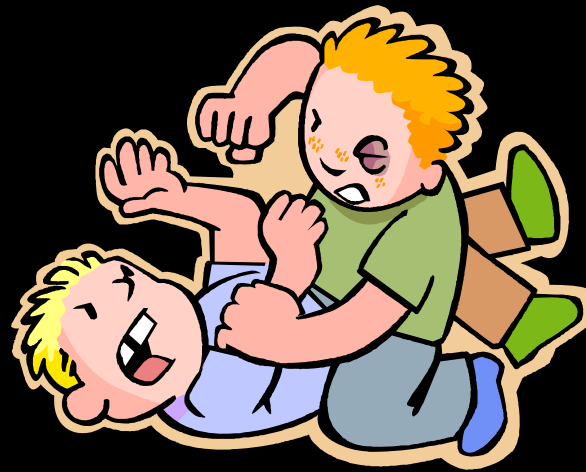


Ogilvie III



“Back To The Drawing Board”

Donald R. Barthel
Bradford & Barthel, LLP
Chris Brigham, MD
Impairment Resources, LLC



Welcome to our Webinar Series

- Goal is to provide insights to the challenges encountered in managing California workers' compensation cases – therefore providing you with solutions that result in better outcomes.
- Provide opportunity to interact with highly regarded legal and medical experts who will educate, offer guidance, entertain, and answer your questions.



Your Hosts

- Christopher R. Brigham, MD
Impairment Resources, LLC
www.impairment.com



- Donald R. Barthel, Esquire
Bradford & Barthel, LLP
www.bradfordbarthel.com



Don Barthel, Esq.



- Donald R. Barthel has dedicated his legal career to the defense of employers' rights in the arenas of labor law, employment law and workers' compensation. During the last dozen years, his practice has exclusively focused on workers' compensation defense. With many years' experience in southern and northern California, he has appeared at virtually every WCAB District Office in the state.
- Bradford & Barthel has provided quality legal services in California since 1997. We specialize in Workers' Compensation claims and Personal Injury.
- www.bradfordbarthel.com



Chris Brigham, MD



- Christopher R. Brigham, MD is Chairman of Impairment Resources and has dedicated his medical career to understanding the complexities of impairment and disability. He is the Editor of the *Guides Newsletter*, Senior Contributing Editor of the Sixth Edition, and authored over 200 publications. He is a board-certified occupational medicine licensed in California who understands the uniqueness of California workers' compensation.
- Impairment Resources, LLC and its predecessor have provided expertise on the use of the *Guides* since 1995. The goal of the organization is to drive accurate ratings and serves clients internationally.
- www.impairment.com



California Ratings

What You Don't Know Will Cost you

- 9/13 *Untangling Ogilvie*
- 10/20 *Unraveling the Mysteries of Rating*
- 11/17 *Apportionment – Every Defendants' Friend*
- 12/14 *Doctor Cross-Examination*

- Submit your questions in advance by emailing
 - Don dbarthel@bradfordbarthel.com
 - Chris cbrigham@impairment.com



DFEC

What's the issue?

It's not about...



...despite CAAA's claims!



What do YOU think it's about?

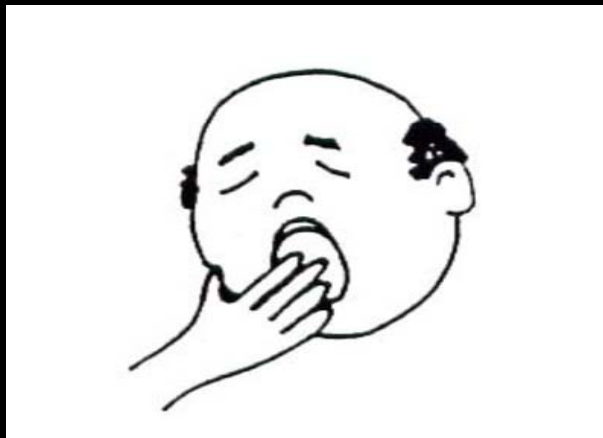


Money...
(ain't it always!??!)



What is P.D. now based on?

- “Nature of the physical injury or disfigurement” (AMA-based)
- Occupation
- Age



YAWN!

What is P.D. now based on? (continued)

- “Employee’s diminished future earning capacity” (FEC)

HUH?

What about competing in “the open labor market”?



