RAND
INSTITUTE FOR CIVIL JUSTICE

Improving Dispute Resolution for California's Injured Workers

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PREFACE

For more than two decades, legislators, stakeholders, and litigants have complained that the process by which disputed workers' compensation claims in California are adjudicated and resolved has become ponderously slow, too expensive, and plagued by a lack of consistency from office to office, from judge to judge, and from case to case. In response to these concerns, the Commission on Health and Safety and Workers' Compensation (CHSWC), an independent state commission charged with monitoring and evaluating the California workers' compensation system, provided funding to the RAND Institute for Civil Justice (ICJ) to conduct a top-to-bottom review of the workers' compensation courts in the state.

This report contains the complete description of the methodology, findings, conclusions, and recommendations of the ICJ's review of the adjudicatory services offered by the Workers' Compensation Appeals Board and the Division of Workers' Compensation. A separate summary of the study's results is available in Improving Dispute Resolution for California's Injured Workers - Executive Summary, RAND, MR-1425/1-ICJ, by Nicholas M. Pace, Robert T. Reville, Lionel Galway, Amanda B. Geller, Orla Hayden, Laural A. Hill, Christopher Mardesich, Frank W. Neuhauser, Suzanne Polich, Jane Yeom, and Laura Zakaras, 2003. Data collection instruments and other project tools and products can be found in Technical Appendices: Improving Dispute Resolution for California's Injured Workers, RAND, PM-1443-ICJ, by Nicholas M. Pace, Robert T. Reville, Lionel Galway, Amanda B. Geller, Orla Hayden, Laural A. Hill, Christopher Mardesich, Frank W. Neuhauser, Suzanne Polich, Jane Yeom, and Laura Zakaras, 2003.

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EXECUTIVE SUMMARY

California's 90-year-old workers' compensation system is designed to provide injured workers immediate and speedy relief without resorting to a formal trial. Instead of involving judges and the civil courts, injured workers may simply file a claim through a no-fault, administrative process.

In theory, the process for delivering workers' compensation benefits, such as medical care, replacement of lost wages, and vocational rehabilitation services, is precisely defined in the California Labor Code and other regulations and is mostly automatic. In reality, however, disputes often arise over issues such as whether an injury in fact occurred at work, whether medical treatment is necessary, and the extent to which an injury poses long-term consequences for the worker. All such disputes are resolved in a single forum: the Workers' Compensation Appeals Board (WCAB). Of the one million workers' compensation claims filed in California every year, about 200,000 end up at the WCAB.

For more than 20 years, however, the workers' compensation courts increasingly have been perceived as a weak link in the workers' compensation system. As early as 1981, the courts had become so bogged down with cases that some observers used the word "crisis" to describe the situation. What were once regarded as premium judicial services provided by the state's oldest social insurance system had become so problem-filled that a number of observers felt that the system was no longer serving the public interest.

Today, the workers' compensation courts are criticized primarily for three reasons: They are slow in reaching decisions, litigation is increasingly expensive, and the courts' procedures and actions have little consistency statewide. These problems have become so acute that they threaten to undermine the foundation of the entire workers' compensation system—a "social contract" by which injured workers give up their rights to seek damages in a civil court of law in exchange for compensation that is both swift and certain.

STUDY OBJECTIVES AND APPROACH

To address this situation, the California state legislature passed several comprehensive workers' compensation reform bills in recent years that, among other things, called for a top-to-bottom review of the courts. When all these bills were vetoed by the governor for budgetary and other reasons, the Commission on Health and Safety and Workers' Compensation (CHSWC), an independent state commission charged with monitoring and evaluating the California workers' compensation system, sought another avenue for conducting this review. The commission provided funding to the RAND Institute for Civil Justice (ICJ) to conduct a comprehensive analysis of the trial-level operations of the WCAB and the support and supervision of those operations provided by the California Division of Workers' Compensation (DWC). The ICJ study team focused on how the courts work, why they work the way they do, and how they can be improved.

The study team adopted a multifaceted approach that the ICJ has used successfully in other judicial process studies. The team members analyzed an on-line database compiled by the DWC that includes more than a million workers' compensation cases; they reviewed case files for nearly 1,000 claims to identify the key factors and events influencing how those claims were handled; and they visited many of the branch offices of the WCAB throughout the state to gain a better understanding of the processes used in litigating workers' compensation cases. The ICJ study team also conducted intensive site visits at six representative courts and asked all the judges in those courts to record how they spent their time over the course of a week. In addition, the study team interviewed a range of participants in the California workers' compensation system, including attorneys, judges, clerks, secretaries, hearing reporters, litigants, and others, and team members sat in on many conferences and trials.

Armed with this information, the research team analyzed the causes of delay in the resolution of workers' compensation disputes, the reasons for the high costs of litigation, and why procedures are inconsistent across the state. The study team found that the main problems afflicting the courts stem from decades of underfunding in the

areas of staffing and technological improvements. Staff shortages affect every aspect of court operations and every part of the litigation process. The outmoded computer system of the DWC exacerbates the courts' problems because the system requires enormous duplication of data entry and has very limited capacity for caseload management or effective calendaring. These problems lead to delays, increase the private costs of prosecuting and defending cases, and create obstacles to reforming the outdated and contradictory rules and procedures that guide the courts.

In addition to a number of specific recommendations on policies and procedures designed to address these problems, the study team had three main recommendations:

- Provide realistic funding to fill every staff position that was authorized in 2001, assuming demands on the workers' compensation system remain at 2001 levels.
- Implement a complete overhaul of the courts' technological infrastructure without reducing short-term staffing levels.
- Conduct a comprehensive review, refinement, and coordination of all procedural rules governing the workers' compensation dispute resolution process.

A DISTINCTIVE SYSTEM OF JUSTICE

Approximately 180 trial judges in 25 local offices across California are at the heart of the state's workers' compensation dispute resolution system. The judges' judicial authority stems from the seven independent commissioners of the Workers' Compensation Appeals Board who are appointed by the governor and confirmed by the California Senate. While these commissioners have full power to review the trial judges' decisions, they have no direct supervisory control over the day-to-day operations of those judges. That authority rests with the Division of Workers' Compensation, a part of the California Department of Industrial Relations. The judges are employees of the DWC, along with the clerks, secretaries, hearing reporters, and other support staff in the local offices. DWC administrators decide where the judges will hold court, the size of the hearing rooms, the judges' work hours, and the quantity

and type of staff support provided to the judges. The administrators of the DWC, along with the commissioners of the WCAB, are also responsible for developing the rules and policies used throughout the dispute resolution process.

Taken together, the WCAB and DWC are sometimes referred to as "The People's Court" because the litigant pool is so diverse and the courts' procedures are so informal that workers often represent themselves. It is a distinctive system for dispute resolution: A high-volume tribunal that never uses juries, operates under relatively relaxed rules of evidence, and has exclusive jurisdiction over most work injury disputes in this state. Judges must approve all settlements between injured workers and insurers and must also approve workers' attorney's fees. Rather than simply acting as a state agency's administrative law court, the WCAB is a fully functioning trial court of limited jurisdiction. Moreover, it functions as part of a much larger system of treating and compensating work injuries and returning employees back to the workplace as quickly as possible. To this end, judges are asked to construe the law liberally with the overriding purpose of extending legally entitled benefits to injured workers and are asked to do so "expeditiously, inexpensively, and without incumbrance of any character."[1]

As noted earlier, disputes over every aspect of the workers' compensation system are an ongoing fact of life. Participants in the workers' compensation process routinely differ over, for example, whether an injury did in fact arise from work activities, whether medical treatment is required at all, whether particular types of treatments are necessary and who will provide them, the extent of an employee's injuries and the long-term impact those injuries will have on his or her ability to make a living, whether the injured employee's condition has stabilized enough to be precisely evaluated, the amount and duration of any cash benefits, whether vocational rehabilitation or ongoing medical care will be needed in the future, and many other critical issues. Unless these disputes are dropped or resolved informally, the parties must turn to the WCAB for adjudication.

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[1] California Constitution, Article 14 ("Labor Relations"), Section 4.

To invoke the jurisdiction of the WCAB, a worker typically files an Application for Adjudication. No judicial action is automatically triggered by this filing; often, the Application is submitted shortly after the injury has taken place but long before the worker's medical condition has stabilized—i.e., before the effects of any long-term disability can be evaluated.

After the worker and the employer or insurer are in a position to assess the future impact of an injury, settlement negotiations can then take place. If a negotiated resolution is not possible, either side in the dispute may then file a Declaration of Readiness to request that the case be placed in the queue for a future trial. The first event that follows the filing of the Declaration, however, is the Mandatory Settlement Conference. This conference is designed to promote settlement with judicial assistance. If a settlement is not reached, a date must be set for a trial in the immediate future. If the case goes to trial, the judge will likely hear testimony from a handful of witnesses, but the judge's decision will be based primarily upon written medical evaluations submitted by each side.

The judge's decision will be issued days or even months after the trial. If either party disputes the outcome, that party can file a Petition for Reconsideration with the WCAB's commissioners for review. If at any point in this process the parties reach a settlement, they must submit the agreement to a trial judge for formal approval.

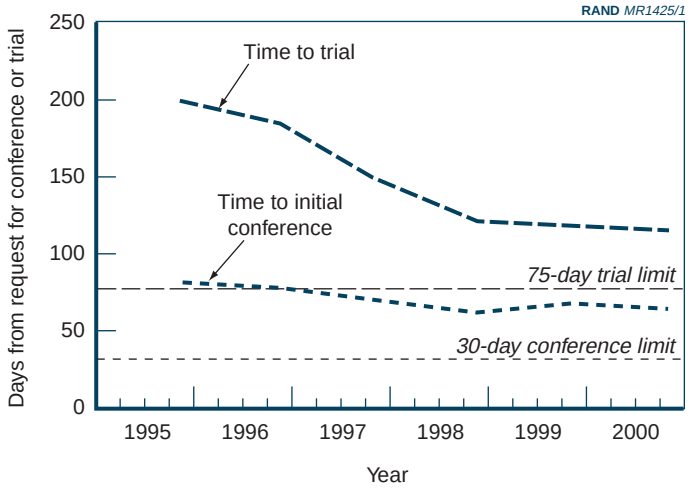
ADDRESSING THE CAUSES OF DELAY

As mentioned earlier, the workers' compensation system is different from the traditional civil law tort system in that injured workers give up their right to seek unlimited damages in exchange for swift and certain compensation and a promise to rapidly adjudicate any disputes that arise from their claims. To enforce this social bargain, California state law requires the courts to adhere to two specific time limits within the dispute process: The courts must hold an initial conference within 30 days from the time a party asks to have the case placed on the trial track through the filing of a Declaration of

Readiness, and the courts must hold the trial within 75 days of the party's request.

The figure on this page shows the average amount of time, from 1995 to 2000, that cases took to get to conference and trial following the initial request to have them placed on the trial track. Although these averages, particularly the number of days to trial, have improved over the past few years, the reason for that improvement is primarily the decline in the number of new case filings from the peak numbers in the early 1990s, rather than more-efficient practices. Today, even with the reduced demand placed upon the courts, the time that it takes to hold both the conference and trial is much longer than the amount of time allowed by law.

What are the reasons for the courts' failure to meet the California legislature's mandates? As discussed next, the ICJ study team concluded that the causes of delays in holding conferences are quite different from the causes of delays in going to trial.



Average Time to Initial Conference and Trial, 1995–2000

Delays in Getting to Conference

The ICJ study team found understaffing to be the most important factor behind the slow pace in scheduling conferences. Most key positions in the California workers' compensation courts have been

severely understaffed for years, with the most serious understaffing problem at the support-staff level: Clerks are in very short supply.

Overall, DWC local offices actually staff only about 70 percent of the number of authorized clerical-support positions because of a combination of insufficient funds for hiring, noncompetitive salaries, and high turnover rates. Some offices are operating with only half the number of authorized clerks. Because workers' compensation cases generate a great deal of paperwork, a chronic shortage of clerks creates a serious bottleneck in the system, particularly in getting cases to the initial conference stage. Clerks must review pleadings for compliance with legal requirements, enter relevant information into a computerized database, calendar conferences and trials, deal with questions from the public, perform most file management tasks, archive older cases, and perform a host of other duties. Because of understaffing and the heavy workload of the average clerk, it is not uncommon for an office's clerical staff to take 30 days just to process the request for trial and schedule a date for the initial conference. In other words, this step alone can consume all the time legally allotted to hold the Mandatory Settlement Conference.

As a result, the study team recommends that DWC administrators give top priority to hiring, training, and retaining clerks. Hiring and retention can be improved by slightly increasing clerks' pay to make it commensurate with the clerks' responsibilities and comparable with staff pay at other administrative law courts in the state.

The high clerical turnover rate makes retaining the clerks' supervisors vital to the courts' efficient operations. However, because lead clerks (i.e., supervisors) make less money than judges' secretaries do, they tend to leave their positions as soon as they find an opportunity for an intraoffice promotion. To address this problem, the study team also recommends that the clerical supervisor at each DWC local office be paid as much as judges' secretaries.

The hiring and retention measures that the study team recommends will require making changes to the state's traditional budgeting practices, which currently provide only 79 percent of the funds required to fully staff all existing authorized positions (including clerks,

judges, secretaries, and other staff members) at the workers' compensation courts. The study team also recommends that the DWC take aggressive steps to minimize workers' compensation–related vacancies among its own staff and to improve the clerical training process.

Delays in Getting to Trial

The sources of delay in getting claims to trial are another matter. Judicial resource levels contribute to delay, but they do not fully explain why trials are not being held within the mandated 75-day time limit. Here, the study points to the behavior of judges, particularly judges who manage their personal trial calendars in counterproductive ways, or who liberally grant continuances, or who have not developed good case management or trial decisionmaking skills.

Judges have the ability to slow the pace of litigation in some offices by underscheduling the number of trials they hear or by freely granting continuances on the day of the hearing, sometimes postponing trial dates indefinitely. Although workers' compensation trials are traditionally very brief (with in-court testimony typically lasting two hours or less), the study showed that judges spend about four hours working on a case following the trial for every hour of testimony heard during the trial. This additional time is spent drafting a required summary of all the evidence heard, reviewing medical reports, writing a lengthy opinion, and frequently responding to an appeal—tasks not normally performed by civil court judges who, for the most part, preside over trials but do not decide cases. Preparing for trial adds yet more hours to a judge's workload for each hearing.

Therefore, one can understand why judges would try to minimize the number of trials they conduct to allow enough time for their other duties. But some judges carry this practice to an extreme. The under-scheduling and questionable continuance practices of a few judges can extend the entire trial calendar for all other judges in that office.

The study team proposes several reforms to mitigate problems related to trial scheduling:

- First, when offices experience difficulties in getting trials scheduled within 45 days of the initial conference (especially

if this situation appears to be limited to certain judges), then the office should consider moving to a system in which a judge other than the conference judge is typically assigned to handle the trial following the initial conference. The study team acknowledged that such procedural changes should be evaluated to determine if they actually increase efficiency and whether they should be adopted more widely.

- Second, judges should not be allowed to continue a morning trial to another day just because the trial was not completed by noon.
- Third, DWC local offices should review the formulas they use for trial calendaring to ensure some limited amount of overbooking. Scheduling slightly more trials than a judge can actually hear in one day is justified because many, if not most, of the cases will be settled before they reach trial. While the post-trial demands on a judge's time that each hearing requires should be considered when refining the trial calendaring formulas, making sure that a trial is held as soon as possible in every instance should be considered the shared responsibility of all judges in an office.
- Finally, a more flexible and efficient "rollover" policy would allow overbooked cases that failed to settle to be quickly reassigned to available judges on the day of a trial, a change that would also help fill some judges' occasionally empty trial calendars.

The study team also identified another cause of trial delays: Some judges take an unreasonable amount of time to submit decisions after a hearing. The study team found that, in some instances, judges took more than three months to reach a decision, even though 30 days is the maximum time established by statute. Even among judges in the same office with about the same workloads, there were wide disparities in the time they took to issue a decision. Interviews with secretaries and hearing reporters who work with judges who were slow to submit their decisions suggested that those judges simply lacked the necessary organizational and time-management skills.

One of the study team's most important recommendations is that judges need more formal training in how to perform the tasks required of them. Most new judges come from the ranks of attorney-advocates and therefore are already familiar with the world of workers' compensation law and practice. But new judges often have little experience in efficient note-taking during testimony, promoting settlements between contentious parties, managing a crowded conference calendar, issuing decisions quickly and competently following trial, and writing a well-reasoned opinion. As a result, some judges operate in the same inefficient way year after year because they have not been offered alternatives on how to manage their caseloads or streamline various tasks.

The study also suggests that each presiding judge (the supervising judge at each DWC local office) be firmly committed to cutting delays. In so doing, the presiding judges should spend more time mentoring the judges they supervise, make greater efforts to monitor judicial performance, and look for good case-management skills in candidates for judge positions.

REDUCING UNNECESSARY LITIGATION COSTS

The study team found that the permissive attitude of some judges in granting continuances at conferences and granting requests for postponements on the day of trial not only slows down the overall judicial process, it results in repeated appearances by counsel over the life of a drawn-out dispute. Every subsequent court date can be costly to defendants who must pay their counsel for each court appearance (even if the matter is continued), costly to workers' attorneys who have only a limited amount of time to devote to each case, and costly to workers who must take a day off from their jobs each time they have to appear in court.

The study team found that most of the continuances granted at the initial conferences were not issued to help the parties finalize an impending settlement; instead, they were granted as the result of a party waiting until the last minute to make a claim that the case was not ready for trial. It is not uncommon for attorneys to examine a case

file for the first time right before a conference. Because all future discovery is cut off after a trial date is formally set at the end of the conference, an attorney who has not reviewed a case for more than a few minutes may look for an excuse to request a delay through a continuance or through an order to take the case off the trial calendar. Moreover, an attorney who is not yet familiar with a file is less effective in settlement negotiations (the primary purpose of the initial conference) and often fails to obtain authority to settle the case in advance of the initial conference.

Curtailing last-minute postponements may be the single most important step to reducing litigation costs. The authors of this report make several proposals to help reduce the number of such postponements:

- Other than those related to illnesses and emergencies, continuances and removals from the trial calendar should be considered only if specific requests are made in writing, filed, and served within a specific number of days after the filing of the Declaration of Readiness. By forcing parties in a case to review the case file at the time the request for trial is made, the settlement process at the initial conference is more likely to be successful, thereby avoiding a trial and reducing costs.
- More proactive case management is needed for cases that are continued. No continuance should be granted without (1) the parties in a case being given a specific date to return, (2) the judge explicitly detailing in the file the reasons for granting the request, and (3) orders being issued describing what is to be done to get the case back on track. Many judges currently grant requests for postponement without requiring any other next step, causing the case to drift into “judicial limbo” and sometimes into an endless cycle of costly delays.
- Judges must stop granting requests for postponements on the day of trial in all but the most extraordinary circumstances. If a judge is faced with more trials than can be heard in a single day, the presiding judge should be immediately informed and the case rolled over to another judicial officer, if possible.

MAKING PROCEDURES MORE UNIFORM

One of the main complaints heard from practitioners and judges is that the rules governing practice in workers' compensation courts across the state are unclear and inconsistent. These concerns are not surprising given that the controlling rules and procedures are derived from a wide variety of sources, including the California Labor Code, WCAB Rules, DWC Administrative Director Rules, and the DWC/WCAB Policy & Procedural Manual. Because the rules are sometimes contradictory, vague, confusing, or convoluted, many local offices and judges invent their own procedures or evaluative criteria, creating a hodgepodge of largely unwritten local practices across the state.

In addressing the issue of uniformity, the authors of this report make a distinction between the pretrial and trial litigation phases. The trial already has built-in procedures that encourage uniformity. The judge's production of a comprehensive summary of evidence presented at trial, the use of detailed and organized reports for the presentation of medical evidence as opposed to only brief oral testimony, the relatively unhurried post-trial decisionmaking process, the requirement that the judge must clearly document the reasoning behind his or her decision, and the ability of litigants to easily appeal on questions of fact rather than solely on questions of law are all practices that help to ensure high-quality trial outcomes. But such safeguards do not exist for pretrial decisions and case management.

The study team found wide variation in judicial actions and behavior prior to trial, including how judges handle continuances and other postponements, the standards they use to decide whether proposed settlements comply with the law, and the criteria they use to approve attorneys' fees. In most instances, the reasons for the variation in behavior appeared to stem from the rules themselves; often, there was simply no clear and unambiguous guidance on the proper course of action in a case.

To promote greater uniformity and efficiency in the rules governing practice in the workers' compensation courts, the study team recommends a coordinated and long-term effort by both the WCAB and the DWC to (1) review the various sources of the rules, (2) eliminate or correct

language that is no longer relevant or that is vague or confusing, (3) highlight the rules that are clear and straightforward, (4) provide supplemental commentary to act as guideposts in making decisions, and (5) revise the forms and procedures accordingly. This review should be conducted not only by WCAB commissioners and DWC administrators but also by judges and attorneys to make sure that the new rules will work in actual practice. This review process is the single most important step that can be taken immediately to improve uniformity prior to trial. While progress in this area has been made recently, much more is needed.

RETHINKING A NUMBER OF PAST REFORM PROPOSALS

While the study team has proposed a number of recommendations for change, the team also explored several prominent reform proposals frequently cited in the debate about California's workers' compensation courts. The study team found that those proposals might be unnecessary, ill advised, costly, or premature. They include proposals to (1) implement a new automated case management system without first increasing staff levels and performing a comprehensive review of regulations, (2) create a new upper-level systemwide position of Court Administrator, (3) eliminate specific judicial tasks in order to reduce judges' workloads, and (4) require an additional case status conference at the outset of every dispute. The following section presents the pros and cons of each proposal.

Updating the Computer System Without Adequate Staffing, Funding, and Planning

We noted earlier that the DWC's computer system is woefully outdated, consumes enormous staff resources, and is in need of an overhaul. However, moving to an automated case management system and electronic filing of claims and pleadings without supplemental funding and staffing will likely lead to significant and costly disruptions in case processing in the short term and a flawed upgrade in the long term. The considerable expense of designing and installing a new system would be incurred at a time when the workers' compensation courts clearly do not have enough available staff at their local offices. In the current fiscal environment, taking such a step to fund the implementation of

updated technology would likely reduce personnel levels even further, a situation that could have disastrous consequences for litigants.

Moving to an automated system without first reviewing existing regulations and policies might also "cement in" current inefficient practices, contradictory regulations, and out-of-date pleadings. While the study team emphasizes that the current electronic case management system is a source of much wasted time and effort, and recommends that the groundwork for implementation of an updated system (such as exploring design alternatives and seeking supplemental state funding) be initiated as soon as possible, they caution, however, that a significant diversion of funds or staffing for this purpose could prove to be counterproductive. Adequate staffing, funding, and planning for future technological upgrades should be implemented simultaneously.

Creating a New Court Administrator Position

Recent legislation[2] signed by Governor Gray Davis in 2002 establishes the new position of a systemwide court administrator who will be charged with expediting the judicial process, supervising judges, and establishing uniform court procedures. The study team found that even if the court administrator's position had more-sweeping powers than those eventually approved in AB 749 (as were envisioned in an earlier version of the legislation), the position would still be unlikely to address the critical causes of delay, high litigation costs, and contradictory regulations identified in the team's analysis. In fact, the study team found that the court administrator would have had no greater supervisory powers than the administrative director of the DWC has today, nor would the position as it was originally envisioned have had additional authority to increase resources or make judges adhere to deadlines and other rules. Moreover, establishing the new position and staffing the court administrator's office would likely shift resources away from the lowest-paid positions in the DWC, the department level that needs increased staff resources the most.

[2] California Assembly Bill No. 749, 2001–2002 Reg. Sess., chaptered February 19, 2002.

Eliminating Two Specific Judicial Tasks

The ICJ study team also rejected the idea of eliminating two long-standing judicial requirements—the summary of evidence and the review of all settlements—despite the hours of labor they require of already overworked judges. The study found that summaries of evidence, which are typically prepared from copious handwritten notes and are very time-consuming, provide a great benefit to the decisionmaking process and substantial savings in private litigation costs. Judges currently are also required to review all proposed settlements. Although about 15 percent of a judge's time is spent reviewing proposed agreements, the study team found that the effort expended on this task was justified because so many complicated cases are resolved by workers themselves without the assistance of an attorney. Even in cases involving attorneys on both sides, judicial review helps to protect the interests of lien claimants who do not always participate directly in the settlement process.

Requiring an Initial Status Conference

The study team found the "one conference, one trial" litigation model (currently utilized by the WCAB) to be a reasonable one, and did not endorse the proposal that an initial "status conference" be required to identify potential problems early in a case. While such a practice may be justified in particular cases, the study team found that the administrative costs for adopting this proposal statewide would be overwhelming.

CONCLUSIONS

What is the main factor behind the problems of the so-called People's Court? The study team found little evidence to support a number of widely held views on this question.

It is not that the WCAB and DWC administration is indifferent to the system's problems or is resistant to reform; in fact, administrators appear to be consumed by problems of chronic staff shortages and have little opportunity to address systemwide problems.

It is not that current rules and policies are at the heart of the courts' problems and simply need to be modified to achieve more prompt

resolutions and fewer court appearances. Revamping the rules would do little on its own to correct the courts' most pressing problems.

And, above all, it is not that the courts have excess funds that contribute to waste and inefficiencies, and therefore the courts need to be underfunded to make them run "leaner and meaner." The full report on this study lays that theory to rest with a comprehensive description of the inefficiencies created by inadequate budgets, which have resulted in high staff turnover, the inability to attract competent personnel, outmoded computing equipment, the lack of a modern case management information system, packing of initial conference calendars, and judges being overloaded with trial work. All of these problems are symptoms of a system that is failing on its promise to deliver swift and equitable compensation for workplace injuries.

The study team concludes that the primary source of the complaints from the workers' compensation community is the chronic funding shortage, which has hampered hiring, training, and technological improvements for decades. Year after year of scrambling to provide local offices with the bare minimum of staff has prevented DWC administration from addressing long-term needs, most notably the long-overdue upgrade of the courts' information technology infra-structure. Ironically, the courts' computer system has made staff shortages more acute because the outmoded system requires a great deal of duplicate data entry. Its inability to automatically schedule future conferences and trials means that clerks must laboriously perform the task of calendaring the exact same way that they have for decades, resulting in delays in scheduling initial conferences and in costly calendaring conflicts for litigants. Moreover, the system is so old that it offers little help as a management tool to more efficiently allocate judicial resources. Yet, replacing this system has not been possible given the gaping holes in office staffing that have been the status quo in nearly every fiscal year in recent memory.

In the face of long-term funding and staffing shortages, procedural uniformity also has become more difficult to achieve. To meet legislatively mandated time limits for case processing, some local offices, for example, have dispensed with certain aspects of pleading

review that the offices believe consume unjustifiable amounts of staff resources. And plans for uniform training manuals for staff have been on the back burner for years because lead clerks and lead secretaries cannot be spared to draft the documents. The problem of nonuniformity is not likely to go away anytime soon: The assignment of judges and administrators to the much-needed long-term task of reviewing conflicting or ambiguous procedural regulations has been made extremely difficult in a fiscal environment such as the current one.

Most important, insufficient staffing levels can diminish the quality of justice. Judges who are facing considerable workload demands from every trial over which they preside may prefer the idea of granting requests for continuances, however questionable they may be, over more prompt resolutions that would add yet more work to their plates. When trials do take place, a judge's careful and deliberate review of the record when making a decision may not be possible because of other equally pressing demands on the judge's time. Presiding judges are unable to closely supervise the work of their trial judges, as long as those presiding judges have to handle a nearly equal share of each office's routine caseload, a complaint the research team heard again and again from both defense counsel and injured workers' attorneys. Resource shortages have also prevented initial and ongoing training of trial judges. As a result, there is a great disparity in the knowledge and abilities among those who are asked to be the final arbiters in this system.

SUMMARY OF RECOMMENDATIONS

The ICJ study team developed three main recommendations to address the problems confronting California's workers' compensation courts, in addition to a number of specific recommendations on workers' compensation system policies and procedures.

Main Recommendations

1. Provide adequate funding to fill every position that was authorized in 2001, assuming that demands on the system remain at 2001 levels. Rather than calling for more positions, the study team found that staffing levels authorized in 2001 reasonably match current

caseloads. But the traditional practice of state government has been to provide the DWC with just 79 percent of the funds needed to fill all authorized positions. This study calls for addressing this built-in shortfall and filling *all* authorized positions. Adequate funding also includes adjustments in the salaries for specific job classifications, most notably for clerks and their supervisors, which need to be high enough to attract and retain qualified recruits. Some offices, for example, are currently operating at half the number of clerks for which they are authorized, a staffing level far below what was needed to process the enormous amount of paperwork generated in 2001.

If demands placed on the workers' compensation system increase from 2001 levels as a result of population growth, changes in the rules for workers' compensation, or for any other reason, the number of authorized positions would have to increase as well. Ultimately, adequate funding must be made available each year, and not simply as a one-time fix.

2. Implement a complete overhaul of the court's technological infrastructure without reducing short-term staff levels. The DWC Claims Adjudication On-Line System (CAOLS) used for case management purposes is woefully outdated. CAOLS clearly is a source of much waste and delay, and it should be replaced. Any such system replacement or overhaul, however, must be in addition to, and not in exchange for, adequate funding for current personnel requirements. Only after a modern case management system is in place, and the long-touted benefits of electronic filing come to pass, can the number of support positions be reduced, as well as the costs of administering the workers' compensation courts. Until then, those responsible for resource allocation must be willing to support full staffing levels *and* the costs of the infra-structure upgrade.

3. Conduct a comprehensive review, refinement, and coordination of all procedural rules. Existing WCAB Rules, DWC Administrative Director Rules, directives contained in the DWC/WCAB Policy & Procedural Manual, and the set of official pleadings all must be updated, coordinated, and made consistent by a standing committee composed of judges, WCAB

commissioners, DWC administrators, practitioners, and other members of the workers' compensation community. A key goal of this group should be to minimize variation in interpreting procedural rules, including what constitutes good cause for granting continuances and orders to take a case out of the trial queue. The commissioners of the WCAB have recently taken some steps toward the goal of conducting a comprehensive review, but an even greater effort needs to be made.

The review process must also be ongoing so that no rule or regulation becomes so irrelevant or unrealistic that it ends up being routinely ignored by judges and practitioners. As with the need for adequate funding, a one-time review would be nothing more than a temporary fix.

Specific Recommendations

The study team also proposes a number of specific recommendations to address the problems faced by the California workers' compensation courts. Some of those recommendations are listed here, and a complete list is contained in the report that follows.

Recommendations Concerning Judicial Responsibilities and Training

- Presiding judges must view the goal of ensuring the prompt, uniform, and streamlined resolution of the office's caseload as their primary duty. Their close monitoring of the actions of trial judges and support staff is critical to ensuring that both the letter and spirit of administrative policy and formal regulations are carried out.
- Judges need more than an extensive knowledge of workers' compensation rules and case law to effectively carry out their duties. They must have the necessary skills for performing the case management and decisionmaking aspects of their jobs. The existing training in this area is inadequate and needs improvement.
- New training programs for judges should focus on the best ways for them to manage individual caseloads and to issue trial decisions rapidly.

Recommendations Concerning Conference and Trial Scheduling

- Trial calendaring should be done by clerical staff and not by the judge who presides over the Mandatory Settlement Conference (MSC).
- If local offices are having problems with scheduling and completing trials within a reasonable period of time following the MSC, then the office should consider moving to a system in which a judge *other* than the conference judge is typically assigned to handle the trial following the initial conference. In such a system, the trial judge assignment is generally made according to which judge has the next available open trial slot. The DWC should evaluate the effects of any office's change in their policy regarding trial judge assignment, both for assessing whether the new policy should be adopted systemwide and for determining if the switch has in fact achieved its goals at the office in question.
- Calendaring formulas should be monitored and regularly adjusted to ensure that each judge has a sufficient and balanced trial workload. Better procedures are needed for shifting cases from overbooked judges on a trial day to other judges with a lighter trial schedule. A mandatory "roll call" at the beginning of the daily trial calendar should aid judges in determining whether they can hear all the trials scheduled for them that day. The presiding judge should be regularly updated with information about canceled and anticipated trials each morning.
- If offices are having problems with scheduling and completing trials within a reasonable time, they should consider switching to a single day-long trial calendar rather than using separate calendars for the morning and afternoon.

Recommendations Concerning Postponements

- Except under extraordinary circumstances, judges at conferences should grant continuances or orders to take a case off the trial calendar only if they receive formal, written requests from the moving party before the initial conference detailing the reasons for the postponement.

- Unless they are associated with an *impending* settlement, day-of-trial requests for continuances or orders to take a case off the trial calendar should rarely be granted. If granted, counsel should be required to serve their respective clients with a copy of the detailed order.
- No continuance or order taking a case off the trial calendar should be granted at a conference or trial without (1) setting a new date for the parties to return, (2) explaining to the parties in writing why the delay was granted, and (3) outlining what is to be accomplished during the delay. A litigant's failure to accomplish the promised tasks should be a subject of great concern to a judge.

Recommendations Concerning Settlements and Attorneys' Fees

- Judges should continue to review all proposed settlements. Judicial oversight is an important way to ensure that the mission of the workers' compensation system is carried out under all circumstances.
- The standards for granting settlements, and the form those agreements can take, need to be more precisely defined to reduce frustration among the bar when attorneys request approval of proposed settlement agreements and to address the serious problem of nonuniform application of approval criteria.
- The criteria for the awarding of both attorneys' fees and deposition fees need to be more precisely defined to reduce frustration among the bar when attorneys make fee requests and to address the problem of nonuniform awards.

Recommendations Concerning Other Pretrial Matters

- The rules regarding preconference screening of Declarations of Readiness and the rules regarding any review of Objections filed in response to those trial requests need to be clarified.
- The criteria for determining what constitutes availability of a representative with settlement authority need to be clarified, and judges should be given better guidance on what to do when a representative is not present or is not available.

Recommendations Concerning Trials

- If any trial decisions are pending for more than 30 days after the final receipt of all evidence in a case, the delay should be considered presumptive evidence that the judge has unfinished work in his or her daily duties. A delay of more than 60 days should be perceived as a clear sign that the judge requires additional training in the decisionmaking process.
- Judges should be allowed to adopt their original Opinion and Decision as a Report on Reconsideration if they certify that they have done a full review of the Petition for Reconsideration and have considered possible modifications to their decision.

Recommendations Concerning Technology and Administration

- Although a system for electronic filing of pleadings is clearly the model of the future, implementing such a system within the California workers' compensation courts is premature at this time. Electronic filing should become the standard method for filing documents with the WCAB only after the CAOLS has been completely replaced and the rules of practice and procedure have been reviewed and updated.
- A networked calendaring system for the scheduling of trials and conferences should be the top priority among new technological implementations. All clerks should be trained in the use of this system and should be able to operate it from any terminal within the district offices to avoid bottlenecks during absences. Litigants should be able to remotely provide potentially conflicting court dates to reduce scheduling problems.

A BLUEPRINT FOR THE FUTURE

The WCAB has become a focus of attention for those who feel that the entire California workers' compensation system has strayed from its original purpose of delivering swift and certain benefits through a user-friendly dispute resolution system that serves the interests of injured workers, employers, and other litigants.

This study suggests that if the way in which the courts operate continues to be plagued by unnecessary delays that frustrate injured workers and their employers, by unreasonable private and public litigation costs, and by unexpected outcomes due to idiosyncratic procedures, the California workers' compensation system is in fact failing to serve its statutory and historical mandate. The ICJ study team's recommendations offer a blueprint for judicial and administrative reform that will help the system to fulfill that mandate.

-- PART ONE: BACKGROUND AND METHODOLOGY --

CHAPTER 1. "...A FEELING OF CRISIS..."

