VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

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Discrimination Against Employees Who Report Workers' Compensation Injuries

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SAN FERNANDO VALLEY BAR ASSOCIATION

21250 Califa Street, Suite 113
Woodland Hills, CA 91367
Phone (818) 227-0490
Fax (818) 227-0499
www.sfvba.org

EDITOR
Angela M. Hutchinson

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Leading Our Youth to Achieve

SEYMOUR I. AMSTER
SFVBA President

IT HAS LONG BEEN THE GOAL of the SFVBA to promote diversity in the legal profession. This was the purpose and direction Past President Richard Lewis guided us toward through the formation of the Diversity Committee during his administration. Past President Sue Bendavid expanded on this concept with the establishment of the Explorer Post during her administration. The Explorer Post served as a vehicle for a group of around 30 high school students to be involved with law related activities. It is noble that we have enlightened the minds of these high school students. But we must strive to enlighten even more.

As the premier and most recognized legal organization in the San Fernando Valley, it is essential that we take a more active role in our local high schools. We must lead to allow our youth to achieve. Our leadership must be in the form of direct involvement in the high schools. By being directly involved in the high schools we will have the opportunity to influence many high school students. We will open the eyes of many students to consider a path in law who never considered it before nor thought it was possible. We will make diversity in the legal profession a real possibility by reaching out to those who have never had an opportunity to interact so closely with attorneys in an informal, positive setting before.

Thus, how do we embark on this worthy venture? The answer is the journey has already begun. In July, our board enacted a program reaching out to all of the high schools in the San Fernando Valley known as the "High School Law Posts of the San Fernando Valley."

Purpose of a Law Post

Through the establishment of these law posts we will have an opportunity to succeed in our endeavor. The law posts will serve many purposes. We will be able to foster inspiring minds toward the field of law. The students will serve as our ambassadors at high schools to help coordinate legal related programs. The post will allow us to better serve the community by allowing the parents of high school student's easier access to law related services. Furthermore, it will give our members an opportunity to become involved with our local high schools.

How will the SFVBA Law Post program work? Representatives of the Bar will reach out to each high school in the San Fernando Valley. If the high school has a law related club in place, the bar association will offer its assistance to the club in exchange for it becoming a law post. If no law related club has been created, the bar association will help the high school form one. The law post will be supervised by a teacher at the high school, a member of the SFVBA, and a law school student.

Each post will then have a representative who will meet with other representatives from other law posts. This representative body will be called the Council of San Fernando Valley Law Posts. The purpose of the council will be to plan events for the participation of all of the law posts, so different students from different parts of the Valley, of different ethnicities, of different socio-economic backgrounds, all sharing a common interest, the law, will have an opportunity to meet each other and interact with each other.

In time it is envisioned that moot court competitions among the posts can be coordinated, as well as other programs that will help them become acclimated with the legal profession. All of this can be accomplished in time, but we must walk before we run. Nevertheless, by causing these law posts to be created and guided by us we will be able to foster inspiring minds into the field of law.

Programs that Educate Youth

The members of our law posts will serve as our ambassadors at high schools to help coordinate legal related programs. There are various programs Valley-wide that are geared towards educating high school students in the San Fernando Valley about the law and jurisprudence, though regrettably they are not currently offered at every high school. Some of these programs are Teen Court, Law Day, Dialogues on Freedom (September 11), court tour, and When You Turn 18 presentations, to list a few.

Many of these programs, though conceptually sound, lack the necessary design or infrastructure to be carried out in a smooth flowing manner. As a result of these inefficiencies, the SFVBA has often been asked to offer

its assistance in coordinating some of these programs. Our participation in these have often turned a weak or troubled program into a successful and memorable one.

These and others are worthy and valuable programs that benefit our high schools and quite often impact participating high school students in a profound and meaningful way. But there is no organized structure to have these programs presented at many of the Valley high schools.

Our law posts can serve as this organized structure. At each high school where a law post is in place they can work to schedule and coordinate the presentation of these programs at their high school. Thus, the members of the law posts will serve as our local ambassadors at the high school helping us to bring these noble programs to their high school.

Serving the Community

The post will allow us to better serve the community by allowing the parents of high school student's easier access to law related services. Once a month, the council of law posts will meet at a different high school in the Valley. Prior to the meeting, an attorney from ARS will talk about the type of law his practice is concerning. While the council meeting is taking place, other ARS attorneys will meet with individuals who desire a consultation. There will also be ARS intake personnel present to obtain information on anyone who desires our services. In this way we will provide a community service and also generate new referrals for ARS. Of course any individual law post can request an ARS attorney to do a similar program at their school.

This endeavor cannot be and will not be successful without the help of the members of the SFVBA. There will be a need for many volunteers in order to make this program successful. A member may have the query, "Why get involved?"

The answer is rather simple. No one more than lawyers understand the importance of a society based upon laws. Only by having laws that our citizens have an understanding of and are willing to follow can we have a peaceful society. A peaceful society occurs when our citizens seek to redress their grievances through our courts and not through self help.

But how do we achieve this? How do we achieve two important goals – that our citizens have an understanding of our laws and that our citizens are willing to follow our laws.

By reaching out to our high schools and by interacting with the students and the parents of these students, we will be able to educate them on how to address their legal issues. We will enlighten them that good legal help at a reasonable rate is available to them. We will show the children that attorneys exist to help people, that it is a noble profession.

We will give a true reason for the members of our community to respect not only our bar association but our profession. We will give our association a good name, as well as name recognition by being directly involved at the high school level. We will help our community, generate referrals for our organization, and above all we will lead our youth to achieve.

Seymour Amster can be contacted at Attyamster@aol.com.

From the Editor

For questions, comments or candid feedback regarding ***Valley Lawyer*** *or* ***Bar Notes****, please contact Angela at (818) 227-0490, ext. 109 or via email at angela@sfvba.org.*

ANGELA M. HUTCHINSON
Editor

Dear Members,

Inside this Work/Life Balance issue of *Valley Lawyer*, we address compensation equality in the workplace, benefits of a home-based law office and other pertinent legal issues.

This month's cover photo was taken by Rosie Soto, SFVBA Director of Public Services. The San Fernando Valley Bar Association is sad, yet excited to see outgoing President Robert Flagg pass the gavel to the new President, Seymour Amster. To learn more about President Amster, be sure to read his column and the Q&A feature article on page 20.

There is also a great article on striking life's balance. For working professionals, striking life's balance is indeed a balancing act. Many attorneys must nurture relationships with their spouses, significant others, children, family and friends, as well as maintain strong business relationships with clients, colleagues, judges, etc. In addition, some attorneys spend a great deal of time not only networking, but also giving back to their community and affiliated associations.

It is our hope that this month's *Valley Lawyer* encourages you to volunteer with the SFVBA. One way to aim for a balanced life is to make sure you are giving back to the community and associations like the Bar that strive to serve you and your career. There are several ways to become more involved with SFVBA, including joining a committee or participating in one of our many public service programs.

For more information on volunteer opportunities, please visit this link on our website: **https://www.sfvba.org/Member%20Resources/volunteer.aspx**. You can also contact Executive Director Liz Post at ext. 101 or epost@sfvba.org.

The SFVBA Editorial Committee recently planned the *Valley Lawyer* editorial topics for 2011. If you are interested in becoming involved with this committee, please contact me. We are seeking attorney writers who have contributed articles and have an understanding of the magazine's vision to provide SFVBA members with exceptional content.

Have a balanced month!

Angela M. Hutchinson

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Compensation Equality in the Workplace

By Roman Otkupman

IMAGINE A SITUATION WHERE AN INDIVIDUAL works for a company for over 20 years, has numerous promotions, finally reaches retirement only to find out that their services at the company were valued substantially less than those of other equally qualified employees. This happened in 1997 to Lilly Ledbetter who was employed by Goodyear Tire and Rubber Co. since the 1970's and towards the end of her career discovered that her pay was significantly less than those of her male counterparts having the same duties and carrying identical qualifications for the last ten years of her employment.

Specifically, Ms. Ledbetter was earning $3,727 while the male employees, who were performing identical duties as Ms. Ledbetter, were earning at least $4,286. Ms. Ledbetter brought a lawsuit asking for damages on the count of, among many causes of actions, sex discrimination. Specifically, she claimed that she was discriminated based on her sex as a result of Goodyear's discriminatory policy of compensating male supervisors more than the female supervisors. While the discrimination was relatively clear to ascertain, the main issue revolved around the statute of limitations of filing her claim.