FEC Adjustment

- All impairments fit into one of eight ranks
- Rank 1 = 10% increase = min. adj.
- Rank 8 = 40% increase = max adj.



Ogilvie v. SFO City/County

I 2/3/09 – *En Banc*

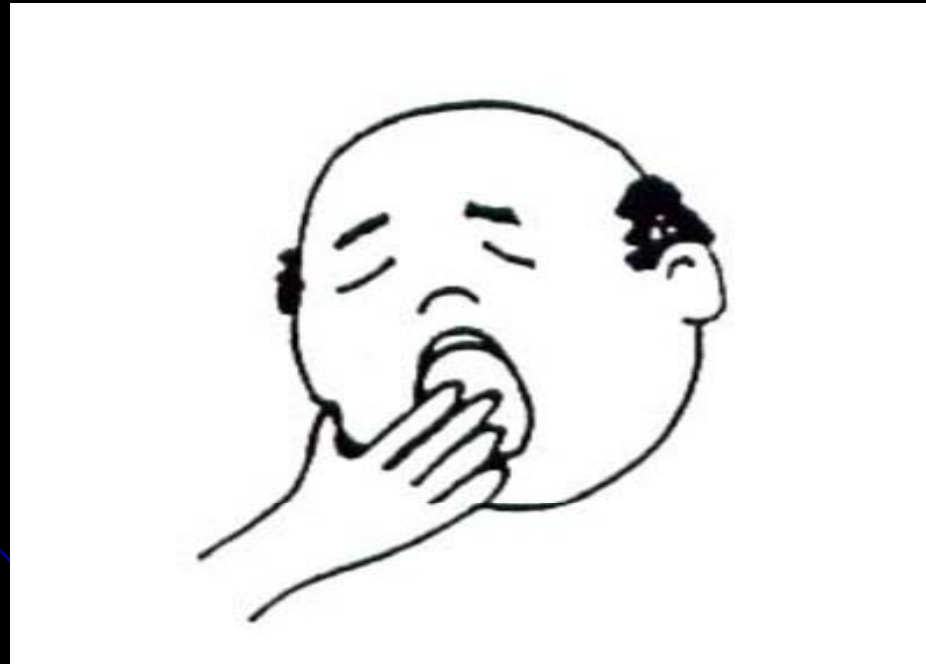
II 9/3/09 – *En Banc*



What Was All About?

What the majority *really* said...

NUMBER 1: The DFEC “portion of the Schedule” is rebuttable.



YAWN!

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What the majority *really* said...

NUMBER 2: Here's how to rebut the DFEC...





Law Offices of
Bradford & Barthel, LLP

Ogilvie Calculator

Enter injured worker's after injury earnings:

Enter Similarly Situated Employee eaming:

Enter Whole Person Impairment:

Calculate

Estimated Earnings loss:

Proportional Earnings Loss:

Individualized Rating to Proportional Earnings Loss Ratio:

Future Earnings Capacity:

Future Earnings Capacity multiplier:

WPI adjusted for FEC:

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1st DCA says to WCAB,



(7/29/11)



QUESTION



Can DFEC modifier be rebutted...really?



QUESTION



Can DFEC be rebutted using the WCAB's
"Ogilvie formula"?





"When [the WCAB] devised [the *Ogilvie* formula], the WCAB acted in excess of its authority...Nothing in [SB] 899 authorizes... the calculation of an alternative [DFEC...] as the WCAB devised in order to resolve *Ogilvie's* claim."

Say “Goodbye” to...

Computer program gobbly-gook



"Ogilvie I & II's "simple formula" is OUT!

CAAA asks,



REBUTTING THE DFEC...