INTRODUCTION

Growing delay in resolving disputes before the Workers' Compensation Appeals Board has produced a feeling of crisis.... What were once "premium" services rendered by the WCAB are now only "adequate," and the public is not satisfied.... The shift [in levels of service reflects] the mood of taxpayers who want more for less. The effect...is that workers' compensation, which is California's oldest social insurance system, is no longer the cutting edge of social insurance plans. People think it will continue no matter what, not knowing the serious straits it is in....

...[The caseload has increased along with the] growing complexity of the legal issues in occupational disease and cumulative injury cases. [But even] increased productivity cannot prevent delays in the face of the huge workload. The public has been promised benefits and services that government cannot deliver....

...Space [at individual offices] has been reduced to minimal standards, which impinge on the dignity of WCAB proceedings. The public complains of too few seats in the waiting rooms, and meetings between attorney and client often have to be held in the cafeteria. Air conditioning in the small hearing rooms is inadequate when all the seats are filled. Injured workers with respiratory problems are affected adversely, and animosity between witnesses is accentuated in confined areas....

Judges lack adequate numbers of secretaries and clerks as the state falls further behind the private sector in recruitment… Entry salary levels are too low to allow the Board to recruit the caliber of employees that it once did. Promotional opportunities have decreased, often causing the better workers to leave....[3]

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[3] Views of Richard W. Kirby, President of the Conference of Workers' Compensation Judges, as set forth in "Special Report: Delays Before WCAB Causing 'Crisis Feeling,' Head of Judges' Group Says: Too Many Cases for Too Few Judges," *California Workers' Compensation Reporter*, Vol. 9, No. 3, April 1981, pp. 53, 74, 75.

The above passages reflect what many believe are the key issues of today facing the Workers' Compensation Appeals Board (WCAB) in its work adjudicating disputes in workers' compensation claims: Delay is felt to be on the rise, cases are thought to be increasingly more complex, facilities are derided as inadequate, and it is feared that qualified staff are becoming more difficult to attract and retain. But none of these are solely recent concerns; the preceding quotations come from an issue of the *California Workers' Compensation Reporter* that is over 20 years old. For those whose personal, professional, and business lives are directly affected by what the WCAB does, the fact that decades have passed by without core problems being successfully addressed may be more frustrating than the problems themselves.

The workers' compensation benefit delivery system in California is an extremely complex process in which a wide variety of organizations and individuals play significant roles.[4] Injured workers,[5] insurance carriers, self-insured employers, third-party administrators, medical care providers, medical-legal evaluators, vocational rehabilitation counselors, and a number of government agencies all figure into the overall mix. But over the years, one entity in particular has become the focal point for those who feel the entire system has strayed from its original purpose to provide benefits for workplace injuries and illnesses in a manner that should be, as expressly mandated by the California Constitution, expeditious, inexpensive, and without encumbrance of any character.[6] Whether deserved or not, the way the Workers' Compensation Appeals Board handles disputed claims is seen as

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[4] In this document, "workers' compensation" refers only to the system for addressing workplace injuries and illnesses authorized by California statute and regulation and the state's Constitution. It does not include industrial injuries that are covered by federal law (such as those affecting sailors, harbor workers, federal employees, railroad employees, and others) nor the so-called "carve-out" alternative dispute resolution process used in the construction industry.

[5] In this document, the term "injured worker" is generically used to refer to any person who has made or conceivably could make a claim for benefits under the California workers' compensation system. In some cases, the fact of whether the worker is indeed injured at all or whether the incident took place within the scope and course of employment is vigorously disputed.

[6] California Constitution, Article 14 ("Labor Relations"), Sec. 4.

the barometer of whether the workers' compensation system is "working" or on the brink of disaster.

It is against this background that the Commission on Health and Safety and Workers' Compensation (CHSWC) asked the RAND Institute for Civil Justice (ICJ) to look into the adjudicatory practices of the WCAB. CHSWC, an independent body comprised of labor and management representatives, is charged with overseeing health and safety in the California workplace as well as the state's workers' compensation system. The Commission's mission of conducting a continuing examination of the workers' compensation system is performed, in part, by contracting with independent research organizations such as RAND-ICJ for projects and studies designed to evaluate critical areas of key programs.

The scope of RAND-ICJ's Commission-sponsored research into the judicial functions of the WCAB was broad, but essentially we were asked to inquire into the sources of excess delay and unnecessary costs in resolving matters before the WCAB, the nonuniform application of the law by individual WCAB offices and judges, any dissatisfaction with the process by litigants, attorneys, and staff, and all relevant issues related to upper-level management and administration. Most importantly, we were also asked to develop a series of recommendations to effectively address those issues in a way that would be mindful of the core mission of the California workers' compensation system to deliver adequate benefits for work-related injuries and illnesses in a fair and timely manner and at a reasonable cost.

Our guiding philosophy from the start of this work was that meaningful reform of judicial systems such as the WCAB is impossible without the continuing input of the community that the court is designed to serve. It would not be enough to simply collect data on the operations of these courts, report such findings, and draw theoretical conclusions that might bear little relationship to the real world of California workers' compensation practice. We believed that input from those who appear before the WCAB, from those who staff its courts, and from those whose interests are affected by the decisions of its judges would be vital for three interconnected reasons: understanding what the

core problems are, drafting workable solutions, and engaging long-term support for any subsequent reform effort. Our hope is that the recommendations that follow have adequately incorporated both the results of our research and the knowledgeable contributions of the workers' compensation community.

BACKGROUND TO THIS STUDY

Dispute Resolution in a "Dispute Free" System

The statutes, administrative rules, and appellate cases shaping California's nine-decade-old system of addressing the needs of injured workers are designed to establish a process that will "provide immediate and speedy relief without the intervention of a judicial tribunal."[7] Prior to the implementation of our workers' compensation insurance system, a worker was required to prove negligence on the part of the employer for his or her injuries[8] and moreover had to successfully respond to the almost inevitable claim that the employee upon accepting employment assumed the inherent risks of the job. Given the relatively less progressive state of tort law at the time, and given the reasonable concern of employees that seeking redress for injuries might well result in termination, it is not surprising that formal claims for compensation were both difficult to initiate and to conclude successfully.

In that light, the system that social reformers created early last century was designed to establish a faster, less expensive, and fairer method of addressing the consequences of work injuries. Essentially, the mechanism for delivering the compensation for such losses was shifted from the judges and juries of the civil courts to a "no-fault," streamlined administrative process.

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[7] St. Clair, Sheldon C., *California Workers' Compensation Law and Practice*, Fifth Edition, California Compensation Seminars, Northridge, CA, 1996, p. 6.

[8] In this report, the term "injury" generally covers both injuries and diseases as defined by California Labor Code §3208 as well as conditions resulting in the death of the worker. It should be kept in mind that some procedures related to claims for death benefits differ significantly from those resulting in nonfatal injuries and diseases.

In theory, an employee suffering an occupationally caused injury or disease can receive all necessary medical treatment at no cost, a nearly uninterrupted income stream while he or she recovers from the condition, benefits to compensate for any residual permanent disability, and if needed, vocational rehabilitation services, all without the need to seek legal representation or bring an action in the state's civil trial courts to establish fault on the part of the employer. In theory, the employee need only inform his or her employer that a job-related injury has taken place and eventually make a formal claim for workers' compensation benefits in order to ensure that all relief that he or she is legally entitled to will begin to flow in an orderly, timely, self-executing, and sufficient fashion.

Moreover, the size and scope of those benefits appear on first glance to have been so precisely defined in the Labor Code and associated regulations that there could be little argument over what ought to be provided and when. In theory, workers, employers, and insurers need only refer to a sizable body of law to obtain a clear picture of their rights and responsibilities. Indeed, part of the "fundamental social compromise" that underlies the workers' compensation system is that employees have given up their right to seek seemingly limitless damages and employers have given up their right to seek relief from all liability in exchange for outcomes that are swift, certain, and predictable for all concerned.[9] At the core of this compromise was the promise that the scope and extent of such benefits would be designed as a function of rational and objective standards, not the sometimes volatile reactions of a civil jury. Finally, in theory, none of these benefits require the intervention of government entities unless the worker disagrees with the insurer's decisions.

In reality, disputes over every aspect of the workers' compensation system are an ongoing fact of life. Participants in the process routinely differ over, for example, whether the injury did indeed arise from work activities, whether medical treatment is required at all, whether particular types of treatments are necessary and who will

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[9] See, e.g., Shoemaker v. Myers, 53 Cal.3rd 1 (1990).

provide them, the extent of the employee's injuries and the long-term impact they will have on his or her ability to make a living, whether the condition has stabilized enough to be precisely evaluated, the amount and duration of any cash benefits, whether vocational rehabilitation or ongoing medical care will be needed in the future, and many, many other core issues. Often these disputes are resolved informally, but in a significant number of instances,[10] the parties turn to the one forum that has exclusive jurisdiction to adjudicate most work-injury claims in the state of California: the Workers' Compensation Appeals Board.

For a significant fraction of the many hundreds of thousands of workers who invoke the jurisdiction of the WCAB each decade, the experience might be the only time in their lives that they will actively seek redress from a judicial body or visit a court of law in person. Indeed, one of the comments we heard repeatedly during our research is that the WCAB is truly "the People's Court" in the broadest sense of the term, both for its relatively informal procedures and the composition of the primary consumers of its services. Because of the fact that the potential pool from which the "plaintiffs" may be drawn consists of almost every Californian who works for a living and the fact that the pool of defendants consists of nearly every employer in the state, no matter how small or large (from "mom & pop" corner grocery stores to Silicon Valley software giants), the parties in these disputes reflect in many ways the changing demographics and the evolving economy of the state of California.

The Judicial Officers of WCAB and the Administration of the DWC

Despite a name that solely suggests a court of appeal, the WCAB has the potential to be routinely involved in just about every aspect of the process from nearly the moment a worker is injured to the day a claim is

[10] Approximately 200,000 new "claims" (defined as a specific or cumulative *injury* on a specific *date* for a specific *employee*) request the jurisdiction of the Workers' Compensation Appeals Board each year. However, not all of those claims actually wind up before a judge of the WCAB; a sizable fraction of employees decide to accept whatever benefits are being offered by the insurer or employer without ever "settling" the claim or requesting a trial.

finally resolved; indeed, some workers' compensation practice manuals suggest that the document that is most often used to begin the process of notifying the WCAB of a need for services (an *Application for Adjudication of Claim*[11]) should be filed on behalf of every worker in every instance soon after the injury has occurred even if no dispute over the benefits provided by the insurer or employer has arisen. In most instances, however, the Application is simply a method of invoking the jurisdiction of the WCAB; it is not until a party has demanded the case be put on the trial track (by filing a *Declaration of Readiness*) or submits a proposed settlement agreement for review that judicial officers of the WCAB are likely to become directly involved.

Regardless of when intervention is triggered, the WCAB's adjudicatory responsibilities range from hearing and ruling on a wide variety of matters related to particular benefit issues, conducting a full trial on the underlying merits of the case, and, in a large number of instances, deciding on the adequacy of any settlement reached between a worker and an insurer.[12] WCAB judges also have the responsibility to manage the litigation prior to trial through settlement conferences and other pretrial conferences and are additionally tasked with ruling on discovery motions and resolving lien issues. Rather than simply acting as an appellate body, the WCAB is without question a fully functioning trial court of limited jurisdiction.

To be precise, the *Workers' Compensation Appeals Board* is an independent, quasi-judicial body (hereinafter referred to as the *Appeals Board*) whose seven Commissioners are appointed by the Governor and

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[11] Note that other documents, notably "original" *Compromise and Releases* or *Stipulations with Request for Award* can open a WCAB case when no Application for Adjudication has been previously filed. However, in recent years Applications have by far been the most common method of case initiation.

[12] In this document, the term "insurer" generally refers to any entity or person responsible for covering the costs related to workers' compensation benefits or handling related claims. This would include private workers' compensation insurance companies, the State Compensation Insurance Fund (SCIF), companies operating under a certificate of self-insurance, "third party administrators" who handle claims on behalf of others, "legally uninsured" entities, and even illegally uninsured employers.

confirmed by the Senate.[13] In theory, these Commissioners embody all judicial powers related to the workers' compensation system; in practice, however, the Commissioners have delegated a significant part of their judicial powers to about 180 or so trial-level judges who hold court at 25 offices (often referred to as "Boards," "district offices," "branch offices," "local offices," or even "courts") scattered across the state.[14] The trial-level judges (plus the clerks, secretaries, hearing reporters, and other support staff) are actually employees of the Division of Workers' Compensation (DWC), a part of the California Department of Industrial Relations (DIR), and the 25 locations where cases are tried are actually branch offices of the DWC.

The DWC's judges—in their exercise of the Appeals Board's judicial functions—are the ones who decide the outcome of the lion's share of disputes between workers and defendants. They and they alone hold conferences with litigants, rule on motions, review settlements, and ultimately hear and decide trials. Litigants, attorneys, and the general public view a judicial officer of the DWC to be the judge for their case and also view the particular branch office to which the case was assigned as the court where the matter is to be heard; indeed, few if any litigants will ever have a face-to-face encounter with one of the seven[15] Commissioners at the Appeals Board's offices in San Francisco. With this partial delegation of decisionmaking authority to the DWC's judges, the Commissioners' primary remaining functions include adopting rules of practice and procedure to be followed at the trial level and reviewing Petitions for Reconsideration (essentially a type of appeal) of trial-level rulings and decisions. In some aspects, the Commissioners do indeed act as an appellate body and given their

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[13] Labor Code §111.

[14] Conferences and hearings are also periodically held at a small number of auxiliary sites without a permanent branch office of the DWC such as Bishop, Chico, Crescent City, El Centro, Marysville, Oceanside, Palm Springs, Santa Cruz, and Ukiah.

[15] Seven is the authorized number of Commissioners; in recent years, fewer than seven Commissioners have staffed the Appeals Board for extensive periods of time.

rulemaking functions, a type of "Supreme Court" for the California workers' compensation world.

The end result is that the adjudication of the overwhelming bulk of workers' compensation disputes is handled by judges who are part of the overall DWC administration but whose judicial authority stems from the independent Commissioners.[16] The situation can be quite confusing to litigants who may be unfamiliar with these subtleties when trying to find out where their case will be heard; prominent signs at many offices sometimes contain references only to the Division of Workers' Compensation, sometimes refer only to the Workers' Compensation Appeals Board, and sometimes refer to both entities.

The relationship between the DWC and WCAB is a complex and intertwined one. DWC administrators decide where WCAB trial judges will hold court, the size of hearing rooms, the WCAB trial judges' work hours, the quantity and type of staff support provided, and many of the rules of practice and procedure under which the California dispute resolution process operates. The Commissioners have no direct supervisory control over the day-to-day operations of their own trial judges, but they have full power to "affirm, rescind, alter, or amend" any trial-level judicial action, their *en banc* opinions have the force of law with respect to how the trial-level judges reach their own decisions, and they have developed their own separate set of rules of practice and procedure. In many instances, the DWC-developed rules and the Appeals Board-developed rules are essentially mirror images of each other, in other instances (especially in regard to branch office administration) they complement each other by covering completely separate areas, and in still other instances they can act as a source of confusion to practitioners and litigants. Reflecting these dual lines of authority (one stemming from a legal concept and the other from organizational realities), the official manual detailing the policies and procedures to be followed at the branch offices is jointly approved

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[16] Adding to the confusion is the fact that Board Rule §10310(p) defines the Workers' Compensation Appeals Board as "the Appeals Board, commissioners, deputy commissioners, presiding workers' compensation judges and workers' compensation judges."

by both the Administrative Director (AD) of the DWC and the Chairman of the Appeals Board. Some official forms used by litigants and trial judges are "DWC" forms, some are "WCAB" forms, and some have the stamp of approval from both entities.

In this document, we employ a number of shorthand conventions to avoid revisiting this sometimes confusing situation. References to the "WCAB" include the trial-level judges who work for the DWC and the associated administrative support (e.g., secretaries, physical facilities, salaries, etc.) provided by the DWC. References to the "DWC" include these claims adjudication personnel, equipment, and facilities but also other units within the Division as well (the DWC has a myriad of responsibilities besides claims adjudication, including vocational rehabilitation support, auditing claims administrators, providing evaluations of permanent injuries, assisting workers in making claims, and the like). References to the "Commissioners" or the "Appeals Board" include only the members of the independent panel in the exercise of their duties for hearing reconsiderations and for promulgating rules of practice and procedure. References to "judges" or "workers' compensation judges" (WCJs) all refer to the DWC's trial-level judicial officers.[17] References to a particular "Board," to a "District Office" (the DWC's official name for the hearing locations), to a "court," to a "branch office," or to a "local office" are interchangeably intended to cover one of the 25 DWC/WCAB locations where matters are routinely decided at the trial level.

The Nature of the WCAB

The WCAB operates a very distinctive dispute resolution system, so much so that for many years, workers' compensation practice was the only certified specialty available to members of the California Bar. It is a high-volume tribunal, never uses juries as triers-of-fact, operates under relatively relaxed rules of evidence, acts as the adjudicatory arm

[17] Some statutory language also refers to the trial-level judges of the DWC as "workers' compensation administrative law judges" (WCALJ) or "workers' compensation referees" (WCR). In order to simplify the discussion, we will use the terms "judge," "workers' compensation judge," and "WCJ" interchangeably.

of a state administrative agency rather than as a part of an independent judiciary, takes what has been characterized as a "paternal" interest in assuring that privately negotiated resolutions are adequate, and, though it must decide questions of evidence in a fair and deliberate manner, is tasked with liberally construing the body of law under which it operates with the purpose of extending benefits to injured workers.[18] Moreover, the WCAB is viewed by many as simply one component of a much larger system of efficiently treating and compensating work injuries and returning employees back to the workplace as quickly as possible. In many ways, the role it plays in attempting to achieve these broad policy goals parallels the social welfare missions of specialty forums such as family or juvenile courts rather than a narrow focus on dispute resolution services such as provided in a state civil trial court of general jurisdiction.

Nevertheless, the issues surrounding the disputes that are decided by the judges of the WCAB are not fundamentally different from those that arise in civil tort or insurance-related cases. Indeed, the relatively high stakes involved in many workers' compensation claims, the lasting impact of WCAB decisions upon the life of an injured worker, the routine presence of attorneys on both sides of the dispute (with claimants nearly always hiring attorneys on a contingent fee basis), the infrequent use of case-resolving trials compared to the more pervasive use of settlements, and the fact that the WCAB is the exclusive forum for deciding workers' compensation disputes (rather than a nonbinding alternative dispute resolution process such as arbitration or mediation) suggests that it operates in a manner closely approximating a traditional civil trial court and that the parties involved are driven

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[18] Labor Code §3202 mandates that "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." However, LC §3202.5 suggests that while the laws may be interpreted in favor of encouraging benefit delivery to workers, WCAB judges must still determine questions of fact without favoring one side or another: "Nothing contained in Section 3202 shall be construed as relieving a party or a lien claimant from meeting the evidentiary burden of proof by a preponderance of the evidence...."

by similar incentives. It certainly is not a prototypical administrative law tribunal. Unlike such bodies, the decisions of the judges of the WCAB are final rather than simply a recommendation to an agency head, such decisions are only reviewable by the Commissioners of the Appeals Board who in turn are reviewed only by a state appellate court (rather than a California Superior Court judge), the dispute being adjudicated much more likely to be over provisions contained in legislatively enacted statutes rather than administratively adopted regulations, and the DWC does not act in a uniform role as either a prosecutor or a respondent (as do other agencies in their own administrative law hearings).[19] Indeed, the WCAB "in matters within its jurisdiction, acts as a judicial body and exercises judicial functions and, in legal effect, is a court."[20]

Areas of Concern

Over the past two decades, various members of the workers' compensation community have voiced their dissatisfaction with the degree to which the trial-level judges of the WCAB and the support and supervision given to them by the DWC have jointly succeeded in adjudicating disputes in a manner that is expeditious, efficient, evenhanded, and user-friendly. The discussion below reflects the general character of such complaints, though the extent to which they mirror reality is explored in greater detail elsewhere in this document.

Excess Delay

Like many other courts across the country, the WCAB has been criticized for failing to resolve matters before it in a timely fashion. Though there appears to be some progress in recent years toward meeting statutory time standards for holding conferences and trials following a request for formal WCAB intervention,[21] clearly there is much to be

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[19] The exception, of course, is when the applicant is one of the DWC's own employees. In such situations, the DWC stands in the same shoes as any other defendant.

[20] Bankers Ind. Ins. Co. v. IAC, 4 Cal.2nd 89 at 97 (1935).

[21] The average number of days from the filing of the Declaration of Readiness to the date of the first trial has dropped from 184 in the 4th quarter of 1996 to 117 in the 4th quarter of 1999. Commission on Health

done. This well-publicized state of affairs is a major source of concern for many who see delay in dispute resolution as antithetical to the idea of a fast-acting workers' compensation process. Almost like clockwork, each state legislative session in recent years seems to spawn yet another package of reforms that includes some fundamental changes in the structure of the WCAB judiciary and associated administration as a means to streamline the handling of disputed claims. While some might question whether the primary cure for core problems within the California workers' compensation system can be found within its adjudicatory process, the demand for change certainly indicates that there is a widespread perception that the WCAB is not working at peak efficiency or effectiveness.

This is not an issue unique to the WCAB. Other courts have had similar concerns about delay in both recent times and throughout much of the 20th Century.[22] Sometimes with the assistance of research groups such as the National Center for State Courts, the American Bar Foundation, the Federal Judicial Center, or the RAND Institute for Civil Justice, courts have spent a considerable amount of time and energy trying to understand why cases move at the speed they do and why they consume the resources they do.[23]

One problem that makes research in this area difficult is how one might measure the extent to which cases are "delayed." Because the concept of delay is essentially subjective, there is no unambiguous way to determine whether an individual case took too long to resolve. The use of time standards such as those contained in Labor Code Section 5502

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and Safety and Workers' Compensation, *1999-2000 Annual Report*, California Department of Industrial Relations, July 2000, p. 113.

[22] See, e.g., Clark, Charles, and Harry Shulman, *A Study of Law Administration in Connecticut*, Yale University Press, New Haven, 1937, p. 168; Zeisel, Hans, Harry Kalven, Jr., and Bernard Buchholz, *Delay in the Court*, Little and Brown, Boston, MA, 1958; Selvin, Molly, and Patricia A. Ebener, *Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court*, RAND, Santa Monica, CA, R-3165-ICJ, 1984.

[23] See, e.g., Kakalik, J. S., T. Dunworth, L. A. Hill, D. McCaffrey, M. Oshiro, N. M. Pace, and M. E. Vaiana, *An Evaluation of Judicial Case Management under the Civil Justice Reform Act*, RAND, Santa Monica, CA, MR-802-ICJ, 1996.

are helpful in that they provide a benchmark or goal for efforts to minimize delay but cannot help us decide whether any one case took an unnecessarily long time to reach a conclusion. Depending on the issues litigated, the need to perform extensive medical evaluations, and the atmosphere in which settlement negotiations were conducted, an attorney or a litigant involved in a matter that is not concluded until a number of years have passed from the time the file was first opened might feel that the case proceeded at an appropriate pace; on the other hand, others involved in a claim that was heard just three weeks after a request for trial might assert that given the relatively simple nature of the dispute, justice was both delayed and denied.

One explanation for this difference in perception is that whatever "delay" is, it has a variety of causes. When parties to the litigation are ready to go to trial, but the earliest the court can hear the matter is months or years away due to a lack of available courtrooms, the case is clearly delayed. But when an injured worker perceives that his or her attorney is not moving quickly enough to file documents promptly and instead waits until the very last day to do so time and time again, the case is delayed as well. When an attorney files an endless stream of motions in order to beat down the opponent in a war of attrition, the case is also delayed, as it is when parties show up for a hearing unprepared because they assumed the matter would be pushed off the calendar due to scheduling conflicts and, if that does not happen, they also assume that any continuance requested will be granted without protest. Addressing each of these sources is a very difficult task.

Extrinsically linked to any analysis of delay is a concern that an overemphasis on reducing time to disposition brings with it the danger that the core business of the courts—dispensing fair and deliberate justice—will take a back seat to more easily measured achievements in processing statistics. Trying to find a balance between speed and quality can be difficult as well; added pressure on judges to make snap decisions or on litigants to attempt to try cases that are clearly not ripe for formal hearing may result in giving considerations of fairness and due process only passing attention. In such situations, some additional delay is not necessarily to be avoided at all costs.

Further complicating the question is that for some, delay is not measured by elapsed time but by an increasing succession of “hoops” to jump through or court appearances to attend. It is not unheard of for litigants and their attorneys to assemble for a WCAB hearing at 8:30 a.m. only to find out that for some reason or another, the matter must be postponed to some date in the future. Regardless of whether or not the time from start to finish for this case will be no worse than others, each appearance is costly to workers who must take time off from their jobs and to insurers and employers who must pay their counsel for each visit to a WCAB branch office, regardless of whether the hearing was completed. Even more frustrating is the sense that a resolution for a matter that might have been proceeding along for years, so tantalizingly close at the start of the day, is now unlikely to happen for months to come.

Excess Costs

Another source of concern for both civil trial courts and the WCAB in particular involves the costs of litigation for both the court system itself and for the litigants who appear before it. Influential consumers of WCAB services have repeatedly voiced their displeasure with the costs for litigating such disputes and the perceived failure of the WCAB to keep a lid on the rising costs of workers’ compensation premiums. Indeed, 20% of the DWC’s overall funding is provided by the contributions of employers;[24] while only a portion of these funds are used for adjudication, the end result is that as costs for judicial services rise, so do the overall costs of the entire benefit delivery system.

Public expenditures associated with workers’ compensation dispute resolution are not only a burden for taxpayers in general and employers

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[24] The costs for governmental administration of the workers’ compensation system, including the adjudicatory process, come from two sources. State General Fund revenues provide 80% of the budget for the DWC and the WCAB and the remaining 20% comes from a supplemental assessment on employers. For those who purchase workers’ compensation insurance, the assessment is calculated as a percentage of premiums paid; for those who essentially are self-insured, the assessment is calculated as a percentage of recent liability payments.

in particular, they affect the very ability of the court to provide the services it was designed for. Courts must compete with other government entities for their share from the finite pool of tax dollars and they rarely have the independent power to insist on funding at levels their administrators believe are necessary to meet both current and future demand. This is certainly true of the WCAB as well. Funding for the workers' compensation courts are at the mercy, so to speak, of DWC and DIR decisions as to fiscal priorities and ultimately to decisions made by the Governor and the Legislature. If caseload levels increase without corresponding matches in judicial or administrative resources (or in increased productivity), the system will become overwhelmed, a backlog will develop, delay will increase, and the level of attention each case will receive from a judge will be reduced. Even if caseload levels remain steady, average case "complexity" may increase over time with additional hearings needed, longer trials the rule, or more intensive processing required by clerical staff. Again, if judicial and administrative resources are unable to match the increased burden on the courts, case processing will suffer. Accordingly, minimizing, or at least stabilizing, the public costs of handling cases is an important tool in reducing or preventing delay.

The private costs of litigation (over and above the 20% employer contribution for system administration[25]) are also an important concern, though for different reasons. Justice must be affordable; it cannot be solely a function of the assets of the litigants. In the context of the California workers' compensation system, much of the private litigation costs are borne by insurers and, ultimately, employers. Additional medical evaluations, additional appearances by their counsel, and additional trials all contribute to what a defendant will have to pay out on top of what the worker will receive as benefits. As expenses related to defending claims increase, so do workers' compensation premiums that in turn are factored into the costs of goods and services

[25] Though one can certainly view these assessments as part of overall "private costs of litigation" expenditures (in addition to attorney's fees and other direct costs), they are better characterized as a type of "tax" used to fund the public cost of administration such as court facilities and judicial salaries.

produced in the state. Workers are not as directly impacted by rises in private litigation costs, as they pay a relatively stable percentage of their recovery as fees (and very little else in terms of associated expenses), but if the costs to prosecute a typical workers' compensation case increase while benefits stay constant, attorneys who represent injured employees are likely to seek proportionally larger fee awards as well. The end result will be that the workers will walk away with an increasingly smaller share of the award or settlement, a significant problem in a system where some have suggested that the current benefit levels are already inadequate compensation for the seriousness of a workplace injury. Furthermore, lawyers working for injured employees operate at relatively thin margins, as they receive a fee percentage that is usually less than half of what one might pay to a personal injury attorney in a similarly sized case. To the extent that the costs borne by the attorneys representing workers rise, it may become unprofitable for some to continue practicing in this highly specialized area of the law. Even if they remain as workers' compensation attorneys, they may decline to represent all but the most lucrative clients (such as those with the largest claims or most straightforward issues) or take on caseloads so large as to reduce the amount of time they can devote to any one client. The importance of keeping a lid on private litigation costs for workers' compensation disputes cannot be minimized.

Nonuniformity

The third current area of concern for many in the workers' compensation community is in uniformity, or the alleged lack if it, as practiced by the 180 or so WCAB judges in the 25 branch offices. As a system that is set up to follow rational and certain guidelines, workers' compensation requires that procedures and outcomes be predictable. This goes far beyond ensuring that workers with similar injuries will receive similar levels of benefits no matter where they reside or which judge is assigned to hear their case. The steps needed to litigate these cases and the decisions a judge might make prior to trial must also be reasonably uniform. Some attorneys who practice workers' compensation law regularly handle matters at multiple branch

offices that are spread across entire counties or regions of the state. Insurers and larger employers are also likely to have to defend their interests in multiple locations. Having to satisfy the idiosyncratic decisions of local judges or administrators in order to advance or defend the interests of their clients creates a burden that can range from merely bothersome to one that directly impacts the fair delivery of justice.

Level of Service

An additional concern voiced by stakeholders is that the adjudication of cases before the WCAB increasingly is marked by unnecessary formalities and bureaucratic indifference. There is a shared sense among many who are involved in the workers' compensation system that the environment in which these courts have operated has traditionally been "different" in very fundamental ways from other civil trial forums. Rather than simply acting as independent and sometimes unapproachable arbitrators, judges and branch office staff are expected to behave in ways that best serve the interests of the primary consumers of their services. The WCAB is viewed as a link in the overall workers' compensation benefit delivery system; indeed, judicial intervention to some degree is the rule for the bulk of serious injuries with permanent disabilities and is unavoidable for any claim that eventually results in a settlement. Because so many claims pass through the WCAB on the way from the initial notification of the employer of the injury through the day the worker receives his or her final payment, unsatisfactory experiences at branch offices by claimants, defendants, and their representatives color the way the entire workers' compensation system is perceived.

"Consumer satisfaction" is more than simply a matter of good public relation skills. The extent to which a branch office is thought to be "user-friendly" by those who are involved in cases before its judges is often a reflection of how well it minimizes unnecessary delay in reaching a resolution of the case, unnecessary costs required to prosecute or defend a claim, and any unexpected outcomes or idiosyncratic procedures. Local DWC offices where attorneys, seemingly on demand, can find a judge ready, willing, and available to review a

settlement at just about any moment that the doors are unlocked are seen as far more business-like and results-oriented than a forum where a scheduled appearance at some future date is needed to accomplish the same goal. A branch office where all of its judges apply similar and predictable criteria for evaluating settlements is viewed as a place that is "working" in contrast to offices where whether or not the agreement is approved is more a function of the identity of the assigned judge than the intent of the Labor Code. A branch office where workers are unable to easily get simple answers to simple questions about the status of their case or what they should do next to get the benefits that are their due is thought of as the embodiment of a system that cares little for their problems. Enhancing customer satisfaction is clearly a legitimate goal for a service-oriented entity such as the WCAB.

Administration and Management Issues

A final area that has been at the top of many agendas is the belief that the difficulties the WCAB has had in terms of delay, costs, uniformity, and service to its target audience primarily stem from the failure of upper-level DWC administrators to focus their attention on its claims adjudication duties and to manage its operations more effectively. The concern is that given its myriad responsibilities to audit and regulate insurance companies and their practices, to provide information and assistance about the workers' compensation process, to conduct independent evaluations of permanent disabilities, to handle the special problems of uninsured employers, to coordinate vocational rehabilitation services, and to oversee the delivery of managed care options, the DWC cannot be expected to adequately supervise the judges of the WCAB or to provide the sort of guidance to these judicial officers that is needed to move cases through in a fair, speedy, and inexpensive manner. One approach that has been repeatedly advanced in a number of recent legislation packages would be to shift the direct supervision of the trial judges away from both the Appeals Board and the DWC to a gubernatorial appointee who would act in the role of a "Court Administrator."

STUDY MISSION

The concerns listed above are at the core of what CHSWC has asked RAND-ICJ to explore in developing recommendations for improving the adjudication of claims before the WCAB. In the area of delay, we have attempted to understand the extent to which cases take longer to resolve than they should, identify what is causing such cases to move toward disposition at the speed they do, and to suggest strategies for meeting statutory standards, while mindful of the WCAB's core mission of dispensing justice in a fair and deliberate manner.

As for claims that costs have been increasing without expected improvements in system efficiency, we have tried to identify the types of cases and activities within the branch offices that consume an inordinate amount of public and private resources and to develop ideas for streamlining workflow without adversely affecting the pace of litigation or the quality of justice.

We have also tried to identify the extent to which policies and procedures vary from office to office and from judge to judge and to address those differences that cause the greatest dissatisfaction among court users. Our primary desire is to reduce nonuniformity in a way that does not increase delay or costs or detract from considerations of due process or fundamental fairness.

As can be seen, these are interrelated areas of concern. We consider issues of delay, costs, and uniformity to be primary ones to our work. These are the ones for which our methodology was primarily designed to address. But related to these issues are the goals of increasing "customer satisfaction" and of exploring possible revisions to current DWC lines of authority. We have tried to identify what causes a less-than-optimal experience at District Offices for parties, their representatives, or the people who work there and in that light, have suggested possible changes that might enhance the current level of services. Finally, we hoped to determine whether any of the foregoing mission areas could be significantly or best addressed by the creation of a systemwide "Court Administrator" of department-head status whose sole responsibility would be to oversee the claims adjudication unit.

ORGANIZATION OF THE REPORT

Part One of this document (***CHAPTER 1*** and ***CHAPTER 2***) describes the background to the study as well as the scope of the research and our methodological approach. The initial sections (***CHAPTER 1*** through ***CHAPTER 5***) of **Part Two** provide an overview of some of the common features of dispute resolution in the California workers' compensation system, a synopsis of how that process has evolved over time, and a description of the size and character of the workload of the local offices in recent years. The remainder of **Part Two** (***CHAPTER 6*** through ***CHAPTER 10***) sets forth the quantitative results of our work with an analysis of the DWC's transactional database, a comparison of the characteristics of the various offices in the system, an assessment of how judges spend their time, a description of what was learned from typical cases files, and an examination of staffing resources and related budgetary issues. **Part Three** (***CHAPTER 11*** through ***CHAPTER 20***) combines such quantitative data with an extensive amount of information collected through discussions with system participants and firsthand observation of office operations to generate a series of recommendations and the reasoning behind each. Each chapter focuses on a particular area or issue within the dispute resolution process, such as the roles of various staff members, uniformity, calendaring, case management, pretrial matters, procedures for trials, and technology. The final chapter (***CHAPTER 20***) attempts to distill the core lessons learned during our research.

A companion document (*Technical Appendices: Improving Dispute Resolution for California's Injured Workers*, RAND, PM-1443-ICJ, Nicholas M. Pace, Robert T. Reville, Lionel Galway, Amanda B. Geller, Orla Hayden, Laural A. Hill, Christopher Mardesich, Frank W. Neuhauser, Suzanne Polich, Jane Yeom, and Laura Zakaras, 2003) provides some additional information on comments from the workers' compensation community we received during the course of this research, detailed intraoffice characteristics, the data collection instruments used during the judicial time study as well as the case file abstraction, and other technical aspects of the project. Copies of the *Technical Appendices*

are available upon request from the Director of Communications for the RAND Institute for Civil Justice.