The controlling law in the litigation was Title VII of the Civil Rights Act, which prohibits discrimination in the workplace based on sex and other protected categories such as religion, race, national origin, and color. The Title VII law also states that a plaintiff must file a claim within 180 days of the original discriminatory act by their employer. While Ms. Ledbetter did not file the claim within the 180 days of the original discriminatory act, she argued that a new statute of limitations started to run every time she was issued a paycheck, which constituted a discriminatory act. This case went all the way to the Supreme Court which ruled against Ms. Ledbetter on a 5-4 vote. During the ruling, Justice Ginsberg read her dissent aloud in open court, an unusual practice by Justice Ginsburg.

The effect of this law was such that employees had a harder time bringing their claims against employers as the statute of limitations mandated that the claim be brought within 180 days of the original discriminatory act. Thus, if, for example, a company implemented a discriminatory procedure which affect plaintiff, and plaintiff was aware of this procedure, the Supreme Court stated that plaintiff's claim was fatally flawed if it was brought 180 days after the original discriminatory policy.

Justice Ginsburg stated that this law was unrealistic and did not take into consideration a number of issues, such as the fact that the disparity in salaries are generally confidential and it is extremely difficult to ascertain the salaries of your coworkers at any time during one's employment. The dissent also focused on the fact that the decision by the Supreme Court was inconsistent with the overall purpose of Title VII, which as mentioned above, stands for equality and prevention of discrimination in the workplace.

The Supreme Court decision resulted in two bills being introduced in the 111th Congress and the House passed H.R. 11, which was the Lilly Ledbetter Fair Pay Act on January 9, 2009. This bill was a large source of debate during the Obama/McCain presidential campaign. President Obama was in favor of the bill while McCain was against it. Thereafter, Senate voted in favor of the bill and in January 2009, President Obama signed the act into law. This law took effect retroactively one day before the Supreme Court ruling in 2007. Congress stated the following when assessing the Supreme Court decision: "The Supreme Court in *Ledbetter* significantly impaired statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."

While legal analysts expected for this promulgation to inspire more salary-related lawsuits as the law gave employees the right to sue every time an employee received a discriminatory paycheck, this has not occurred. The courts tend to interpret the law very narrowly, which apparently, has prevented lawsuits based on the paycheck inequalities.

Continuing Violation and the Fair Pay Act

In some cases, plaintiffs try to argue that the continuing issuance of the discriminatory paychecks triggered the "continuing violation theory" which permits a plaintiff to pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he or she can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant. *Nat'l R.R. Passenger Corp. v.*

act is part of an ongoing practice or pattern of discrimination of the defendant. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112-14, 122 S. Ct. 2061. However, this argument is flawed as the Fair Pay Act clearly dictates that each violation is a discrete act of discrimination, not an overarching practice of discrimination. Therefore, the continuing violation theory does not apply to independent actionable events even if they are related to the same pattern or part of the same practice.

Therefore, under Fair Pay Act, plaintiff must demonstrate that his/her wages were a result of a discriminatory decision. If plaintiff is successful at proving this, plaintiff may recover compensation for each paycheck she received during the 300-day limitations period. However, plaintiff does not have to show that a discriminatory decision was made every time plaintiff received the paycheck.

Discovery Rule and the Fair Pay Act

Discovery Rule generally refers to postponing the beginning of the statutory limitation period from the date when the alleged unlawful employment practice occurred. The discovery rule is especially important when assessing the Fair Pay Act as the adverse or unlawful act of the employer is extremely difficult to ascertain.

For example, while employees are generally aware of the discriminatory act on the part of the employer when either a demotion, termination or other adverse action is taken against the employee, the fact that the employee is receiving a smaller salary as compared with other employees at the company will almost always be a very subtle issue that rarely is brought up between coworkers. Therefore, the discovery rule may be applicable in many of the disparate pay situations.

Justice Ginsburg in her dissent specifically stated that while many discrimination claims are clearly an injury, receiving a paycheck is not. Thus, with every Fair Pay Act case, it is important to discover when plaintiff had knowledge of the alleged discriminatory action on the part of the employer.

Equitable Tolling and the Fair Pay Act

Equitable Tolling refers to situations where employers or defendants either actively mislead plaintiffs regarding the causes of action; where certain extraordinary measures prevent plaintiff from asserting his/her rights; or where plaintiff mistakenly asserted his/her right in the wrong forum. While rarely utilized, this concept can be used in one of the three instances provided that the elements of the three excuses are met.

While the Lilly Ledbetter Fair Pay Act has only seen a very limited exposure in the courts of law, one can be sure that in the years to come this act will be revisited numerous times. One important issue that needs to be evaluated is the effect of the Lilly Ledbetter Fair Pay Act will have on the pension funds of the individuals wronged by the employer's discriminatory actions. After all, if one is receiving a lower paycheck, that individual will surely receive lower pension benefits once he/she retires.

Roman Otkupman *is the founding attorney of Precision Legal Center, ALC, with offices in Woodland Hills and Beverly Hills. He specializes in employment law litigation, landlord/tenant matters and bankruptcy law. Otkupman can be reached at roman@precisionlegalcenter.com.*

Staying Sane

ROSIE SOTO
Director of
Public Services

THE JOB OF AN ATTORNEY Referral Service consultant, while often rewarding, can also be wearing. Recently, a well-respected ARS director solicited advice from other program directors via the ABA listserve with the headline "Staying Sane". She wrote "Is there a method for intake-stress debriefing? Or do you get mental health days or anything?"

Her inquiry was triggered by the third angry and difficult caller in one day. This is a scenario that the ARS often sees day in and day out. Being at the forefront and working with people with massive problems is certainly not a light-hearted matter. The present question for ARS programs nationwide is not how to handle the caller, but how to handle the daily stress that staff faces.

The listserve inquiry generated nearly 20 immediate replies. To see that colleagues from all parts of the country, all in the same position, and all so willing to share advice, gives solace to the fact that no one is alone.

The SFVBA's ARS has three full-time consultants answering the phones daily. Inquiries will range anywhere from 75 to 100 calls each day. Compared to other tasks that keep a bar association going, there's no question, amongst the ARS community at least, that intake is probably of a different magnitude. It gets frenzied.

Asking the right questions and listening are two things that the ARS does best. Clients have sometimes said, "I just want someone to take the time to listen." In those circumstances, no referral may be made. After all, the ARS is a public service, which does more than just refer people to attorneys; the ARS is a resource for the community.

Another strategy mentioned by the listserve replies is to have a half-hour "gearing up/cooling off" period on the front and back ends of the day to help staff unwind and mentally prepare for the next day. This also helps staff to work on some of the paperwork that can very easily pile up and add to the stress of running an ARS.

Additionally, dealing with stressed out (sometimes abusive) callers is the foundation of this line of work. It is necessary to accept the facts and find sufficient satisfaction in the people who have said, "Thank you, you are the only person that listened," or "Thanks for being so calm, it really helped to calm me," to keep from burning out.

Having sufficient time off to have a day of leisure is also critical, along with supportive colleagues, committee members and board members.

There are plenty of very successful calls, but the fact remains that the lay public can remain mostly blissfully unaware that certain problems cannot be fixed by the ARS and the attorneys. It's a huge responsibility to learn that a client within the community is distressed. It's good to first acknowledge stress, and then find a stressor solution. If one has a good sense of humor, laughing is always an option.

***Rosie Soto** can be contacted at referrals@sfvba.org.*

How Some ARS Staff Manage the Stress

- Walk away and remember that people are never expected to take any type of abuse
- Create some buffer time between calls/duties and between work and home
- Go for a bike ride or a routine run/walk in the mornings to blow off steam before heading to work, or in the evenings after work to alleviate pressure before heading home
- Make good use of the backdoor, particularly after an awful call, walk right out it like you're never coming back, but just circle a couple of blocks then return to the office.
- Find the thing or action that will break up the negative energy, which will feed the stress into something good.
- Take a snack break to eat a scoop ice cream, coffee drink or microwave popcorn
- Take a 30-second mute-button break just to shake your head at other people complaining about "awful days"

Cut Stress and Overhead with a Home-Based Office

By Darrell C. Harriman

IN AN EFFORT TO REDUCE COST AND STRESS, many attorneys choose to run their practices from home. By doing this, they are often able to dramatically reduce overhead costs, and eliminate the aggravation and stress of long commutes. Some attorneys consider it a huge plus that they are able to spend more time with children and other family members by operating in this fashion.