CAAA



3 OPTIONS

1. **Factual Errors**
2. Complicating Factors
3. LeBoeuf

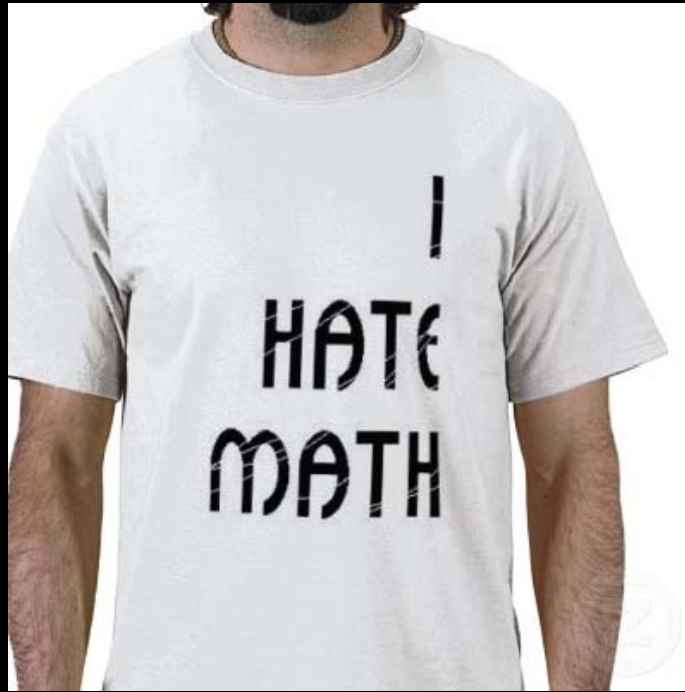


1. FACTUAL ERRORS

The "possibility an employee can demonstrate...an error in [DFEC] is more than theoretical".

I've got some...





"at the time the [FEC] adjustments were established, there was no direct link between the data used by RAND and the [AMA] Guides."

1. FACTUAL ERRORS

RAND itself noted "one of the challenges faced by...RAND...was that the data previously assembled to consider earnings loss attributable to certain injuries was categorized by descriptions used by [the pre-SB 899 PD] Rating System, while [SB] 899 requires injury descriptions based on the [AMA] Guides"



1. FACTUAL ERRORS



This is a job for...



ROSA MORAN
(your brand new AD!)



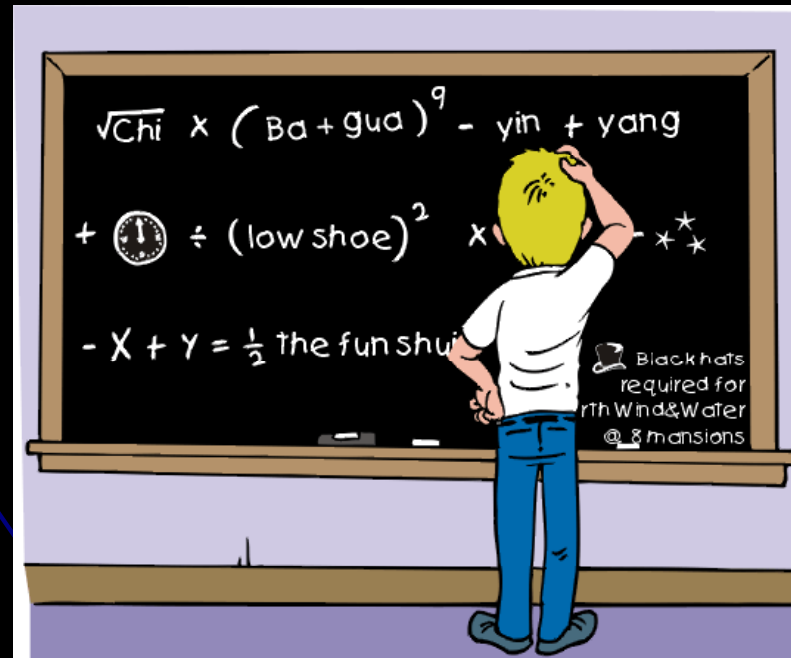
Can you say “Cross-Walk” Study?

See *Boughner v. Comp USA* (2008 en banc) 73
Cal.Comp.Cases 854



3 OPTIONS

1. Factual Errors
2. Complicating Factors
3. LeBoeuf



2. COMPLICATING FACTORS

"an employee may challenge the [DFEC]...by showing...the omission of **medical complications** aggravating the employee's disability in preparation of the rating schedule..."

"In certain **rare cases**...a [DFEC] may not capture the severity or all of the **medical complications** of an employee's work-related injury."

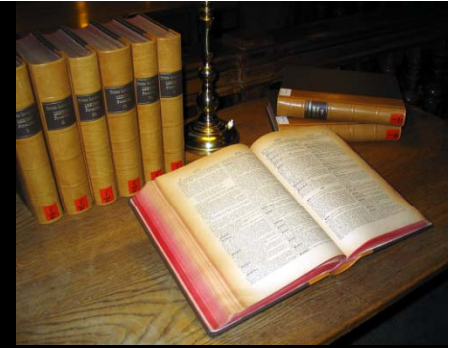
RARE cases????