CHAPTER 2. RAND-ICJ'S APPROACH TO UNDERSTANDING THE WCAB JUDICIAL FUNCTION

INTRODUCTION

In order to accomplish the task given to us by the Commission on Health and Safety and Workers' Compensation, we have attempted to evaluate the WCAB's performance, organization, and workflow as well as its support staff levels and its infrastructure. From the very start, it was made clear to us by our project's sponsors that the ultimate goal of the research must be a set of workable recommendations that take into account the realities of the California workers' compensation system. Merely producing a report that carefully avoided specific or unpopular suggestions would not be acceptable. As such, our findings include the results of our qualitative and quantitative data collection, our analysis of what we learned, and what we believe are the steps needed to address the five main areas of concern regarding the WCAB today. These recommendations include workflow improvement, changes to current calendaring practices, modification of continuance policies, adjustments in judicial resources and support staff levels, and matters related to technological innovations.

SCOPE OF THE RESEARCH

This study is primarily a review of the practices and procedures of the trial judges of the Workers' Compensation Appeals Board as well as the administration and activities of the Claims Adjudication Unit of the Division of Workers' Compensation of the State Department of Industrial Relations. We specifically did not include in the scope of our research the following areas:

- The policies, procedures, and administration of the Commissioners of the Workers' Compensation Appeals Board as they relate to their appellate duties and responsibilities,
- Workers' compensation benefit levels, scope, or delivery,

- The mechanism for funding the operations of the DWC and WCAB through a combination of employer assessments and General Fund allocations,
- Issues involving fraud regardless of whether committed by insurers, employers, employees, medical providers, or others,
- Issues involving workplace health or safety,
- The weight given to evidence before the WCAB, including the "treating physician presumption" and final offer arbitration,
- Medical treatment issues (including the use of managed care), the operation and activities of the Industrial Medical Council, and the costs of providing health care related to workers' compensation (including the Official Medical Fee Schedule),
- Workers' compensation insurance claims handling practices prior to reaching the stage where WCAB action is requested,
- Responsibilities of the Division of Workers' Compensation that are not related to the adjudication of claims,
- Safety and security at DWC district offices,[26]
- Rehabilitation issues such as return to work programs,
- The adjudication of Rehabilitation Unit disputes,
- Evaluations of disability by physicians, and
- The disability rating schedule.

Without question, many of the foregoing issues have a significant impact on how claims evolve into disputes, how disputes evolve into formal cases before the WCAB, and how those cases are ultimately resolved. Furthermore, how efficiently and effectively other units of the DWC perform their duties can mean the difference between prompt adjudication by the WCAB or having the matter drag out for months. While we have attempted to identify some of the key influences coming

[26] At the start of our research, safety and security issues at local offices was an area in which we actively solicited input from DWC workers. However, as we did not visit even the majority of offices in person, we were unable to compare how well they were designed to prevent unauthorized access and inappropriate contact. Nevertheless, the current level of security (or lack thereof) was repeatedly voiced to us by numerous DWC office personnel as a significant concern.

from sources external to the Claims Adjudication Unit of the DWC, our main focus is on case management and administration within that unit. Moreover, matters such as the treating physician presumption, medical services delivery following work injuries, benefit levels and their relationship to compensating the costs of work injuries, and the disability rating schedule are already the subject of ongoing and highly focused research being conducted by the Commission on Health and Safety and Workers' Compensation.[27] Hopefully, policymakers will use our analysis of the adjudication process in conjunction with the Commission's other work in deciding future directions for the DWC. In the instant document, we mention some of the areas listed above as sources of discontent among the workers' compensation community, but we make no recommendation as to whether the current policies should be changed.[28]

OVERVIEW OF METHODOLOGY

In order to assist the WCAB and DWC in developing and assessing possible solutions to perceived problems, we undertook our analysis of the local courts' operations with an eye primarily toward how cases are managed by the courts, how they are litigated by the parties, and whether the existing resources are adequate to meet demand. In the course of this analysis, we obtained the input of litigants, judges, lawyers, and court administrators; analyzed the workload at the branch offices; observed firsthand the operations of judges and court personnel; and built on decades of previous ICJ work in this area. The

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[27] See, e.g., Commission on Health and Safety and Workers' Compensation, *Preliminary Evidence on the Implementation of Baseball Arbitration*, California Department of Industrial Relations, 1999.

[28] For example, some members of the workers' compensation community suggested to us that increasing case complexity, a lack of collegiality among the bar, and unnecessary delay throughout the system were being driven in part by the alleged ease with which an applicant can seek penalties for even minor claims handling infractions. Regardless of whether this is the case, such issues involve the substantive law of workers' compensation, not procedures or management. While we certainly explored the relationship between penalty requests and time to resolution, deciding whether or not the availability of such penalties was beneficial to the overall workers' compensation scheme was beyond the scope of our work.

approach to completing this analysis is briefly outlined below, though more complete descriptions of our methodology for particular data collection tasks are described elsewhere.

Initial Steps

We began by familiarizing ourselves with the California workers' compensation adjudication system through a series of informal, unstructured visits to five district offices (Oakland, San Diego, Santa Ana, Santa Monica, and Santa Rosa) in the fall of 2000.[29] These visits included discussions with judges, clerks, secretaries, other DWC staff members, ancillary service providers, and local counsel as well as in-court and in-chambers observations.

At an early stage in our research, we associated with a team of nearly 20 workers' compensation experts from across the state to act as an advisory and resource group. This group reflected, we believe, a balance of applicants' attorneys, defense attorneys, judges, lien claimants, and DWC staff members.[30] We used the experience of this group to help us understand how the system works in theory and in practice as well as to act as a source for suggested reforms. They were

[29] These sites were chosen primarily for geographical diversity and convenience to RAND research team members.

[30] The group consisted of **Elliot Berkowitz**, Los Angeles (applicants' attorney); **Walter Brophy**, Redding (Retired Workers' Compensation Judge); **Ellen Flynn**, Anaheim (Presiding Judge, Anaheim WCAB); **Mark Gearheart**, Pleasant Hill (applicants' attorney); **Howard Goodman**, Santa Monica (Workers' Compensation Judge, Santa Monica WCAB); **Joel Harter**, Sacramento (Presiding Judge, Sacramento WCAB); **Mark Kahn**, Van Nuys (DWC Regional Manager, Central Region); **Jim Libien**, San Francisco (defense attorney); **Kris Nielsen**, Costa Mesa (Litigation Manager, AIG Claim Services); **Dave Null**, Van Nuys (Supervising Workers' Compensation Consultant, DWC Information & Assistance Unit); **Barry Pearlman**, Encino (defense attorney); **Bob Quaid**, San Jose (Claims Manager, State Compensation Insurance Fund); **Robert Rassp**, Woodland Hills (applicants' attorney); **Nancy Roberts**, Alameda (lien claimants' attorney); **Steve Siemers**, Oakland (Workers' Compensation Judge, Oakland WCAB); **Cindy Stephan**, Los Angeles (DWC Office Services Supervisor, Los Angeles WCAB); **Larry Swezey**, Palo Alto (former Appeals Board Commissioner; CHSWC consultant); and **Rich Younkin**, San Francisco (DWC Assistant Chief). It should be noted that a number of the attorneys listed here as an "applicants' attorney" or "defense attorney" occasionally represent applicants, defendants, and lien claimants as well.

also kept abreast of key project developments and were extremely helpful in acting as liaisons to their segments of the workers' compensation community. Our initial observations and recommendations were discussed in person with many members of the group in order to gauge at the earliest opportunity whether the underlying assumptions were reasonable. It should be understood, however, that the Advisory Group did not have direct oversight over our research approach, and on occasion various members have differed with some of our conclusions. Additionally, all advisory group members contributed their assistance solely as private individuals and not as representatives of the law firms, government agencies, or other organizations with which they may be associated.

A primary source of information throughout the study was the DWC's own networked database (the *Claims Adjudication On-Line System* or CAOLS[31]) which, despite the fact it was installed in the 1980s, is the only complete and available electronic depository of transactional information.[32] We received a complete set of data from the DWC in March of 2001 and we performed case-level and court-level analyses of system throughput, system workload, and individual case characteristics.

Throughout the course of this project, we continued to review relevant research literature and the most important studies and reports available regarding the workers' compensation adjudicatory process in California. We also obtained a wealth of information directly from the DWC, the Appeals Board, our project's sponsor (the Commission on Health and Safety and Workers' Compensation), and other state entities concerning such areas as staffing levels, budgetary practices, and system performance.

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[31] While we identify this networked database as CAOLS in order to distinguish it from separate data systems used by the Vocational Rehabilitation Unit and the Disability Rating Unit, it is generally known within the DWC simply as "the On-Line System." "CAOLS" is a term developed during the course of the research by RAND.

[32] Another data system that contains many of the records found in CAOLS is the fee-for-use "EDEX" network created as a public access version of CAOLS. EDEX also is a depository for liens filed electronically. We used CAOLS rather than EDEX because we wanted to replicate some of the analysis procedures performed by the DWC on its own system. Other than liens, the data in EDEX essentially reflects that in CAOLS.

Analysis of System Workload Data

A major focus of our work was an analysis of CAOLS data to determine whether the time needed to complete various stages of litigation, and the number of judicial resource-consuming events such as conferences and trials, could be predicted by a case's characteristics known at the time of case opening (see ***CHAPTER 6***). Our hope was to identify those factors that might effectively lead to an appropriate level of case management tailored to the needs of the case. Also, this work would help us better understand the sources of delay and multiple appearances so that effective recommendations in other areas might be developed as well.

Analysis of Staffing and Related Budget Data

Early on in our research, it became clear that staff levels were an important factor in how the WCAB is able to meet the demands of a changing caseload. In addition, the quality of many staff members seemed to be a function of the length of time they worked in their positions and the training and experience they received. Accordingly, we spent a considerable amount of effort pulling together information from a surprisingly large number of sometimes inconsistent sources. We collected data on staffing levels as they fluctuated over time for every position at various branch offices, the process required to determine adequate staffing levels and to actually fill the positions, and the fiscal impact of fully staffing the Claims Adjudication Unit of the DWC (see ***CHAPTER 10***).

Intensive Look at Six Representative Courts

Selection

Our next major step was to conduct site-level data collection effort in six "representative" courts. The six District Offices were chosen by the research team after reviewing performance measures, known characteristics such as calendaring procedures and other management differences, office size, and staffing levels. Our primary goal was to identify a set of six courts that when taken together reflected the workload in all of the District Offices of the DWC as well as the

resources available to, and the diversity of approaches taken by, judges and office staff to meet those demands. After careful consideration, the RAND-ICJ team decided to include only those District Offices with five or more authorized judges. It was felt that while much could be learned from the smallest offices in the system, the specialized needs of these sometimes remote courts would make it difficult to include them in the general analysis of office practices. The disproportionate impact of the study on these offices was also a factor. The remaining medium and large courts that were considered for possible selection handle more than 90% of all new case openings.

We were also cognizant of the generally held belief of a so-called "north-south" difference in District Office size, procedures, judicial demeanor, caseloads, performance, and relationships between bench and bar. As such, the team took steps to ensure that at least some District Offices would be from both the northern and southern parts of the state, though not necessarily in a way that matches the three official regions of the DWC. In the end, the sites chosen consist of three large and three medium-size District Offices: Los Angeles, Pomona, Sacramento, San Bernardino, Stockton, and Van Nuys. It should be emphasized that none of the sites were chosen because of any particular performance or personnel problems. Indeed, compared to branch offices of similar size, these sites are fairly typical in the way the overall business of the DWC is conducted.[33]

Judicial Time Study

In these six courts, we conducted a judicial time study for all of their judges that lasted for five consecutive weekdays (see ***CHAPTER***

[33] We would have also preferred to include a targeted selection of a number of local offices that were reportedly going through difficult times as a result of severe shortages in staff levels, adverse relationships with the workers' compensation community, or internal problems with staff discipline. Because of resource and time considerations, this was not possible, though we certainly spoke by telephone or in person with a number of those who worked at or practiced before such problem offices. Nevertheless, our selection criteria was primarily designed to obtain data from "typical" offices in order to better gauge the general effects of changes in rules, regulations, and management policies.

8).[34] We sought to understand what judges do and what kinds of cases they handle by tracking all time spent in the performance of their duties. We received self-reported forms from every active judge at the six courts. The judges were assured that their individual responses would not be published or released to anyone outside of RAND.

Site Visits

RAND-ICJ research teams also conduced site visits to the six branch offices over a period of six weeks with occasional follow-up visits as needed. At each location, we walked through its back offices to review procedures, facilities, and equipment; we conducted formal interviews with judges, support staff, local attorneys, and others; we had numerous informal discussions with members of the workers' compensation community at every opportunity; and we spent many hours observing conferences and trials (as much as possible without the knowledge of any of the participants). What we saw and were told during these visits (as well as those to the five "familiarization" offices earlier) form the primary foundation for our ultimate findings and conclusions. As with other aspects of this research, all conversations with individuals conducted as a part of the site visits have been kept confidential.

Litigation Characteristics Sample

We also conducted an intensive study of almost 1,000 cases at these six sites to learn of the processes that drove them through the system and what transpired during their lives. We believe that this work yielded a rich source of data and was one of the best ways to identify the extent of delay and excess cost. The cases all involved injuries taking place on or after January 1, 1994, because such post-"1993 Reform" matters are the ones branch offices primarily handle today. We

[34] An alternative approach that would have provided more in the way of case-specific information would have been to conduct a judicial time study linked to activity on a selected sample of cases, follow such cases from the moment of case opening through final termination, and then analyze the data on the basis of case type. Such an approach is similar to that used by the Federal Judicial Center for their workload analysis of Federal District Court judges. To do so here would have required collecting data for at least a year or more for most of our cases.

also used only cases involving injuries or diseases that did not result in death and that were initiated (through an *Application for Adjudication* or a settlement document opening) in 1998 or 1999.[35] We used CAOLS for summary information, but we also performed an "eyes-on" abstraction of each physical case file to better understand what happened during the case and how it was resolved. Information was abstracted from every relevant *Application for Adjudication*, *Declaration of Readiness*, *Request for Expedited Hearing*, *Order and Minutes for Continuance or to Take Off Calendar*, *Mandatory Settlement Conference Summary Statement of Stipulations and Issues*, settlement documents such as a *Compromise & Release* or *Stipulations with Request for Award*, and trial decisions as contained in all *Findings & Award* or *Findings and Order* we found in the file.

We used this data for a number of purposes.[36] Besides developing a detailed picture of typical workers' compensation cases (see ***CHAPTER 9***), we combined the data extracted from the files with that already contained in CAOLS to supplement and enhance our existing analysis of the factors influencing delay (see ***CHAPTER 6***). Also, the experience of reviewing actual case files was extremely helpful in determining how effective the judges of the WCAB were in documenting their actions and

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[35] Because DWC branch offices generally send files to the State Records Center for long-term archiving on the basis of date of case opening, it would have been quite costly to review activity in matters more than about three-and-a-half years old (a typical criteria used by offices for archiving). Additionally, we sought cases that would have been for the most part resolved by the time of abstraction and so newer cases such as those begun in 2000 or 2001 would not have been good candidates.

[36] We considered an approach that would have also included surveys of litigants, attorneys, and judges in each case to obtain the most complete data possible on how the case was managed and the factors that drove it to resolution. Unfortunately, initial discussions with typical representatives of each of these potential respondents revealed that specific recollections of what happened in individual workers' compensation cases litigated as long as three years earlier would have been sporadic. This would not have been as true with the applicants themselves, but we believed that their general concerns about case processing would be obtained just as easily through the public input phase and via specific site interviews with current litigants.

how accurate were the official record-keeping functions of the Claims Adjudication On-Line System.

Presiding Judge Survey

Time and resources did not permit us to visit all 25 district offices of the WCAB. While we received a substantial amount of information about operations, procedures and policies in effect, and issues regarding staffing and the like at various offices across the state from our public input process and from DWC reports, we also systematically collected data through the use of two separate surveys of each Presiding Judge.[37] The initial survey was conducted as part of the RAND-ICJ project through the efforts of the three DWC Regional Managers in early 2001. It covered areas such as staffing needs, concerns over the adequacy of existing facilities and security, and general calendaring practices. A more detailed follow-up survey was conducted by RAND-ICJ in late 2001 and focused on calendaring, judicial assignment, and management differences.[38] Taken together, the surveys provide a comprehensive picture of some of the key differences between various district offices (see ***CHAPTER 7***).

Stakeholder Input

Experience has shown that judicial reform efforts in other systems have sometimes been hampered by the failure of legislators, administrators, and researchers to consult with judges, attorneys, staff, litigants, and other stakeholders to identify problem areas and to create workable solutions. To obtain that input, we used a multifaceted approach including direct contact with key interest groups

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[37] In this document, the term “Presiding Judge” also covers those who are designated as an “Acting Presiding Judge,” typically at the smallest offices that are not eligible for a supervisor at the official Presiding Judge classification.

[38] The results of the second survey are found in the ***Technical Appendices***. Participants were informed from the start that unlike other contacts with RAND staff, their answers would be made publicly available and the identity of the contributor would be known. The initial survey of Presiding Judges was intended to be a confidential communication to DWC management and RAND staff and so is not reproduced here, though many questions in the second survey duplicate those of the first.

as well as setting up anonymous channels of communication. Early on in this work, we attempted to contact organizations such as injured worker advocacy and support groups, associations of applicants' attorneys and defense attorneys, the State Bar section on workers' compensation, and various workers' compensation reform organizations. Requests for public input were placed in all district offices so that both current users of WCAB services and DWC staff members at every level would also contribute. We established an external website to provide an easily accessible method of learning about the project's features but also to act as an avenue for anonymous comments that would supplement more traditional lines of communication. As a result, we regularly received helpful letters, phone calls, e-mail messages, and anonymous web-based submissions throughout the life of the project. To the extent resources permitted, we also attempted to attend key meetings of stakeholder organizations to report on the progress of the research, to discuss issues related to workers' compensation reform with the organizations' leadership, and most importantly to encourage the private submissions of comments from their rank and file members.

Another major source of input for us were the on-site talks we conducted with a wide variety of stakeholders such as judges, attorneys, DWC staff members, and individual parties (applicants, lien holders, and employers) whenever we visited a branch office for any reason. These contacts ranged from brief chats in the hallways or waiting rooms to intensive discussions that took place over many hours. While much of that effort was involved in collecting data about court operations, procedural issues, and the like, many contacts evolved into free-ranging discussions about whatever workers' compensation-related topics were of greatest concern to these people.

Contributions have all been held in the strictest confidence. In order to encourage frank and honest discussions, we took great steps to ensure that the identity of the contributor would not be revealed to anyone, including the DWC, the WCAB, or even our sponsors, the Commission on Health and Safety and Workers' Compensation, unless required by law. A summary of typical submissions provided to the research team through mail and e-mail correspondence can be found in the

Technical Appendices. Detailed interview notes are not repeated here because of the high potential for identification of the interviewee.

Candidate Recommendations and Public Roundtables

By the end of August of 2001, we had completed most of our data collection and analysis and were at a point where we had identified a number of areas that were excellent candidates for recommendation. The public input we had obtained up to that point had generally been characterized by the identification of problems with the adjudication process but did not always discuss the pros and cons of various potential solutions. We felt that by communicating our preliminary findings to the workers' compensation community at that time, we would be able to learn from their focused criticism and suggestions and we could in turn focus our final analysis on the areas of greatest interest and of maximum potential benefit.

We widely distributed copies of a document outlining our "candidate recommendations" (*Improving "The People's Court": Candidate Recommendations for the Adjudication of Claims Before the California Workers' Compensation Appeals Board*, The RAND Corporation, DRU-2645-ICJ, September, 2001) through the Commission on Health and Safety and Workers' Compensation, through remote download via our project website, and through direct mailing to key stakeholders and organizations. A free hardcopy was also provided to anyone who contacted RAND-ICJ project staff with a mailed request. Following the distribution of the publication, we received a new round of contributions and direct contacts that helped guide our final research.

Though the *Candidate Recommendations* were in draft form and readers was cautioned that the conclusions and suggestions made within that document might undergo significant modification, they served as a starting point for discussions within the DWC and the WCAB aimed at reforming legal procedures and internal operations. A "RAND Study Committee" was jointly formed by each entity and was made up of judges, branch office staff members, and upper-level members of the WCAB and DWC. The Committee proposed a number of new or revised regulations, changes in policies and procedures, and organizational modifications

using the *Candidate Recommendations* as a guide. A public forum was also established on the DWC website in order to obtain input from the workers' compensation community on various topical areas such as pleadings, rules of practice and procedure, transcripts, hearings and conferences, document filing, liens, evidence, service, Declarations of Readiness and Objections thereto, settlements, arbitration, review of administrative orders, document reproduction, the Subsequent Injuries Fund, the use of different judges for the Mandatory Settlement Conference and trials, judicial reassignment, dismissals, case file destruction, and "walk-through" orders. Many, though not all, of the proposals generated by the committee are a direct outgrowth of the *Candidate Recommendations* draft as well as initial drafts of the final RAND report.

In order to capture the widest possible array of input from the workers' compensation community during the final stages of the research, we held two public roundtables (one in San Francisco and one in Van Nuys) in early November 2001. These sessions were primarily intended as an opportunity for individuals to openly discuss and debate the *Candidate Recommendations* with project staff members but were also for the purpose of getting a better understanding of the issues that were of greatest concern to injured workers.

-- PART TWO: PAST HISTORY & CURRENT STATUS OF WORKERS' COMPENSATION DISPUTE RESOLUTION --

CHAPTER 3. OVERVIEW OF THE CALIFORNIA WORKERS' COMPENSATION ADJUDICATION PROCESS AND ADMINISTRATION

INTRODUCTION

This chapter is intended to introduce and explain some of the basic features of how disputes over workers' compensation claims are resolved with the assistance of the WCAB and how these procedures have developed over time. It is *not* intended to be an exhaustive review of workers' compensation law and practice and generally only focuses on the system in place for injuries occurring on or after January 1, 1994. Many important exceptions to the procedures discussed below are omitted for the sake of brevity. Those readers who are familiar with how the California workers' compensation system operates may wish to skip to ***CHAPTER 4: EVOLUTION OF THE WORKERS' COMPENSATION JUDICIAL PROCESS***.

SYSTEM ADMINISTRATION

According to its website's mission statement, the *Department of Industrial Relations* (DIR) is a state agency "established to improve working conditions for wage earners, and to advance opportunities for profitable employment in California." DIR has a number of divisions covering particular areas of responsibility including occupational health and safety (CAL/OSHA), labor standards, collective bargaining mediation, labor statistics and research, apprenticeship standards, workers' compensation, and the like.[39]

Within DIR, there are two divisions of interest in the workers' compensation process. The *Division of Workers' Compensation* (DWC) is the group primarily charged with administering the provisions of the *Workers' Compensation Act*. It is headed by an *Administrative Director* (AD) (a gubernatorial appointee) with the support of a *Chief Deputy Administrative Director* (CDAD). At the present time, the duties of the

[39] The State Compensation Insurance Fund (SCIF), a nonprofit, public enterprise fund set up to provide workers' compensation coverage and act as an assigned risk pool, is also associated with the Department of Industrial Relations.

CDAD are being handled part-time by the Presiding Judge of the Walnut Creek office with support from the Presiding Judge of the San Francisco office. The Division is broken up into various sections such as Disability Evaluation, Information and Assistance, Rehabilitation, Audit and Enforcement, Uninsured Employers' Fund Claims, Managed Care, and Claims Adjudication. The latter unit, essentially the "workers' compensation courts" of this state, is headed by an *Assistant Chief for Adjudication of Claims* (ACAC).

The other Division under DIR that is directly related to workers' compensation is the *Self Insurance Plans' Workers Compensatio*n. It is responsible for regulating the plans of those companies that are large enough to dispense with the need to buy workers' compensation insurance policies. Additionally, the state *Department of Insurance* (DOI) regulates some aspects of traditional workers' compensation insurers.

Besides CHSWC and the Appeals Board, another independent commission loosely associated with DIR is a part of the overall workers' compensation system. The 16-member *Industrial Medical Council* (IMC) is responsible for administering the health care, rehabilitation, and medico-legal components of the Workers' Compensation Act.

The 25 District Offices of the Claims Adjudication Unit of the DWC are essentially the workers' compensation courts for this state. About 180 trial judges are authorized to work at these locations and depending on which versions of the relevant statutes or regulations are currently in vogue, the line judges are known as *Workers' Compensation Judges* (WCJs), *Workers' Compensation Referees* (WCRs), or *Workers' Compensation Administrative Law Judges* (WCALJs).

At most offices, the WCJs are supervised by a fellow judge known either as a *Presiding Judge* (PJ), *Presiding Workers' Compensation Judge* (PWCJ), or a *Presiding Workers' Compensation Administrative Law Judge* (PWCALJ). The PJs are management-level employees who have a reduced caseload in exchange for extra administrative duties. They act both as the "Chief Judge" of each branch office and as "Clerk of Court" in all but name.

The offices across the state are divided into three regions (*Northern*, *Central*, and *Southern*), each with its own *Regional Manager*,

all of whom are former WCJs. A typical office might have a single PJ, multiple WCJs, assigned secretaries for each judge at the *Senior Legal Typist* (SLT) classification, a single supervisor (typically the PJ's secretary) for the secretarial staff at the *Legal Support Supervisor – Level I* classification (LSS-I), a number (slightly larger than the number of judges) of clerical staff members at the *Office Assistant* (OA) classification, a single supervisor for the clerical section at the *Office Services Supervisor – Level I* (OSS-I) classification, and about six certified stenographers at the *Hearing Reporter* (HR) classification for every ten judges. The PJ is the immediate supervisor of all of these Claims Adjudication staff members.

Not all offices have all of these authorized positions or in the ratios suggested above. At the very smallest locations, there is no official PJ, though one of the WCJs will typically serve as an *Acting Presiding Judge* without any formal change in classification. Small offices may also not be eligible for an LSS-I or an OSS-I to supervise secretaries and clerks, though again, one person in each section will usually perform that role by default.

In addition, some offices (depending on size, staffing resources, and location) may have one or more members of so-called "ancillary services units" of the DWC that deal with "rating" the extent of the injuries (the *Disability Evaluation Unit* or DEU) determine the services needed to return injured employees to the workforce and if necessary, resolve rehabilitation-related disputes (the *Rehabilitation Unit* or RU), or act as a resource for members of the community to learn more about the workers' compensation process (the *Information and Assistance Unit* or I&A). The professionals that make up the three units, generally known respectively as *Raters*, *Rehab Consultants*, and *I&A Officers*, are provided clerical support from some of the OA-level staff at the district office. Raters and I&A Officers are at the *Workers' Compensation Consultant* (WCC) classification while the Rehab Consultants are at the *Workers' Compensation Rehabilitation Consultant* (WCRC) classification. While the WCCs and WCRCs look to regional or divisional managers for professional training and guidance, the PJ, even though he

or she is technically in another DWC unit, is their immediate supervisor as well.

APPLICABLE RULES AND REGULATIONS[40]

Besides the state Constitution, the primary authority for workers' compensation is found in the *Labor Code* (LC). Sections related to general provisions (§§1 to 29.5), the Department of Industrial Relations (§§50 to 175), and specific aspects of workers' compensation (§§3200 to 6208) are most relevant to this discussion.

The rules of practice and procedure developed by the Appeals Board are known as *Board Rules* (BR) and are found in Chapter 4.5 ("Division of Workers' Compensation"), Subchapter 2 of Title 8 of the *California Code of Regulations* (CCR), §§10300 to 10999. The rules of practice and procedure developed by the Administrative Director of the DWC are known as *Administrative Director Rules* (ADR) and are found in Subchapter 1 of Chapter 4.5 in CCR Title 8 §§9720.1 to 10021. Other sections found in Chapter 4.5 and Chapter 8 of CCR Title 8 also relate to workers' compensation administration.

Directives to DWC district offices regarding internal operations are contained in the *Policy & Procedural Manual* (P&P). The P&P Manual collects bulletins and policy orders issued by upper-level administrators going back three decades or more. Those sections that affect the adjudication of claims have typically been approved by both the Administrative Director and the Chairperson of the Appeals Board, though not always. Matters found in the P&P Manual include calendar-setting policies, lien procedures, continuance criteria, settlement approval guidelines, as well as more mundane information such as the addresses of workers' compensation agencies in other states. Unlike the

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[40] Another extremely important source of authority not included here is the considerable body of case law that has developed out of the decisions of the Commissioners of the Appeals Board and the California appellate courts. Because such decisions either are derived from the statutes and regulations we already suggest need a reexamination or involve due process, Constitutional, and other issues beyond the immediate control of administrators and lawmakers, they are not a subject of our discussion.

Title 8 CCR regulations, P&P Manual bulletins have not been subject to a formal rulemaking process.

Official forms used for pleadings and orders or other workers' compensation purposes related to adjudication do not have any single source. Some can be found in the P&P Manual while others appear to be created to address individual needs or statutory requirements by the Administrative Director, by the Appeals Board, or jointly.

CALIFORNIA WORKERS' COMPENSATION SUMMARY

The Benefit Delivery System

Introduction

Workers' compensation in California is not administered by a government agency but instead is provided primarily by private entities such as insurance companies and self-insured employers. Once the employer is aware of an on-the-job injury, it is expected to self-start the process of providing the injured worker with all entitled benefits. In simplistic terms, the state's role in this system is to regulate the process of benefit delivery, provide information and assistance to members of the workers' compensation community, and to resolve disputes that arise during the claims process.

The vast majority of workers' compensation claims are administered without dispute or litigation. For many smaller claims, typically those in which only medical care is provided and the worker is away from the job only a few days, the WCAB is never aware that they exist.[41] The same would be true for larger or somewhat more serious claims if the worker accepted all benefit payments at the level offered and over the period required by law. It is only when there is an actual or anticipated dispute over the benefits or if there is a desire to

[41] The DWC, on the other hand, does get notice of the injury through a hardcopy "First Report of Injury" form from the employer. Because the DWC has traditionally lacked the ability to perform data entry of all forms received, there would not be any way to "know" whether an injury occurred. These reports are now in the process of being delivered to the DWC electronically and so eventually there will be practical notice of each injury.

“settle” the claim and self-define the relative rights of the parties that the WCAB will become involved.

Defining an “Industrial Injury”

As long as the injury (or disease or death) occurred as a result of work-related activities or environment (“arising out of employment” or “AOE”), as long as it happened while the worker was performing activities required by the job (“in the course of employment” or “COE”), and as long as some other criteria are met, a worker should be able to get workers’ compensation benefits without having to file suit to prove negligence.

In theory, this approach should reduce the issue of what sorts of benefits a worker is entitled to down to a question of how extensive are the injuries and what will be their long-term impact on employability. In practice, AOE/COE issues can be complex as can the task of assigning responsibility to the correct employer (especially if the injury is alleged to have developed over time as the result of cumulative trauma or “CT”). It also can be very difficult to deal with psychiatric injuries that are due to stress or arise as a consequence of some sort of physical injury. Most vexing of all is trying to translate subjective and objective physical complaints into something that can be used to precisely determine the extent of permanent disability. The end result is that WCAB judges are often asked to decide matters as complex as any found in traditional civil trial courts.

Sources and Types of Benefits[42]

Besides private insurers (including the state-operated *State Compensation Insurance Fund* or "SCIF") and self-insured employers (often managing claims through the use of a *Third Party Administrator* or "TPA"), benefits can come from two special state-managed funds. The *Subsequent Injuries Fund* (SIF) covers injuries occurring as a result of employment with different employers when the combined percentage of permanent disability is at least 70%. The *Uninsured Employers Fund* (UEF) is tapped when the employer is unlawfully uninsured and fails to provide a bond to cover the costs of any workers' compensation claims. Matters involving the UEF are extremely complex as many procedural aspects begin to parallel those of traditional tort law.

No matter what the source, injured workers are entitled to medical care, temporary disability benefits, permanent disability, vocational rehabilitation services, and death benefits.

Medical Care Benefits

Workers are to receive at no cost all reasonably necessary medical care required to cure or relieve the effects of the injury. Unless the

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[42] Workers' compensation is not the only way an employee can recover for work injuries or obtain replacement income or medical services. If the condition was caused by others outside the employee-employer relationship (which includes fellow employees) such as from an automobile collision or a defective manufacturing tool, remedies are also available from traditional tort litigation. In such instances, employers may be entitled to a credit equal to the workers' net recovery from a third party, unless there are issues of employer negligence. *Intentional* harms caused by the employer or by fellow employees can also be addressed with a civil damage suit. Recovery of penalties for violations of the Fair Employment and Housing Act (FEHA) arising from discrimination based upon a work-related disability is possible as well.

Other sources of income for a person injured on the job might include unemployment insurance benefits from the Employment Development Department (EDD), California State Disability Insurance (SDI, also administered by EDD), federal Title II Social Security Disability (SSD), and federal Title XVI Supplemental Security Income (SSI). Some workers might also receive payments for work injuries if they have supplemental disability insurance policies either self-purchased or made available through their employer. Additionally, some employers have relatively liberal sick leave or disability compensation policies that may offset the financial impact caused by capped workers' compensation payments.

employer has been notified prior to the injury that the worker has a "personal physician," the employer generally controls the medical treatment for at least the first 30 days after the injury is reported. After those first 30 days, the worker is free to seek treatment elsewhere.

Temporary Disability Benefits

Employees unable to return to work within three days are entitled to *temporary disability* (TD) benefits to partially replace lost wages. TD is paid at two-thirds of the original salary, up to a maximum of $490 per week. TD is supposed to begin automatically within 14 days of the insurer learning that the treating doctor has determined the worker is temporarily disabled unless it issues a *delay letter*, which provides additional time to evaluate the claim. TD continues until the employee is able to fully return to work[43] or until the employee's condition has been judged *permanent and stationary* (P&S) as documented in a physician's report. The *P&S Report* discusses the nature and extent of any permanent disability sustained, the need for future medical treatment, and whether and how the worker qualifies for vocational rehabilitation benefits.

Permanent Disability Benefits

Generally

Injured workers who are disabled beyond the date of the P&S report receive monetary *permanent disability* (PD) benefits that can continue even if the worker returns to full employment. The length and amount of such benefits depend on whether the permanent disability is determined to be *total* or *partial*. The disability is evaluated (or *rated*) in terms of a percentage, with 0% being not permanently disabled at all and 100% equaling total disability. LC §4660(a) describes the core criteria for this assessment:

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[43] Employees returning to work in a limited capacity affecting their ability to earn income are entitled to *temporary partial disability* (TPD) indemnity payments that are two-thirds of any resulting reduction in weekly wages.

> In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.

While the disability percentage can be calculated by privately retained professional raters or by the raters employed in the DWC's Disability Evaluation Unit (DEU), ultimately it is a decision of a worker' compensation judge or an agreement reached among all the parties that result in an anointed rating of the injury. The *Permanent Disability Rating Schedule* (PDRS) is used to translate a physician's assessment of impairments and limitations into a particular percentage figure. The PDRS process starts with standard ratings for specific conditions and then adjusts depending on the worker's age and occupation. The specific rating for a worker's condition must sometimes be determined by analogies to similar scheduled disabilities even if not exact matches. According to many people we spoke to, rating is more of an art than a science despite a very detailed PDRS that is filled with precise definitions and standards.

Despite the room for interpretation, much of what goes into the rating is a direct reflection of the physician's assessment (the P&S report) and so it is in the interests of workers and employers/insurers to obtain the most favorable report possible in language that will best translate into the desired rating. This assessment can be made by either the treating physician (who, depending on the circumstances described above, may be the choice of the employee or the employer), a *Qualified Medical Evaluator* (QME), or an *Agreed Medical Evaluator* (AME). QMEs are appointed and regulated by the Industrial Medical Council (IMC) and can form a three-member panel from which unrepresented workers can choose one for a reevaluation. In other instances, a represented worker and the employer/insurer will jointly choose an AME to perform the evaluation and if they are unable to agree, can obtain individual evaluations from a QME of their choice.

Permanent and Total Disability

A worker who is awarded *permanent total disability* (PTD) status (with a 100% disability rating) receives the maximum allowable temporary disability benefit (i.e., two-thirds of average weekly wages up to $490 per week) for life.