Though home-based offices are not a practical option for everyone, those for whom it works often consider it one of the wisest business decisions they have ever made.

Common Home Office Arrangements

Three types of home-based offices appear to be the most common.

In-Home Office

Assuming one has the available square footage and an accommodating floor plan, a full service office in the residence can work well. A fairly traditional office arrangement can be duplicated using bedrooms as separate offices for the attorney and any staff members. Some attorneys work together with an assistant in a large room, with client interviews conducted in a neatly maintained family living room or dining room. Still others have combined these options, placing the attorney's office in a living or family room that may also accommodate client interviews while placing the staff member's office in an available bedroom.

Generally in-home offices are, with the exception of those in extremely large houses, not workable with small children in the home. Once children are school age, client appointments can be scheduled so they don't conflict with family members needing to use common living areas. One attorney interviewed, who has practiced from home for 32 of his 34 years in practice, stated that the most important benefit he has received by working from home was the ability to see his children (and now his grandchildren) grow up.

No-Clients-in-the-Home Office

For attorneys whose practices seldom require face-to-face conferences with clients, the square footage requirements of a full-service home office can be significantly reduced. A spare bedroom may be all that is needed. On those occasions that conferences must be held in person, the attorney can travel to the client's home or office. Many clients are thrilled at the prospect of a professional that still makes "house calls".

Alternatively, it is usually not difficult to find a traditional law office or a "virtual office" willing to let an attorney schedule conferences in the host office's conference room for a small fee. Attorneys able to conduct this type of practice may also consider maintaining an outside postal suite with an upscale address. Not only can this help the firm project a more professional image, it can avoid revealing the attorney's home address – an issue that many view as a "deal-breaker" when considering a home office.

Home Office Outside the Home

Homes with guest houses or legally converted garages can afford an ideal office arrangement. It becomes possible for the attorney to physically separate office and home life, and still avoid a commute. Such an arrangement may not be too attractive to the attorney whose primary concern is lowering overhead, however. The added expense of renting or buying a property with a separate guest house may be as much, or more, than renting standard commercial space for the office. The convenience of such a set up, however, is difficult to rival. Attorneys with "guest house" offices not only find those offices preferable to any other format, but say they are often envied by colleagues that learn of their situation.

Ups and Downs

Some attorneys that have operated home offices for many years discussed what they see as the major plusses and minuses of operating from home.

Upsides

Many of the advantages to practicing from home have already been mentioned: reduced overhead, elimination of daily commutes, and the ability to be around family. Another frequently mentioned benefit is the flexibility of scheduling. Although some home-based attorneys still maintain a fairly rigid "nine-to-five" discipline in their practice, others like the freedom to intersperse personal matters with business, putting in additional billing hours at odd times, without the need to travel to an outside office. One attorney, who is an admitted procrastinator, says he has frequently done "all-nighters" to beat a deadline, and appreciated not having to run to the office and abandon his family in the process. Some attorneys appreciate the fact that they can dress far more casually than they would in an outside office on those days they are not in court or meeting clients.

Downsides

One attorney says she misses the professional interaction she enjoyed when working at her former office. Another attorney, who conducts most of his client meetings at a virtual office, says the occasional meetings he must do at home create a real

challenge: With three dogs and seven cats, getting ready for guests is quite a bit of work for both him and his wife.

For yet another attorney who ran an in-home office for a few years before purchasing a home with a guest house, it was difficult having the family room filled with the constant mess that is necessarily a part of running a business. It should be noted, however, that none of these practitioners felt these issues were significant.

Misconceptions and Frequent Questions

Many of the situations attorneys fear when considering moving to a home office never actually materialize. The following are some of the more common questions and concerns raised by those considering a change to a home-based practice.

A home office appears unprofessional. Will it drive clients away? While it is true that certain clients may be hesitant to deal with a home-based attorney, the attorneys interviewed state that they have only lost a handful of potential clients over the issue. In fact, many clients are quite enthusiastic about the prospect of using a home-based attorney. Most clients are coming to an attorney in a time of great stress, and the home atmosphere often helps put them at ease.

One attorney, who frequently conducts client interviews on the living room couch, had a client voice how much she appreciated the relaxed atmosphere at his office; it did much to calm the fears her legal situation had created.

It takes too much discipline to work from home. For some, this may be a valid concern. However, attorneys are very much driven by their caseload. If the work needs to get done, and the attorney is reasonably conscientious, the work will get done. None of the attorneys interviewed saw the distractions of working from home as significant.

It will be difficult to relax at home if office is in the same place. This is the flipside to the previous concern. Of those attorneys interviewed, however, none said that this is a problem. By some unknown internal mechanism, they are able to put the office behind them in non-work hours, even if the office is in the next room. Most of those interviewed simply ignore the office phone on evenings and weekends. One (the exception), who often deals with foreign clients, says he has always taken phone calls at any time of day or night, and would do so whether or not he was working from his home.

Attorney may not want clients to know the location of his/her home. If an attorney's practice requires him or her to deal with highly emotional or dangerous clientele, or if the attorney has a number of commercial clients that might be put off by a home practice, the only workable home office arrangement is probably using an outside virtual office for appointments. Even this may not be workable if the attorney's practice requires a high volume of office conferences. But if the only concern is that clients won't respect the attorney's privacy, the fears of divulging a home address are probably unfounded. Those interviewed state that over the years only a handful of clients have shown up unannounced. Most clients truly respect the attorney's privacy, and those that don't understand the concept can usually be quickly and politely educated.

Attorney may not want to conduct depositions inside their home. Then don't. Larger deposition services frequently make

conference rooms available for little or no fee; opposing counsel may be more than happy to allow depositions to proceed in their offices; or, if one already uses an outside "virtual office," depositions can be scheduled there.

When to consider a home office?

For those attorneys that did not begin practicing from home early in their careers, the decision to move their office home was difficult and often brought about by outside forces. One attorney faced a health crisis that left him no choice but to remove the stress of an extended commute; another had deep disagreements with her employer over ethical concerns. The decision to move home was always undertaken only after considerable thought and investigation, and in the midst of great concern whether the new office would be economically viable.

Yet, for those that made the transition, there seems to be consistent agreement that it was a wise decision, and that they would never voluntarily consider a move back to a standard office practice. With all attorneys interviewed, the reduction in stress, the increase in flexibility, and the savings on overhead heavily outweighed any negatives they have encountered while operating law offices out of their homes.

Darrell C. Harriman *has been practicing law for the past thirty years in Los Angeles and Orange Counties, and, for the last six years has conducted a general civil practice from his home in North Hills. He can be reached at (818) 892-7093 or at darrell@harrimanlaw.com.*

MCLE ARTICLE AND SELF-ASSESSMENT TEST
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 19.

Discrimination Against Employees Who Report Workers' Compensation Injuries

By Everett Meiners

SINCE 1941, THE LABOR CODE of the State of California has prohibited employers from discriminating against employees because they have filed a workers' compensation claim arising out of injuries incurred while working for their employer.

Labor Code Section 132a

Section 132a of the Labor Code is the provision which protects such employees. It has been amended several times since it was first enacted and now provides that an employer who engages in the following activities is guilty of a misdemeanor:

1. Discharging or threatening to discharge an employee if the employee files a workers' compensation claim;
2. Discriminating in any manner against an employee because the employee has filed a workers' compensation claim, or has made known an intention to do so;
3. Discriminating in any manner against an employee because he has testified or made known an intention to testify in another employee's case.

In addition to criminal liability, there is civil liability. When an employee proves a 132a claim he is entitled to an increase in his workers' compensation benefits by one-half, not to exceed $10,000. More significantly for the employer, from an operations standpoint, the injured employee is also entitled to "reinstatement" to his former position, and "reimbursement for lost wages and work benefits."

