BOWES, INC (2001)
- 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

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.

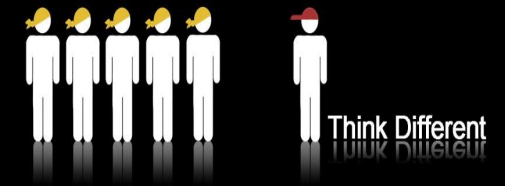
Issues: What is Catastrophic?
 TD/PD/Medical Only?
 Treatment and Rating Guidelines?

**LAW &
ORDER**

HOW CIVIL CLAIMS DIFFER

- **No Requirement of Physical Injury**

- “Negligent” and “Intentional” Infliction of Emotional Distress
- Emotional Distress as a Result of Illegal Workplace Conduct (Discrimination/Retaliation/ Harassment)
- Emotional Distress from Physical Injuries
- Emotional “Fear of”



- **No Requirement of Predominant Injury**

- Requires only “Serious” Emotional Distress

IMPACT ON CIVIL DAMAGES

- Focusing on the 51% Rule can harm the Civil Case
 - Can confirm the existence of legally viable 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
- “Garden Variety” vs. “Serious” – It's a Trap!
- The “2/3rds” Component?



EVALUATING THE CLAIMS

WORKERS' COMPENSATION VS CIVIL

“Garden-variety” – the Derivative Claims

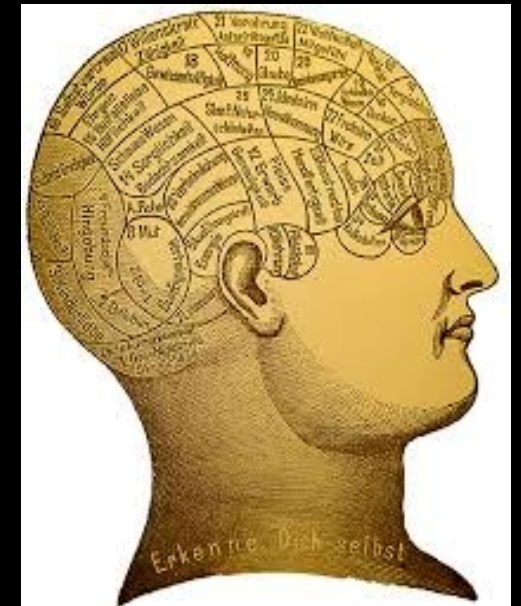
Lawful Personnel Action/Unlawful Personnel Action

Post-Traumatic Stress Disorder

Bystander

Severe Injury with Psych Consequences

“Organic” and Neuropsychological Cases



SO, WE GET THE RIGHT TEAM

Who: Industrial Medical Clinic
MPN Physician
Specialty area: Psychologist/Psychiatrist/Neurologist/MD?
Nurse Case Manager – Telephonic or Field

When: When reported?
Late notice?
After acceptance, delay or post denial

What: Doctors First Visit
Approved Clinic / MPN Evaluation
AME/PQME



WE DO THE RIGHT EVALUATIONS

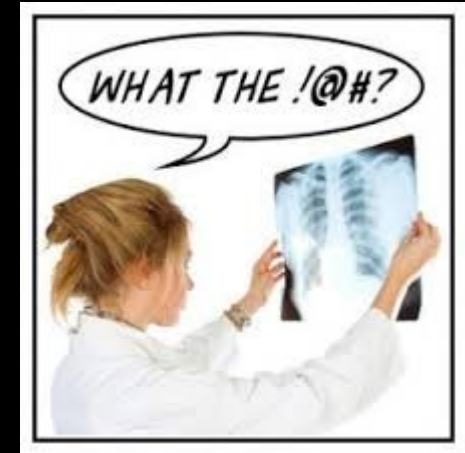
- History (QME and/or IME)
 - From Patient and From Records
- Medical/Neuropsychiatric Tests
- Review of Other Medical Opinions



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

THE REPORT ... AND THE DEPOSITION

- Do We Want / Do We Need One?
- Identify what we know
- Identify what we don't know (**and why**)
 - **Identify how an absence of documents/records/ diagnostic evaluations impacts conclusions**
- Recognize overall impact (W/C vs. Civil vs. Disability Accom.)
- “Good Faith Personnel Action” is still one of the best defenses
 - **Does it Fit the “Diagnosis”**
 - And then ... The Testimony!!!!



EVALUATIONS ARE SUPPOSED TO HELP RESOLVE CASES ... BUT

- Financial Incentives May Prolong Cases
- Scarcity Of Qualified/Capable Psychological Injury Evaluators/Treaters
 - Or, You Only Work for One Side/Bias
- Payments To Treaters Are Restricted and/or Become a Serious Point of Contention
- Future Medical Can Be Provided Without Treatment Being “Completed” So Case Can Settle



DIFFERING MEDICAL EVALUATIONS HOW TO HANDLE THEM?

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

- What Happens if the W/C vs. Civil vs. ADA Evaluations are not the Same?
- What Happens if the “Claim” Changes?
- What if ?

TIPS FOR VALUING AND SETTLING

- **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





Rob Cutbirth, Esq.
44 Montgomery Street, Suite 3580
San Francisco, CA 94105
(415) 352-6424
RCutbirth@FMGLaw.com



Marc Leibowitz, Esq.
600 B Street, Suite 2300
San Diego, CA 92101
(619) 233-9898
mleibowitz@lflm.com



Brian P. Jacks, M.D., F.A.P.A., F.A.A.C.P.
9730 Wilshire Boulevard, Suite 108
Beverly Hills, CA 90212
(310) 274-0684
Satellite offices: Oakland, Fresno &
Sacramento