Permanent and Partial Disability

A worker who is awarded *permanent partial disability* (PPD) status receives weekly benefits on a sliding scale of both amount and duration. An employee with a 1% permanent disability will receive payments for only four weeks while a 99.75% disabled worker receives benefits for up to 694.25 weeks (a little over 13 years). Like TD, permanent and partial benefits are also payable at two-thirds average weekly wages, but the maximum depends on the disability percentage. Disabilities less than 14.75% are capped at $140 per week, $160 is the maximum for disabilities rated at 15% to 24.75%, $170 is the maximum for disabilities rated at 25% to 69%, and $230 per week is the cap for disabilities rated at 70% to 99.75%. Those with a permanent partial disability of 70% or more also receive a pension at a maximum rate of $153.65 per week following the final payment of permanent partial disability benefits. This makes 70% the “magic number” threshold because any rating above that figure is associated with a much higher total of benefit payments over the expected lifetime of the worker.

Advancing Permanent Disability

The process of determining an injured workers’ permanent disability rating is not instantaneous and so the cessation of TD payments following the issuance of a P&S report could result in hardships for someone who has not yet returned to work. Under LC §4650(b), insurers must begin weekly PD payments (calculated by a good faith estimation of the most likely PD rating) within 14 days of the last TD payment and continue until the employer’s “reasonable estimate” of the total future PD has been paid. The total amount of such “advances” is deducted from the final settlement or award. Under certain circumstances, a lump sum portion of these anticipated future permanent disability payments can be advanced as well at the discretion of the insurers.

Vocational Rehabilitation Services

Injured workers who are unable to return to their former type of work are entitled to vocational rehabilitation benefits that may include the development of a suitable plan, the cost of any training, and a *Vocational Rehabilitation Maintenance Allowance* (VRMA) while undergoing rehabilitation. In theory, the employer and worker will develop a suitable rehabilitation plan, but any disputes that arise between them on such issues are resolved by the Rehab Consultants of the DWC's Rehabilitation Unit (the Consultants' decisions are in turn appealable to Workers' Compensation Judges). VRMA paid to an injured worker while in rehabilitation is similar to TD in that it is set at two-thirds of average weekly earnings, but the maximum weekly amount is lower ($246 per week). A typical method of obtaining adequate income during the rehabilitation process is to supplement VRMA with advances of permanent disability benefits to achieve a total benefit level equal to that of potential TD payments. Total costs for rehabilitation including VRMA are limited to $16,000.

Death Benefits

Fatal injuries are eligible for up to $5,000 in reasonable burial expenses and if the decedent was entitled to unpaid TD and PD, retroactive payments to the estate. If the worker left at least one total dependent, a fixed sum death benefit is shared among all total and partial dependents and ranges from $125,000 (one surviving dependent) to $160,000 (three or more total dependents). If there are only partial dependents, they take a proportional share of either four times the total amount of the combined annual support provided by the decedent or $125,000, whichever is less.

Penalty Assessments and Supplemental Benefits

Separate from the amount of regular benefits but extremely important to how disputes are resolved are issues related to determining whether the worker is eligible for additional benefits or penalty assessments arising out of the wrongful acts of the employer or insurer.

Labor Code §132a Discrimination Benefits

A separate claim (i.e., one that does not depend on whether a compensable injury actually occurred) can be made if the employer discriminated against the worker for using or attempting to use any aspect of the workers' compensation process. Typical examples might include an unreasonable and unjustified refusal to allow a worker to return to the job despite a favorable doctor's report or threats of termination if the worker seeks medical care for an injury. Under LC §132a, penalties of up to $10,000 can be awarded along with any back pay and an order for reinstatement.

Employer's Serious and Willful Misconduct Under LC §4553

If the employer's seriously improper actions or inactions to remedy an obvious safety violation caused the injury, available workers' compensation benefits can be increased by half. Such *Serious and Willful* (S&W) allegations require more than simple negligence or even gross negligence to sustain.

Automatic Penalties for Delay Under LC §4650

An insurer who is late with a payment for any reason whatsoever is required to self-assess an additional 10% for that payment when it is eventually made.

Penalties Awarded for Delay Under LC §5814

Another penalty is also set at a 10% level, but the total impact on the claim can be much greater. If an insurer is found to have unreasonably delayed or refused to pay a particular benefit (as opposed to inadvertent errors caused by a "business necessity"), the insurer may be assessed an additional 10% for **all** benefits of that class whether paid on time or not. *LC 5814* penalties can therefore be relatively large because a single wrongfully delayed or denied TD payment, for example, will require an additional 10% for all past and future TD payments as well. The only valid reason for the delay or denial would be a genuine medical or legal doubt as to liability.

The Process of Claiming Benefits

Initial Considerations

Within 24 hours of learning about the injury, the employer is required to provide the worker with a *Worker's Compensation Claim Form*. The Claim Form must be filed within one year of the date of the injury or death or five years if the insurer provided benefits. In CT cases, the "date of injury" is when the employee knew or should have known that the disability was work-related. For most current cases before the WCAB, the Claim Form simply preserves the right to request adjudication (though it does not reserve the court's jurisdiction) and tolls any applicable statute of limitations until the point at which the employer denies the claim or the injury becomes presumably compensable.

Once the Claim Form is filed, the employer has 14 days to accept or deny the claim by serving proper notice; by putting the claim on *delay status*, the insurer can have up to a total of 90 days to make the decision. If the insurer fails to reject liability within this period, the injury is presumed to be compensable. The presumption is rebuttable only by evidence subsequently discovered that could not have been obtained during the initial 90-day period in the exercise of reasonable diligence. In some instances, an employee will not see a check for TD at all during the first 90 days following the injury, thus requiring him or her to seek alternative benefits from other sources. Steering a newly disabled worker toward one of these alternative sources (such as the Employment Development Department or as a last resort, the Social Security Administration) is an important function of the staff of the I&A Unit.

Even in cases where the matter ultimately proceeds to serious litigation, the worker typically gets some level of medical care and temporary disability benefits from the employer or the carrier without needing to turn to the WCAB for help. Employers have great incentives to accept responsibility—at least on a temporary basis—because if they refuse to authorize medical treatment, they give up the right to control the treatment from the first 30 to 365 days from the injury and the employee can go to any doctor he or she chooses. Also, a denial of initial medical benefits by the insurer means that unrepresented

employees will have greater freedom in choosing a Qualified Medical Examiner at a later point in time. Medical care provided by the employer is tightly regulated as to cost; except in extraordinary circumstances, charges cannot exceed the maximums listed in the Industrial Medical Council's *Official Medical Fee Schedule* (OMFS).

As indicated earlier, workers have a right to go to any doctor they choose after the first 30 days of the injury, but many stick with the company's doctors. In some instances where the employee has chosen his or her own medical care provider, the employer may cover that cost as well (subject to a later audit of any bills submitted to determine whether they are appropriate). But when there are disputes over the cause of the injury or the extent to which the complaints are related to something that happened at the workplace, insurers might refuse to pay at all. In that situation, the worker will have to pay the costs of treatment on his or her own unless a doctor is willing to work on a *lien* basis and defer payment until the claim is resolved and the treatment is eventually approved through settlement or award. In order to protect their interests, these doctors and other lien claimants will file an initial "Green Lien" (so called because the form is green) with the WCAB. Filing such a lien is not a guarantee of payment because ultimately the injury must still be determined to be covered by workers' compensation rules, the medical care provided must be reasonable, and the charges cannot exceed the provider's usual and customary fees. Subsequent increases to the original amount claimed by lien are not filed with the WCAB but instead are served on the parties directly.[44] Liens can also be filed by other types of health care providers, rehabilitation specialists, former attorneys for the worker, child

[44] BR §10770(e) indicates that the WCAB will not accept lien amendments for filing unless in conjunction with a hearing or a proposed settlement or when they are intended to notify the office of a new address. Copies of all amendments are nevertheless required to be served on the parties. The rule is designed to save the DWC the labor costs of endlessly filing away notices of every new treatment when only two documents covering the initial lien and the final amount are actually needed. In practice, we observed clerks spending a considerable amount of time opening mail, finding an unnecessary lien amendment that concerns only a change in the total bill, and throwing it away.

support enforcement agencies, the Employment Development Department (EDD), and the like.

Ongoing Medical Treatment and Other Benefits

Within five days of any initial examination, the treating physician prepares a standard report describing the injury and sends it to the insurer. Included in this report is either an “off-work” order, a “limited or light” duties order or some other order with restrictions (e.g., “no lifting over X pounds,” “no repeated motions,” etc.), or a “return to work without restrictions” order. Additional reports must be filed at least once every 45 days (sooner if the employee’s condition or work status has changed).

After getting the initial doctor’s report, the workers’ compensation insurer can either provide TD and medical treatment or notify the employee in writing that a dispute exists. In the latter situation, an insurer might ground its denial of benefits on the assertion that the employee did not sustain an injury covered by the workers’ compensation system, that the worker is not temporarily disabled, that there is no need for medical treatment, or that the payment of benefits is someone else’s responsibility.

Absent such a denial, the worker gets a *Benefit Notice* setting forth the dates and rates of TD payments, VRMA, and PD advance payments each time benefits are started or stopped.

The Next Steps

Following the P&S report, the injury needs to be rated. If the worker is unrepresented, the extent of the permanent disability can be assessed by a DEU rater. The DEU rater looks at the comprehensive medical evaluation performed by the QME or the report of the primary treating physician and is supposed to issue a rating within 20 days of the report. The rating is not binding or admissible at trial but usually goes a long way in any settlement negotiations and in the way a judge will review a proposed settlement agreement. A party can request that the DEU “re-rate” the reports if they make such a request within 30 days of receipt of the summary rating and provide adequate justification.

If the worker is represented, either the DEU or a hired rating service (or both) will do the rating, now called a *consultative* or *advisory* rating. The DEU can also be used if the insurer and the worker's attorney agree to submit the case file to them for a rating (a common practice during settlement negotiations) or if the judge or an Information and Assistance Officer requests one. There is nothing to stop the insurers or applicants from using their own hired raters (often ex-DEU staffers who have gone into private practice).

In reality, none of these ratings (summary or consultative) constitute the final determination of the worker's rating. That is a matter to ultimately be decided by a WCJ either by approval of a proposed settlement between the worker and the insurer or by a decision rendered following a hearing.

When Litigation Begins

Generally

An injured worker's rating basically drives the amount of money he or she will receive through the workers' compensation system and this appears to be the core reason for most claimants to request formal adjudication. Another source of judicial intervention revolves around settlements, even if everyone agrees on the rating and what is owed to the worker. While the total amount of PD payments for which a worker would be eligible is a known quantity (given a particular PD percentage and preinjury salary), there are no limits to the amount of medical care the insurer might be liable for. As such, insurers will often propose to the worker an agreement to advance all future payments for PD and provide an additional amount to cover any costs needed for medical care if the worker would agree to release the insurer from all future liability. While the worker may be agreeable to such a settlement, a WCJ must always review the documents to ensure the provisions are adequate. As such, many injuries come into the court system even without an actual dispute.

Note that there can be a significant amount of activity in the DWC's Rehabilitation Unit regarding the workers' vocational rehabilitation plans that are separate from medical and disability

benefits. It is beyond the scope of this note to describe them, but it should be kept in mind that many workers can have serious disputes over vocational rehabilitation even if there is nothing going on in the more traditional workers' compensation world. Indeed, issues regarding vocational rehabilitation are handled separately within the RU and only involve WCJs when appealed.

Invoking the Jurisdiction of the WCAB

An injured worker has a year from the injury (if compensation or medical treatment has been provided, then one year from the date of the last payment, treatment, or other benefit) to file an *Application for Adjudication of Claim*. For pre-1990 and post-1993 injuries, the Application is the document that vests jurisdiction over the dispute with the WCAB (for 1990-1993 injuries, jurisdiction is vested by the Claim Form, which also satisfies the statute of limitations).

The Application is filed at the WCAB office in the county either where the injury occurred, where the worker lives, or where the worker's attorneys have their principal place of business. Eighteen counties in the state have just one WCAB office, two have more than one, while the remainder have none but are served by a (hopefully) nearby office. With the filing of the Application, a file number is given to the case, but no judge is assigned at the time. This makes sense as the Application for pre-1990 and post-1993 injuries does not request any immediate judicial action.

The worker is now an *Applicant*. If the worker is unrepresented, the WCAB office will serve a copy of the Application on the insurer. If a lawyer is involved, the office sends a copy of the date-stamped Application to the lawyer who in turn serves it on the insurer. The insurer then has to file an *Answer* (within ten days if service of the Application was in person, 15 if by mail). The Answer is supposed to list inaccuracies in the Application and set forth defenses, though it does not appear to be a routine filing.

Not all cases "begin" with the filing of an Application. The alternative way to invoke the jurisdiction of the WCAB is to file a proposed settlement agreement for judicial review and approval (see ***A Word About Settlements***, below). In most instances, a case opening by

settlement results in a fairly quick end to the matter that is little different from that experienced if the settlement is submitted at a point subsequent to the filing of an Application. As such, settlement review is discussed in relation to the more typical litigation process initiated by Applications.

Attorneys

In theory, a worker need not get an attorney to represent him- or herself when a claim is denied. Some workers will file an Application as a precautionary move without hiring an attorney until things get more complicated. Some never do.

Workers desiring legal representation can hire an attorney who will work on a contingency fee. The fee percent is determined by a judge and typically ranges anywhere from about 10% to 15% and is usually assessed against total estimated permanent disability or death benefits since temporary disability and medical treatment are (in most instances) provided voluntarily. The WCAB must approve any fees, though the range of average fee percentages being requested seems to vary from office to office. Under certain circumstances, the applicant's attorney fees would be paid for by the employer or insurance carrier rather than be deducted from any benefits awarded or settled. Other costs of litigation (medical-legal evaluations, depositions, interpreter fees, subpoena fees, witness fees, etc.) are the ultimate responsibility of the defendant even if incurred by the applicant.

The costs of defense attorneys are not regulated. To minimize their legal expenditures, some insurers will have cases handled almost exclusively by claims administrators who do all the negotiations and other file management right up until the first time a court appearance is required.

A party can also be represented by someone who is not a member of the California Bar. These "hearing representatives" are extensively used by some carriers, third party administrators, applicants' attorney firms, and lien holders as another way of controlling litigation costs.

"Independent" hearing representatives are prohibited from receiving any applicants' attorney's fees.[45]

Requesting Judicial Intervention

After the Application is filed, parties can go about the business of getting the reports of treating physicians, QMEs, AMEs, etc., and having them rated. Depositions and other discovery may take place as well, though generally this is limited to gathering medical records and obtaining medical evaluations. Intensive discovery as might be seen in civil courts of law is usually discouraged. When the defendant takes the applicant's deposition, it will be responsible for the deponent's expenses including attorney fees (the amount of the fees and expenses awarded at the discretion of the WCJ). Recovery of the applicant's attorney fees for deposition of lay witnesses is not mandatory.[46] Little contact with the court takes place until one side formally indicates that they are in need of a WCJ to step in and decide an irresolvable issue.

Getting the attention of the WCAB for matters other than settlement review is accomplished by the filing of a *Declaration of Readiness to Proceed* (DOR). The DOR is the first step in getting a case on the track[47] for a regular hearing.[48] It can be filed by any party, even a lien claimant, who declares that all evidence has been marshaled, that

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[45] There appears to be no restriction against awarding attorney's fees to a law firm that has had one of its nonattorney employees appear on behalf of an injured worker.

[46] This fact led one commentator to suggest that in disputes over serious and willful claims, penalties, and other nonmedical issues, the trial itself has evolved into the primary "discovery" mechanism. Under LC §4553, for example, recoverable costs and expenses for a serious and willful misconduct award are limited to $250. Some attorneys may choose to spend their time examining witnesses on the stand regarding this issue rather than essentially shouldering the costs of discovery alone.

[47] We use the term "trial track" to encompass the notion that until a DOR is filed, the matter cannot begin the process of moving toward a regular hearing. Therefore a case is "placed on the trial track" following the filing of a DOR even though the next event is likely to be a conference (in this case, a Mandatory Settlement Conference).

[48] In reality, the current version of the DOR gives the filing party the ability to request that the matter be set for a regular hearing, a pretrial conference, or a rating conference. Nevertheless, most DORs are intended to get the case on track to a regular hearing.

discovery is complete, that the case is ready to proceed to trial on one or more issues, and that efforts have been made to resolve any disputed areas. These issues can include the entire matter (i.e., the *case-in-chief*) or some intermediate problem, even a single question. The declarant states under penalty of perjury that he or she is ready to proceed to hearing[49] on the issues stated and also sets forth the efforts made to resolve the issues (or that the other side failed to respond within 15 days to such an effort). All relevant medical reports are usually filed with the DOR. For pre-1990 and post-1993 injuries, the DOR is the primary way for parties to request intervention by the WCAB and in some sense is the equivalent of the initial complaint or petition being filed in more traditional trial courts.[50]

The opinion expressed in this unilateral declaration that the case is ready for trial is not always shared by the other side. The responding side has six days (11 if the service was by mail) to file and serve an *Objection* to the DOR that states (again under penalty of perjury) the grounds why the case should not be set for hearing or why the requested proceeding is inappropriate. Such grounds might include ongoing medical treatment, the assertion that the condition isn't permanent and stationary, a previously scheduled QME evaluation that has not yet taken place, ongoing vocational rehabilitation needs, or other reasons. A special form for such Objections is not required.

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[49] In California workers' compensation practice, the term "hearing" applies to a number of different appearances before a judicial officer, not just matters where evidence or arguments are presented and a formal decision rendered. Hearings can include Mandatory Settlement Conferences, pretrial conferences of any type, "lien conferences," settlement "adequacy hearings," discovery conferences, and "trials" in the more traditional sense. Trials can be for limited or preliminary purposes (such as the appropriateness of outstanding liens or the need for immediate medical treatment) or for resolving the core issues of whether the injury is a covered one and the extent of future disability payments (i.e., the "case-in-chief"). In other words, all trials are hearings, but not all hearings are trials. To minimize confusion, in this document we generally reserve the term *hearing* for trials.

[50] For 1990-1993 injuries, the Application used for these cases essentially acts as the DOR to request a hearing or arbitration, as much of the language in the version of the pleading used for such cases mirrors that found in a post-'93 case DOR.

In theory, the court screens the DOR to see if it adequately sets forth the necessary facts that indicate the case is ready for trial. Additionally, the issues raised in the Objection are considered and decided. Branch offices differ as to when and the degree to which the screening and Objection review is accomplished, if at all, prior to any initial conference. If the DOR is acceptable, the case is scheduled or calendared (usually by a *calendar clerk*) for a *Mandatory Settlement Conference* (MSC), though a limited number of other conference types could be scheduled as well. If it is not acceptable, then the DOR is rejected and no conference is scheduled (though parties are free to refile at will).

Alternatively, a party might decide that an issue is too important or too immediate to be placed on the regular trial track. If the matter involves entitlement to medical treatment, TD, or vocational rehabilitation (all of which are supposedly being provided prior to a final determination of permanent disability) or if there is a dispute between multiple employers as to who is liable, a party may file a *Request for Expedited Hearing and Decision* rather than a stand-alone DOR. The court screens the Request, but because of the requirement to both hold the hearing and issue a decision within 30 days of the Request's filing, there is no opportunity for submitting an Objection in response (disputes over whether the issues are properly the subject of an Expedited Hearing are argued at the Hearing itself). These hearings are typically very brief events (less than an hour), often are resolved by the parties prior to the date of the hearing, and ideally receive a decision directly from the bench at the conclusion of testimony. Following resolution of these interim (though important) issues, a DOR would still have to be filed in the normal manner to place the matter on the regular trial track for handling the case-in-chief.

The most common alternative to the filing of a DOR subsequent to the Application is the submission of a proposed settlement agreement for judicial review. Features of most workers' compensation settlements are described below.

A Word About Settlements

As suggested previously, many cases never get as far as the DOR. A substantial number of matters begin life as a proposed settlement rather than as an Application and even many of those cases that have had case file creation triggered by an Application ultimately have a settlement filing as the next (and last) event in its life. Even in cases where a DOR or Expedited Hearing Request is filed, the parties may choose to settle the case-in-chief at or before the MSC or right up until the start of a formal trial. Unlike most civil court cases, a hallmark of the California workers' compensation system from its earliest days has been the requirement that judicial officers inquire into the adequacy of any proposed settlements and that no such agreements are valid unless approved.

Settlement agreements are on standard forms and generally contain information about an agreed-to rating, the total amount of money to be paid to the applicant, the amount of the gross award to be deducted for attorney's fees, how outstanding liens are to be handled, any retroactive TD payments, the defendant's responsibility for future medical care, penalties determinations, the status of vocational rehabilitation, and other key issues.

There are two types of settlements. A *Compromise and Release* (C&R) is the rough equivalent of a civil court settlement with wide latitude given to the parties to decide most issues among themselves, while a *Stipulation with Request for Award* (Stips) is really a listing of agreed facts (as if they were decided at trial) with the actual award granted at the discretion of the judge (in reality, the Award usually reflects the parties' intentions).

The differences between these types are far more than in name only. With a typical Stips, PD benefits (calculated by the stipulated PD percentage and preinjury income) are paid on a biweekly basis, future medical expenses are covered by the insurance company as needed, the worker has the right to reopen the case if there is a new and further disability, and the worker has the ability to petition the court at a later time to have yet unpaid PD payments and medical care costs advanced ("commuted") in time of need. With the far more common C&R,

there is a lot more money up front and the total amount to be paid is less a reflection of a PD rating than of what the parties believe the case is "worth." Typical C&Rs have the entire award paid in a single lump sum (discounted for inflation) soon after approval, the right to future medical treatment is waived in favor of an additional amount of money to be paid to the applicant, the right to reopen the case is generally waived as well, commutation is at the discretion of the insurer, there is greater latitude to characterize the gross lump sum payment or parts thereof in ways the parties find beneficial, and various other potential benefits are sometimes negotiated in exchange for a larger lump sum payment. Attorney's fees are deducted from the gross amounts offered in both C&Rs and Stips (in the latter type of settlements where PD is to be paid over time, some portion of future benefits are advanced in order to cover the costs of fees).

Settlements can be submitted for review in a number of ways. In all instances, the judge expects that relevant medical reports will accompany the proposed agreement so adequacy can be determined. Also, a permanent disability evaluation by a rater (either from the DEU or an independent professional) is usually necessary as well, though some judges will to do their own ratings in relatively simple cases. Case-opening settlements (usually filed over-the-counter or through the mail) result in the branch office creating a case file, issuing a file number, and sending the file and agreement to the judge for review. When the Application is the case-opening document, settlements are sometimes reached on the very day a conference or trial takes place and if so, the judge who was scheduled to hear the matter will review the settlement in the presence of the parties. Settlements are also filed over-the-counter or by mail, which result in the clerks providing the file and the agreement to a judge for review. Finally, parties at most WCAB offices have the option of showing up at the court with little or no advance notice to "walk-through" a settlement by requesting the file from the clerk and finding an available judge to do an immediate review.

Not all settlements are approved on first review. Judges may have concerns, for example, over whether the proposed permanent disability rating is reasonable, whether the money being designated in a C&R for

future medical treatment will be adequate for the most likely care needed, or whether certain waivers are justified given the facts of the case. Sometimes, the questions are addressed while the parties stand before the judge, but on other occasions, the judge will schedule a subsequent and more formal *Adequacy Hearing* to decide the matter.

Conferences and Trials

The Mandatory Settlement Conference

Within 30 days of the filing of a DOR that requests a *regular hearing* (essentially a trial) and that has successfully passed the screening process, the WCAB must hold a *Mandatory Settlement Conference* (MSC). The purpose of the MSC is to provide the parties another opportunity[51] to resolve the dispute, and failing such settlement by the conclusion of the MSC, the judge will cut off all further discovery (such as medical-legal evaluations and depositions) and set the case for trial. When such trials are required, during the MSC the parties will meet and jointly submit a *Summary of Settlement Conference Proceedings* that lists any stipulated facts, remaining issues to try, estimated length of the trial, and witnesses and evidence to be presented. Absent having the MSC continued or canceled for some reason, the only two outcomes at the end of the MSC are either settlement or the scheduling of a trial date.

MSCs typically take place in a courtroom crowded with attorneys or in the judge's office with counsel lined up outside the door. While the presence of applicants is a mandatory feature of MSCs, in most instances they remain in the WCAB's main waiting room out of the sight of the judge (unless they are representing themselves or unless a settlement agreement is being approved and the judge wishes to question them). Defendants need to have a person with settlement authority present at the MSC (often their attorney) or available by telephone.

MSCs are not formal affairs. Judges do not call roll at the start and more often than not leave it up to the attorneys to decide which

[51] In theory, the DOR attests to the fact that an effort had already been made by one of the parties to resolve the issues in question.

cases need attention first. The courtroom is usually abuzz with the sounds of attorneys discussing their cases among themselves (either negotiating a settlement or working on the Conference Summary), trying to find counsel for the other side (who may handling multiple matters and moving between various hearing rooms), or speaking to the judge. Attorneys will usually only approach the judge when they have a settlement or Conference Summary ready, if they would like to first get an immediate rating of the file by the DEU (the judge can provide access to the head of the sometimes lengthy queue for DEU services) to help define the case's value, or if one or both parties are requesting a continuance or an order (known as an *OTOC*) that the case be taken off the immediate trial track (in effect, "canceling" the DOR).

The extent of judge participation at the MSC varies. If the parties have settled on their own initiative, the judge's role is limited to reviewing the file and the proposed agreement, asking questions about the condition of the applicant, and voicing any concerns about adequacy. In the latter instance, the parties will sometimes leave the courtroom and discuss the matter with the applicant or with other representatives of the defendant; they might return later in the day with an enhanced agreement that the judge conceivably will find more acceptable.

If the parties are unable to settle and are determined to go to trial, the judge might make a last-ditch attempt to encourage them to reach an agreement. In reality, the time available does not always permit a judge to "go deep" into a file, and the mediation effort, such as it is, is often extremely limited. Failing settlement, the judge reviews the proposed Conference Summary and may attempt to see if any of the issues listed as continuing disputes needing trial might be stipulated instead in order to better focus the trial on only the most important matters. Also, the judge might review the descriptions of proposed exhibits and witnesses to make sure they are listed with adequate specificity. As with settlement mediation attempts, time pressures can limit the extent to which judicial review of the Summary is performed.

In a significant number of instances, neither a settlement nor a trial setting is the immediate result of an MSC. For example, an understanding might have been reached during the conference as to the terms of a settlement, but the proposed dollar amount is beyond the authority of counsel at the MSC and unfortunately, there is no way to immediately contact someone who can sign off on the deal (this is especially problematic with government agencies or out-of-state defendants). Knowing that resolution is only a few days away, the parties will not wish to go through the effort of drafting a Conference Summary and will instead ask the judge to either continue the MSC to another day or take the case off calendar. There is little downside to the applicant for agreeing to an OTOC rather than a continuance in this situation (other than the removal of the threat of trial over the defendant's head); if the agreement collapses, the applicant can always file another DOR to return the case to the trial track.

Another source of OTOCs are requests made at the MSC to allow one or both parties to continue discovery for an additional period of time. The reasons vary and can include claims that the applicant is not permanent and stationary, that there has not been time to review newly served medical reports, that the parties wish to try to resolve the case through a new medical examination conducted by a jointly agreed-to doctor, that there are no triable issues, or that the applicant has experienced a new injury or change in his or her condition. If the judge denies the request, all possibility of additional discovery is eliminated and a date is set for regular trial.

Other Conference Types

Not all sessions before a WCJ are MSCs, regular trials, or Expedited Hearings. The generically named *Conference Pre-Trial* (CPT) is also a possible event anytime before regular hearing and typically is held when there are discovery issues needing resolution (in such instances, the session might be called a *Discovery Conference* or a *Law & Motion Conference*) or if the court wishes to meet with a pro per applicant without the overt threat of closing off discovery. Parties can request such CPTs through a DOR, but they are also set as needed during the life of a case. *Adequacy Conferences* (also known as *Adequacy*

Hearings) are sometimes held at the instigation of a judge reviewing a settlement in which questions have arisen that could not be resolved informally. *Lien Conferences* are roughly equivalent to an MSC for any lien issues that remain following a settlement of the main aspects of the case, though the usual practice currently is to set the case directly for a *Lien Trial* without any intervening conference. A *Rating Pre-Trial* conference is a relatively uncommon event that is requested primarily for the purpose of getting the case before a judge for priority in obtaining a DEU rater and perhaps to obtain the judge's help in resolving the case with the rating as a benchmark. No matter what names are used for these sessions, as long as the case is on the trial track following the submission of an approved DOR, judges have the authority to set the case for trial at any time. Moreover, judges at a conference also have the authority to receive evidence during the session and decide on any outstanding issues if the parties so agree.

Regular Trials

By law, a regular hearing must be held within 75 days of the filing of a DOR. These case-in-chief trials usually revolve around issues such as the nature and extent of permanent disability, the need for future medical treatment, the appropriateness of penalties, and on occasion, disputes as to whether the injury arose out of the course of employment, jurisdiction, and other threshold matters.

The WCJ is the sole trier of fact. The WCAB is relatively unique among American courts in that "discontinuous" trials are not unknown (e.g., the first witness may be heard on the initial day of trial and a second witness weeks later), nor are lengthy periods of time from the start of opening testimony until the point at which the judge has pronounced that all necessary evidence has been received. While the rules of evidence are somewhat relaxed and the practice of wearing robes at the hearing is far from uniform, the overall conduct of these trials is similar to that of bench trials in civil court systems: Witnesses (who may be subpoenaed) are sworn under oath and are examined and cross-examined, reports and other documents are offered into evidence, judges have the power to hold parties in contempt, evidentiary objections are raised and considered, the hearing is conducted in a very serious manner

(and in contrast to the MSC calendar, the room is virtually empty except for the direct participants), and a hearing reporter makes a complete and official record of the proceedings.

Live medical testimony is almost never presented (and is not allowed except by a showing of good cause). The applicant is often the only witness. If there are additional witnesses, they are typically called by the defendant and involve such matters as AOE/COE, psychiatric claims, or penalty issues. The medical reports, records, and evaluations that serve in this role are usually entered into the record with little objection or the need for laying any foundation for their submission. Other documentary evidence can be submitted as well even if it might be considered hearsay by a regular civil trial court. Lawyers do not typically make oral arguments or submit trial briefs (unless there are unusual legal issues or such briefs have been requested by the judge). Trials that last more than half a day are uncommon and a few hours is typical.

The proceedings usually begin by reviewing the Conference Summary's list of stipulations and issues and perhaps fine-tuning the list prior to reading them into the record or incorporating them into the *Minutes of Hearing*. The documentary evidence to be offered is also listed in the Minutes and some time is spent organizing the exhibits in the case file. On occasion, the parties will submit the case for the judge's decision on the documentary evidence alone, but more often than not at least one witness (typically the applicant) will testify.

Another trademark of this system is the judge's affirmative duty to "develop the record." The judge will sometimes ask questions of witnesses during testimony, especially if the applicant is not represented (which can lead to the interesting situation of a judge ruling on defense counsel's objections to his or her own questions). Following trial, if the judge believes not enough evidence has been heard or received to make an informed decision, or if the judge desires an expert opinion on the level of permanent disability, he or she can require additional testimony or ratings. One common exercise of this obligation is a request to the DEU with instructions to review the file at a point subsequent to the close of testimony and issue a *formal*

rating. Unlike consultative or summary ratings that might have been generated during the pretrial phase, formal ratings must be based on the "factors of disability" described in the judge's instructions rather than existing medical reports. Also in contrast to consultative or summary ratings, only formal ratings can be considered by the judge at trial;[52] because such posthearing ratings become part of the official trial record, parties on occasion will seek the right to cross-examine the DEU rater before the judge makes a final decision. Another way to help develop the record is to request a follow-up report by a doctor on a particular aspect of the condition not developed fully in earlier evaluations. Until the judge is satisfied that the record is complete, the case is not "submitted"; in other words, the trial itself might not be finished though no further oral testimony is heard. If additional evidence is obtained during this period, the parties have an opportunity to rebut or cross-examine.

Still another unique feature is a requirement that the judges produce a formal *Summary of Evidence* presented or considered. The judges take handwritten notes (or on occasion, use a laptop during trial) and typically draft the Summary almost immediately following the close of testimony with the help of the hearing reporter. The Summary is made a part of the Minutes of Hearing and essentially acts as an abridged "transcript" for the use of the judge, the attorneys who may consider an appeal of the judge's ruling, and the Appeals Board if the matter ever reaches their attention.

Once the matter has been submitted, the Labor Code mandates that the judge is to issue a decision within 30 days and moreover if a judge has any matters pending and undetermined 90 days after submission, his or her salary must be withheld. The decision actually consists of three elements: findings of fact, an award of benefits or an order that the applicant "take nothing" (i.e., a defense verdict), and an *Opinion on Decision* that includes a summary of all the evidence the judge relied

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[52] Because a judge is considered competent to perform ratings independently, there is no mandatory requirement that a formal DEU rating be obtained. In practice, however, judges will typically self-rate only simple injuries.

upon and the reasons behind the decision. If the judge has ruled in favor of the applicant, the decision is called a *Findings and Award*; if in favor of the defendant, it is a *Findings and Order*.

Appealing the Decision of the WCJ

Anyone affected by a judge's award or order can file a *Petition for Reconsideration* (familiarly known as a "Recon") with the Appeals Board within 20 days (plus five if mailed) of the judge's ruling. The most common ground is a claim that the findings were not justified by the evidence. Within 10 days, the responding side files an *Answer to Petition for Reconsideration* that would presumably support the judge's decision and provide legal authority for the Appeals Board to uphold it. The latitude for filing a Petition is wide and includes an allegation that the judge's decision was not supported by the written or oral testimony.

Within 15 days of the filing of the Recon, the WCJ can decide on his or her own initiative to amend or modify (or even reverse) the action or order or to rescind it in its entirety and conduct further proceedings within 30 days. A more likely scenario within the 15-day time limit is that the judge will prepare a *Report on Reconsideration*. This report contains a statement of the contentions raised by the Petition, discusses the parts of the record that support the judge's original findings of fact and conclusions of law, and recommends the action that the Appeals Board takes.

The Appeals Board has 60 days to deny or accept the Petition (if they do nothing, it is deemed denied). They can then affirm, rescind the original decision, change it, or return it to the original office for future proceedings. Appeals of the decisions of the Appeals Board go directly to the California Court of Appeal and ultimately to the California Supreme Court. The Superior Courts of the state never get involved in either deciding workers' compensation claims or reviewing the decisions of the WCAB.

The Appeals Board can also get involved with cases prior to the point at which a final decision is rendered. Under LC §5310, a party can petition the Appeals Board to have a still-pending case removed from

the local office in order to review a judge's interlocutory orders. In practice, removal is an extraordinary remedy only granted when some prejudice or irreparable harm can be shown.

Actions Following Settlement or Trial

Even in the absence of a Petition for Reconsideration, there is no single "final" event that closes the file for good. First, there is no limit to the length of time available for a party to file a petition for enforcement of a WCAB order (including an order approving the terms of a C&R). If, for example, ongoing health care treatment is ordered, the parties can still return to the WCAB to litigate whether particular medical procedures are required long after any disability benefits have been exhausted. If the matter involves a worker who was permanently disabled and who was relatively young at the time of initial case resolution, his or her WCAB file might need to be reviewed for enforcement purposes many decades later.

Other events that stretch out the period during which the WCAB is involved include the ability of applicants to file a petition to commute (i.e., advance) unpaid future installments of permanent disability payments in time of need or to reopen the case to provide additional benefits for any "new and further disability" that arises out of the same injury within five years of that injury.