The employer's workers' compensation carrier is prohibited from representing the employer with respect to a 132a claim, and cannot reimburse the employer for the cost of the defense of such a claim nor pay any damages awarded by the Workers' Compensation Appeals Board. Thus, the defense of a 132a claim must be provided by private counsel. This cost, together with the potential obligation to reinstate the employee and reimburse him for lost wages and benefits, means that employers must be careful to avoid the possible application of section 132a.

An employee must file a 132a petition with the Workers' Compensation Appeals Board within one year from the date of the discriminatory act or the date of the employee's termination. Failure to file within one year waives the 132a claim.

The employer must file an answer and any affirmative defenses with the Workers' Compensation Appeals Board. It is not unusual that the 132a claim is settled at the same time as the underlying workers' compensation claim. Thus, many 132a claims are never litigated.

In the event the 132a claim is not settled when the underlying workers' compensation claim is settled, it will be tried before an Administrative Law Judge for the Workers' Compensation Appeals Board. The employer's private counsel must present witnesses and documentary evidence to establish that the employer made the decision to terminate or otherwise discipline the employee without any reference to the fact that the employee threaten to file, or filed, a workers' compensation claim.

EAMS

The Workers' Compensation Appeals Board has adopted a computerized program which must be used to obtain the proper forms for documents to be filed, including an Answer to a 132a Petition. This program, the Electronic Adjudication Management System (EAMS), can be accessed through the web at: http://www.dir.ca.gov/dwc/eams/eams.htm. This system also allows attorneys to electronically submit forms and documents directly into EAMS from their office.

Using a logon and password to access EAMS, e-form filers fill out electronic forms on their computer and file them over the Internet. A computer based training course to use EAMS can be accessed at the above cited web site.

Proof of Causation: The *Lauher* Case

Prior to the *Lauher* case[1], which was decided by the California Supreme Court in 2003 (30 Cal.4th 1281), the employee had a relatively low standard of proof to establish a prima facie case that the employer had terminated the employee in violation of Labor Code section 132a. Previously, section 132a had been interpreted in such a manner that the employee only had to establish:

1. That employer engaged in some conduct against an employee (e.g. termination or reassignment to a different job);
2. That the employee believed the action was detrimental to him; and

3. That the employee was industrially injured at the time of the employer's conduct.

In rebuttal, the employer had to prove that the disadvantageous conduct was not caused by, or as a result of, the employee's injury. In the *Lauher* case, the injured employee who had returned to work was required to use sick leave and vacation leave when he missed work and was away from the work place seeking continuing treatment for his industrial injury.

In review, the Supreme Court found that there was a fourth element to the employee's prima facie case. The court stated: "An employer thus does not necessarily engage in 'discrimination' prohibited by section 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting 'discrimination' in section 132a, we assume the Legislature meant to prohibit treating injured employee differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim"

In *Lauher*, the employee alleged that the requirement that he use sick leave and vacation leave to replace his salary for time lost attending a doctor's appointment required as a result of an industrial injury was discriminatory under section 132a. However, the *Lauher* court noted that all employees, those industrially injured and those requiring doctor's appointments because of non-industrial injuries, were treated the same, i.e., they were all required to use sick leave and vacation leave to replace their lost working time.

The court stated: ". . . nothing suggests his employer *singled him out for disadvantageous treatment because of the industrial nature of his injury.*" (italics in original) Thus, there was no discrimination since the fourth element, a requirement that the industrially injured employee be treated differently from other employees, was not satisfied, since all employees, those with industrial injuries and those with non-industrial injuries, were required to use their accrued sick and vacation leave time.

Higher Standard of Proof Necessary to Establish Causation

The recent cases of *Gelson's Supermarkets v. Workers' Comp. Appeals Bd. (Fowler)* (November 2009) 179 Cal.App.4th 201 and *Castaneda v. Galasso's Bakery* (December 2009) ADJ 774763 (POM 0289182) emphasize the substantial standard of proof that employees must satisfy in order to prove that their termination, or other conduct by the employer which was detrimental to them, was a violation of Labor Code section 132a.

The Gelson's Case

In the *Gelson's* case, the employee ("Fowler") suffered an injury to his neck and received workers' compensation benefits for that injury. When he was released to return to work he presented a doctor's note which limited his use of a fork lift truck. As a result, Gelson's advised Fowler that there was no position which could accommodate his restrictions. Shortly thereafter, Fowler presented a new doctor's note stating that he could return to work without restriction. Gelson's, finding the notes to be irreconcilable, asked the doctor to provide a clear statement whether or not Fowler was able to perform the essential functions of his job, with or without reasonable accommodation.

This dispute was not resolved until several months later when a deposition of an agreed medical examiner was taken and he testified that Fowler could perform his usual and customary job. However, as a result of this delay, Fowler filed a 132a petition alleging that he was discriminatorily denied benefits from the time the doctor initially released him, without restrictions, to return to work.

The Workers' Compensation Appeals Board, reviewing an Administrative Law Judge's decision, concluded that Gelson's violated 132a when it did not return Fowler to work after the unconditional release.

Gelson's filed a writ of review and contended that it had not violated 132a because the conflicting "releases" from Fowler's doctor were not adequate to allow the company to determine if the employee could perform the work required for his position. In addition, Gelson's contended that Fowler did not establish that Gelson's treated him differently than non-industrially injured employees.

In reviewing this case the Court of Appeal stated: "to establish a prima facie case of discrimination in violation of section 132a, the employee must show that he suffered an industrial injury, that the employer caused him to suffer some detrimental consequences as a result, and that the employer singled out the employee for disadvantageous treatment because of his injury."

The court found that the employee did not establish that Gelson's "treated him differently from non-industrially injured employees." It concluded that the employee failed to show that "Gelson's would have returned to work a non-industrially injured employee whose physician provided the same" type of releases.

Thus, the employee failed to prove that he was treated "differently" from non-industrially injured employees and therefore was unable to prove a 132a violation. The *Gelson's* court also chastised the WCAB for not applying the *Lauher* standard: "The WCAB's decision in this case applied the former standard which *Lauher* replaced, failed to recognize *Lauher* and did not apply the new standard *Lauher* established." This language set the stage for the Request for Reconsideration filed with the Workers' Compensation Board in the *Galasso's Bakery* case.

Galasso's Bakery Case

Galasso's Bakery terminated a probationary employee for his failure to wear the proper safety equipment while handling hot baking pans. As a result, the hands of the employee were burned. In addition to a workers' compensation claim, the employee filed a 132a petition, alleging that he was terminated because he was injured.

Although the employee alleged that he had used the proper safety equipment, he was unable to present any evidence to that effect, other than his statement. No supervisor had observed the incident; however company personnel testified that the alleged burns would not have occurred if the employee had been wearing the provided safety equipment. In addition, company personnel testified that in their many years of service, they had not heard of or observed similar injuries to employees who used the provided safety equipment.

After an evidentiary hearing, the Administrative Law Judge concluded that the company's testimony was based on "surmise, guess, and/or speculation" and therefore was not sufficient to rebut the employee's testimony that he was fired because he was injured.

On review by the Workers' Compensation Appeals Board, the

Board stated that "section 132a does not preclude an employer from terminating a probationary employee based on speculative reasons, unless those reasons are a pretext for unlawful discrimination." The Board noted that the employer's "speculation" was reasonable, since it was based on past experience.

The Board also stated: "It is not our task to substitute our judgment for that of the employer, if the employer's reasons were not a pretext for unlawful discrimination against an injured worker. [L]iability under section 132a does depend on the employer's intentions. A speculative reason, and even a mistaken or poor reason, does not invoke liability under section 132a. A violation of section 132a requires that the employer's detrimental conduct be done *because* of the injury." (Emphasis in original)

Finally, the Board concluded that the employee had not submitted any evidence that he was treated any differently that any other employee who violated company safety rules. The Board noted: "that applicant has satisfied the first two elements [the action or conduct and the detriment] of his prima facie case: defendant's conduct (termination) was detrimental to applicant. Applicant has failed, however, to satisfy the third and fourth elements. He did not show that defendant's conduct was done because of applicant's injury.