"RARE"

adj., rar·er, rar·est.

Infrequently occurring; uncommon: *a rare event; a plant that is rare in this region.*



Can we have an example...?

"[A] claimant who sustains a compensable foot fracture with complications resulting from nerve damage may have greater permanent effects of the injury and thereby disprove the scheduled rating if the sampling used to arrive at the rating did not include any workers with complications."





#1 *AMA Guides*—as written—have this covered!!!

#2 DCA hasn't heard of CVT???

“Rare” Medical Cases

- Vast majority of workers’ compensation cases are reflected by relatively small group of diagnoses.
- By the time the Fifth Edition was written nearly all situations were covered by the *Guides*.
- Rare cases are more based on subjective reports and opinions not supported by science.
- If case defined rare, recommend medical file review to determine if rare.



What could be rare?

- Rare for a rare case to actually be rare.
- Surgical spine case, complicated by post-surgical infection.
- Complex crush injury.
- Complex head injury.

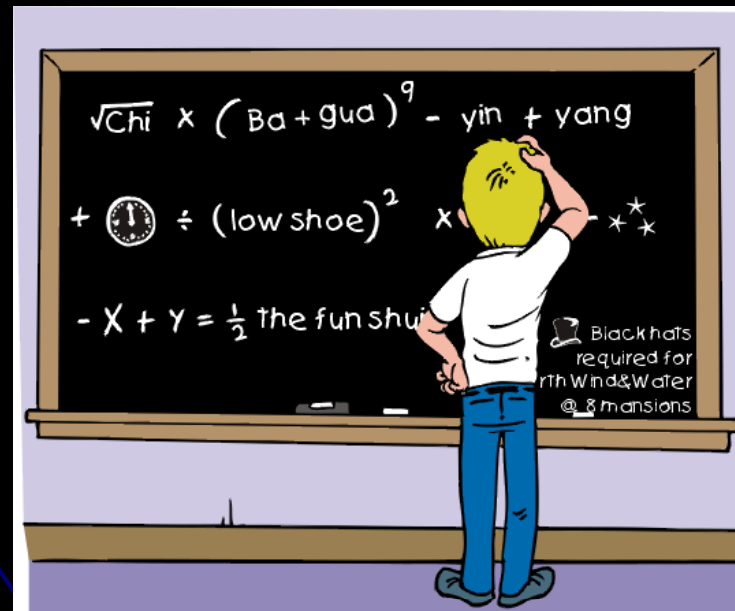


What is not rare?

- Spine injuries, whether treated non-surgically or surgically.
- Most extremity cases, including shoulder, elbow, wrist, knee, ankle / foot, etc.
- Carpal tunnel syndrome
- Complex regional pain syndrome (if diagnosis is accurate)

3 OPTIONS

1. Factual Errors
2. Complicating Factors
3. LeBoeuf



3. LeBOEUF

LeBoeuf v. WCAB (1983) 34 Cal.3d 234

DCA notes "cases have long recognized that a scheduled rating has been effectively rebutted when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's [DFEC] is greater than reflected in the employee's scheduling rating."