But by far, the most common significant postresolution event[53] involves the resolution of liens. In theory, lien issues (such as who is responsible for paying them, whether they should be allowed or adjusted, whether the medical treatments the lien reflects were necessary, etc.) should be resolved at the same time as any case-in-chief issues. To accomplish this goal, lien claimants are supposed to be provided with notice of MSCs and other conferences and hearings and can participate in the same way as any other party. If proposed settlements are submitted, the WCJ is supposed to check the hardcopy

[53] Other matters, especially including attorney fee requests in conjunction with vocational rehabilitation matters, may also commonly be a part of a case file after initial resolution. We use the term "significant" to distinguish the sometimes disputed aspects of lien issues from the relatively straightforward event of a fee approval.

case file and the *EDEX* electronic lien filing system[54] to make sure that all liens are considered in the agreement. Only if there has been a good faith attempt to contact the lien claimants can the WCJ approve a settlement that does not resolve all outstanding lien issues. If the lien claimants are present at the time of a settlement that does not resolve their interests, the WCJ can try such issues on the spot or set the matter for trial. Lien claimants can also file a DOR to request a trial years after the settlement was approved without a resolution of their claims.[55]

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[54] "EDEX" is a privately operated system for public access to the DWC's primary claims adjudication transactional database. For a fee, subscribers can query the DWC's system (with an overnight turnaround for responses), view the event histories of cases filed since the 1980s, and electronically file the "Notice and Request for Allowance of Lien." Access to EDEX requires special application software and an account from the vendor, CompData.

[55] While there are no express time limits, the equitable doctrine of laches could likely serve to bar a lien claim that has unreasonably failed to be prosecuted in a timely fashion.

CHAPTER 4. EVOLUTION OF THE WORKERS' COMPENSATION JUDICIAL PROCESS IN CALIFORNIA

EARLY STRUCTURE

A sequence of groundbreaking enactments shaped the way disputes over workers' compensation benefits have been adjudicated in California for nine decades. Initially, the *Roseberry Act* (Stats. 1911, Chapter 399) created a voluntary system of coverage in 1911 and the *Industrial Accident Commission* (IAC) was to be the administrative body charged with oversight. In 1913, a provision in the California Constitution was enacted to allow compulsory coverage and the ability to impose liability upon employers without fault. As a result, the *Boynton Act* (Stats. 1913, Chapter 176) was passed to address the details needed to administer such a wide-sweeping system.

In 1917, Article XX, Section 21 of the Constitution was amended into its present form and in response the *Workmen's Compensation, Insurance and Safety Act* (Stats. 1917, Chapter 586) was passed to replace many of the provisions found in the Boynton Act. In many ways, the current system for providing workers' compensation benefits and deciding related disputes is a direct descendant of this 1917 legislation.

In 1937, the Legislature created a Labor Code that overhauled provisions relating to labor and employment relations including matters related to workers' compensation (Stats. 1937, Chapter 90).

POSTWAR CHANGES

The basic structure of the Industrial Accident Commission for many years was to have two separate three-member panels (one based in San Francisco and one in Los Angeles) that handled cases within its assigned region. Limited in number and unable to cover the entire state, the IAC would refer cases to various hearing officers for the purpose of taking testimony and other evidence.[56] These referees prepared unsigned

[56] Some of this traditional role as a recorder of testimony survives today in the requirement that each WCJ issue a "Summary of

proposed decisions with supporting documentation that was provided to the panels of the IAC for internal use only. The panel members would then issue the final decision using the information supplied by the hearing officers.

In 1945, the hearing officers, termed "referees," were now allowed to sign their proposed decisions that were to be circulated among the parties as well. Despite the higher profile of the referees, these proposed decisions were in fact simply recommendations to the IAC and the final decision was ultimately made by one of the panels which would be free to adopt, modify, or reject the recommendations. Moreover, some matters, such as death cases and settlement approvals, continued to remain under the exclusive jurisdiction of the IAC panels.

In 1951, the Legislature enacted a law (Stats. 1951, Chapter 778, page 2266) that changed forever the relationship between the Commission and the referees who were hearing workers' compensation disputes. From that point onward, the referees' findings, orders, decisions, and awards would have the same force of law as if the Commissioners themselves had made them *unless* a petition to the IAC for reconsidering the referee's actions was granted. By 1953, the referees also were now involved in just about every type of workers' compensation case, not just nondeath injury trials. In effect, the referees had evolved into trial judges and the Commissioners had evolved into a quasi-appellate body.

Administrative aspects of the workers' compensation system were handled by a variety of organizations including the Insurance Commissioner, the Department of Industrial Relations, as well as the Industrial Accident Commission acting in concert with the *Division of Industrial Accidents* (DIA). Control over the Division was vested in the Chairman of the IAC. The IAC would therefore be responsible for adjudicating disputes through its referees[57] and through its own direct

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Evidence" in addition to any decision following trial. California Workmen's Compensation Study Commission, *Report of the Workmen's Compensation Study Commission*, April 1965, p. 69.

[57] By 1965, the number of referees had grown to about 100 spread across 21 offices in the state. These 100 referees and other IAC staff were responsible for handling just over 48,000 Applications filed in 1963. California Workmen's Compensation Study Commission (1965), p. 60 and Table 3.2. It is interesting to note that despite the number of

decisionmaking process but be also responsible for administering many of the basic provisions of the workers' compensation system through its Chairman as well.

This situation led to concerns that the Chairman of the IAC could not effectively supervise and control the nonjudicial functions of the Commission's work (specifically those carried out by the Division of Industrial Accidents)[58] while at the same time the IAC was adjudicating cases. The two-panel organization of the Commission not only made it difficult to define precise lines of authority but also resulted in the development of conflicting decisions and case law. Many of the administrative functions were carried out by the San Francisco office (though it was unclear who was actually in charge) while the Los Angeles panel appeared to be operating independently of the Chairman's supervision.

THE END OF THE INDUSTRIAL ACCIDENT COMMISSION

In April of 1965, the *Report of the Workmen's Compensation Study Commission* was issued, in part, as a response to a concern that the current organization of the IAC was not the best way to fulfill the workers' compensation mandates contained in the Constitution. The Study Commission recommended that the current Chairman of the IAC be redesignated as the chief executive officer (the "Commissioner") of the Division of Industrial Accidents but no longer be involved in the exercise of any judicial functions. The primary job of this position would be to oversee the administrative side of the workers' compensation system by performing duties that would be clearly defined by statute. Moreover, the Commissioner would be chosen not for his or her judicial abilities (indeed, he or she need not be a lawyer at all) but rather for "demonstrated executive capability and public spirit, and secondarily upon the basis of knowledge of the workmen's compensation system."[59]

Applications rising to about 160,000 by 2002, the number of filled judge positions had increased only to 170 located in 25 offices.

[58] California Workmen's Compensation Study Commission (1965), p. 60.

[59] California Workmen's Compensation Study Commission (1965), p. 62.

The IAC would be changed as well into a single panel “Appeals Board” of perhaps seven members responsible for hearing and deciding cases. The Chairman of the Board would be responsible for supervising and coordinating the work of both the Appeals Board and its referees (including recruiting, training, and assigning referees). Moreover, the Chairman would also be in charge of controlling the referees’ calendars, the number of referees needed, and other aspects of the adjudicatory process.

The new Commissioner of the Division of Industrial Accidents would play no role in the deliberations of the Appeals Board but would be required to furnish it with “quarters, equipment and supplies.” The Appeals Board members and the referees would become part of the DIA but independent in the exercise of their duties. Indeed, the role of the Chairman in making all decisions affecting the way in which the referees would work and that complementary role of the Commissioner in simply acting as a type of Clerk of Court was made clear by the Report: the Appeals Board “...would receive administrative support from the division under the supervision of the Commissioner. For example, the Chairman would make the determination that additional hearing rooms were required; the Commissioner would have the responsibility to determine where and how the rooms should be provided.”

As the Study Commission suggested, in 1966 the Industrial Accident Commission was indeed split into two entities, one to handle the administrative side of workers’ compensation and the other to resolve disputes between workers, employers, lien claimants, and others including state agencies. A seven-member Workers’ Compensation Appeals Board would function as the adjudicatory arm and the Division of Industrial Accidents (headed by an Administrative Director) would take care of the day-to-day business of regulating the industry. The WCAB would generally review the decisions of the trial-level judges at DIA offices and develop a set of rules and procedures (as well as a body of law based on published opinions) for those same judges to decide the matters before them. The Administrative Director could also make rules, presumably those required to administer the basic provisions of the workers’ compensation system.

Other changes to the way the DIA operated took place in intervening years. In the mid-1970s, special ancillary service units were created to advise workers on their rights in workers' compensation cases and to administer and adjudicate rehabilitation benefits.[60] These units were in addition to the long-established bureau used to make decisions regarding permanent disability ratings. In 1975, the official designation for the hearing officers was changed by Board Rule from "referee" to "Workers' Compensation Judge." In the early 1980s, the DIA began the transition to a new "online" case management system in which summary case data was entered via terminals at branch offices and stored and processed at a central location. Notices of upcoming conferences and trials would be automatically generated by this system and sent to the last known addresses of the parties to the dispute.

THE "LITTLE HOOVER COMMISSION" REPORT

In March of 1988, the Commission on California State Government Organization and Economy issued its report on problems in the state's workers' compensation system.[61] Among other things, the document warned of a dramatic increase in soft tissue, mental distress, and employer liability claims and suggested that "[u]nless controlled, the increasing costs of benefits and administration in these areas may strain the workers' compensation system to the breaking point."[62] Especially troubling was the report that in 1987 it cost 52 cents to deliver $1 in benefits for a litigated case while in 1984 and 1977 the figures were 44

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[60] In many respects, some services of the ancillary service units were already available at local offices. The Industrial Accident Commission had "trouble desks" at its San Francisco and Los Angeles offices to respond to questions posed by injured workers and employers, to contact claims administrators to resolve problems, and to give out information upon request. At the branch offices of the IAC, the referees performed these duties when not in conference or trial. California Workmen's Compensation Study Commission (1965), pp. 72-73. Currently, the Information and Assistance Unit performs this function.

[61] Commission on California State Government Organization and Economy, *A Review of Current Problems in California's Workers' Compensation System*, March 1988.

[62] Commission on California State Government Organization and Economy (1988), p. 1.

cents and 32 cents, respectively.[63] To address the adjudicative side of the equation, the report suggested that "professional court administrators" be used to manage the systems and calendars at local WCAB offices, a special judge be assigned to review only Compromise and Releases, the process for evaluating psychological and stress-related injury claims be rethought, and an "agreed-upon third party" medical report be required if previous reports reached opposite conclusions.

THE 1989 REFORMS

In 1989, the Legislature passed the Margolin-Greene Workers' Compensation Reform Act (Stats. 1989, Chapters 892 and 893). This package of legislation substantially changed the way in which the level of disability was assessed and how disputes were to be resolved. Limits for disability benefits were increased for injuries sustained from 1990 onward. Importantly, the legislation also created a new Division of Workers' Compensation to replace the former Division of Industrial Accidents.

Other changes instituted by this reform package were:

- The formation of an Industrial Medical Council to appoint "Qualified Medical Examiners," to develop procedures used by examining physicians in evaluating injuries, and to set limits on the costs of such evaluations.
- The creation of a settlement conference referee (SCR) classification to handle conferences, thus freeing up the workers' compensation judges for trial work (note: all settlement conference referees have been subsequently elevated to full WCJ status over intervening years).
- The establishment of an audit function within the DWC to monitor the claims handling practices of insurers, self-insured employers, and third party administrators.
- Establishment of a "Claims Unit" to oversee the Uninsured Employers Fund and Subsequent Injury Fund.

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[63] Commission on California State Government Organization and Economy (1988), p. 19 (citing California Workers' Compensation Institute, *Bulletin*, June 3, 1987).

Significant procedural changes also took place for cases with injuries taking place on or after January 1, 1990. They included:

- In cases with uncontested compensability, the triggering of a highly regulated "AME/QME process" rather than simply a duel of competing doctors' reports. Unrepresented workers would use a QME and if the worker had an attorney, an AME would be used if both sides agreed. In disputed claims, there would only be one medical evaluation report per medical specialty.
- Changes to various dates for time of service.
- Injured employees were now required to fill out Form DWC-1 with their employers within a year of the injury.
- The Application for Adjudication of Claim, formerly the jurisdiction-invoking document filed with the WCAB that did not trigger any action, now would be the pleading that actually requested a hearing; as such, new case files would not be opened until shortly before the hearing.
- The scope of compensability for psychiatric injuries was narrowed.
- If there were prehearing disputes that arose before the filing of the Application, the parties could obtain a new case number via a petition.

At their core, the 1989 procedural reforms were designed to encourage the opening of a new case file with the WCAB only in the event that a true dispute had taken place. The filing of an Application so early in the life of a case had long been a source of concern to many observers because the basic principle of the workers' compensation system is to avoid needless litigation whenever possible. The 1965 *Report of the Workmen's Compensation Study Commission* complained that "Applicants' attorneys have increasingly adopted the practice of filing applications with the Industrial Accident Commission at a time when no real dispute has developed between the parties."[64] Nevertheless, some workers' compensation litigation experts suggest that prudent practice demands that an injured worker, even in advance of any problems with a

[64] California Workmen's Compensation Study Commission (1965), p. 86.

claims administrator, file an Application for Adjudication.[65] By discouraging routine litigation, the 1989 reforms would theoretically reduce the need for judicial intervention in typical claims.

THE ERNST & YOUNG WORKLOAD STANDARDS STUDY

In 1990, the DWC retained Ernst & Young to develop a set of workload standards for each of the newly created DWC operational units in light of the 1989 Reforms.[66] The report concluded that there existed a need for a 2.6% increase in the number of authorized positions within the DWC but a 45% increase in the number of actually filled positions. The striking difference between the recommendations reflected the fact that regardless of formal authorizations, many DWC positions were routinely going unfilled. Indeed, Ernst & Young recommended decreasing the total number of Claims Adjudication Unit allocations by six positions while increasing the number of filled by 179.

Though the focus of the study was on staffing standards and requirements, Ernst & Young also briefly relayed a number of concerns

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[65] See, e.g., Ball, Christopher A., *Take Charge of Your Workers' Compensation Claim*, 2nd California Edition, Nolo Press, Berkeley, CA, February 2000: After notifying the employer of an injury and getting medical treatment, "Your next step is to protect your rights as an injured worker under the workers' compensation system by promptly completing two forms: Workers' Compensation Claim Form (DWC-1)...[and an] Application for Adjudication of Claim..."; "...as a matter of common sense, you should complete and file these within 30 days of your injury, or at your first opportunity," Chapter 2, pp. 3-4. "Reporting an injury to your supervisor or boss simply informs your employer that you have been injured; it is not the same as filing a workers' compensation claim. You must still take care of the paperwork necessary to initiate a claim. For injuries occurring on or after 1/1/94, you must file two forms: a DWC-1 claim form... and an application for Adjudication of Claim...." Chapter 4, p. 4. "You'd be wise to file your workers' compensation claim within 30 days of your injury," Chapter 4, p. 4. The problem that there would likely be no matters in dispute if the Application were filed so soon after the injury occurs is easily solved: "Paragraph 9. Here you place an 'X' or check mark for each issue you and the insurance company may disagree. Because a disagreement is always possible, and not in your control, check each and every line. On the blank line entitled 'Other (specify),' enter the words 'penalties and interest'," Chapter 4, p. 12.

[66] Ernst & Young, *Workload Standards for the Division of Workers' Compensation*, California Department of Industrial Relations, December 1990.

voiced by DWC staff and recommended that there be a comprehensive assessment of branch office records management and storage practices, branch office automated equipment support needs, and personnel hiring practices for filling vacancies. The report also saw a need for a concerted effort to identify specific problems in ongoing assessment of the DWC's workload as well as a need to develop strategies for addressing those problems. Considerable variability was noted among the district offices in the policies and practices employed by staff, a problem that was said to be related to a lack of an up-to-date Policy & Procedural Manual. An "Internal Compliance Unit" would be responsible for developing standard documentation as well as performing annual reviews related to uniformity.

THE 1993 REFORMS

Some minor adjustments were made in 1990 and 1991 in order to fine-tune the sweeping changes of the 1989 reforms, but by 1993, the idea of radical reform of the workers' compensation claim dispute process was restored to the top of the legislative agenda. The reforms contained in the California Workers' Compensation Reform Act of 1993 actually developed out of a variety of bills[67] and one of the outgrowths of this package was the creation of the sponsors of this study, the California Commission on Health and Safety and Workers' Compensation. According to the Commission, whose core mandate includes assessing the impact of the 1993 reforms, the legislation came about because:

> ...during the late 1980s and early 1990s, California employers had one of the highest workers' compensation premium costs in the nation, while the maximum indemnity benefits to California injured workers for temporary and permanent disability were among the lowest in the nation. Moreover, California had one of the highest rates of workers' compensation claims filing, which increase costs to employers.[68]

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[67] Assembly Bills 110, 119, and 1300 as well as Senate Bills 30, 223, 484, 983, and 1005.

[68] Commission on Health and Safety and Workers' Compensation, *1999-2000 Annual Report* (2000), p. 57.

Much of the reform package appeared to be an acknowledgment of the dissatisfaction with some of the 1989 procedural changes. One of the ideas behind the first set of reforms seemed to be that by not starting a new "case" until at least one of the parties claimed they were ready to go to trial, resorting to litigation would not be thought of as the rule rather than the exception. While this was a laudable idea, the result experienced was simply a shift from one form to another. Prior to 1990, a worker filed a claim form upon injury to notify "the world" that there had been an accident, an Application was filed to start a case file and reserve the jurisdiction of the WCAB in the event of an irresolvable dispute, and the Declaration of Readiness (DOR) was filed to put the case on the immediate trial track if the matter could not be resolved amicably. After 1989, the notice of injury and jurisdiction of the WCAB were reserved simultaneously by the filing of the claim form, but the Application could not be filed until a party was actually ready for trial (in theory eliminating the creation of cases where no dispute exists).[69] A modified version of the Application now served as the Declaration of Readiness.

It soon became clear that many actions of the WCAB could take place far in advance of the filing of a DOR. Vocational rehabilitation disputes, discovery matters, settlements, penalties, lien issues, and the like can require an action on the part of a WCJ and to do so, the injury claim would first need a WCAB case number. As a result, a considerable number of new case files were being opened even though the new design attempted to minimize this event. It also became clear that there was simply a shift in the form of the document being filed; regardless of whether one called the initial trial request an

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[69] This was a return to a much earlier process of initiating cases. At one time, the filing of an Application to start a case also triggered the reservation of a time for hearing and the sending out of notices to the parties of the scheduled meeting. The experience was that in many instances, the party filing the Application was not ready to proceed to trial so soon and would simultaneously attach a request to take the matter off calendar. It was estimated that half of original Applications filed in the Los Angeles office of the Industrial Accident Commission were accompanied by a request to take the matter off calendar. California Workmen's Compensation Study Commission (1965), p. 86.

"Application" or a "Declaration of Readiness," the end result was the same. While other features of the 1989 reforms were also designed to deflect workers' compensation claims from heading down the formal litigation highway, these particular procedural modifications did not seem to have the clearly positive effect the legislators intended despite a high degree of visibility and a significant impact on day-to-day workers' compensation practices.

The problems noted with the system were addressed in a variety of ways by the 1993 reforms. Some of the changes appeared to be superficial ones such as renaming the hearing officers at the trial level as "workers' compensation referees."[70] More important procedural changes were a return to the pre-1990 concepts of the claim form as merely a method of placing the employer and/or insurer on notice that an injury was claimed, the Application as the initial pleading required to invoke the WCAB's jurisdiction, and a separate Declaration of Readiness as the primary avenue to request judicial action. In an effort to further reduce costs associated with the spectacle of "battling docs," the opinion of the treating physician was given the presumption of correctness,[71] the Qualified Medical Examiner (QME) designation tightened up the requirements of those who were able to evaluate workers' injuries, and the AME/QME process was extended to cases with contested compensability. Going beyond the first steps taken in the 1989 reforms, psychiatric claims related to stress or those developing posttermination were now limited or made more difficult to prove.[72]

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[70] For reasons that are not clear, Governor Pete Wilson later characterized the title change as an "important aspect of the 1993 workers' compensation reform." Wilson, Pete, *SB 1945 Veto Message*, September 25, 1994.

[71] See, e.g., Commission on Health and Safety and Workers' Compensation, *Report on the Quality of the Treating Physician Reports and the Cost-Benefit of Presumption in Favor of the Treating Physician*, California Department of Industrial Relations, 1999.

[72] Psychiatric claims were now required to have been predominantly caused by work-related sources unless a violent act (such as being held up at gunpoint while on the job) was involved. Moreover, recovery on such claims would now be barred if they were substantially caused by a "personnel" action (such as termination, discipline, or changes in job duties) that was lawful, nondiscriminatory, and done in good faith. Moreover, claims first filed after termination, including psychiatric

When parties offered differing disability ratings based on QME reports, the judge now would be limited (in theory) to choosing between one of the two ratings rather than some middle figure (a controversial process known as "baseball arbitration").[73] Various new administrative requirements were also imposed upon the DWC, including the institution of a cost-efficient information system to help track claim progress and provide a better method of assessing systemwide performance; this new "Workers' Compensation Information System" (WCIS) would be developed in order to automate the exchange of information between the workers' compensation community and the DWC.[74] Vocational rehabilitation benefits were now under a $16,000 total ceiling, a cap was placed on the total costs of services provided by a qualified rehabilitation representative (QRR), and VR benefits were no longer available if the

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ones, would generally be allowed only if it could be demonstrated that the injury existed prior to termination. Many judges we spoke to indicated their opinion that the reduction in psychiatric claims has resulted in a significant reduction in the workload of the local offices both in volume and in average case complexity (in contrast, one suggested that the cases that are tried are more lengthy because the personnel action defense substantially broadens the scope of the judicial inquiry; also, it was suggested that the increased reluctance of attorneys to take such cases simply shifted the burden to pro pers who may make case management more difficult). Research in this area suggests that while the percentage of permanent disability ratings involving psychiatric issues has essentially remained unchanged, there indeed has been a significant drop off in the likelihood that workers' compensation disputes would require a costly psychiatric examination as part of the discovery process. See, e.g., Commission on Health and Safety and Workers' Compensation, *Evaluating the Reforms of the Medical-Legal Process*, California Department of Industrial Relations, 1997. One possible explanation is that the workers' compensation system continues to receive and compensate about the same level of psychiatric injuries from year to year, but the frequency of cases where a potential claim along these lines is either threatened or feared (but not a part of any final settlement or award) has fallen off due to additional procedural hurdles. It should be kept in mind, though, that the dramatic drop off in psychiatric examination frequency began prior to institution of the 1993 reforms and may have been precipitated by a crackdown on so-called "lien mills" whose forte were stress claims.

[73] Labor Code §4065. See, e.g., Commission on Health and Safety and Workers' Compensation, *Preliminary Evidence on the Implementation of Baseball Arbitration* (1999). Some have suggested that judges and attorneys routinely ignoring the "one or the other rating" requirement tempered the impact of the rule.

[74] See ***CHAPTER 17.***

employer made an offer of alternative or modified work.[75] Finally, benefit levels for both temporary disability and permanent disability (15% and higher) benefits were increased.

The 1993 reforms essentially returned the steps needed to initiate a case before the WCAB and request a hearing back to the way it had been done before 1990. But most of these changes (though certainly not all) only applied to those who had been injured on January 1, 1994, and beyond. As a result, the system now had three primary tracks for cases: injuries occurring in 1989 and prior years, injuries occurring in 1990 through 1993, and injuries occurring in 1994 and later.

While all of the 1993 changes affected how disputes moved through the system, the benefits available to injured workers, and the costs of addressing work injuries, perhaps the most significant impact of the 93 reforms was the deregulation of workers' compensation premium levels. Before this point, minimum rates were established by the state in such a way as to essentially guarantee profitability to those offering coverage to California employers. Now, insurers were free to set whatever premium levels the market would bear by using the rates developed by the *Workers' Compensation Insurance Rating Bureau* (WCIRB) in an advisory capacity only. The wave of premium cuts resulting from insurers finding themselves in the previously unfamiliar environment of open markets and unfettered competition was primarily responsible for a significant drop in total written premiums (additionally, a contributing factor may have been the decline in claim frequency). In calendar year 1993, $8.9 billion worth of workers' compensation premiums were written in the state, but by 1995, that figure had dropped to just $5.7 billion.[76] The drastic reduction may have also been one of the underlying reasons why a

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[75] The changes to the rules regarding vocational rehabilitation services and benefits appear to have had a significant impact on overall costs. Average VR costs per claim prior to the 1993 reforms were about $13,000 but dropped to just over $7,000 in 1994. Neuhauser, Frank W., and Nancy Shaw, *Vocational Rehabilitation Benefit: An Analysis of Costs, Characteristics, and the Impact of the 1993 Reforms Interim Report*, August 1997.

[76] Commission on Health and Safety and Workers' Compensation, *1999-2000 Annual Report* (2000), p. 58.

number of workers' compensation insurers have found themselves in financial difficulties in recent years.[77]

Related impacts upon the dispute resolution process from deregulation are difficult to quantify. A number of defense attorneys have indicated to us that in their personal experience, the ways claims managers for insurers worked their cases changed almost overnight as a result of intensive efforts to reduce costs associated with litigation expenses. Reportedly, files were increasingly turned over to counsel just prior to the first required appearance before a WCAB judge, sometimes only on the morning of the initial MSC. Another impact that was reported to us from these same sources was that obtaining authority for settlements became more difficult compared to past behavior; previously, it was claimed, claims managers would readily agree to relatively higher demands from applicants because the total costs of the case and others like it would simply be factored into future official premium rates. Finally, some defense attorneys we spoke to believed that both the number and the quality of insurer claims managers declined in the light of increased competition and reduced premiums; they felt that the increased workload of the remaining claims managers caused additional problems in communication and file handling and that new managers appeared to not be as familiar with business practices, WCAB rules, and medical terminology. Whether these claims are valid is beyond the scope of this study, but they do suggest that the possible sea change in insurer behavior might have greater significance to how the system has operated post-1993 than any of the extensive

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[77] Ironically, this situation is similar to that experienced in the first two years of workers' compensation in this state following the passage of the Boynton Act. Aggressive rate cutting at the time threatened the solvency of some insurers and the activities of the State Fund. California Industrial Accident Commission, *Report of the Industrial Accident Commission of the State of California for the Year 1913 and from January 1 to June 30, 1914*, 1914, p. 21; California Industrial Accident Commission, *Report of the Industrial Accident Commission of the State of California from July 1, 1914 to June 30, 1915*, 1915, p. 28; California Industrial Accident Commission, *Report of the Industrial Accident Commission of the State of California from July 1, 1915 to June 30, 1916*, 1916, p. 26. In response, the legislature passed a minimum rate setting law (Stats. 1915, c. 642) that essentially remained in effect until 1993.

modifications to the rules of practice and procedure that took place at the same time.

THE KPMG BUSINESS PROCESS REENGINEERING STUDY

In early 1996, the DWC retained KPMG Peat Marwick LLP to review the activities and operations of the Claims Adjudication, DEU, I&A, and VR units and suggest strategies for reorganization.[78] The study arose out of a 1995 internal strategic planning process within the DWC that concluded that any substantial technological investments first required rethinking current practices.

After reviewing how the four key units of the DWC relate to one another and to consumers of their services, the KPMG report suggested that many similar duties (such as file creation and telephone contact) were being performed independently by members of each unit. Communication between the units was felt to be fragmented and more a function of individual personalities than established guidelines. At the time, the Presiding Judge managed the activities of the Claims Adjudication Unit, but off-site Area Supervisors managed the personnel attached to the other three units. The then-recent innovation of Regional Managers was thought to be a positive step toward facilitating communication between the units, but the fact that multiple files were routinely being maintained for the same worker, the lack of unit standardization, and the use of separate computer systems were seen as significant continuing problems. The deficiencies of the Claims Adjudication On-Line System were specifically pointed out as a cause of wasted staff resources. It was also felt that the offices routinely received documents from litigants and others that should never be filed in the first place.

The report suggested that rather than having Office Assistants (with varying degrees of training, experience, and skill levels) in each of the four units at each district office fielding separate telephone calls, it would be more efficient to centralize telephonic contact with

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[78] KPMG Peat Marwick LLP, *Business Process Reengineering Study of the California Department of Industrial Relations, Division of Workers' Compensation*, July 1996.

the public through the use of regional “phone banks.” At each office, mail handling would be performed by a few clerks rather than separately in each unit. The scheduling functions of the Claims Adjudication and Vocational Rehabilitation Units would also be consolidated. As services were increasingly centralized, the ratio of secretaries to judges could be reduced. A newly created position of “Administrative Officer” would manage all the routine nonjudicial activities (such as file creation, public inquiries, ratings, vocational rehabilitation plans, etc.) taking place at each district office, though the Presiding Judge would be responsible for activities related to “disputes.” Finally, an enhanced series of performance measurements were proposed in order to gauge the efficiency and effectiveness of each unit’s operations; most of these measures would be collected by the future implementation of the Workers’ Compensation Insurance System required by the 1993 reforms.

One key outgrowth of the study was the eventual establishment of the Presiding Judge as the sole supervisor responsible for the operation of all DWC staff in the four key units at each branch office. While I&A Officers, Vocational Rehabilitation Counselors, and Disability Evaluation Unit raters might receive professional guidance from Area Managers, day-to-day supervision on control now was in the hands of the Presiding Judge.[79] Another major change was the creation of Regional Phone Centers designed to handle most telephone calls to branch offices. If the customer service provider at the Regional Center was unable to respond to the inquiry, the call would then be redirected to someone at the branch office. Some personnel at branch offices were transferred to staff these offices, a move that reportedly caused great disruption during the transition to centralized services. As of this writing, Regional Centers are functioning only in the Northern (in Walnut Creek) and Southern (in San Bernardino) Regions and there is talk of consolidating all such operations into a single location.

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[79] A 1997 CHSWC study also suggested the need to place the Presiding Judge in charge of all DWC staff at district offices. Commission on Health and Safety and Workers’ Compensation, *CHSWC Profile of DWC District Offices* (memorandum to Casey L. Young, Administrative Director, DWC), California Department of Industrial Relations, June 25, 1997.

THE CHSWC OFFICE PROFILE PROJECT

In November 1996, the Commission on Health and Safety and Workers' Compensation began a study of the operations of district offices of the DWC in response to office closings and complaints about the level of services to litigants. Surveys were sent to each location to collect data on equipment, calendar settings, lien backlogs, staffing levels, and workload. Additionally, formal "walk-throughs" were conducted at selected offices for further information.

In June of 1997, a memo was provided to the then Administrative Director of the DWC that detailed the major findings of the project team.[80] Areas of concern included a lack of performance standards (such as caseloads for judges and uniform guidelines for case assignment) for monitoring staff and operations; inconsistent adherence to established policy and procedures (especially in regard to continuances); a failure to properly plan for evolving equipment and data processing needs; severe shortages of clerical staff at some locations; disparities in the level of facilities from location to location; confusion in the organizational structure within offices with only the Claims Adjudication staff and judges reporting to the Presiding Judge (others reported to off-site managers); case files stored haphazardly; and a backlog in lien claims driven in part by the filing of liens for payments made ten years previously and in newer cases, a failure to provide lien claimants with proper notice.

The report reached the following conclusions:

- The Regional Manager positions that were created in 1995 appeared to have a generally positive effect upon operational consistency within regions.
- Better coordination should be attempted to help resolve outstanding liens filed by the state Employment Development Department.
- Future district office closures should be done only after cost-benefit analyses have been performed.
- Workload versus staffing ratios should be reassessed.

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[80] Commission on Health and Safety and Workers' Compensation, *CHSWC Profile of DWC District Offices* (1997).

- Statewide standards for calendar settings are needed.
- Existing continuance policies needed better enforcement.
- A major onetime capital investment in infrastructure was needed.
- Any changes to notice policies should be the subject of a cost-benefit analysis so that any short-term savings of having the parties rather than the DWC provide notice are not offset by additional hearings.

It is not clear what effect the CHSWC Office Profile Project had upon the decisions of upper-level DWC administration at that time.

RECENT CHANGES

By January 1997, a number of branch offices (Agoura, Norwalk, and Pasadena) in the Central Region that had experienced declining filings were closed in favor of other Los Angeles County offices as part of cost-cutting measures. Though in danger of also being shut down in January of 1998 as a result of a review of DWC facilities completed in October 1996, the Anaheim office was given a reprieve in September 1997.

In late 1998, the DWC was reorganized to incorporate some of the recommendations of the KPMG report. Incoming mail at the branch offices would now be handled by a centralized pool of clerical staff (rather than by Office Assistants attached to the various units). The first full-fledged Regional Call Center was also established to provide centralized responses to telephone inquiries about the status of a workers' compensation benefit claim regardless of whether the information touched on claims adjudication, disability evaluation, or vocational rehabilitation. The key idea, as suggested by KPMG, was to separate "claims resolution" services (which might or might not have anything to do with an actual WCAB case) from "dispute resolution" services that by and large required more formal handling.

In February of 2000, a number of new uniform pleadings and procedures became effective. A standardized Pre-Trial Conference Statement was adopted to allow parties the option of completing the multipage listing of stipulated issues, areas still in dispute, and anticipated evidence to be filled out prior to the appearance. A form

was also developed that allowed judges to use a single page to record their orders following conferences and other matters. This “Pink Form” (so called because of its color) combined individual documents for Minutes of Hearing, Orders Taking Off Calendar or for Continuance, and other judicial actions; another purpose was to help Presiding Judges[81] and others get a better idea of not only what a judge ordered but just as importantly, why.

Despite these new forms and other minor developments, the workers’ compensation adjudicatory process has not changed markedly since the advent of the 1993 reforms.

[81] Some of the lien-related problems were clearly improving during the study period. A backlog in calendaring some 6,000 lien DORs at one office had been cut in half by the time the CHSWC project staff made a subsequent visit.

CHAPTER 5. THE CURRENT WORKLOAD OF THE WCAB

OVERALL DEMAND[82]

Out of the approximately one million annual workers' compensation claims against insurers and self-insured employers in California,[83] about 200,000 new cases are begun with the WCAB each year.[84] The numbers of new cases in recent years are much less than the peak levels

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[82] Case and transaction type counts in this chapter are, unless otherwise indicated, derived from RAND's analysis of the DWC's networked case management system (which for ease of reference we have labeled as "CAOLS"). For more information on our use of this system, see ***Initial Steps*** in ***CHAPTER 2***. While CAOLS certainly has its drawbacks as a case management and analysis tool (see ***DWC Claims Adjudication Unit On-Line Case Management Information System*** in ***CHAPTER 17***), it is the official electronic repository for data concerning every formal case filed with the DWC. Analyzing CAOLS data is difficult because many of the underlying assumptions about case processing that were used during its installation in the 1980s are no longer valid and the sometimes cumbersome way case event histories are stored can be a source of confusion for those trying to extract meaningful information from the system. Virtually all of the staff members who were part of the original CAOLS development and implementation no longer work with the DWC and so there is a noticeable lack of institutional memory in this area. For example, the methodology employed by analysis programs used for decades by staff to obtain summary information for annual reports and the like are not well understood any longer. Because there is no "correct" way to count certain types of events, numbers yielded from data will vary significantly depending on the assumptions of the individual doing the analysis. As such, we use aggregate CAOLS data not for precise counts but rather for getting a meaningful perspective on the relative magnitude of particular events or pleadings.

[83] The total numbers of workers' compensation claims in 1998 and 1999 have been estimated at 1,037,639 and 993,274, respectively, and 38.2% of all workers' compensation claims in 1996 involved temporary or permanent disability indemnity claims. Electronic mail message from Mark Johnson, DWC Audit Manager, to Frank W. Neuhauser, June 1, 2001.

[84] The number of "open" or "active" cases before the WCAB is much greater than the number of new case files. In 2000, for example, about 520,000 cases in the WCAB had some sort of activity noted in the CAOLS transactional database. Not all such activity consists of what one might view as traditional litigation; besides trials and conferences, new case openings, the filing of pleadings, and the like, "case activity" includes fairly trivial events such as routine address updates and the archiving of the physical case file to the State Records Center.

seen in the mid-1990s, a somewhat surprising result given an expanding population and a growing state economy.[85] In 1995, a total of 242,557 Applications and case-opening settlements were filed compared to just 195,369 in 2000. Opinions differ for the change, but according to the Commission on Health and Safety and Workers' Compensation, the significant decline in claims associated with industrial illnesses and injuries from the mid-1990s is due to "shifts in the workforce, greater emphasis on workplace safety, continued efforts to combat workers' compensation fraud, limitations on psychiatric injuries, and changes in employer reporting patterns."[86] Whatever the reason, the number of new cases has remained fairly stable since 1997.