It appears from the evidence that the termination was due to a genuine belief, justified or not, that applicant violated the employer's safety rule regarding wearing of protective gloves. As to the fourth element of applicant's prima facie case, disparate treatment, applicant offered no evidence that other probationary employees who were believed to have violated safety rules, but who were not industrially injured, were disciplined differently. To the contrary, the unrebutted testimony regarding disciplinary procedures indicates that any probationary employee who violates a major safety rule is terminated. The occurrence of an industrial injury was not shown to be a factor. We find no evidence that applicant was 'singled out' because he was industrially injured."

With respect to the fourth prong, disparate treatment, it is worth repeating that the Board found that the employee "offered no evidence that other probationary employees who were believed to have violated safety rules, but who were not industrially injured, were disciplined differently."

Labor Code Charge

These cases are of substantial importance for the defense against a Labor Code section132a charge by an injured employee. The employee has the burden of showing not only that his employer took some detrimental action toward him (such as termination), but also that the action was taken *because* of his industrial injury. The employee must establish that he was singled out for disadvantageous treatment.

In the *Gelson's* case, Fowler failed to establish that Gelson's treated him any differently that it treated non-industrially injured employees. It required all injured employees, whether injured on or off the job, to present clear medical evidence of their ability to perform the essential functions of their job before they would be returned to work. There was no evidence that Fowler was singled out for disadvantageous treatment.

In the *Galasso's* case, the company's good faith belief that they were terminating the employee because of a safety violation, and not an injury, obviates one of the prongs necessary to establish a 132a violation. In addition, the employee must establish that he was treated in a disparate manner from other employees. Thus if, as in *Galasso's*, the company terminated all employees for the same misconduct, i.e. failure to comply with safety rules, then there can be no violation of 132a since there is no disparate treatment.

It is the employee's burden to show that he was treated in a disparate manner from non-industrially injured employees. Consistency of treatment for all employees is vital for a sound Labor Code section 132a defense.

Everett F. Meiners *practices labor and employment law for the firm of Parker, Milliken, Clark, O'Hara and Samuelian in Los Angeles. He also mediates cases, mainly employment matters, for the Los Angeles Superior Court, the Court of Appeal, Second Appellate District, and ARC (Alternative Resolution Centers). He can be reached at (213) 683-6610 or efm@pmcos.com.*

[1] *Department of Rehabilitation v. Workers' Compensation Appeals Board and Ronald Lauher.*

MCLE Test No. 26

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Section 132a of the California Labor Code protects injured employees who file workers' compensation claims because they were injured while working.
   True
   False

2. It is a violation of section 132a for an employer to fire an employee because the employee advises his employer that the employee may file a workers' compensation claim.
   True
   False

3. It is a violation of section 132a for an employer to reassign an employee to a less desirable job because the employer learns that the employee plans on testifying in support of an injured employee's workers' compensation claim.
   True
   False

4. There is criminal and civil liability for a violation of section 132a.
   True
   False

5. A violation of section 132a results in the injured employee receiving a 50% increase in the benefits he would normally receive.
   True
   False

6. In addition, the injured employee is entitled to reinstatement to his job and reimbursement for lost wages and work benefits.
   True
   False

7. The employer's workers' compensation carrier can represent the employer in a section 132a claim.
   True
   False

8. The employer's workers' compensation carrier will reimburse the employee for legal fees incurred in defending against a section 132a claim.
   True
   False

9. The employer can obtain insurance to protect him from any potential liability, including attorney's fees, for a section 132a claim.
   True
   False

10. The employer must engage a private attorney to represent the employer in the event of a section 132a claim.
    True
    False

11. The injured employee has two years within which to file a claim under section 132a that his employer fired him for filing a workers' compensation claim.
    True
    False

12. The *Lauher* case stands for the proposition than an injured employee must show that he received disadvantageous treatment from the employer, which non-industrially injured employees did not suffer, to be entitled to receive section 132a benefits.
    True
    False

13. It is a violation of section 132a for an employer to require industrially injured employees and non-industrially injured employees to use their vacation time benefits for any absences caused by visiting the doctor for treatment of the injury.
    True
    False

14. An employee establishes a prima facie violation of section 132a if he shows that he incurred an industrial injury, that he suffered some detriment as a result and that he was singled out for disadvantageous treatment because of his injury.
    True
    False

15. *The Gelson's* case emphasized that the employee bears the burden of establishing that his employer "singled" him out for disadvantageous treatment because of his industrial injury.
    True
    False

16. The Administrative Law Judge in the *Galasso's Bakery* case found that the employer's factual statements were improper because they were based on "surmise, guess, and/or speculation."
    True
    False

17. On appeal the WCAB found that "section 132a does not preclude an employer from terminating a probationary employee based on speculative reasons, unless those reasons are a pretext for unlawful discrimination."
    True
    False

18. A speculative reason, and even a mistaken or poor reason, does not result in liability under section 132a.
    True
    False

19. A violation of section 132a requires that the employer's detrimental conduct be done because of the injury.
    True
    False

20. The injured employee must show that he was treated in a disparate manner from non-industrially injured employees.
    True
    False

MCLE Answer Sheet No. 26

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

   San Fernando Valley Bar Association
   21250 Califa Street, Suite 113
   Woodland Hills, CA 91367

METHOD OF PAYMENT:
- ❒ Check or money order payable to "SFVBA"
- ❒ Please charge my credit card for $_____.

_____
Credit Card Number Exp. Date

_____
Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

Q&A with New SFVBA President Seymour I. Amster

By Angela M. Hutchinson

THE SAN FERNANDO VALLEY BAR ASSOCIATION IS EXCITED about its new President Seymour Amster. The Bar is grateful to have experienced the leadership of outgoing President Robert Flagg. His legacy will be cherished for the vision he set forth and the goals he accomplished during the past year.

"Robert was a leader who led without any fanfare or drama. It was never about him it was always about the SFVBA," says Amster. "I will do my utmost to continue the tradition of the great leadership provided by those who served before me. Only by continuing the successes of our predecessors can the future of the Bar be assured.

"The Bar serves as a vital institution for our members to network with each other. Through this networking environment our members are able to not only expand their practices but also able to expand their minds by exchanging ideas and experiences. In this way we our better able to serve our community by becoming better lawyers."

Seymour I. Amster

Q: How would you describe your experience as an SFVBA member?
A: Very rewarding. [Being an SFVBA member] gives me an opportunity to meet other attorneys and help people through such programs as Blanket the Homeless.

Q: How has the SFVBA contributed to your success as an attorney?
A: [I have} fostered friendships among the other members of the Bar and [can] call on their help when I need it. I was recently able to win a death penalty trial due to the expert testimony of past president Patti McCabe. Her testimony helped me save a man's life.

Q: What inspired you to become involved in the SFVBA's leadership?
A: The opportunity to continue the great work of our past president [is what inspired me to become involved].

Q: As the new SFVBA president, what are some of your goals for the upcoming year?
A: To have our organization become more active in our local high schools with our law post program [is one of my presidency goals for the upcoming year].

Q: What strategic efforts should the Bar pursue to recruit new members and retain current ones?
A: We need an identity, a reason for members to be part of the Bar. I feel our law post program will do this. The more members we get involved in the program, the more they will see the good work we do and how they can make a difference in the community by being part of the SFVBA.

Q: You are passionate about exposing youth to law, why is that important to you?
A: In order for us to be a true democratic society, our leaders must come from every socio-economic group, so that every member of our population has a voice. The only way to do this is to enlighten our youth from all socio-economic groups that they have the opportunity to be lawyers. Once they are lawyers, they will have an opportunity to be leaders in our society, because many leaders of our society were once lawyers.

Q: What do you like most about being an attorney?
A: Jury trials.

Q: If you could instantly change one aspect of our legal system, what would it be?
A: [I would change our legal system so] that jurors make decisions more on the facts and the law instead of emotion.

Q: What is your favorite non-fiction book, and why?
A: The Art of War. No other book describes how to handle a contest of wills better, which law, and often life is.

Q: Finish this sentence: "If there were more time in the day, I would…"
A: … write a novel.

San Fernando Valley Bar Association

Member Benefits

■ SFVBA rents its Executive Boardroom and Small Conference Room for depositions and hearings. Amenities include breakout room, beverage service, and free parking. Only $150 per day.

■ Wells Fargo Insurance Services offers an exclusive Lawyers Professional Liability insurance program for law firms of 1-10 attorneys. Call Terri Peckinpaugh at (818) 464-9353.