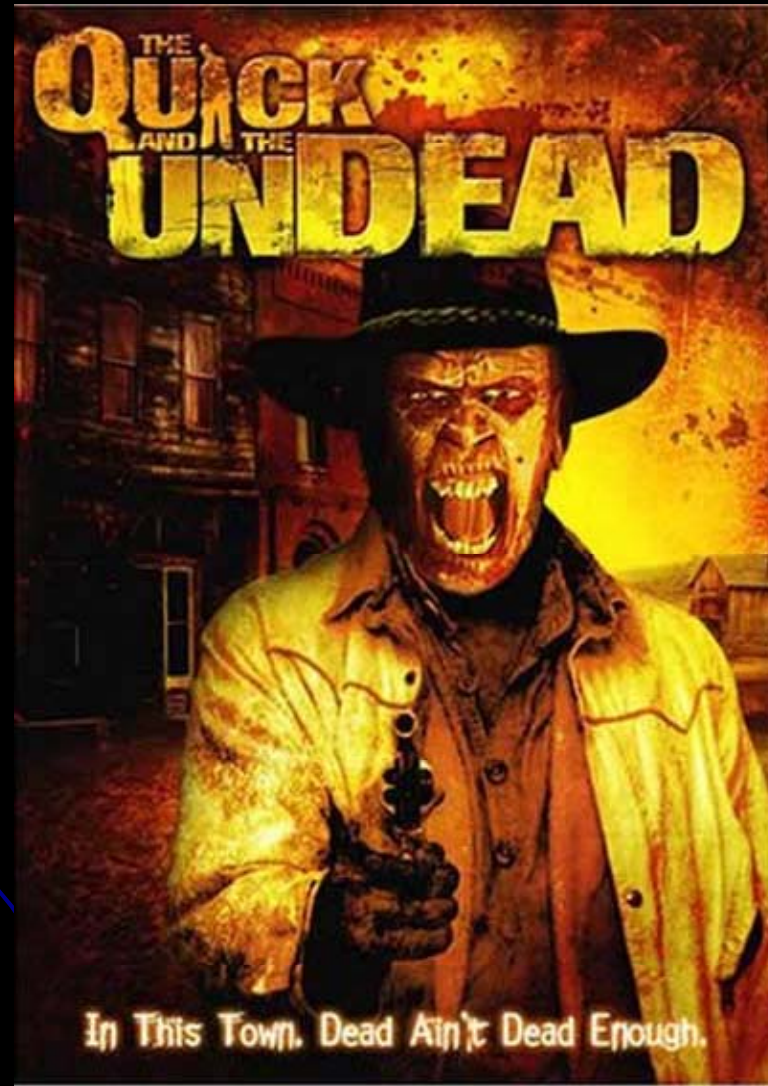




Problem #1: Um...has no one
told the DCA voc rehab has
gone...



Problem #2: Is VR now the



Good News!!!

How does IW

PROVE

he/she can't be rehab'd

WITHOUT

VR?



Tough putt, eh?!?!?!?



IW Needs to

PAY

for VR?



3. LeBOEUF



DCA interprets LeBoeuf conservatively: "the most widely accepted view...is to limit [LeBoeuf's] application to cases where the employee's [DFEC] are **directly attributable** to the employee's work related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education."



What does the Labor Code say about PD
being "**directly attributable**" to work?



2. LeBOEUF

What does the Labor Code say about PD being "**directly attributable**" to work?

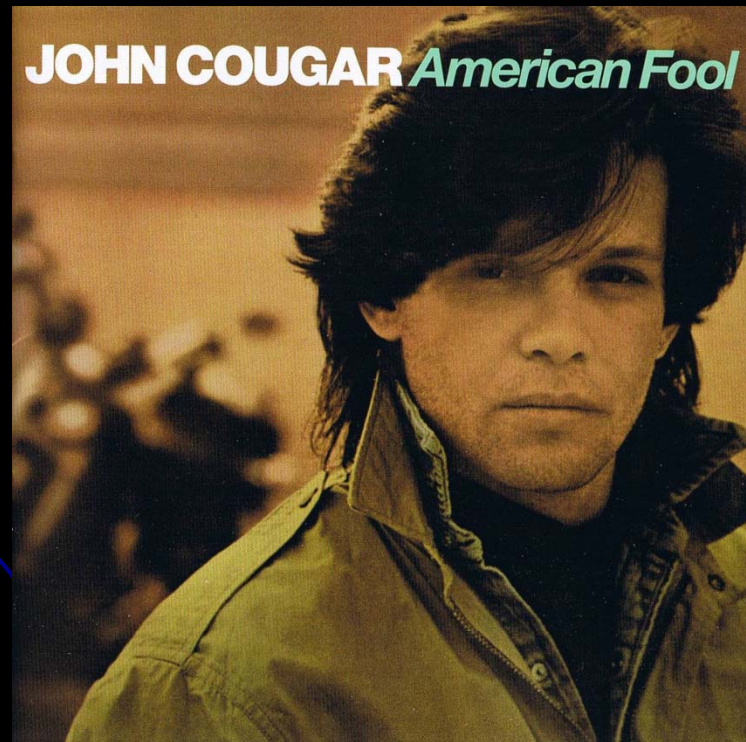
LC 4664(a) The employer shall only be liable for the percentage of permanent disability **directly caused** by the injury arising out of and occurring in the course of employment.



Do you remember...

Hertz v. WCAB (Aguilar) (12/16/08)

"Hertz so good!!!"