A similar story is told when one looks at new cases opened only by the filing of an Application for Adjudication, as the number of such pleadings has been steady over the past few years as well. Applications are not the only way a case can open and thereafter require clerical and/or judicial action from the WCAB (see ***Table 5.1***); workers and insurers often reach agreement on a settlement of a claim even if the matter has never been brought to the attention of the WCAB previously and when that document is filed for the purpose of a judicial review, a new case number is issued and a file is created just as if an Application had been filed. A not-insignificant amount of clerical resources are expended to open any new file, even if only for the purpose of settlement review, and judges must at least spend some amount of time considering the adequacy of a case-opening agreement. But it is unlikely that cases opening with a settlement will require a conference or trial later on in their lives, events that require far more judicial attention and staff support. As such, Applications are a reasonable way to view changing workload levels.

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[85] From 1997 to 2000, the total number of case opening Applications and settlements have floated between 188,000 to 198,000 each year. During the mid-1990s, new filings were much higher and ranged between 213,000 and 243,000. Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report*, California Department of Industrial Relations, September 2001, p. 100.

[86] Commission on Health and Safety and Workers' Compensation, *1999-2000 Annual Report*, (2000), p. 5.

Table 5.1

Types of Case Openings (Opening Documents Received, CY 2000)

Type	*Frequency*	*Percent*
Applications for Adjudication	159,467	81.5
Case-Opening "Compromise & Release" Settlements	14,884	7.6
Case-Opening "Stipulation with Request for Award" Settlements	21,288	10.9

As can be seen by ***Figure 5.1***, relatively flat numbers of new Applications have been matched by relatively flat numbers of authorized positions in the Claims Adjudication Unit. It should be noted, however, that the historical experience within the DWC's CA Unit is that the number of positions actually filled can be much less than the authorized numbers (see ***CHAPTER 10***); nevertheless, authorizations provide an adequate insight into how administrators and policymakers have perceived the need to address changes in workload.

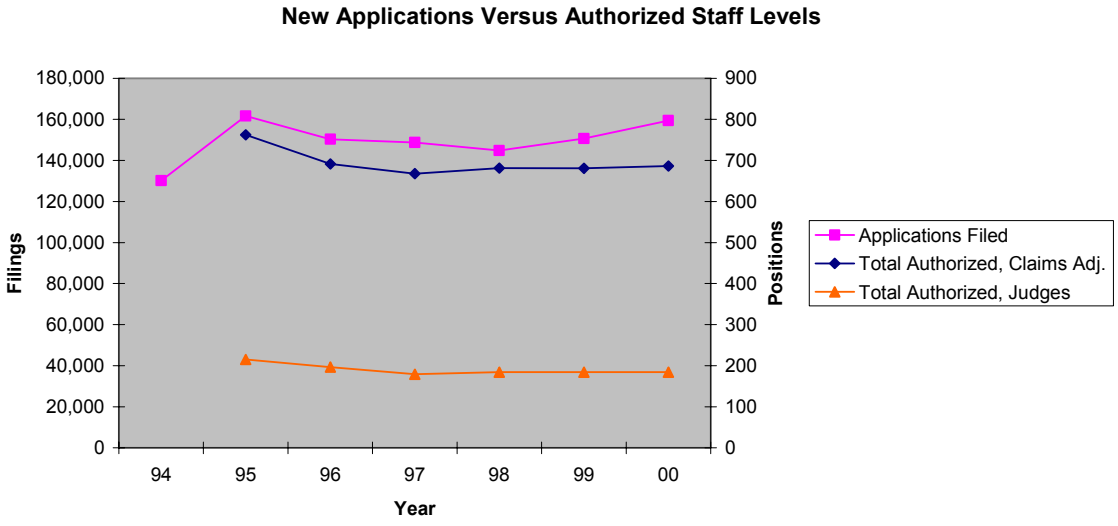

Figure 5.1 Applications and Authorized Positions[87]

[87] Staff-level data in this figure is derived from information provided to RAND by the DWC. See the discussion contained in ***Data Availability*** in ***CHAPTER 10***. Counts of new Applications come from Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 100.

A richer picture of what the workload of the WCAB is can be seen by looking at closed cases rather than new openings. In one sense, workers' compensation disputes are never truly "closed" in the same way one might characterize a traditional civil case in which a settlement, verdict, or dispository ruling has taken place. Unlike typical civil cases, matters before the WCAB can have multiple trials to decide reoccurring issues, settlements can be reopened depending on changing circumstances, and even judicial verdicts intended to resolve the case-in-chief can be easily revisited down the line. It is not unusual for a branch office of the WCAB to routinely request the return of long-archived case files from the State Records Center in order to address new problems in a case that was essentially disposed of five or more years previously. Nevertheless, in order to get a better understanding as to how cases are processed, we can make a few assumptions that will allow us to find a set of cases where some sort of closure was reached.

In the tables below, we defined a case closed by a "settlement" as one where a Compromise & Release was approved or a Stipulation with Request for Award was granted; a case closed by a "finding" (typically one issued following a trial and formal decision on the merits) as one where a judge issued a Findings & Award, a Findings of Fact, or a Findings & Order; and a case closed by "other" means as one where a dismissal of the claim, a lien or commutation order, or any one of a number of other types of final orders were issued. Looking only at the 192,000 closing events that were recorded by the DWC's transactional database maintained for use by the Claims Adjudication Unit as having taken place during calendar year 2000,[88] it is clear that the primary

[88] It should be understood that the numbers in the table include some double counting. If a single case record indicated that two or more "closing" orders were entered during CY 2000, then each closing was treated as a separate event. As such, the number of actual cases that had closing orders issued will be smaller than the numbers shown in ***Table 5.2.*** We also do not take into account the problem of parallel entry of a single event for related cases (see ***Specific Types of Filings and Judicial Actions***, below). We eliminate such double counting for subsequent tables dealing with closing orders but preserve it here because the discussion in this section includes a consideration of how the cases were originally opened (which is an event that is not affected

business of the WCAB is in encouraging, reviewing, and approving settlements (***Table 5.2***):

Table 5.2

Type of Closure (Closing Orders Issued, CY 2000)

Type	*Frequency*	*Percent*
"Findings"	14,765	7.7
Settlements	160,788	83.9
Other Closures	16,176	8.4

While cases that are concluded by some sort of judicially determined finding are likely to have run the entire gamut in what one might think of as a classic workers' compensation case,[89] it is not clear how much in the way of judicial and staff resources would have been expended when a case was resolved only by settlement. Some of these matters could have started out as a case-opening settlement (essentially, filing a proposed settlement operates in the same way as an Application if no case number had previously been issued) and almost immediately the agreement was reviewed and approved with no court appearances whatsoever. Some of these settlements could have been filed after the Application but before any requests were made to have the case placed on the trial track (represented by the filing of a DOR); in other words, court appearances in such cases would not have been likely either. Finally, some of these settlements might have come about after a DOR was filed and an MSC was scheduled. For such cases, the point at which the settlement was actually approved could then run the gamut from prior to the actual start of the MSC (essentially the parties arrived at the branch office of the DWC with an agreement already in hand) to after a trial had been held and concluded (but before a final decision was

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by the parallel entry problem) and because we are interested in the level of judicial activity expended by such closures.

[89] In other words, an Application was filed; a Declaration of Readiness was subsequently filed and as a result, a Mandatory Settlement Conference was scheduled; at the conclusion of the MSC, no settlement had taken place, so a regular hearing was scheduled; and following the holding of the trial, a judge eventually issued some sort of dispositive ruling.

issued) with numerous appearances and judicial interventions required along the way.

In order to see where cases fit into the continuum of effort expended by the DWC, we defined a case opening as either one begun by the filing of an Application, a settlement, or one of a series of special pleadings that caused the issuance of a case number for the dispute where none had existed before (such as a claim for a “Serious & Willful” penalty prior to the filing of an Application).

Initially, the 15,000 cases disposed of by a Findings implicitly require some sort of significant judicial involvement. In other words, nearly 8% of case closures generally reflect what might be considered a paradigm litigation path of an initial case opening, various conferences (at least one), and eventually a trial. What took place in the other 92% of cases (161,000 cases resolved by settlements and 16,000 cases resolved by other types of closures) that did not end in trial?

As shown in ***Table 5.3***, some 70,000 settlements are approved each year without the case ever being placed on the trial track. In other words, 44% of all settlements (and 37% of all closures of any type) take place with only a minimal amount of interaction with the judges of the WCAB beyond the time needed to review the proposed agreement.

Table 5.3
Key Events in Cases with Closure by Settlement or Other Nonfindings Outcome (CY 2000)

Opening Type Category	*Settlement w/o DOR*	*Settlement, DOR Filed*	*Other Closure w/o DOR*	*Other Closure, DOR Filed*
Application	40,228	80,484	5,969	8,904
Opening Settlement	29,231	9,667	682	255
Other Type of Opening	635	543	216	150
Total for This Closure Type	70,094	90,694	6,867	9,309

This figure should be considered as the absolute floor for the number of “low-demand” sorts of matters handled by WCJs; when settlements that are reached at the very start of (or prior to the date

of) the MSC without any intervention of the judge are included (as well as those closing orders that were issued without a conference or hearing of any sort; this would include dismissals for lack of prosecution), it may be that less than half of all formal cases filed annually with the WCAB are truly ones where any serious judicial involvement is required. This suggests that those seeking to streamline or modify the process by which workers' compensation disputes are resolved need to separately consider the types of cases that are settled without any formally scheduled appearances, those that are settled with some amount of in-court activity, and those that actually reach the trial stage.

SPECIFIC TYPES OF FILINGS AND JUDICIAL ACTIONS

In calendar year 2000 (the last complete year of data we have available in the version of CAOLS provided to RAND), 81% of the 195,000 new cases filed with the WCAB were new Applications for Adjudication with the rest being case-opening settlements. Beyond a simple count of the case openings, however, our analysis of the DWC's transactional system had to make a significant adjustment to the data in order to better reflect actual events. Once a new case is started, it is the typical practice of the DWC to match the social security number of the applicant against the CAOLS database to determine what other workers' compensation disputes are still open for the same individual. While the matters could be litigated separately, very often the defendants are the same entities and it makes sense from the standpoint of all the litigants to try to resolve all outstanding issues (regardless of the date of the injury) at the same time. This makes getting accurate counts of postopening events somewhat problematic because when multiple cases are linked up in this manner, staff members performing data entry tasks to record new pleadings being filed, conferences and trials being held, orders being issued, and the like duplicate the entry in all associated cases. Thus, a code for "MSC held" in the CAOLS database might show up in two or more cases even though there was only one actual appearance by the applicant and the defendants. In order to avoid multiple counting, our analysis of CAOLS data ignores all duplicate pleadings, orders, hearings, etc., when we found that the same

individual received the same code for the same type of event on the same day in two or more cases. This is not an insignificant adjustment; for example, there were 161,000 settlements "approved" in calendar year 2000, but in actuality, judges signed off on 126,000 separate agreements.[90]

What sorts of nonopening pleadings are being filed? For the most part, clerical staff spends their day, handling new Declarations of Readiness and proposed settlement agreements, with attorney's fee requests the next-largest single category (***Table 5.4***).

Table 5.4

Petitions and Other Pleadings Filed, CY 2000

Type	*Frequency*
Attorney's Fees	34,366
Challenges	825
Commutation Petitions	1,996
Declarations of Readiness	179,741
Dismissals	6,830
Objections to Declarations of Readiness	15,420
Other Type	37,275
Penalty Petitions	8,659
Reconsideration Petitions	4,431
Reopening Petitions	5,839
Supplemental Insurance Fund Petitions	215
Settlements (proposed)	104,463

Postponements of one type or another (i.e., continuances and orders taking cases off the trial calendar[91]) far and away make up the majority

[90] Based on our discussions with judges, it did not appear that dealing with a universal settlement involving, for example, three separate injury claims was generally considered to be three times as difficult or three times as time-consuming as a single injury agreement (as long as multiple employers or insurers are not involved). Official DWC statistics for case-closing events also drop duplicate counts recorded in multiple files for the same type of activity for the same worker taking place on the same day.

[91] An order taking the case off calendar or "OTOC" essentially results in a "cancellation" of the request implicit in the Declaration of Readiness to have a trial as soon as possible on some or all of the outstanding issues of the case. OTOCs are often issued at conferences after one party has convinced a judge that a subsequent trial would be

of significant interim (non-case dispositive) orders issued by WCAB judges (***Table 5.5***).[92] Though attorney fees are usually made a part of a decision on the merits or incorporated into approved settlement language, some 36,000 separate orders were issued as well, many involving depositions and vocational rehabilitation services. The understandable desire of counsel to have the WCAB process those requests as expeditiously as possible has led to some controversy over whether attorneys should be allowed to approach judges essentially upon demand for immediate review of the petition outside of a normal conference or hearing setting (see ***The "Walk-Through" Process*** in ***CHAPTER 15***). In contrast to the 15,000 Objections to the DOR that were filed in CY 2000, only about 1,700 interim orders were issued that definitively ruled on the petition one way or another. However, it is likely that judges almost always make an implicit decision on an opposing party's request to not place the case on the trial calendar when the litigants appear in person at the Mandatory Settlement Conference (see ***Screening Versus Objections Review*** in ***CHAPTER 14***).

The remaining large categories of specific interim orders in ***Table 5.5*** involve questions of when a matter will actually be "submitted" for a judge's decision (43,000 "Submission Made" and 35,000 "Submission Pending" orders). Submission does not mean the judge actually makes a decision at the time but rather that all necessary information is available. The most important context in which the question of submission arises is in the posttrial decisionmaking process. For a variety of reasons including the time needed to draft and complete a Summary of Evidence, to obtain some sort of additional evidence or argument, or to get a formal rating performed by the DEU, the judge can temporarily defer consideration of the testimony received at trial until such time as he or she is satisfied that all necessary documents and other materials have been received. This is an important issue because,

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premature at the present time. In order to get back in the queue for trial, the other party must then file a new DOR.

[92] "Other Interim Orders" constitute a variety of high-volume but essentially routine judicial acts. For example, the category includes some 37,000 "calendar memos" that were written to request that the clerks schedule some sort of future conference or trial.

as will be seen in ***The Degree of Success with Meeting Time Limits*** below, the 30-day "clock" requiring a judge to issue an Opinion and Decision following a trial (or the 90-day limit in which a judge's salary would be withheld for uncompleted decisions) does not begin to tick until the judge personally decides the case is ready for submission. The number of interim orders involving submissions made or pending shown in ***Table 5.5*** is much larger than the number of trials because the order appears to be also used when proposed settlements are received and the judge has chosen to defer an immediate decision. There is also evidence that the manner in which non-trial related submission actions are interpreted by clerks and secretaries and keyed into the CAOLS database is both inconsistent and unreliable.

As noted earlier, disputes before the WCAB are usually resolved by means of settlement; of the 150,000 closing orders issued, 84% were approvals of Compromises & Releases or Stipulations with Request for Award (findings issued after a trial or other decision on the merits were made in only about 8% of all closures). One interesting facet of closing orders is the relatively large number of lien orders. Official policy mandates that lien decisions separate from resolution of the case-in-chief should be a rarity (see ***Lien Procedures*** in ***CHAPTER 14***), but when both closing and interim lien orders are included, some 15,000 distinct rulings on lien were issued in CY 2000. Nevertheless, this is a marked improvement from the mid-1990s when more than twice that number was decided each year.[93]

[93] Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 106.

Table 5.5

Closing and Interim Orders Issued, CY 2000

Type	*Frequency*
Closing—Dismissal	4,378
Closing—Findings Issued	11,354
Closing—Lien Orders	1,930
Closing—Other Closure	6,533
Closing—Settlement Approved	126,162
----------	----------
Interim—Application Rejected	343
Interim—Attorney's Fees	36,391
Interim—Case Continued	70,646
Interim—Dismissal (partial)	3,011
Interim—Findings (partial) Issued	971
Interim—Lien Orders	12,966
Interim—Objection to DOR Denied	993
Interim—Objection to DOR Granted	754
Interim—Other Interim Order	97,329
Interim—OTOC (case off calendar)	127,414
Interim—Settlement Approved	2,301
Interim—Settlement Denied	923
Interim—Submission Made	43,240
Interim—Submission Pending	35,263

Mandatory Settlement Conferences (MSCs) are by far the most common official in-court events for parties to attend (***Table 5.6***). Some 124,000 MSCs were noted in the CAOLS database as having been "held," though the counts in ***Table 5.6*** should be considered an upper bound to the actual number of official sessions conducted. CAOLS indicates that a conference or trial has been held when in fact the parties immediately requested and were granted a continuance or order taking the matter off the trial calendar, especially in regard to settlement. As such, it would be incorrect to say that 174,000 conferences, 9,000 expedited hearings, and 54,000 trials were started and completed in CY 2000. More accurately, these events were scheduled and remained on the calendar until the day of the event (when many of them would have been canceled or continued for a variety of reasons). Still, the numbers do suggest that perhaps just one out of three cases that reach the Mandatory Settlement Conference stage go on to have a trial set for the future.

Table 5.6

Conferences and Hearings Scheduled, CY 2000

Type	*Frequency*
Mandatory Settlement Conferences	123,744
Other Conferences	48,276
Expedited Hearings	9,248
Hearings, Other	7,440
Hearings, Regular	46,706

THE DEGREE OF SUCCESS WITH MEETING TIME LIMITS

Statutory Authority

Given the concerns of many stakeholders that the workers' compensation process should at all times be an expeditious and informal one, it is not surprising that a number of legislatively enacted mandates control how matters are resolved. The filing of the most common judicial action request, the Declaration of Readiness, starts the clock ticking on the time available to the WCAB to resolve a dispute. From that point, the WCAB has 30 days to conduct a Mandatory Settlement Conference and 75 days to hold the trial (or "regular hearing"). Under LC §5502(d)(1),

> In all cases, a mandatory settlement conference shall be conducted not less than 10 days, and not more than 30 days, after the filing of a declaration of readiness to proceed. If the dispute is not resolved, the regular hearing shall be held within 75 days after the declaration of readiness to proceed is filed.

The holding of such a trial within the 75-day time limit, however, does not necessarily mean a decision will be rendered at that time. Indeed, under LC §5313, a judge has up to 30 days after trial "submission" in which to formally decide the relative rights of the parties:

> The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied

> upon and the reasons or grounds upon which the determination was made.

The key here is when the matter is submitted. "Submissions" are defined under AD Rule §9711(d) as the point at which the record is closed and no further evidence or argument will be allowed in. This is *not* the same as the close of testimony of the formal hearing. Submission might indeed occur at the end of live testimony, but it might also occur many weeks or months later when the judge is satisfied all required evidence or ratings have been received. When exactly a case is formally submitted for a decision essentially rests in the hands of the trial judge. This is an important consideration that goes beyond the imperatives contained in LC §5313 because under LC §123.5(a), a judge

> ...may not receive his or her salary as a workers' compensation judge while any cause before the workers' compensation judge remains pending and undetermined for 90 days after it has been submitted for decision.

By deferring the official date of actual submission, judges can conceivably give themselves some breathing room for avoiding any potential paycheck cutoff (a practice frankly admitted by a number of our judicial interviewees).

If the parties need a more immediate resolution for high-priority problems, a Request for Expedited Hearing and Decision can be filed instead of the DOR under a number of specified circumstances. If granted, both the hearing must be held and a decision issued following the filing of the Request. There is no intervening conference similar to the MSC under LC §5502(b), but the types of disputes available for expedited handling are limited:

> The administrative director shall establish a priority calendar for issues requiring an expedited hearing and decision. A hearing shall be held and a determination as to the rights of the parties shall be made and filed within 30 days after the declaration of readiness to proceed is filed if the issues in dispute are any of the following:
>
> (1) The employee's entitlement to medical treatment pursuant to Section 4600.
>
> (2) The employee's entitlement to, or the amount of, temporary disability indemnity payments.

> (3) The employee's entitlement to vocational rehabilitation services, or the termination of an employer's liability to provide these services to an employee.
> (4) The employee's entitlement to compensation from one or more responsible employers when two or more employers dispute liability as among themselves.
> (5) Any other issues requiring an expedited hearing and determination as prescribed in rules and regulations of the administrative director.

Unlike regular trials, time intervals for Expedited Hearings do not depend on a judge's determination of when the matter might be submitted. The determination must be filed within 30 days of the request for expedited handling regardless of whether the judge feels more time is needed.

Time to Key Event Trends

So how has the WCAB been able to meet the LC §5502 mandates in light of this relatively stable environment?

While some improvement has been the experience regarding initial conferences (from an average of 81 days from DOR filing in late 1995 to 64 days in late 2000), a much more dramatic change took place with trials (***Figure 5.2***). In 1995, nearly 200 days were required to hold a trial while in more recent times, cases are getting to regular hearing in about 3.8 months. Both the DOR-conference and DOR-trial averages remain over the statutory maximums but nevertheless evidence a system that is much quicker than traditional civil courts. Expedited hearings have also shown quicker response times: in late 1995 an average of 36 days were required to turn out an expedited decision while the DWC is now generally able to comply with LC §5502(b) in an average of just 30 days.

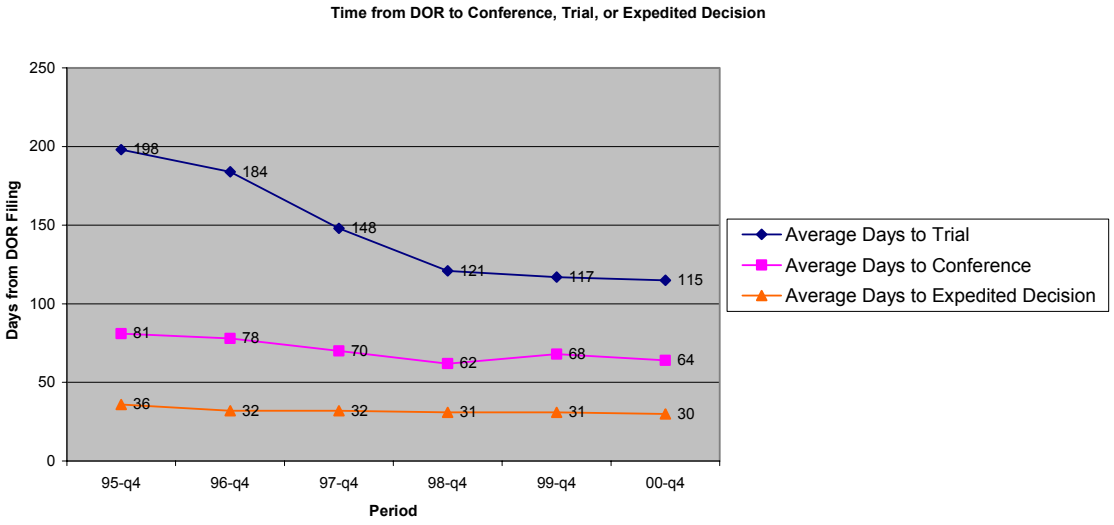

Figure 5.2 Key Interval Times[94]

It should be noted that these estimates are for systemwide performance and so obscure important differences between branch offices, differences that might mean that litigants in an entire region of the state would have to routinely deal with far worse processing times. Moreover, there may be particular cases where extreme delay in every aspect of the litigation has been the experience right from the very start even if the office in which it is being handled (or the DWC generally) is able to provide most cases with a conference, trial, or expedited decision on time. Charts such as these do not reveal the significant impact on the lives of individuals that is wrought by a failure to resolve a workers' compensation dispute in the shortest length of time possible. Reflecting similar concerns, the legislative mandate to the WCAB and DWC to make a conference available within 30 days of the filing of a DOR (or a trial within 75 days or an expedited hearing decision within 30 days) is couched not in terms of mean or median times but instead in absolutes: "...*shall be conducted...*," "...*shall be held...*," and "...*shall be made and filed....*"

The averages in ***Figure 5.2*** were generated in the way the DWC has traditionally analyzed its online system of transactional information,

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[94] Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 103.

but there is good reason to suspect that such time intervals are calculated in an extremely conservative way. Matters that are scheduled to be held (such as an MSC following the receipt of a DOR) but for one reason or another are continued to another day (even at the request of the parties) appear to be figured into the DWC estimates using the time from DOR filing to the concluding conference rather than using the interval from DOR filing to the first (though unfinished) conference. Thus, the averages are driven upward each time a conference or trial is begun but subsequently postponed. While this method of calculating intervals provides incentives for WCAB judges to disfavor the granting of a continuance or an order to take the case off the trial calendar (because of such orders' adverse impact on average time intervals), no matter what the cause, it is a less accurate measure of an office's ability to ***provide*** litigants with a conference or hearing in a timely manner. Accommodating requests to schedule a trial or a conference at a time more convenient to the parties rather than at the earliest available calendar setting the office has to offer also pushes the averages upward. In any event, there clearly has been an improvement in this area, regardless of whether or not the WCAB is doing a better job of meeting the mandates than the charts are showing.

While other factors may have also contributed to the decreased times, plummeting demand by litigants for conferences and trials since the mid-1990s seems to have given the WCAB the relief needed to move more expeditiously. Though stability has been the situation recently, the early years of the 1990s were marked by substantial growth in the number of new cases and their associated demands upon judicial and clerical resources.[95] In 1993 (the last major year of the 1989 reform procedures), 178,760 new cases were begun. By 1995, however, that number had climbed to 242,557 new cases annually, an increase of 36%. Annual filings eventually contracted to 197,598 by 1997, but during the intervening "bubble" years, tens of thousands of additional conferences and trials of all types would have been needed to move the extra cases to resolution.

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[95] Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 100.

With relatively fixed resources available to the WCAB to schedule and hold these hearings, the time from the filing of the Declaration of Readiness to either a conference or a trial would have moved upward during the early 1990s and then moved downward as the situation returned to "normal." While there is some flexibility available to administrators in terms of the number of conferences that a judge will hold during a three-and-a-half-hour morning or afternoon calendar (at the present time, some offices schedule ten conferences or less per calendar while others schedule as many as 30; see ***Conference Calendars*** in ***CHAPTER 7***), if the calendar is too packed the average time available for each conference will be so short that the event might degenerate into nothing more that a roll call and the logistics of handling the crowds of attorneys might overwhelm available office space.[96] With the surge of cases being filed during the peak years, the predictable response for administrators would have been to extend out the conference calendar queue further and further. Moreover, the impact of the additional filings would have been felt in the clerical section of the office as well. As discussed in ***Clerks and the Pace of Litigation*** in ***CHAPTER 11***, the time and effort needed to process DORs to the point at which a calendar clerk can find an open conference date and enter it into the CAOLS notice system is not trivial. With the mid-1990s spike in requests for MSCs, clerks would also have been hard pressed to keep up with the paperwork and in the end, the front-end scheduling aspect of conferences would also have fallen further behind.

Thankfully, the situation is much better today. As seen in ***Figure 5.3***, the drop in the average times to a conference has indeed been matched by a similar drop in the number of such hearings.

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[96] Even with the relatively stable demand experienced today, a 30-conference MSC calendar provides an average of just seven minutes for each case to attempt settlement with the help of the judge or to prepare for trial by carefully reviewing the issues and documenting anticipated witnesses and other evidence. See ***CHAPTER 8***. This situation should be compared to the average of ten minutes required during a conference setting for the review and approval of a settlement submitted at that time.

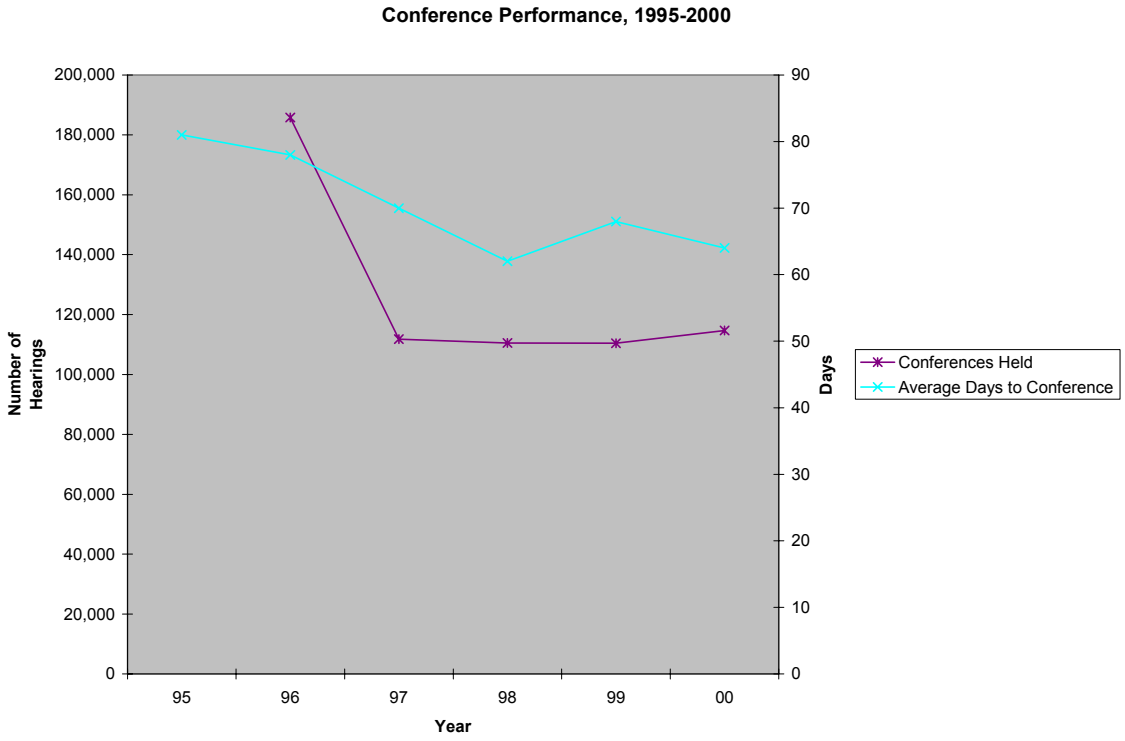

Figure 5.3 Conference Interval Times Versus Conferences Held[97]

While trials do not have the same problems in clerical processing (the setting of a trial date following the end of the MSC gets nearly immediate attention by the calendar clerk while the attorneys stand close by to approve the tentative day and time being announced), the ability to pack a trial calendar with additional hearings when demand goes up is not nearly as elastic as conference calendars. Though in comparison to civil courts, trials in the WCAB are relatively short events, but even two or three brief hearings can take up a judge's entire day. There is little room for shoehorning more trials into a single session without running into the equally undesirable prospect of regularly sending litigants home because the judge was unable to finish other scheduled matters that day. As demand went up during the 1990s, the trial calendar reacted in a predictable manner and stretched out to

[97] Data for the number of conferences held is from Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 102.

unacceptable lengths. Moreover, DOR-to-trial times are driven in part by the time needed to first hold the required MSC; even with a reasonable time from MSC to trial, if it took additional days to get the MSC completed in the first place, the overall time to the regular hearing would suffer as well. As with conferences, the decreased demand for trials of late has resulted in better time interval averages (***Figure 5.4***):

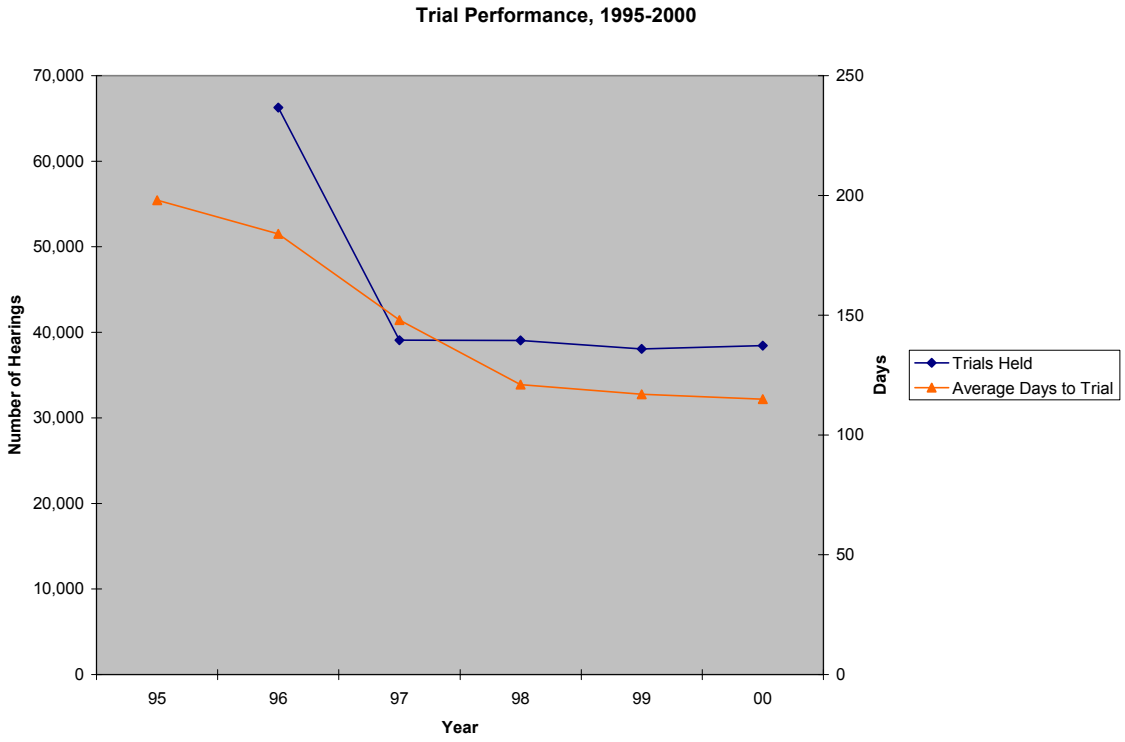

Figure 5.4 Trial Interval Times Versus Trials Held[98]

The improvements appear to be bottoming out. Demand for conferences and hearings has flattened, so it is unrealistic to assume that the average times to these hearings will improve any further absent some other change in the way the WCAB operates. On the other hand, any significant increase in hearing frequency or any reduction in staff is likely to be associated with a movement upward toward the longer interval times of the mid-1990s.

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[98] Data for the number of trials held is from Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 102.

Time Mandates Versus Case Length

It should be kept in mind that these DOR-to-conference and DOR-to-trial intervals (as well as the LC §5313 trial-to-decision interval) measure only partial segments of an overall litigation process that might be thought of as the span of time from the moment the jurisdiction of the WCAB is invoked (primarily through the filing of an Application) to the point at which the "case-in-chief" is resolved via trial or settlement and any outstanding liens or other remaining matters are taken care of. But the mere creation of a new case file (typically occurring because of the filing of an Application) is not the true trigger event for WCAB involvement. After some summary data is entered into CAOLS and a new file number is assigned, the case essentially lies dormant from the WCAB's perspective until one of the parties asks the judges to actually do something. Until then, the litigants are solely responsible for overseeing the process where the worker is treated for the injury, determining when the condition has become permanent and stationary, obtaining a medical report that can then provide the basis for an accurate disability evaluation, and then deciding whether to seek approval of a privately negotiated settlement or to request that the case be placed on the active trial track. Until that point in time, the prosecution of the case depends almost entirely on the actions of the applicant and his or her attorney if represented, the defendants and their lawyers and claims adjusters, health care providers, medical evaluators, and the like; the WCAB is not really a player in this part of the benefit delivery process for the vast majority of cases.