■ The SFVBA offers Fastcase, a comprehensive online law library, as a free service to all SFVBA members. Click on the Fastcase logo at www.sfvba. org to enjoy unlimited usage, unlimited customer service and unlimited printing, all at no cost.

■ Powered by CompuLaw, Deadlines On Demand (www.deadlines.com) is an online legal research service that offers accurate, reliable, and instant rules-based deadlines on a pay-per-use basis. SFVBA members receive three free searches. Contact Melissa Notari at (888)363-5522 ext. 2113 or mnotari@deadlines.com.

■ As a member of the ABA's House of Delegates, SFVBA Members can take advantage of the ABA Retirement Funds program, administered by global leader State Street. The program provides full service, cost-effective retirement plan solutions to law firms of all sizes, and charges no out-of-pocket fees for administrative services. For more information see the program's prospectus at www.abaretirement.com or contact Plan Consultant Patrick Conlon at (617) 376-9326.

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■ Contact the SFVBA office to receive a package of discount coupons & membership cards for Southern California's major theme parks and attractions.

■ Now Messenger Service offers members who open new accounts a 5% discount off their current rates. Call (818) 774-9111.

■ SFVBA members save $10 on new AAA Membership. Please also ask us about new insurance with many available discounts. Call Hazel Sheldon at (818) 615-2289. Mention campaign code 39727.

■ Receive 10% off Super Value daily and weekly rates and 5% off promotional rates from Avis Rent A Car. To make a reservation, call (800) 331-1212 or visit www.AVIS.com. When reserving a vehicle, provide discount AWD Number G133902.

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Why do I belong to the SFVBA?

PROFESSIONALISM

David Gurnick
Franchise Law
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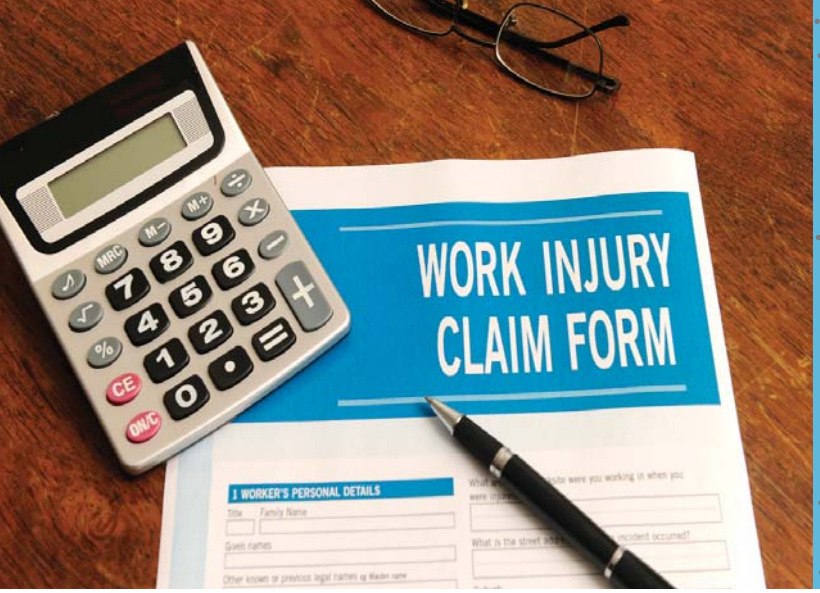
"I belong to SFVBA to serve and improve our honorable profession and to help the community. The SFVBA helps lawyers be better lawyers and deliver better service to clients, helps our courts dispense justice, and helps members of the public get needed legal services.

Along the way, the SFVBA provides many benefits: friendships, referrals, education, leadership and fun. SFVBA is an essential part of being and achieving all you can as a lawyer in the Valley."

Renew your SFVBA membership online at WWW.SFVBA.ORG or call (818) 227-0490, ext. 110.



Federal Workers' Compensation Claims

By Max Gest

WORKERS' COMPENSATION CLAIMS FOR over two million federal civilian employees are governed by the Federal Employees' Compensation Act (FECA), which is codified at 5 U.S.C. Section 8101 *et seq.* The rules and regulations are more meaningfully discussed in chapter two of the FECA Procedure Manual, which is utilized by claims personnel at the Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs (OWCP). There are very few publications outside of government publications concerning FECA claims procedures.

From a practice standpoint, it is essential to understand that the rules and regulations governing federal workers' compensation claims are significantly different from those involved in state workers' compensation and personal injury claims. One major difference is that an applicant's representative must provide an itemized statement showing the hourly rate, the number of hours worked, the type of work performed and the total amount charged for the representation (excluding administrative costs). Contingency fee arrangements are not permitted. In addition, percentage fee arrangements are not permitted.

There are no liens for attorneys or physicians in the federal system. However, attorneys may request deposits from claimants. These funds must be placed into a segregated account, usually a trust account or escrow account, and remain there until fees are approved by the Claims Examiners at OWCP.

Federal employees whose claims are accepted may receive benefits which include payment of medical bills for evaluations and, in some cases, payment of disability compensation benefits. Monetary benefits under the FECA are tax-free.

Requirements for Federal Claim

There are five basic requirements for a claim to be accepted.

1. The claim must be timely. Written notice of injury or illness must be filed within three years of the date of injury or illness. In the case of an ongoing injury, such as a repetitive motion injury, the claimant must file the claim within three years of the date of last exposure to the employment factors which have caused and/or aggravated the condition claimed. In the case of latent injury claims, time begins to run when the injured employee becomes aware, or reasonably should have become aware, of a possible relationship between the disease or condition and the employment.
2. A claimant must also be a civilian employee for purposes of the FECA. This is very seldom a problem, as most claimants are quite obviously civilian employees who work for government agencies. There are, however, some individuals who are not direct employees of the federal government but who may be covered by the FECA.
3. Fact of injury must also be shown. It must be demonstrated that the employee actually experienced the accident, event or employment factor which caused the injury. In this regard, witness statements can be of great importance. However, this requirement can be satisfied based upon the statement of the claimant alone, if that statement is not contradicted by factual evidence regarding the claim. It must also be shown by medical evidence that the claimant suffered a diagnosed injury or illness.
4. Performance of duty, which is basically the equivalent of AOE/COE (arising out of employment and in the course of employment), is another requirement. The question is generally whether the individual was performing his or her duties on the date, at the time and at the place where the injury or illness occurred. This issue is generally fairly straightforward in physical injury claims. The issue of performance of duty becomes much more important and much more difficult in emotional illness claims.
5. The next requirement is causal relationship. The injury or illness suffered by the claimant must be shown by medical evidence to be causally related to the duties performed by the claimant.

When the claimant meets all five of these requirements, the claim should be accepted by the Claims Examiners at OWCP.

Claim Approved

A claimant with an approved claim has the right to select a treating physician. Once an approved treating physician has been selected by the claimant and recognized by the Claims Examiners at OWCP, it is extremely difficult to change treating physicians.

Another benefit available to claimants with accepted physical injury claims is the schedule award, which is a payment of additional compensation for permanent impairment related to the accepted condition. The treating physician must provide a report advising that the claimant's condition has become permanent and stationary and reached a

point of maximum medical improvement, indicating the date of maximum medical improvement. There are no schedule awards for the head, the heart or the spine. However, when a claim has been accepted for a spine condition, the claimant may receive a schedule award for permanent impairment to an arm or leg resulting from the accepted spine condition.

Second Opinions

The Claims Examiners at OWCP may at any time decide to refer a claimant for a second opinion physician (SECOP) evaluation. SECOPs are physicians who work for a private company which contracts with OWCP. The SECOP is provided with medical documentation from the case file. The SECOP is also provided with a very important document called the Statement of Accepted Facts (SOAF). This advises the SECOP of the background of the case, including information concerning the conditions accepted.

Under FECA rules and regulations, the SOAF must be utilized by treating physicians, evaluating physicians, SECOPs and referee physicians as the only factual framework for these physicians' opinions. The SECOP is also provided with another document entitled Questions to the Second Opinion Physician. These questions generally deal with the issue of the conditions diagnosed by the SECOP, issues involving temporary or permanent aggravation, issues regarding disability, issues regarding whether or not the claimant continues to suffer residuals of the accepted injury, as well as issues regarding the permanent impairment to a part of the body in regards to schedule award claims.