"An employee effectively rebuts the [DFEC] when the employee will have greater [DFEC] than reflected in a rating because, **due to the industrial injury**, the employee is not amendable to rehabilitation."

Injured?

Can't work?

• Can't be retrained?

Options limited to



QUESTION:

How does IW's
“expert”
distinguish which factors impacted FEC?

Good luck with that!!



QUESTION:

Now what?

aka

What's the NEW FEC?

aka

What's the correct PD?

1st DCA says...

NOTHING!!!



QUESTION:

Expect CAAA to say:

1. Projected lifetime income was \$1,000,000
2. Projected income now = \$500,000
3. $\frac{500,000}{1,000,000} = \frac{1}{2} = 50\%$ FEC loss
4. PD = 50%

NO WAY!!!

4660(a)... “in determining the percentage of [PD], account shall be taken of the nature of the physical injury or disfigurement, the occupation...and...age...”



NOT just DFEC!!!!

Who pays for the VR/Economics expert?

- CAAA says “YOU, the defendant”
- Defense says “A/A”



A well-known DA wrote...

“Costa...verified that...the defense is obligated...to pay experts who might be used to...rebut[] the DFEC”

WRONG!



Are the costs allowable or not?

...Maybe!



Who pays for the VR/Economics expert? (cont'd)

What is LC 5811?

5811(a) ...In all proceedings...before the appeals board, costs as between the parties *may* be allowed by the appeals board.



Who pays for the VR/Economics expert? (cont'd)

How important is this?

Workcompcentral (12/11/06)
“‘Bargaining Chip’ Discovered
In *En Banc* Ruling”

“The expense of the expert
becomes a bargaining chip
for the applicants”



Wait...\$10,000 - \$12,000
BEFORE
OGILVIE

Now: testimony, travel, prep, etc. =
\$200.00/hour*

Down payment prior to beginning work =
\$3,800

*Mirfak Associates, Inc. Fee Schedule



LC 5811(a)

“...in all proceedings...before the appeals board, costs between the parties may be allowed by the appeals board.”

“may” = “discretionary”

“may” ≠ “mandatory”



TEST

- *Really* an “expert”?
- *Really* “expert opinion testimony”?
- *Really* “reasonably, actually and necessarily incurred”?

● **NOT** the test: “the expert evidence...does not necessarily have to affect the [PD] rating to be reimbursable”



TEST

1. *Really* an “expert”?

Attack “expert” at trial

Challenge claimed
“expertise”



TEST

2. *Really* “expert opinion testimony”?

“[T]he qualifications of each...expert must...be determined on a case by case basis.” (*Costa II*)



TEST

“Once a person has qualified as an expert, ... costs ... *may* be allowable ... similar to the standards for allowing [M-L] costs...”



TEST

What's the M-L cost test?

4621(a) “... the employee...shall be reimbursed for...medical-legal *expenses...reasonably, actually, and necessarily incurred*...The reasonableness of, and necessity for, incurring these expenses shall be determined with respect to the *time when...actually incurred.*”



How do you defend against 2005 PDRS challenges?

- Subpoena: (a) expert's report
(b) expert's entire file (all notes, testing, etc.)



How do you defend against 2005 PDRS challenges? (cont'd)

Depose expert



How do you defend against 2005 PDRS challenges? (cont'd)

Attack expert at trial

Challenge claimed “expertise” Evidence Code 720

- (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
- (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.



B.T.W...

Can the defense force IW to submit to a defense VR expert?

You bet!

“fundamental fairness...requires that the applicant submit to evaluation by defendant’s vocational expert.”

Andrade v Diamond Contract Services 2011 Ca.Work.Comp.
P.D. LEXIS 99



Take Aways

- ✓ Expect Round 4 (it may be your case)
- ✓ Agree to NO AVR “expert”
- ✓ Challenge AA’s expert’s “expertise”
- ✓ Object to “expert’s” bills/liens, argue
 1. expertise, *Costa*
 2. L.C. §4621
- ✓ Keep eye out for non-AOE/COE factors impacting FEC (aka “*Hertz So Good*”, aka L.C. 4664)



We're done! But don't forget...

“Who ya gonna call?”



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(619) 299-PDRS - www.impairment.com



Questions / Answers

Join us:

10/20 Unraveling the Mysteries of Rating

11/17 Apportionment – Every Defendants' Friend

12/14 Doctor Cross Examination

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