To get an idea of how much time elapses during each of the critical stages taking place from the point of injury to the point of final resolution, we looked at cases in our CAOLS database where some sort of case-in-chief resolving order was issued (typically a settlement approval, findings and award or order, or a dismissal) during its life, where some sort of significant order was issued in calendar year 2000 (indicating that it was active at some point during that year), and where an Application (rather than a case-opening settlement) was the pleading used to invoke the jurisdiction of the WCAB and assign a new case number. In other words, these are closed cases that began life

with the potential of proceeding down the paradigm litigation track (rather than immediately having a settlement reviewed). As mentioned previously, a case actually can have multiple “final resolutions” and numerous minor events such as attorney’s fee requests essentially throughout the life of the injured worker; cases where a closing decision was issued are therefore not necessarily “over” from the standpoint of any of the litigants. Nevertheless, the numbers in ***Table 5.7*** can shed some light on overall time lines for cases that were concluded with reasonable finality.

Table 5.7

Key Interval Times, “Closed” Cases That Exhibited Some Activity in CY 2000 and That Opened with an Application

Interval	*Mean Days*	*Median Days*
Injury to Application	338	223
Injury to Initial Action Event	693	599
Injury to Last Significant Event	1029	918
Application to Initial Action Event	360	302
Application to First Case-in-Chief Closure	573	494
Application to Last Case-in-Chief Closure	627	532
Initial Action Event to First Case-in-Chief Closure	235	126
Initial Action Event to Last Case-in-Chief Closure	297	155
Initial Action Event to Last Significant Event	374	217

For the purposes of ***Table 5.7***, an “Initial Action Event” is the earlier of either a DOR filing or the filing of a proposed settlement for review. That is the point at which a case begun quietly by an Application is essentially kick-started for WCAB judicial action. A “First Case-in-Chief Closure” is the first event recorded in CAOLS data for a case that reflected an approval of a settlement, the issuance of a Findings, or a dismissal (all of which resolved the case-in-chief); a “Last Case-in-Chief Closure” is the last such event we found in the file. The “Last Significant Event” is the last major event found in the file such as a case-in-chief closure but may also include a variety of

other types of rulings (such as a denial of a C&R, approval of a partial or amended settlement, interim findings of fact, and the like) in order to pick up instances where there is mop-up work still being done in the file. We include this event because it takes into account the situation where the case might have been resolved for the most part with a settlement or trial, but there were still residual details (such as outstanding liens) that needed the attention of the litigants and the judge.

If these cases are typical of litigation generally, then a median of 223 days elapses between the date of injury and the filing of the Application. But it takes 599 days (median) from the injury to the very first point at which some sort of initial response is requested from the WCAB. From that request to the last case-in-chief closure took a median of 155 days and to the last significant event of any type took a median of 217 days. Overall, workers' compensation disputes took a median of 918 days to run the complete course from injury to the point at which any and all loose ends have been tied up that might have remained after essentially disposing of the main issues. Most of what takes place from start to finish in the overall workers' compensation process seen in cases requiring adjudication is therefore clearly outside the control of the judges and staff of the WCAB. Nevertheless, the WCAB is the most visible face of an otherwise impersonal workers' compensation bureaucracy and so may get a disproportional share of the blame when there is a glitch in any part of the overall benefit delivery system.

Whether this blame is justified or not, it does call into question whether Labor Code time mandates for the WCAB go to the heart of the problem of getting workers' compensation benefits out faster. Even if a conference is held within 30 days after the filing of the very first Declaration of Readiness, a trial held about 45 days thereafter, and a decision issued within 30 days after the close of testimony, the "case" (as viewed from the perspective of applicants or lien claimants waiting for final payment) can still drag along for years and years. The frustration that clearly results from such excruciatingly slow progress (frustration that we were told about again and again from letters, e-mail, and phone calls from litigants during the course of this research)

colors the entire workers' compensation experience including whatever brief contact one might have with a DWC judge, clerk, or other staff member. Even if average times from DOR filing to key events are reduced significantly in the future, the opinions of the overall process held by those for whom this social insurance system was designed to benefit are not likely to change much one way or another.

For example, the statutory time mandates might be religiously observed, but a lien claimant who provided benefits right after the injury occurred may have to wait many years for the worker's condition to stabilize in order to permit the filing of a Declaration of Readiness to place the case on the trial track and move the main parties toward settlement or a formal hearing. From their perspective, they have "lent" the costs of their services at zero percent interest but must wait patiently while the case appears to stumble along outside of their control. The exact point at which a judge was required to actually do something is perhaps unimportant in the grand scheme of things as viewed by a lien claimant.[99] Applicants are not likely to appreciate compliance with Labor Code time mandates either, despite the considerable effort and expense required by the DWC to provide (or at least attempt to provide) timely hearings. All they know is that they were hurt a long, long time ago and the "system" hasn't responded anywhere near as fast as would be demanded by the significant impact upon their lives from the injury and resultant benefit dispute. It makes little difference to someone facing a financial disaster that the cause of the lengthy time from the accident to ultimate resolution may be the result of factors completely off the radar screen of the judges of the WCAB; all they know is that the workers' compensation process (of which the most obvious symbols are the branch offices of the DWC/WCAB and the people who work there) has taken years to get them a final check and close out the claim.

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[99] In actuality, lien claimants may be the only ones interacting with the WCAB during the injury to DOR period due to the fact that they are continually filing new or changed liens with the local office to protect their interests in anticipation of final resolution.

Even when a DOR has been filed, there may be only so much that the WCAB can do to move the matter along smartly. In the case of an applicant who has endured multiple injuries during the course of employment, for example, there is little benefit to resolving each incident in a piecemeal fashion when the defendant in each incident is the same entity. But subsequent injury begins a new cycle of medical treatment and evaluation that draws out the time from the initial trauma to final resolution for years (perhaps even decades) even if the WCAB is operating at peak efficiency. In far more simple cases, there may also be great delay after the permanent and stationary condition has been reached. Given the high demand for certain specialists who are much sought after for their services as an Agreed Medical Evaluator, it is not unknown to have to wait as much as a year for an open appointment. When both the applicant and the defendant have concluded that this particular AME is the only one who will address the issues related to the specific injury adequately, there is little the judges and administrators of the WCAB can do to speed up resolution besides patiently waiting for the parties to conclude their business and request a final determination.

Though we discuss elsewhere the propriety of having the WCAB get involved in claims handling prior to the filing of a DOR and how more effective control might be exercised over cases that are unreasonably delayed due to the desires of the parties (see ***CHAPTER 14***), we are aware that our focus upon legislative time mandates, especially when couched in terms of impersonal means and medians, may be of questionable relevance to the needs of litigants in particularly difficult cases. Nevertheless, the analysis that follows uses such benchmarks as an entry point into understanding how efficiently the entire workers' compensation adjudicatory process is operating.

CHAPTER 6. ANALYSIS OF FACTORS INFLUENCING THE SPEED OF LITIGATION

INTRODUCTION

The timing of events such as conferences, trials, and decisions is clearly important to all participants in the workers' compensation system. However, speed is not always possible regardless of how quickly or efficiently the WCAB operates. Sometimes there are unquestioned needs to further develop medical information in a case, to wait for a medical condition to stabilize, or to give the parties sufficient time to negotiate and resolve a dispute informally. When the matter is within the WCAB's control, steamrolling a case through the system in the absolute shortest time possible can sometimes conflict with the ultimate goal of obtaining a reasoned and evenhanded decision on the merits. But all things being equal, "faster is better" in resolving these types of disputes. This policy is reflected in the Legislature's mandate that the times between key events should never be longer than certain preset maximums; if those times are exceeded systematically, there is certainly a need for closer attention as to the causes of and potential remedies for delay.

In order to help manage workers' compensation cases, it would be of great interest to know what, if any, characteristics of a case are associated with longer times to closure, to key conferences, and to trial. We were especially interested in those characteristics that are known *before* a case begins the process of serious litigation or early enough in its course so that special attention could help reduce times by proactive management. Differentiated Case Management (DCM) programs in other courts have been useful tools to predict, at the earliest stage in a case's life, the appropriate level of attention to be given to it by judges and court administrators. The approach of assigning different cases to different procedural "tracks" allows judicial officers to spend the maximum amount of time possible on those cases that are likely to need extra guidance and to avoid unnecessary appearances and

micromanaging of cases that are likely to resolve themselves quickly on their own.[100]

DCM tracks are usually defined by information provided to the court soon after the time of filing, either through a "case information sheet" filled out by one or more of the parties or through information received by judges or court staff from counsel at a conference or informal meeting early in the life of the case. In the present configuration of the California workers' compensation adjudication process, requiring parties to attend an additional session at a point soon after filing a Declaration of Readiness but before the first Mandatory Settlement Conference is held to discuss case track assignment would be very difficult given the short time frame already in place. Much more time exists from the point of the filing of an Application until the first conference is held, but in many instances, the Application is filed months (and sometimes years) before the worker's condition has become permanent and stationary. Moreover, it would be, under current or likely funding levels, impossible for the DWC to conduct a mandatory conference (or even informal meeting) in the presence of the parties soon after the filing of every new Application for Adjudication. As such, a more practical source for the information needed for tracking assignment in this system would be that available at the time of filing through information submitted on a form.

The concept of "case filing" that exists in traditional civil trial courts is less easily defined for the WCAB. The Application is the start of the case from the standpoint of file number assignment, but it is not usually until a DOR is filed that litigation, at least from the WCAB's standpoint, begins. In order to determine whether key interval times can be predicted early in a case's life, we will use information from both the Application and the DOR.

There are two (closely related) data sources available for this type of management and for our analysis. The DWC's *Claims Adjudication*

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[100] See, e.g., Steelman, David C., John A. Goerdt, and James E. McMillian, *Caseflow Management: The Heart of Court Management in the New Millennium*, National Center for State Courts, Williamsburg, Virginia, 2000, pp. 5-8.

On-Line System (CAOLS) case management system already contains much of the information found in the Application such as date of injury, injury type, occupation, and the like. Additionally, it maintains records of most actions taking place in the case such as case opening, when DORs have been filed, the scheduling, holding, or canceling of a conference or trial, and case closure. CAOLS also includes some key case information such as into which legislatively defined procedural regime the case falls,[101] the number and identity of employer/agency/carrier defendants, whether serious or willful conduct on the part of the employer has been alleged, and more. All of these may potentially be indicators that a case will take longer than usual. In some instances, these case characteristics may be the direct cause of delays or reductions in time to key events, while other characteristics may only be indicators of such causes. Ideally, WCAB staff deciding a proper case management approach would go beyond this limited amount of information, but CAOLS data is the only easily accessible window on current and historical cases across the entire WCAB system. As it is the sole tool that centralized DWC administrators would have available to them if tracking were to be adopted, we use CAOLS information as our primary source of analytic data as well.[102]

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[101] In the course of refining the California workers' compensation system, the Legislature has periodically modified benefits and rules of procedure that then affect only work injuries sustained during certain periods of dates. Whether or not an applicant has retained counsel also determines, in part, which set of procedures are to be followed.

[102] Conceivably, tracking assignment could also be determined through the use of specialized questionnaires provided to litigants at the time of initial case opening or at the time that some sort of specific action on the part of the WCAB is being requested (such as when a DOR or proposed settlement is filed). Unfortunately, it is not likely that the DWC in its present state of finances would have the resources necessary for entering information from many thousands of the new forms into its case management system. Also, CAOLS does not appear to be flexible enough to accept any additional fields the questionnaires would contain. In order to tailor the tracking process over time and see how case characteristics have compared to resolution times under different approaches, the data that triggered the tracking assignment must be linked to a case management system. As such, we are assuming that the only realistic option available to administrators would be to use existing CAOLS data.

A second and much richer source of data would be the actual case file maintained in each WCAB office. CAOLS only skims the surface of what has happened during litigation while the case file itself provides complete details on characteristics and events. While the file would be available for the branch office to use for case management purposes, the information contained therein is not in computerized form. As part of this project, a sample of case files were pulled at selected WCAB offices and additional data elements were abstracted (see ***CHAPTER 9***). We use these cases to supplement our CAOLS analysis in part to determine whether data found in the existing online system are sufficient to predict time intervals.

OVERVIEW OF THE ANALYSIS

CAOLS was brought online in the late 1980s and contains information on cases that were active at the time. An examination of the data set shows that there are records for transactions from the first half of the 1980s and even earlier (presumably entered so that at least part of the case would be online for management purposes). Because of changes in legislative regimes for injuries and because of the primary focus of this research (the management of the *current* WCAB system), in the analysis presented here we use cases with openings in 1996 or later. The number of such cases is roughly 875,000. Note that the injury involved in such cases may be from an earlier time, although it typically occurred only a few months before the opening date.

For the analysis, we divide cases in 1996 and later into two broad groups:

- *Uncomplicated cases* are those that have no trials between the opening of the case and the first closing ruling (the ruling deciding the “case-in-chief,” i.e., the issues determining the injured worker’s ultimate compensation status). These cases make up 88% of the total.
- *Complex cases* are those that have one or more trials between the opening and first closing. These cases may also include conferences, but the presence of one or more trials indicates

more serious disagreements. These cases account for the remaining 12%.

In the "Uncomplicated" case group, we are primarily interested in the time between opening and the first close. This should be the time of most interest to all parties since it is the first global decision on the injured worker's claims. In CAOLS data, both transactions can be identified easily. For the "Complex" case group, we are interested in three other times:

1. The time from DOR[103] to the first conference (usually but not always a Mandatory Settlement Conference).[104]
2. The time from DOR to the first trial.
3. The time from the last conference before the first trial to the trial itself.

The first two have time standards set legislatively: 30 and 75 days, respectively.[105] The third is a measure that we consider key to measuring court efficiency and available judicial resources: It is the time required to get a trial started after the last preparatory conference.

We focus on the *first* conference and trial for several reasons. First, all cases with a trial or conference have at least the first; this allows us to compare the widest range of cases along a dimension that they all share. Cases that have more than one trial form a much smaller (and hence more idiosyncratic) set of cases and, unlike the

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[103] In Groups 1 and 2, the DOR in question is the last DOR before the trial or conference. In most cases, there is only one DOR, but DORs can be rescinded or have objections made to them by the opposing party, and so this definition is consistent (and the most relevant) across all cases.

[104] We use conferences in general instead of just MSCs (which are legislatively required before a trial can be scheduled or held) because at certain times (especially early in the 1996-2001 time frame) some branch office data entry staff did not identify the hearing as an MSC in CAOLS. In most cases, the first conference held in a case is in fact an MSC.

[105] The times are measured from the DOR instead of case opening because a DOR indicates that at least one party is claiming that all needed evidence is available and that they are ready to proceed. An opening merely indicates that a potential dispute may need to be adjudicated.

first conference or trial, these are more likely to have their timing affected by the particular evolution of the case, especially decisions or informal agreements that have occurred in the proceedings to date but are not indicated in CAOLS data. And CAOLS data is so large that by focusing on the first trial or conference, we are not losing much data.[106]

A more serious drawback is that the analysis does not address lien proceedings, since these usually appear *after* the close of the case-in-chief. However, it seems likely (based upon other data collected as part of this research) that the complexity of lien proceedings are not as closely related to case characteristics, but rather to the how seriously the parties have approached the question of resolving unpaid bills for self-procured medical treatment and other expenses, the appropriateness of the lien holder's charges, the degree to which the judge required resolution of the liens at the time of settlement, the adequacy of service upon lien claimants at the time of initial case closure, the adequacy and availability of information regarding liens available to the court at settlement approval, and other factors. These proceedings would therefore potentially mask the relationships that we are primarily interested in, those that affect the resolution of the *injury* claims.

We are also aware of the well-known limitations of CAOLS for mining consistently reliable, in-depth data from individual cases. The current lack of a systemwide clerical manual suggests that there can be great variation in how personnel interpret information contained on pleadings and other documents and in how such information will be keyed into CAOLS. Information contained on the documents relied upon by staff to build a CAOLS file may not always be updated when the pleadings are

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[106] A further technical reason is that multiple trials or conferences in the same case are not independent because of the shared characteristics of the underlying case, e.g., the same lawyer is usually representing the defendant. Most of the statistical methods used in the analysis assume independent data. This raises the issue of multiple cases from the same applicant proceeding concurrently and having some processing in common. Unfortunately, these are difficult to detect from the CAOLS data and we have not made special allowances for them in this analysis.

amended. Injury data is especially problematic for staff to record in a consistent way because busy clerical personnel may not appreciate the nuances of the descriptions used by the filer. Nevertheless, we use CAOLS data as our starting point because for better or worse, it remains the primary source of systemwide, multiyear data available from the DWC.

Descriptive univariate statistics for the outcome variables can be found in ***Table 6.3***.

Censored Data

In analyzing time to event data the problem of censored data arises. In this case, all of the data is *right-censored*: the initial transaction of the interval is always visible, but sometimes the terminating transaction is not. Such censored intervals are still informative, however. We can infer from their (incomplete) length that in this case the time interval is at least as long as the time we see.[107] In CAOLS data of interest, there are two forms of censoring.

For some of the uncomplicated cases, we do not observe a first close. The case may be one of those that are very long, or it may have opened late in the period covered by the data so that it has not had time to close even though it is not significantly longer than cases that opened earlier. In our analyses, we treat this data as censored; we know that the close will come later than the last transaction, but not how much later.

For the complex cases, the censoring is more complex. We always see both ends of the interval, since we define complex cases as those having one or more trials and the endpoint of two of the intervals of interest are the trials themselves (in these cases there is also virtually always an intervening conference as well). However, close examination of the data indicated that for some long intervals (for example between conference and trial), there were intervening transactions that in effect “stopped the clock.” For example, there may

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[107] The study of such data has a wide statistical and engineering literature, where it is termed “survival analysis” or “reliability analysis.” The names are derived from the usual application of following the lifetimes of subjects in medical or biological experiments or those of components under quality testing.

be a transaction indicating that a trial had been canceled, or that one of the parties made a motion to take the case off calendar. For our purposes, it seems clear that other developments in the case prevented the trial from being held with the assent of both parties. In the analyses below, we will treat such intervals as right-censored, with the date of censoring set to that of the interrupting transaction.[108]

Variables from CAOLS

As noted above, CAOLS history data consists of the record of key transactions as a case progresses; each transaction has a four-character code that identifies the specific action taken. There is also a date for the transaction and a date for the entry into the system, the case ID, plus some other variables, including a lengthy (though little used) comment field. From an inspection of the data and the codes, we constructed variables to indicate case characteristics that could influence the lengths of the time intervals in which we are interested. These are listed in ***Table 6.1***. The next table (***Table 6.2***) gives some descriptive statistics for these variables.

In addition to these variables, we also used the year of the start of the interval that was under study (i.e., for the analysis of uncomplicated cases we used the opening year, for the DOR to first conference analysis we used the year of the DOR, etc.).

Analysis Data Set

In our analysis, we restricted attention to those cases that opened between 1996 and the middle of 2000. Our original data set from DWC went up to March 2001; for all cases analyzed, we included transactions up to the end of our data.[109] We cut off the analysis at the middle of 2000 because we wanted to be able to divide the cases into our two analysis categories and so we wanted to be able to see which had trials

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[108] We understand that the traditional DWC method for statistical analysis of office performance does *not* follow this procedure. If interruptions are common, particularly in longer cases, this will bias DWC estimates of times between key events in an upward direction.

[109] So, while we did not include cases that opened after June 30, 2000, for those that opened before this date we did include all observed transactions up to February 28, 2001.

at some point in at least the first eight months of their life. Some cases, of course, do have their first trial later, but these are a small fraction of cases.

Analysis Methods

The statistical methods used to correlate the effect of explanatory variables (here, the variables in ***Table 6.1***) on the measures of interest (the length of time between key events) are generally known as regression analysis. We did not use regular multiple linear regression, first because it is not adaptable in a straightforward manner to data that is always positive (as our time intervals are). Second, linear regression with censored data poses special challenges.

Instead, we used a method known as *Cox regression* that is designed specifically to do regression on times-to-event data. For complex sets of events such as the ones of interest here, Cox regression has the additional advantage that it is nonparametric, i.e., it does not require the specification of a specific probability distribution for the underlying time, but instead estimates the difference in times to events that are due to different covariate values relative to the times for a base or reference case. By estimating the survival time distribution of the base case and adjusting it according to the regression model fit, we can show the effect of office, year, whether an applicant had legal counsel, and the presence or absence of the other variables listed above.[110] We go into more detail on the interpretation of Cox regression in the discussion of the individual analyses below.

SUMMARY OF FINDINGS

In the sections below we discuss various aspects of the analysis performed on case information extracted from CAOLS and our abstraction of actual case file information, with relatively simple matters and more complex litigation broken out separately. Because some readers would prefer not to delve as deeply into the details, the overall findings are

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[110] Kalbfleisch, John D., and Ross L. Prentice, *The Statistical Analysis of Failure Time Data*, John Wiley, 1980. See also, Therneau, Terry M., and Patricia M. Grambsch, *Modeling Survival Data: Extending the Cox Model*, Springer-Verlag, 2000.

summarized in this section. Nevertheless, we hope that many will find the information contained in this chapter helpful in understanding the factors driving case processing.

Overall, an “office effect” appears to be the predominant factor explaining length of time for a number of key intervals. Case characteristics, while not irrelevant, are not as influential as the location where the matter is initiated and litigated. Of the nonoffice indicators, the presence of issues regarding penalties, multiple defendants in the case, applicants with multiple workers’ compensation cases, and psychiatric and back injuries are sometimes associated with longer time intervals while post-1993 injuries and attorney representation are associated with shorter times.

Current workers’ compensation practice already attempts to address some of the impact related to these characteristics; pro per applicants generally receive additional attention from I&A Officers to help guide them through the complexities of workers’ compensation law and the 1993 reforms were designed in part to reduce the number of psychiatric injury cases. Nevertheless, the choice of office seems to be much more closely related to case processing speed than case characteristics. As such, there may not be much benefit to overlay differentiated case management tracks on top of the existing ones (pre-1990 injuries, 1990-1993 injuries, post-1993 injuries, pro per applicant, and represented applicants) if such tracks are based solely upon information available in CAOLS. Understanding why the individual office makes such a difference in the time a case requires for processing is explored in the chapters that follow.

DETAILS OF THE ANALYSIS

Analysis for Uncomplicated Cases

As noted above, we defined uncomplicated cases to be those that had no trial during the time between the opening and the first closing order that settles the case-in-chief (although they may have had conferences during that time or subsequent lien disputes with trials after the first closing order). Such cases make up the majority of the cases in the WCAB system; most cases consist of an opening followed by

an order settling the case. For these cases, the most important time interval to all parties is the time from the opening of the case to that first close. For univariate statistics on this outcome variable, see ***Table 6.3***.

The data set we used was a 1% sample of all cases with no observed trials that opened after 1/1/96 and before 6/30/00. Because our transaction data extended through 2/28/01, even for cases beginning in 2000 we could determine if there were trials in the following eight months. In terms of censoring, we have information on the cases up to February 28, 2001, so if a first close does not appear in the case record the censoring date is 2/28/01, *not* the date of the last transaction recorded in the case.

After some exploratory work to eliminate variables that were not significant, we settled on a Cox regression with the variables in ***Table 6.13***. The first column of the table is the regression coefficient for the Cox regression itself. Its general interpretation is as follows: A positive coefficient indicates that the presence of that variable *increases* the chance of occurrence of the terminating event (in this case, the first close) at any given time, relative to the base case. This in turn implies that for the presence of this variable the time to the terminating event is shorter on average than for the base case. Similarly, a negative coefficient indicates that this variable is associated with a longer time to the event than the base case. The increase in likelihood is given by the second column; so, for example, a case in the office in Anaheim (AHM) is 1.7 times as likely to conclude at any given time as a case in Van Nuys (VNO), all other characteristics of the case being equal. For our purposes, where we are interested in decreasing the time between open and close, a positive coefficient is "good" and a negative coefficient is "bad."[111]

We note first that the values of the variables that reflect the effects of each office on case processing (one for each office except Van Nuys, the office for the base case), range widely and are all

[111] For a rigorous discussion of the coefficients and their interpretation, in particular why columns 1 and 2 are different, see the references cited previously.

significant at the p=0.05 level[112] except for Los Angeles, San Diego, Santa Monica, and Long Beach. Further, all are positive, indicating less time from open to close than for Van Nuys, other case characteristics being equal. (Los Angeles has a negative coefficient, indicating a longer time to close than Van Nuys, but the coefficient is not statistically significant.) The most extreme office is Goleta, in which a case of similar characteristics is 2.7 times as likely to close at any given time.

Because this explanation is rather abstract, a table of the probabilities of completing an uncomplicated case with a specified set of characteristics by 50, 100, and 150 days after opening is shown for each office in ***Table 6.4***.

The probability of a case ending by 50 days is 75% at Goleta, but is close to 40% at the big courts. For those courts, the probability of completing is still less than 75% by day 150.

The second point to note is that the year variables are negative, indicating an increase in time to close from 1996 on, with a particular extension for (the first half of) 2000. ***Table 6.5*** shows the probabilities of completing in 50, 100, or 150 days for the five years in the data.

The other significant variables are at the bottom of ***Table 6.13***. Having multiple defendants, claiming psychological injuries, and cases claiming serious or willful misconduct tend to lengthen the time to close, as might be expected. However, death cases and post-1993 injury cases tend to close earlier. Note that for these uncomplicated cases, representation by a law firm (about 75% of the cases) is associated with a *shortened* time to closure, other characteristics of the case being equal.[113]

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[112] Column 3 of the tables is the standard error of the coefficient, and column 4 is the z-score (the coefficient divided by its standard error, which is approximately normally distributed). The fifth column is the p-value of the z-score and indicates the statistical significance of the coefficient.

[113] This is an especially good place to emphasize the point about correlation. While it is plausible that legal representation would help a case settle or obtain a trial verdict more quickly because of expert help, that may only explain part of the effect of this variable. For

Analysis for Complex Cases

As we defined them above, complex cases are those with one or more trials or hearings before the first case-in-chief close. In these cases there are also typically one or more Declarations of Readiness, and almost always at least one Mandatory Settlement Conference for discussion prior to a trial.

Because the number of cases with trials is substantially smaller than those without, for this analysis we used a 5% sample of all cases with trials among those opening in 1996 or later.

DOR to First Conference

As with the open to close interval in uncomplicated cases, we use Cox regression here to examine the relationship between the independent variables and the time difference from the last DOR to the first conference (whether MSC or not). The legislated time for this interval is 30 days.

After exploration and the removal of variables that were not significant, the resulting regression is given in ***Table 6.14***. There are a number of differences between this result and the analysis of the open to close interval. First, the different offices now have results that range widely about the effect for the base case office, Van Nuys. In particular, the other big offices now have markedly different effects on the time to conference. And there are several offices that are associated with quite long delays, notably Oakland. However, in many offices it is rare for many cases to meet the mandated time line, as can be seen in ***Table 6.6*** below, although almost all cases with the base characteristics get a first conference by day 90 in all courts. On the other hand, there has been improvement over the past few years as shown by the coefficients in ***Table 6.14*** and the probabilities in ***Table 6.7***.

The other major difference is that fewer of the other special variables have much explanatory power. As before, multiple defendants

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example, it is possible that legal representation is not available for cases with unclear determinants, and that these cases (which would take longer to resolve in any event) are primarily pursued without the aid of a lawyer.

and a second “psychological” injury tend to increase the time to conference (although the court effects are much larger).[114]

DOR to First Trial

The second time of interest is the time from DOR to trial. As with DOR to conference, this interval also has a legislatively mandated value (in this instance, 75 days). As with the previous analysis, we take the time from the last DOR before the first trial to the time of the trial. The results from the Cox regression are in ***Table 6.15***.

Since the DOR to conference results are based on the same cases, and the times are related, we expect the overall results to be similar and they are. As with the DOR to conference analysis, most of the effect is in the office variables, with the different offices ranged around Van Nuys. The year variables do indicate an improvement over the past four years, and the other significant variables are multiple defendants and post-1993 cases, the first of which lengthens the time to trial and the second of which tends to reduce it.

Table 6.8 and ***Table 6.9*** show the probabilities for base cases for having a trial in 75, 150, and 200 days after the conference by office and year.

Last Conference to First Trial

This last interval is not one which has a specific legislatively mandated time limit[115] but is one that we consider a measure of how internal court resources and calendaring practices relate to demand for services. If there are still issues in dispute at this last conference, the matter is set for trial and a date is selected. While different factors (including the schedules of the attorneys) play a role in how much time elapses from conference to scheduled trial date, it is usually a reflection of the number of MSCs that result in trial settings, the number of judges to hear those trials, and calendar density (the number of trials and/or total estimated hours of trials set for a single judge

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[114] Running the same regression on a smaller, independent 2% sample of trial cases suggests that these two variables are not influential.

[115] Arguably, the time from conference to trial should be not much more than 45 days given the 75-day limit for DOR to trial and the 30-day limit for DOR to conference.

on a single day). The measure we use is the time from that last conference until the trial is held. As before, we consider the time censored if there is an intervening transaction (such as a trial cancellation or order taking the case off calendar).

The results of the Cox regression for this analysis are in ***Table 6.16***. As before the office variables have a predominant effect, and the time variables show improving times, with 1999 and 2000 being quite a bit better than the earlier years. The other significant variables are those indicating multiple cases for that applicant in the 1996-2001 time frame (CNC), secondary psychiatric injuries claimed (PSY2), and post-1993 injury (P93). The first two act to increase the time, as in previous cases, and the last tends to decrease the time to trial, as before. ***Table 6.10*** and ***Table 6.11*** give the probabilities for base cases of having a trial within 50, 100, and 150 days from the last conference.

Court Workload Effects

Based on the data collected in other aspects of our research, we felt that of all the positions found at DWC branch offices, the levels of available judges, clerks, and DEU raters were likely to have the greatest impact on the time intervals of concern. We had yearly data for authorized and filled levels for these positions, plus some very restricted data for workers actually on the job (even though a position may be filled, there may be fairly lengthy actual vacancies due to illness, disability, or other reason). Because of the different levels of aggregation, we computed workload factors for WCJs and office staff (clerks and raters together) by dividing the average filled positions over 1996-2000 into the average yearly sum of Applications and DORs by office as a rough proxy for the workload. We then used these factors in our Cox regression models in place of the office factor to see if these explained any of the differences in the four intervals. In all cases, the effects were practically negligible (although often statistically significant, due to the large sample sizes). However, this may be due to the aggregation of workload and personnel levels over the five-year period.

Using Case Abstraction Sample Data in the CAOLS Analysis

Introduction

The CAOLS database covers the entire set of cases currently active and/or closed from the WCAB system. However, there is other information that might also be useful in predicting case length and times between key events that is not in CAOLS because it is not relevant to case management and scheduling. The data abstracted from the case files we sampled can provide some of these data elements. The abstracted data is very detailed and many of the items are designed to look at case procedure and event flow; any given item may therefore pertain to only a small subset of the 957 cases abstracted. This is particularly true for information on trials and trial procedure, since only 146 of the cases actually had trials (as registered in CAOLS). In addition, some very useful data (such as age and income of the applicant) have substantial fractions missing.

With this in mind, we selected the variables in ***Table 6.12*** for their policy potential in affecting key case intervals.

In adding these variables to the CAOLS variables, we proceed as in the previous section by using Cox regression to estimate the effect of these variables with the CAOLS variables on the four key times of interest:

- Time from open to close for uncomplicated (no trial) cases.
- Time from DOR to first conference for complex (trial) cases.
- Time from DOR to first trial for complex cases.
- Time to first trial from last conference for complex cases.

Detailed Results

Overall, unfortunately, the new variables did not add much explanatory power to the CAOLS variables for the sample of cases from which data was abstracted. This is largely due to the smaller sample sizes, particularly for the trial cases (only 146 cases). Another factor may be that cases may be quite heterogeneous along unrecorded dimensions that may mask the effect of the variables that are available.

Table 6.17 through ***Table 6.24*** contain the detailed coefficient estimates from the Cox regressions. There are two tables for each

interval: The first is the output from a regression with all available variables, both from CAOLS and the abstraction data, and the second contains only those variables that are significant.

Uncomplicated Abstraction Sample Cases: Open to Close

As with the overall CAOLS data, the uncomplicated (no trial) cases are a majority of the sample. Since the data were sampled from cases opening in 1998 and 1999, and the CAOLS data extend to the first part of 2001, the classification into uncomplicated and complex cases should be very good.

Table 6.17 displays the regression estimates for all of the variables, both CAOLS and abstracted. As with the full CAOLS data, the offices have a substantial effect, while the year of opening does not (recall that both effects for the opening mid-years in the full CAOLS data were quite close together). Type of opening is also significant, as expected for reasons discussed in the previous section. ***Table 6.18*** eliminates variables that are not significant. Of the other variables, only two are significant at the p=0.05 level and remain so when the others are eliminated: back injury and representation by a law firm. As with the full CAOLS dataset, cases involving applicants who are represented by an attorney are correlated with a reduction in the overall time to case closure. A different result is seen with back injuries; the sign for these cases is opposite to that in the full CAOLS analysis, indicating a lengthening of time to close.

Complex Abstraction Sample Cases: DOR to First Conference

Table 6.19 and ***Table 6.20*** contain the results from the Cox regressions for the time from DOR to first conference. The office results are mixed: The signs and significances for LAO and POM are the same as for the full CAOLS data, but the rest of the offices are not significantly different from Van Nuys. Much of this may be due to the reduced sample sizes: Note the much larger standard errors (third column) of ***Table 6.19*** compared with those in the corresponding ***Table 6.14***. The significance of the case having more than one defendant is

consistent with those previous results, but the sign is reversed (though there are only nine of these cases in the sample).[116]

Complex Abstraction Sample Cases: DOR to First Trial

Table 6.21 and ***Table 6.22*** contain the results from the second analysis of complex cases, that of the time from DOR to first trial. There are office effects as before and a year effect (reduction in time to trial for DORs in 2000) as well. After some exploration, the only other variable that is significant is that indicating whether there was an indication of penalties of any kind. This tends to lengthen the time from DOR to first trial.

Complex Abstraction Sample Cases: Time to First Trial from Last Conference

Finally, ***Table 6.23*** and ***Table 6.24*** contain the results for the regression analysis of time to first trial from the last conference before the trial. In this analysis none of the office variables are ultimately significant, although there is an indication of improvement with time, and with the variable indicating compensation paid before the case Application.

Abstraction Sample Case Analysis Summary

The picture from these analyses is mixed as the addition of the abstracted data was not as helpful as wished. The primary problem is the much smaller number of cases in the abstracted data, which causes the standard errors of the coefficient estimates to be quite large. Many of the significant effects in the analysis of the CAOLS data (both of statistical and practical significance) are smaller than the standard errors in the tables for the analysis of the abstracted data, especially those in the last six tables with results related to complex cases.

[116] We present this finding even though there were only nine cases with multiple defendants in our dataset because multidefendant matters were suggested to us as a source of routine delay.

TABLES

Table 6.1

Variables Used in CAOLS Analysis

Name	*Description*
TOPN	Type of case opening (TOPNSET is settlement, TOPNREG is regular opening)[117]
CNC	Indicates that applicant has more than one case active in 1996-2001
CEMP	Indicates that case has more than one defendant (employer, carrier, or agency)
IPSY	Indicates that primary injury is psychological or to nervous system
PSY2	Indicates that one of the nonprimary injuries is psychological/nervous system
IBK	Indicates that first injury is to the back
LWF	Indicates whether the applicant has legal counsel
SER	Indicates alleged “serious and willful” cause for injury
X12	Indicates a Labor Code §132a penalty is sought
NNTR	One or more transfers between opening and first close
P93	Indicates post-1993 injury
DTH	Death case
ASB	Asbestos case
AHM	WCAB branch office located in Anaheim
ANA	WCAB branch office located in Santa Ana
BAK	WCAB branch office located in Bakersfield
EUR	WCAB branch office located in Eureka
FRE	WCAB branch office located in Fresno
GOL	WCAB branch office located in Goleta
GRO	WCAB branch office located in Grover Beach
LAO	WCAB branch office located in Los Angeles
LBO	WCAB branch office located in Long Beach
MON	WCAB branch office located in Santa Monica
OAK	WCAB branch office located in Oakland
POM	WCAB branch office located in Pomona

[117] TOPNSET cases are initiated with the intention of presenting a settlement and receiving approval from the WCAB. TOPNREG is a “regular” application, implicitly indicating a dispute could require full adjudication. TOPNREG applications are in the majority, but a few TOPNSET cases may have trials and most TOPNREG cases eventually settle without a trial.