When the SECOP's report is adverse to the claimant, it is absolutely essential that the claimant's treating physician or another evaluating physician provide a rebuttal report to the opinions and conclusions expressed by the SECOP. The report should state that the physician has received and reviewed the SOAF, has utilized the SOAF as the only factual basis for the opinions presented, and has received and reviewed the report of the SECOP. The physician's report must be historically accurate based upon the SOAF and responsive to the questions posed to the SECOP. The report must also contain appropriate medical rationale.

When the Claims Examiner determines that there exists an unresolved conflict of medical evidence, usually between the report of the treating physician and the report of the SECOP, the claimant will be referred to a referee physician. This physician must be selected at random, based upon geographical proximity to the claimant's home or work location, from a national database, *Marquis Who's Who of Medical Specialists*.

When the Claims Examiner determines that the referee physician's report is properly based on an accurate history and the SOAF and contains appropriate medical rationale, the report of the referee physician will be provided with additional or special weight. This additional or special weight means that a mere disagreement between a treating or evaluating physician and the referee physician will not be sufficient to shift the weight of medical evidence from the referee physician.

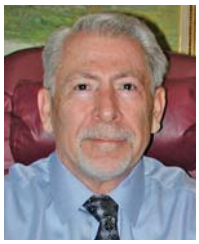
Appeal Rights

Whenever the Claims Examiner at OWCP generates a decision which is adverse to the claimant in whole or in part, the claimant is provided with a formal decision with appeal rights. The initial decision and certain other decisions give the claimant the right to appeal to the Branch of Hearings and Review by way of a telephonic hearing, an oral hearing, or through an Examination of the Written Record. Oral hearings are either in person, with the hearing representative meeting with the claimant, or, increasingly, by teleconference in cities where teleconferencing is available. A request for a hearing must be received by the Branch of Hearings and Review within 30 days of the date of the decision being appealed.

All merit decisions give the claimant the right to request reconsideration with a Reconsideration Examiner at the District Office of OWCP. The Request for Reconsideration must include new information not previously considered and must be received by OWCP within one year of the decision.

In addition, all merit decisions give the claimant the right to appeal to the Employees' Compensation Appeals Board. Most ECAB appeals are papers-only. ECAB hearings are discretionary. When granted, they are held in Washington, D.C. The ECAB can only consider information and documentation in the case file as of the date of the decision being appealed. No new evidence can be considered by the ECAB. The Application for Review must be received by the ECAB within 180 days of the decision being appealed.

Fewer than approximately 100 attorneys across the U.S. represent federal civilian employees in regards to their federal workers' compensation claims.



Max Gest *is a graduate of Loyola Law School. He has been in practice in West Los Angeles for over 40 years. The major emphasis of his practice is representing claimants in federal workers' compensation claims. Gest is AV-rated by Martindale Hubbell. He can be reached at (310) 553-2700.*

Striking Life's Balance

By John D. Weiss

"MASSIVE PILEUP ON LIFE'S HIGHWAY – many lawyers suffer injury; colleagues, friends and family blame loss of balance. Re-imagined routine contemplated," read the headline in an attorney's bad dream. He prayed he was not part of the carnage on the freeway, but it was hard to tell. It was late, there were two more weeks of trial to go, and there was nothing in the market at midnight that looked even mildly appealing. The attorney turned the corner past the end-cap and began to stroll down an aisle he had never visited before. He noted interesting product ads on this aisle: inner peace, healthy lifestyles, broader perspective, deeper understandings and hidden meanings. The offerings were cool, but there were no price tags.

At last he found the display he'd been looking for — balance. He couldn't tell if it was his eyes glossing over or some kind of cosmic fog was blowing in but he was having a devil of a time reading about the products. He called for help (he'd done that a lot lately) but no one seemed to hear, so he moved closer to the shelf.

Strike a Balance

The attorney wanted balance, but life, it seemed, was always in the way. How had he gotten here anyway? It all seemed to start out okay — going to law school, passing the Bar (but not all of them), getting a decent job and working his way up to partner. That, he surmised, might have been the first problem. Work was not just Monday through Friday, it was everyday. Sure, he'd made loads of money, but he'd long lost the passion for how to do anything but spend or save it.

He was married, had kids, but he hadn't really connected with them for a while — a dad and spouse in name only now. He should have seen it coming; he should have seen it when he opened his eyes this morning and looked in the mirror and gasped, "Who is that?" What happened to that clean sheet of paper he was working on to map out life's pursuits? Did it morph into machine-generated discovery requests, depositions so numerous that one blurred into the other, pre-trial prep that would drown an army and the four week trial, only to have the jury go the other way and now having to explain to the client why an appeal looks good and how much more it's going to cost.

Take a Vacation

Exactly what else had he been doing lately besides working, eating and sleeping? He remembered a lunch he had with some of the associates in his firm. They took their Sabbath seriously — no work, no phones, no email, no tweets, no computers, a real break. They said it allowed them to work their butts off for six days because they knew that every week, they would have one day of real rest, a time to charge the batteries, connect with their family, friends, community and spirit. Some of them even said prayers in the morning, every morning — said it "set the table" for their day. His secretary raved about her exercise routine — some days she swam, other days she took spinning classes, did Pilates or rode her bike, sometimes she lifted weights or just took brisk walks — said it made her feel great and she hadn't missed a day of work in ages.

Another attorney who did everything in the firm except practice law, he actually took his vacations. He went to different spots and set things up so he wasn't tied to his iPhone. He also made it a point to take time to go to places where there was no reception except the one he most looked forward to. A colleague in IT was always talking about moderation; she never did anything in excess, not with food, whiskey, money. She believed life has six gears and she was fine to spend most of it in third — it fit her well.

A mix in the routine, a lower gear — maybe that was the trick. But first, the attorney had to find the clutch. For the first time in a long time, the thought of attending a baseball game appealed to him, not because his team was in the race to cop the flag, but because the game was slow. For that matter, so was reading that stack of novels he hadn't

cracked since the holidays. He used to play in a band in high school, but the sax just sat there now — as hard as he tried, he could not remember how free he felt getting lost in his music, but the prospect of a musical jail break tonight was magnetic.

Could he actually work, exercise, eat a bit less, meditate and dial back every day? Was that possible? Who does that? He laughed at the prospect, especially during trial — no one has time. Then he started to do the math: how often was he in trial? If he slept 6 hours a night, was he really going to work the other 18? Could he look at a plate of food, draw a visual line and say: this much I'll eat now, the rest later? Did he have 30 minutes in a day to exercise or read or listen to or play music, sip scotch or have dinner with the family and actually have a chin-wag?

Plan a Party

The attorney recalled a conversation he had with one of his law partners. Years ago, when she was a puppy lawyer sitting first chair in one of her first jury trials, her eldest son was turning ten and wanted a "Star Wars" party. She had arranged for a Deputy Sherriff she knew from Criminal who was 6'4" and broad shouldered to come as Darth Vader and take her son and ten friends to the multiplex to see the movie. The morning of the party, the Deputy called, apologizing that a colleague had the flu and he had to cover. So his partner, who played hoops in college and in her bare feet towered almost over everyone, donned her black boots with the 6-inch stiletto heals, cape and helmet, in the middle of her trial, and gallantly lead her son and his mates to the movies. Her son was thrilled while the mall rats were terrified. The attorney's partner finished her trial later that week and won. It was not a unanimous verdict, but her judgment had already been rendered. She did what she never thought she could, or even should do — took an afternoon off deep into a jury trial and never missed a beat.

Missed beats. When the attorney finally opened his eyes, that was the first thing his doctor talked about. He had been lucky this time — two stents and a triple by-pass later, his doctor told him that his heart had missed a bunch of beats, and a few more minutes later to the hospital — he did not want to think about what would have happened.

The doctor said if he wanted to dance at his daughter's wedding, he needed to make changes, now. Someone else would have to carry the trial load, grazing instead of gorging, and a cardio-vascular routine to clear his mind and exercise his body.

The doctor took out a tongue depressor and balanced it on his index finger, saying: "This is you. If it can't be you, no one inside or outside this building will be able to save you the next time."

Learn to Delegate

It was an effective piece of demonstrative evidence and the message was clear. But how would *he* do it? Delegating had never been his strong suit, but other folks could probably shoulder some of the load without bumping the planet off its axis. Spirituality? He had never been particularly religious and the visual of sitting in a lotus position on a rug just did not move him. But the idea of quiet time did. Swimming laps seemed boring, but he could not be reached in the water — the non-aquatic world would just have to keep rotating without him, even if it was just for half an hour. And the sax — well, he knew he was no Charlie Parker or John Coltrane, but deep down, he loved the sound he made when he played. It stayed with him long after he parked the sax back in its case. Consuming food without a conveyor belt was terrifying, but he could try. The concept of unprocessed food was a revelation — was there actually stuff out there that had not already been refined, and who ate it, other than Woodstock refugees?

Everyone who cared about the attorney cheered him to change. Maybe tonight, he would have sweet dreams, because tomorrow, he could and would change. All of the scales were tipped, but he knew how to get them synced, to point toward balance — ease out the clutch, find a gear that felt right, and drive his ride past that massive pileup on life's highway. With that in his rearview mirror, the open road beckoned, and the attorney would take it.

***John D. Weiss** is a full time neutral with Alternative Resolution Centers in Century City. He can be reached at (310) 284-8224 or johndweiss@att.net.*

New Members

The following joined the SFVBA in August 2010:

Marshall R. Cole
Nemecek & Cole
Sherman Oaks
(818) 788-9500
mcole@nemecek-cole.com
Business Litigation

Nelson F. Cutter
Cutter & Lax
Encino
(818) 269-9584
nelson@cutterlaw.net
Family Law

Saman Ebriani
Law Offices of Saman Ebriani
Los Angeles
(310) 804-3386
jebriani26@aol.com
Business Litigation

Ross B. Erlich
Law Offices of Jeffrey S. Vallens
Sherman Oaks
(818) 783-5700
rosserlich@gmail.com
Criminal

Veronica W. Glaze
Pearson, Simon, Warshaw & Penny, LLP
Sherman Oaks
(818) 788-8300
vglaze@pswplaw.com
Business Litigation

Jonas M. Grant
Law Office of Jonas M. Grant, APC
Woodland Hills
(818) 786-4876
jonas@incorporatecalifornia.com
Business Law, Intellectual Property, Employment Law, Estate Planning

Sara J. Lee
North Hollywood
(818) 726-7878
sara.jennifer.lee@gmail.com
Real Property

Jack M. Liebhaber
Gray Duffy, LLP
Encino
(818) 907-4000
jliebhaber@grayduffylaw.com
Litigation

David A. Myers
Nemecek & Cole
Sherman Oaks
(818) 788-9500
dmyers@nemecek-cole.com
Business Litigation

Maria V. Primushko
Law Office of Maria V. Primushko
Valley Village
(818)760-8292
mplawoffices@yahoo.com
Bankruptcy

Wesley Barry Ross
ROSS Mediation Services
Burbank
(818) 840-0950
BarryRoss@ROSSmediation.com
Alternative Dispute Resolution: Arbitration and Mediation

David Brian Tipton
Granada Hills
(401) 484-7866
davidbtipton@gmail.com
Litigation

Equilibrium – The Art of Work/Life Balance

BRIAN E. KOEGLE
SCVBA President

"What you leave behind is not what is engraved in stone monuments, but what is woven into the lives of others." – Pericles

FOR MANY ATTORNEYS, managing both a legal career and any sort of life outside of work is a difficult, if not impossible task. Long hours, deadlines, and client maintenance often increase stress and make any "downtime" all the more precious. Adding to that stress, the billable hour requirements set by most firms create an inhospitable environment for a healthy work/life balance. That stress will commonly manifest itself in burnout, substance abuse and other stress-related illnesses, will frequently reduce productivity, and can even end in catastrophe.

For those attorneys who also have families, making and spending quality time with their spouses and children, while a priority, often takes a backseat to work, career and progress. Consequently, the relationships that really matter suffer at the expense of our own professional accomplishments.

The problem has become so prevalent among attorneys that the American Bar Association and the State Bar of California have both committed significant resources to assist attorneys in balancing their careers with a healthy and happy personal life. Articles, books, seminars and videos are specifically designed to focus us on avoiding burnout, refining time management skills, and enjoying our (limited) downtime, all in an effort to help those within our profession cope with the natural stressors we experience on a daily basis. The problem is for most attorneys, these resources rarely affect any real change in our behavior!

Sadly, this lack of balance is increasingly leading to discontent within our industry. According to an ABA survey of attorneys, as reported by the *New York Times* in January 2008, 44% of lawyers surveyed indicated they would not recommend the profession to a young person interested in the field.

Further, although the statisticians disagree on the relevance and/or significance of the data, it is undisputed that the number of reported cases of substance abuse (including alcoholism), major depressive disorder and suicides among U.S. practicing attorneys have steadily increased over the course of the last twenty-five years, to reach all-time highs within our industry (www.abanet.org; see also, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns among a Sample of Practicing Lawyers*, 10 J.L. & Health 1 (1996); Connie J. A. Beck).

The Santa Clarita Valley Bar Association proudly encourages its members to enjoy a healthy work/life balance. Nearly all of SCVBA members live or work in the Santa Clarita Valley, with many doing both within the community. The SCVBA encourages members to interact and network socially through our networking mixers and breakfasts. The association also strives to provide a local alternative for its members to obtain continuing legal education credits, which reduces the stress of searching out those credits as the CLE deadline approaches. The SCVBA encourages its members to give back to the local community through SCVBA outreach panels and annual Law Appreciation Day.

While all attorneys strive to succeed in the legal profession, it is important to remember that life is short. A lawyer's epitaph will never read: "I really wish I had billed more hours."

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Calendar

San Fernando Valley Bar Association

Annual Autumn Gala & Installation of Officers and Trustees

SFVBA President
Seymour I. Amster
and
VCLF President
Michael R. Hoff

Law and Media Award to
Joe Mantegna
Star of *Criminal Minds*

President's Award to
David I. Karp

Saturday Night
October 2, 2010
Warner Center Marriott
6:00 PM

$95 Individual Tickets
$950 Table of Ten

Santa Clarita Valley Bar Association
Sixth Annual Law Appreciation Day

OCTOBER 1
11:30 AM
HYATT REGENCY
VALENCIA

Individual tickets are $60. To RSVP, email info@scvbar.org or call Sam Price at (661).290-2991.

Probate & Estate Planning Section
California's Approach to Pre-Death Will Contests

OCTOBER 12
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorney Matt McMurtrey of Sacks Glazier Franklin & Lodise will address this pertinent topic.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1 MCLE HOUR	

Women Lawyers Section
Avoiding the Malpractice Traps

OCTOBER 19
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Margo Milman of Grosslight Insurance will give her insights into malpractice claims and the insurance structure.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
$40 at the door	$50 at the door
1 MCLE HOUR	

Workers' Compensation Section
Almaraz/Guzman II – Real Life Examples

OCTOBER 20
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Richard Rosenberg, M.D. will update the group on this important topic.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1 MCLE HOUR	

Litigation Section
Voir Dire and Jury Selection

OCTOBER 21
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorney John Rosenberg will address this critical aspect of your case.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1 MCLE HOUR	

SFVBA Business Law, Real Property & Bankruptcy Section

Farewell Luncheon
Honoring Retiring
Bankruptcy Judges
Geraldine Mund
and
Kathleen Thompson

Friday, October 22, 2010
12:00 Noon
Warner Center Marriott

Join Us for this Fond Look Back

$50 Ticket
$500 Table of Ten

Family Law Section
Child Abduction

OCTOBER 25
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

This seminar addresses your client's concerns regarding child abduction, means to prevent it and remedies including the Hague Convention.

MEMBERS	NON-MEMBERS
$45 prepaid	$55 prepaid
$55 at the door	$65 at the door
1 MCLE HOUR	

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. To register for an event listed on this page, please contact Linda at (818) 227-0490, ext. 105 or events@sfvba.org.

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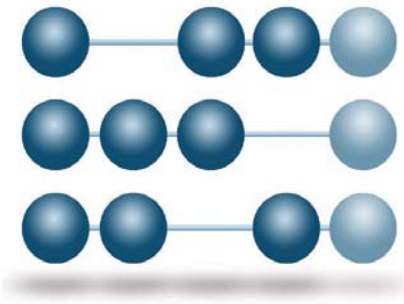

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