Name	*Description*
RDG	WCAB branch office located in Redding
RIV	WCAB branch office located in Riverside
SAC	WCAB branch office located in Sacramento
SAL	WCAB branch office located in Salinas
SBR	WCAB branch office located in San Bernardino
SDO	WCAB branch office located in San Diego
SFO	WCAB branch office located in San Francisco
SJO	WCAB branch office located in San Jose
SRO	WCAB branch office located in Santa Rosa
STK	WCAB branch office located in Stockton
VEN	WCAB branch office located in Ventura
VNO	WCAB branch office located in Van Nuys
WCK	WCAB branch office located in Walnut Creek

Table 6.2

Descriptive Statistics for Variables Used in CAOLS Analysis

Variable	*Mean*
CNC (multiple active cases)	0.260
CEMP (multiple defendants)	0.041
IPSY (psych injury primary)	0.040
PSY2 (psych injury secondary)	0.050
IBK (back injury primary)	0.300
LWF (represented)	0.784
SER (serious & willful)	0.011
X12 (LC 132a)	0.030
NNTR (multiple transfers)	0.001
P93 (post-93 injury)	0.870
DTH (death)	0.004
ASB (asbestos)	0.003

Table 6.3

Descriptive Statistics for Outcome Variables (Days)

Variable	*Mean*	*Median*	*75th Percentile*	*95th Percentile*
Open to Close	291	177	465	967
DOR to Conf.	47	41	56	90
DOR to Trial	116	103	137	222
Conf. to Trial	67	54	77	152

Table 6.4

Probabilities of Closing Uncomplicated Cases by Office

Office	*Probability of closing by day 50*	*Probability of closing by day 100*	*Probability of closing by day 150*
AHM	59.6	75.2	83.3
ANA	47.5	62.9	72.1
BAK	52.9	68.6	77.4
EUR	75.0	88.2	93.6
FRE	49.9	65.4	74.5
GOL	75.7	88.6	93.9
GRO	59.0	74.6	82.8
LAO	39.0	53.2	62.3
LBO	42.2	56.9	66.1
MON	43.9	58.9	68.1
OAK	46.7	62.0	71.2
POM	63.9	79.1	86.7
RDG	66.0	81.0	88.2
RIV	58.7	74.3	82.6
SAC	49.5	65.0	74.1
SAL	53.8	69.4	78.3
SBR	60.6	76.1	84.1
SDO	41.3	55.9	65.1
SFO	57.6	73.2	81.7
SJO	45.9	61.1	70.3
SRO	51.8	67.5	76.4
STK	58.7	74.3	82.6
VEN	64.9	80.0	87.4
VNO	40.5	54.9	64.1
WCK	48.3	63.7	72.9

Note: The tables here are for cases in 2000, injuries after 1993, but with none of the other special characteristics (i.e., no psychological injuries, no serious/willful injuries alleged, etc.).

Table 6.5

Probabilities of Closing Uncomplicated Cases by Year

Year	*Probability of closing by day 50*	*Probability of closing by day 100*	*Probability of closing by day 150*
1996	55.5	71.2	79.8
1997	48.9	64.3	73.5
1998	50.5	66.0	75.1
1999	48.1	63.5	72.6
2000	40.5	54.9	64.1

Note: This is for Van Nuys, post-1993 injury, none of the other special characteristics.

Table 6.6

Probability of Time to First Conference from DOR by Office

Office	*Probability of first conference from DOR by day 30*	*Probability of first conference from DOR by day 60*	*Probability of first conference from DOR by day 90*
AHM	37.1	98.5	100.0
ANA	38.2	98.8	100.0
BAK	91.5	100.0	100.0
EUR	26.2	93.7	99.7
FRE	45.7	99.6	100.0
GOL	96.5	100.0	100.0
GRO	22.5	90.2	99.2
LAO	15.2	77.7	95.7
LBO	17.0	81.6	97.2
MON	17.8	83.2	97.7
OAK	8.2	54.0	80.5
POM	77.4	100.0	100.0
RDG	53.5	99.9	100.0
RIV	30.6	96.4	99.9
SAC	18.3	84.2	97.9
SAL	10.3	62.9	87.6
SBR	46.2	99.6	100.0
SDO	13.8	74.2	94.2
SFO	16.7	81.0	96.9
SJO	22.5	90.2	99.2
SRO	23.8	91.6	99.5
STK	25.5	93.1	99.6
VEN	60.4	100.0	100.0
VNO	33.3	97.5	100.0
WCK	16.3	80.2	96.7

Note: The tables here are for cases in 2000, injuries after 1993, but with none of the other special characteristics (i.e., no psychological injuries, no serious/willful injuries alleged, etc.).

Table 6.7

Probability of Time to First Conference from DOR by Year

Year	*Probability of first conference from DOR by day 30*	*Probability of first conference from DOR by day 60*	*Probability of first conference from DOR by day 90*
1996	18.1	83.7	97.8
1997	22.3	90.0	99.2
1998	25.4	93.1	99.6
1999	25.8	93.4	99.7
2000	33.3	97.5	100.0

Note: This is for Van Nuys, post-1993 injury, none of the other special characteristics.

Table 6.8

Probability of Time to First Trial from DOR by Office

Office	*Probability of first trial from DOR by day 75*	*Probability of first trial from DOR by day 150*	*Probability of first trial from DOR by day 200*
AHM	16.2	86.4	97.5
ANA	15.5	85.0	97.0
BAK	80.3	100.0	100.0
EUR	38.1	99.6	100.0
FRE	31.1	98.5	100.0
GOL	63.1	100.0	100.0
GRO	38.2	99.6	100.0
LAO	22.8	94.7	99.5
LBO	18.2	89.7	98.5
MON	22.0	94.0	99.4
OAK	10.5	71.6	90.1
POM	49.5	100.0	100.0
RDG	60.0	100.0	100.0
RIV	20.6	92.6	99.2
SAC	19.8	91.7	99.0
SAL	9.5	67.7	87.6
SBR	28.1	97.6	99.9
SDO	22.9	94.7	99.5
SFO	13.2	79.8	94.7
SJO	19.3	91.1	98.8
SRO	29.6	98.1	99.9
STK	25.3	96.3	99.8
VEN	70.3	100.0	100.0
VNO	35.5	99.3	100.0
WCK	19.1	90.8	98.8

Note: The tables here are for cases in 2000, injuries after 1993, but with none of the other special characteristics (i.e., no psychological injuries, no serious/willful injuries alleged, etc.).

Table 6.9

Probability of Time to First Trial from DOR by Year

Year	*Probability of first trial from DOR by day 75*	*Probability of first trial from DOR by day 150*	*Probability of first trial from DOR by day 200*
1996	18.1	83.7	97.8
1997	22.3	90.0	99.2
1998	25.4	93.1	99.6
1999	25.8	93.4	99.7
2000	33.3	97.5	100.0

Note: This is for Van Nuys, post-1993 injury, none of the other special characteristics.

Table 6.10

Probability of Time to First Trial from Last Conference by Office

Office	*Probability of first trial from last conference by day 50*	*Probability of first trial from last conference by day 100*	*Probability of first trial from last conference by day 150*
AHM	30.9	84.2	96.0
ANA	30.5	83.7	95.8
BAK	96.0	100.0	100.0
EUR	57.3	98.6	99.9
FRE	54.2	98.0	99.9
GOL	63.1	99.3	100.0
GRO	32.2	85.7	96.6
LAO	73.5	99.9	100.0
LBO	58.4	98.8	100.0
MON	64.5	99.4	100.0
OAK	54.5	98.0	99.9
POM	43.4	94.2	99.3
RDG	86.5	100.0	100.0
RIV	49.7	96.8	99.7
SAC	49.7	96.8	99.7
SAL	32.9	86.4	96.9
SBR	45.9	95.4	99.5
SDO	70.0	99.8	100.0
SFO	34.0	87.5	97.3
SJO	45.4	95.1	99.5
SRO	76.2	99.9	100.0
STK	52.5	97.6	99.8
VEN	87.3	100.0	100.0
VNO	77.2	99.9	100.0
WCK	70.0	99.8	100.0

Note: The tables here are for cases in 2000, injuries after 1993, but with none of the other special characteristics (i.e., no psychological injuries, no serious/willful injuries alleged, etc.).

Table 6.11

Probability of Time to First Trial from Last Conference by Year

Year	*Probability of first trial from last conference by day 50*	*Probability of first trial from last conference by day 100*	*Probability of first trial from last conference by day 150*
1996	47.7	96.1	99.6
1997	53.2	97.8	99.9
1998	62.8	99.3	100.0
1999	78.1	99.9	100.0
2000	77.2	99.9	100.0

Note: This is for Van Nuys, post-1993 injury, none of the other special characteristics.

Table 6.12

Additional Variables from Abstracted Case Data

Name	*Description*
ANYCOMP	Any compensation paid before Application?
ALLMED	Was all medical care provided before Application?
MULINJ	Any indication of multiple injuries?
PENAL	Any evidence of penalties of any kind?
NOENG	Non-English-speaking applicant
MALE	Male applicant
OPYR1997	Case opened in 1997
OPYR1998	Case opened in 1998
OPYR1999	Case opened in 1999
OPYR2000	Case opened in 2000
DYR1997	DOR filed in 1997
DYR1998	DOR filed in 1998
DYR1999	DOR filed in 1999
DYR2000	DOR filed in 2000
CTYR1997	Conference in 1997
CTYR1998	Conference in 1998
CTYR1999	Conference in 1999
CTYR2000	Conference in 2000

Table 6.13

Cox Regression for Uncomplicated Cases, Open to First Close

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
AHM	0.5591	1.7491	0.0935	5.982	2.2e-09
ANA	0.2189	1.2447	0.0844	2.594	9.5e-03
BAK	0.3736	1.4530	0.1194	3.130	1.7e-03
EUR	0.9851	2.6781	0.1905	5.172	2.3e-07
FRE	0.2866	1.3319	0.0827	3.464	5.3e-04
GOL	1.0029	2.7261	0.1416	7.084	1.4e-12
GRO	0.5418	1.7191	0.1628	3.328	8.7e-04
LAO	-0.0485	0.9527	0.0788	-0.615	5.4e-01
LBO	0.0547	1.0563	0.0871	0.629	5.3e-01
MON	0.1098	1.1160	0.0798	1.375	1.7e-01
OAK	0.1944	1.2146	0.0818	2.376	1.7e-02
POM	0.6769	1.9678	0.0871	7.773	7.7e-15
RDG	0.7343	2.0840	0.0899	8.168	3.3e-16
RIV	0.5333	1.7046	0.0893	5.969	2.4e-09
SAC	0.2772	1.3195	0.0739	3.752	1.8e-04
SAL	0.3978	1.4886	0.1200	3.315	9.2e-04
SBR	0.5857	1.7963	0.0911	6.430	1.3e-10
SDO	0.0265	1.0268	0.0742	0.357	7.2e-01
SFO	0.5038	1.6549	0.0755	6.675	2.5e-11
SJO	0.1689	1.1841	0.0808	2.092	3.6e-02
SRO	0.3431	1.4094	0.0930	3.688	2.3e-04
STK	0.5342	1.7061	0.0860	6.210	5.3e-10
VEN	0.7032	2.0201	0.1017	6.917	4.6e-12
WCK	0.2418	1.2735	0.0926	2.611	9.0e-03
OPYR1997 (1997 opening)	-0.1868	0.8296	0.0396	-4.716	2.4e-06
OPYR1998 (1998 opening)	-0.1411	0.8684	0.0417	-3.385	7.1e-04
OPYR1999 (1999 opening)	-0.2106	0.8101	0.0447	-4.707	2.5e-06
OPYR2000 (2000 opening)	-0.4452	0.6407	0.0684	-6.512	7.4e-11
TOPNREG (regular opening)	-2.7827	0.0619	0.0486	-57.311	0.0e+00
CNC (multiple active cases)	-0.1189	0.8879	0.0358	-3.325	8.8e-04
IPSY (psych injury primary)	-0.2240	0.7993	0.0808	-2.773	5.6e-03
PSY2 (psych injury secondary)	-0.4497	0.6378	0.0765	-5.876	4.2e-09
IBK (back injury primary)	0.1325	1.1417	0.0319	4.160	3.2e-05
LWF (represented)	0.4430	1.5574	0.0463	9.573	0.0e+00
SER (serious & willful)	-0.4968	0.6085	0.1789	-2.776	5.5e-03
P93 (post-93 injury)	0.0901	1.0943	0.0446	2.020	4.3e-02
DTH (death)	0.4845	1.6233	0.1861	2.603	9.2e-03

Note: Reference case is VNO, 1996, no duplicate cases, one defendant, no psychological or back injuries, no lawyer, not serious/willful, no LC 132a, transfers, pre-1994 injury, no death, not asbestos.

Table 6.14

Complex Cases, Time from DOR to Conference

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
AHM	0.1361	1.146	0.0817	1.665	9.6e-02
ANA	0.1745	1.191	0.0717	2.432	1.5e-02
BAK	1.8059	6.085	0.1445	12.495	0.0e+00
EUR	-0.2863	0.751	0.3059	-0.936	3.5e-01
FRE	0.4127	1.511	0.1068	3.864	1.1e-04
GOL	2.1156	8.295	0.1440	14.691	0.0e+00
GRO	-0.4616	0.630	0.1234	-3.740	1.8e-04
LAO	-0.8980	0.407	0.0681	-13.196	0.0e+00
LBO	-0.7765	0.460	0.0788	-9.854	0.0e+00
MON	-0.7240	0.485	0.0674	-10.735	0.0e+00
OAK	-1.5562	0.211	0.1120	-13.899	0.0e+00
POM	1.3024	3.678	0.0862	15.107	0.0e+00
RDG	0.6375	1.892	0.1375	4.637	3.5e-06
RIV	-0.0998	0.905	0.0999	-1.000	3.2e-01
SAC	-0.6911	0.501	0.0867	-7.972	1.6e-15
SAL	-1.3119	0.269	0.1184	-11.078	0.0e+00
SBR	0.4273	1.533	0.0974	4.386	1.2e-05
SDO	-0.9999	0.368	0.0909	-10.999	0.0e+00
SFO	-0.7973	0.451	0.1124	-7.093	1.3e-12
SJO	-0.4611	0.631	0.1194	-3.862	1.1e-04
SRO	-0.3964	0.673	0.1114	-3.558	3.7e-04
STK	-0.3186	0.727	0.0859	-3.708	2.1e-04
VEN	0.8292	2.291	0.0936	8.860	0.0e+00
WCK	-0.8226	0.439	0.1237	-6.649	2.9e-11
DYR1997 (DOR in 1997)	0.2367	1.267	0.0697	3.397	6.8e-04
DYR1998 (DOR in 1998)	0.3844	1.469	0.0688	5.584	2.4e-08
DYR1999 (DOR in 1999)	0.4060	1.501	0.0673	6.033	1.6e-09
DYR2000 (DOR in 2000)	0.7078	2.029	0.0722	9.805	0.0e+00
CEMP (multiple defendants)	-0.2112	0.810	0.0600	-3.517	4.4e-04
PSY2 (psych injury secondary)	-0.1310	0.877	0.0602	-2.176	3.0e-02

Table 6.15

Complex Cases, DOR to Trial

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
AHM	-0.9075	0.404	0.0841	-10.787	0.0e+00
ANA	-0.9565	0.384	0.0742	-12.892	0.0e+00
BAK	1.3123	3.715	0.1482	8.852	0.0e+00
EUR	0.0902	1.094	0.3075	0.293	7.7e-01
FRE	-0.1601	0.852	0.1143	-1.401	1.6e-01
GOL	0.8233	2.278	0.1453	5.667	1.5e-08
GRO	0.0936	1.098	0.1228	0.762	4.5e-01
LAO	-0.5241	0.592	0.0692	-7.577	3.5e-14
LBO	-0.7789	0.459	0.0812	-9.594	0.0e+00
MON	-0.5662	0.568	0.0703	-8.057	7.8e-16
OAK	-1.3690	0.254	0.1274	-10.749	0.0e+00
POM	0.4449	1.560	0.0868	5.123	3.0e-07
RDG	0.7387	2.093	0.1396	5.292	1.2e-07
RIV	-0.6418	0.526	0.1035	-6.199	5.7e-10
SAC	-0.6856	0.504	0.0887	-7.728	1.1e-14
SAL	-1.4750	0.229	0.1327	-11.115	0.0e+00
SBR	-0.2815	0.755	0.0988	-2.850	4.4e-03
SDO	-0.5227	0.593	0.0939	-5.569	2.6e-08
SFO	-1.1303	0.323	0.1214	-9.307	0.0e+00
SJO	-0.7161	0.489	0.1458	-4.910	9.1e-07
SRO	-0.2204	0.802	0.1162	-1.896	5.8e-02
STK	-0.4069	0.666	0.0896	-4.539	5.7e-06
VEN	1.0189	2.770	0.0981	10.382	0.0e+00
WCK	-0.7281	0.483	0.1309	-5.562	2.7e-08
DYR1997 (DOR in 1997)	0.2255	1.253	0.0732	3.080	2.1e-03
DYR1998 (DOR in 1998)	0.5480	1.730	0.0723	7.576	3.6e-14
DYR1999 (DOR in 1999)	0.8025	2.231	0.0719	11.165	0.0e+00
DYR2000 (DOR in 2000)	0.9476	2.579	0.0770	12.301	0.0e+00
CEMP (multiple defendants)	-0.2938	0.745	0.0625	-4.702	2.6e-06
P93 (post-93 injury)	0.1760	1.192	0.0738	2.385	1.7e-02

Table 6.16

Complex Cases, Time from Conference to Trial

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
AHM	-1.3878	0.250	0.0818	-16.967	0.0e+00
ANA	-1.4041	0.246	0.0724	-19.402	0.0e+00
BAK	0.7790	2.179	0.1389	5.610	2.0e-08
EUR	-0.5538	0.575	0.3068	-1.805	7.1e-02
FRE	-0.6380	0.528	0.1040	-6.132	8.7e-10
GOL	-0.3939	0.674	0.1267	-3.108	1.9e-03
GRO	-1.3353	0.263	0.1217	-10.971	0.0e+00
LAO	-0.1066	0.899	0.0648	-1.646	1.0e-01
LBO	-0.5234	0.592	0.0764	-6.855	7.1e-12
MON	-0.3566	0.700	0.0665	-5.360	8.3e-08
OAK	-0.6315	0.532	0.1105	-5.713	1.1e-08
POM	-0.9559	0.384	0.0858	-11.141	0.0e+00
RDG	0.3031	1.354	0.1295	2.340	1.9e-02
RIV	-0.7661	0.465	0.0910	-8.417	0.0e+00
SAC	-0.7675	0.464	0.0860	-8.929	0.0e+00
SAL	-1.3097	0.270	0.1142	-11.472	0.0e+00
SBR	-0.8791	0.415	0.0910	-9.660	0.0e+00
SDO	-0.2063	0.814	0.0882	-2.339	1.9e-02
SFO	-1.2683	0.281	0.1200	-10.568	0.0e+00
SJO	-0.8952	0.409	0.1246	-7.183	6.8e-13
SRO	-0.0295	0.971	0.1032	-0.286	7.8e-01
STK	-0.6869	0.503	0.0838	-8.193	2.2e-16
VEN	0.3321	1.394	0.0880	3.773	1.6e-04
WCK	-0.2046	0.815	0.1156	-1.770	7.7e-02
CTYR1997 (1997 conference)	0.1589	1.172	0.0658	2.415	1.6e-02
CTYR1998 (1998 conference)	0.4225	1.526	0.0659	6.412	1.4e-10
CTYR1999 (1999 conference)	0.8508	2.341	0.0666	12.771	0.0e+00
CTYR2000 (2000 conference)	0.8244	2.281	0.0695	11.854	0.0e+00
CNC (multiple active cases)	-0.0673	0.935	0.0330	-2.037	4.2e-02
PSY2 (psych injury secondary)	-0.1305	0.878	0.0588	-2.220	2.6e-02
P93 (post-93 injury)	0.0642	1.066	0.0523	1.227	2.2e-01

Table 6.17

Uncomplicated Cases, Abstracted Data: Open to Close, All Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-0.36931	0.6912	0.1911	-1.9327	5.3e-02
POM	0.74448	2.1053	0.1709	4.3564	1.3e-05
SAC	0.33974	1.4046	0.1727	1.9672	4.9e-02
SBR	0.48549	1.6250	0.1724	2.8158	4.9e-03
STK	0.11760	1.1248	0.1744	0.6744	5.0e-01
OPYR1999 (1999 opening)	0.00658	1.0066	0.0972	0.0677	9.5e-01
TOPNREG (regular opening)	-3.75999	0.0233	0.1972	-19.0684	0.0e+00
CNC (multiple active cases)	-0.19027	0.8267	0.1261	-1.5085	1.3e-01
CEMP (multiple defendants)	-0.36458	0.6945	0.3092	-1.1793	2.4e-01
IPSY (psych injury primary)	0.00513	1.0051	0.2573	0.0199	9.8e-01
PSY2 (psych injury secondary)	-0.07890	0.9241	0.2044	-0.3861	7.0e-01
IBK (back injury primary)	-0.24254	0.7846	0.1034	-2.3453	1.9e-02
LWF (represented)	0.76516	2.1493	0.1822	4.1998	2.7e-05
SER (serious & willful)	0.24261	1.2746	0.4044	0.5999	5.5e-01
X12 (LC 132a)	-0.23659	0.7893	0.3543	-0.6677	5.0e-01
ANYCOMP (early compensation)	-0.01523	0.9849	0.1065	-0.1430	8.9e-01
ALLMED (early medical)	0.09003	1.0942	0.1195	0.7531	4.5e-01
MULINJ (multiple injuries)	-0.14591	0.8642	0.1295	-1.1264	2.6e-01
PENAL (any penalties)	0.16772	1.1826	0.1747	0.9601	3.4e-01
NOENG (English not primary)	0.19618	1.2167	0.1619	1.2118	2.3e-01
MALE (male)	0.08531	1.0891	0.0957	0.8910	3.7e-01

Note: N=811, reference case is VNO, 1998 opening, settlement opening, rest of variables set to 0.

Table 6.18

Uncomplicated Cases, Abstracted Data: Open to Close, Significant Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-0.3946	0.6740	0.1869	-2.112	3.5e-02
POM	0.7438	2.1039	0.1683	4.419	9.9e-06
SAC	0.2917	1.3387	0.1712	1.704	8.8e-02
SBR	0.4765	1.6105	0.1712	2.784	5.4e-03
STK	0.4865	1.6266	0.1679	2.898	3.8e-03
OPYR1999 (1999 opening)	0.0278	1.0282	0.0967	0.288	7.7e-01
TOPNREG (regular opening)	-4.5028	0.0111	0.2182	-20.639	0.0e+00
IBK (back injury primary)	-0.1853	0.8309	0.1003	-1.847	6.5e-02
LWF (represented)	0.8786	2.4075	0.1727	5.087	3.6e-07

Note: N=808, reference case is VNO, 1998 opening, settlement opening, rest of variables set to 0.

Table 6.19

Complex Cases, Abstracted Data: DOR to First Conference, All Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-1.2308	0.292	0.363	-3.386	0.00071
POM	1.3936	4.030	0.359	3.884	0.00010
SAC	-0.2909	0.748	0.392	-0.741	0.46000
SBR	0.4936	1.638	0.429	1.152	0.25000
STK	0.0794	1.083	0.395	0.201	0.84000
DYR1999 (DOR in 1999)	-0.0441	0.957	0.366	-0.121	0.90000
DYR2000 (DOR in 2000)	-0.0592	0.943	0.407	-0.145	0.88000
CNC (multiple active cases)	-0.1951	0.823	0.328	-0.595	0.55000
CEMP (multiple defendants)	1.2234	3.399	0.485	2.522	0.01200
IPSY (psych injury primary)	-0.0524	0.949	0.485	-0.108	0.91000
PSY2 (psych injury secondary)	-0.4273	0.652	0.372	-1.147	0.25000
IBK (back injury primary)	-0.4146	0.661	0.244	-1.696	0.09000
LWF (represented)	-0.3841	0.681	0.763	-0.503	0.61000
SER (serious & willful)	-0.1890	0.828	0.679	-0.278	0.78000
X12 (LC 132a)	0.3838	1.468	0.470	0.816	0.41000
ANYCOMP (early compensation)	0.5446	1.724	0.272	2.006	0.04500
ALLMED (early medical)	-0.2793	0.756	0.265	-1.053	0.29000
MULINJ (multiple injuries)	-0.1506	0.860	0.260	-0.579	0.56000
PENAL (any penalties)	0.0408	1.042	0.246	0.166	0.87000
NOENG (English not primary)	0.0479	1.049	0.305	0.157	0.88000
MALE (male)	-0.1418	0.868	0.246	-0.577	0.56000

Note: N=124, reference case is VNO, DOR in 1998, other variables set to zero.

Table 6.20

Complex Cases, Abstracted Data: DOR to First Conference, Significant Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-1.03937	0.354	0.338	-3.072	2.1e-03
POM	1.37509	3.955	0.313	4.396	1.1e-05
SAC	0.00949	1.010	0.352	0.027	9.8e-01
SBR	0.54093	1.718	0.355	1.525	1.3e-01
STK	0.25418	1.289	0.353	0.720	4.7e-01
DYR1999 (DOR in 1999)	0.08762	1.092	0.350	0.250	8.0e-01
DYR2000 (DOR in 2000)	0.18913	1.208	0.376	0.503	6.1e-01
CEMP (multiple defendants)	1.01838	2.769	0.418	2.435	1.5e-02

Note: N=124, reference case is VNO, DOR in 1998, other variables set to zero.

Table 6.21

Complex Cases, Abstracted Data: DOR to First Trial, All Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-0.437	0.646	0.383	-1.142	0.25000
POM	1.424	4.155	0.376	3.786	0.00015
SAC	0.420	1.522	0.434	0.967	0.33000
SBR	-0.211	0.809	0.415	-0.509	0.61000
STK	-0.118	0.889	0.459	-0.257	0.80000
DYR1999 (DOR in 1999)	0.414	1.513	0.464	0.893	0.37000
DYR2000 (DOR in 2000)	1.227	3.410	0.478	2.568	0.01000
CNC (multiple active cases)	0.243	1.275	0.303	0.801	0.42000
CEMP (multiple defendants)	-0.335	0.715	0.494	-0.678	0.50000
IPSY (psych injury primary)	-0.339	0.713	0.552	-0.615	0.54000
PSY2 (psych injury secondary)	-0.625	0.535	0.402	-1.554	0.12000
IBK (back injury primary)	-0.511	0.600	0.286	-1.785	0.07400
LWF (represented)	2.197	9.000	1.146	1.917	0.05500
SER (serious & willful)	-1.412	0.244	0.839	-1.681	0.09300
X12 (LC 132a)	0.225	1.253	0.531	0.425	0.67000
ANYCOMP (early compensation)	0.610	1.840	0.279	2.185	0.02900
ALLMED (early medical)	-0.676	0.509	0.268	-2.519	0.01200
MULINJ (multiple injuries)	-0.479	0.619	0.248	-1.936	0.05300
PENAL (any penalties)	-0.587	0.556	0.253	-2.322	0.02000
NOENG (English not primary)	-0.554	0.575	0.315	-1.757	0.07900
MALE (male)	0.310	1.363	0.264	1.172	0.24000

Note: N=129, reference case is VNO, DOR in 1998, other variables set to zero.

Table 6.22

Complex Cases, Abstracted Data: DOR to First Trial, Significant Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-0.563	0.570	0.336	-1.674	9.4e-02
POM	1.329	3.777	0.341	3.899	9.7e-05
SAC	0.297	1.346	0.367	0.809	4.2e-01
SBR	-0.415	0.660	0.361	-1.151	2.5e-01
STK	-0.159	0.853	0.398	-0.398	6.9e-01
DYR1999 (DOR in 1999)	0.608	1.836	0.413	1.472	1.4e-01
DYR2000 (DOR in 2000)	1.346	3.841	0.433	3.107	1.9e-03
PENAL (any penalties)	-0.536	0.585	0.230	-2.329	2.0e-02

Note: N=129, reference case is VNO, DOR in 1998, other variables set to zero.

Table 6.23

Complex Cases, Abstracted Data: Time to First Trial from Last Conference, All Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-0.1867	0.830	0.344	-0.5429	0.5900
POM	-0.5206	0.594	0.373	-1.3948	0.1600
SAC	0.7881	2.199	0.391	2.0170	0.0440
SBR	-0.4976	0.608	0.377	-1.3215	0.1900
STK	-0.7125	0.490	0.437	-1.6305	0.1000
CTYR1999 (1999 conference)	1.0696	2.914	0.499	2.1419	0.0320
CTYR2000 (2000 conference)	1.1032	3.014	0.515	2.1432	0.0320
CNC (multiple active cases)	0.0298	1.030	0.268	0.1112	0.9100
CEMP (multiple defendants)	-0.4596	0.632	0.412	-1.1148	0.2600
IPSY (psych injury primary)	-0.8261	0.438	0.512	-1.6126	0.1100
PSY2 (psych injury secondary)	-0.1594	0.853	0.400	-0.3980	0.6900
IBK (back injury primary)	-0.2875	0.750	0.264	-1.0883	0.2800
LWF (represented)	-0.0361	0.965	0.805	-0.0448	0.9600
SER (serious & willful)	-0.4934	0.611	0.764	-0.6458	0.5200
X12 (LC 132a)	0.5932	1.810	0.462	1.2847	0.2000
ANYCOMP (early compensation)	0.7205	2.055	0.267	2.6995	0.0069
ALLMED (early medical)	-0.3567	0.700	0.251	-1.4195	0.1600
MULINJ (multiple injuries)	-0.0675	0.935	0.251	-0.2689	0.7900
PENAL (any penalties)	-0.0080	0.992	0.240	-0.0334	0.9700
NOENG (English not primary)	0.1414	1.152	0.290	0.4875	0.6300
MALE (male)	-0.1271	0.881	0.257	-0.4946	0.6200

Note: N=129, reference case is VNO, DOR in 1998, other variables set to zero.

Table 6.24

Complex Cases, Abstracted Data: Time to First Trial from Last Conference, Significant Variables

Name	*COEF*	*EXP(COEF)*	*SE(COEF)*	*Z*	*P*
LAO	-0.326	0.722	0.316	-1.03	0.300
POM	-0.435	0.648	0.328	-1.32	0.190
SAC	0.398	1.489	0.364	1.09	0.270
SBR	-0.411	0.663	0.339	-1.21	0.230
STK	-0.644	0.525	0.391	-1.65	0.100
CTYR1999 (1999 conference)	1.061	2.889	0.464	2.29	0.022
CTYR2000 (2000 conference)	1.065	2.900	0.450	2.37	0.018
ANYCOMP (early compensation)	0.486	1.626	0.215	2.26	0.024

Note: N=129, reference case is VNO, DOR in 1998, other variables set to zero.

CHAPTER 7. OFFICE COMPARISONS

INTRODUCTION

Part of the problem that DWC administrators have in developing workable court management approaches to apply uniformly across the system is that the local district offices are anything but uniform in size, workload, staff vacancy rates, case types, state of the facilities in which they operate, demographics of their applicant populations, the types of injuries typically claimed, the behavior of local insurers and employers, experience and training levels of office staff, and in the way some office operations are conducted. At the local level, these distinctions are not a source of concern but rather are often held out as a patently obvious explanation of why policies developed for offices the size of Van Nuys can never work as effectively and efficiently for one as small as Eureka (and vice versa). The impression a visitor receives from discussions with staff members is that their particular office prides itself on being uniquely different, for better or for worse, from the other 24 locations in which workers' compensation cases are also heard. Moreover, it seemed that just about everywhere we visited, at least some staff members or attorneys would assert that the way their branch office personnel address the burdens of an overwhelming caseload and the needs of the workers' compensation community in the light of inadequate resources is clearly the model that all WCAB offices should learn from and emulate.

One commonly voiced belief is that the primary distinction between offices lay not in size or other similar factors, but simply in the sections of the state in which they are located. One party line is that offices "up north" are less chaotic, are more deliberate in their decisionmaking processes, and are used by a local bar that seeks to resolve cases amicably; "down south" office calendars, in contrast, are thought of as dehumanizing cattle calls filled with attorneys who are willing to go to trial over any trivial dispute and judges who will do anything to accommodate their desires. As might be expected, the views

expressed by attorneys and staff members located in the southern parts of the state as to what takes place to the north are equally opinionated. They feel that the southern offices tend to move more cases along toward resolution more expeditiously and in a far more "user-friendly" manner (at least from the attorney's perspective) than those in the north despite larger per-judge workloads.

There certainly are differences between typical offices in different regions of the state. Though at one time Los Angeles County had a number of smaller offices located in Agora Hills, Pasadena, and Norwalk, open venue (allowing attorneys to file in locations they believe are most favorable to their practice) and DWC budget reduction measures have reduced the options for applicant attorneys in that county to a few "megaboards." The three largest offices in the state are therefore a 20-minute drive from each other (in good traffic conditions) and together have about a quarter of all WCAB judges handling about a quarter of all new case openings. Though not as large, other Los Angeles and Orange County offices tend to be bigger and deal with more requests for trials than any other area of the state save for Sacramento. Even in the heavily populated Bay Area, the offices serving San Francisco, the East Bay, and the Silicon Valley are only moderately sized.

It is little wonder that a visitor to a southern California megaboard observes a higher level of commotion during a conference calendar than might be found to the north. Applicants are either waiting in cavernous holding areas or are sprawled across large open-air patios. Attorneys are shuttling back and forth constantly between multiple courtrooms, trying to handle as many cases as possible, and with conference calendars packed with up to 30 cases for a judge to hear in three-and-a-half hours, there simply isn't enough room in the courtroom for everyone to quietly wait their turn. The posted list of cases to be heard that day is surrounded by dozens of litigants and attorneys trying to figure out where they should go and whom they are supposed to meet. The back offices are equally chaotic at times, on occasion crowded with attorneys with unfettered access who are attempting to find an available judge to walk-through an order. The

surprising thing is that many attorneys we spoke to at these locations repeatedly confirmed their belief that they would be unable to practice workers' compensation law as efficiently and as enjoyably anywhere else.

In the more rural parts of the state or even in some of the larger Bay Area locations, things are much quieter. Conferences do not appear to be as packed and more "quality" time is able to be spent on judge-aided settlement negotiations at an MSC should the parties so desire. Judges are more likely to personally handle a case from start to finish, conducting both the MSC and the trial. Despite it being sometimes more difficult to find an early trial setting at these locations (and with smaller numbers of judges, personality differences can loom larger), we also encountered experienced and well-traveled attorneys who told us that they would be unwilling to practice at any other type of office, specifically those in what they might characterize as the far more chaotic south.

Determining whether these environmental differences translate into a case-processing experience that is more "just, speedy, or inexpensive" than a location in another part of the state (or even another part of the same county) would be difficult. Based on what we saw and heard at the offices we visited, however, two points became very clear: First, on many dimensions the various branch offices of the DWC/WCAB handle their workload in very different ways, and second, few judges (including Presiding Judges) have an accurate idea at all of how other offices operate.

THE PRESIDING JUDGE SURVEYS

In order to get a sense of the diversity of approaches taken in calendaring practices and to better understand the ability of offices to meet time mandates and the incoming caseload, we contacted the Presiding Judge at each location and asked them a number of questions on a wide variety of topics. One reason why this was necessary was that it became clear soon after our initial visits to the familiarization and site visit courts that each had adapted to problems in staff shortages and workload demands in ways that were not always in lockstep with the image one might receive from a sterile reading of the Labor Code, Title 8 of

the CCRs, and the Policy & Procedural Manual. Screening of DORs was sometimes performed by the Presiding Judge, sometimes by WCJs on rotation, sometimes by a clerk, and sometimes not at all. At some offices, attorneys could walk-through a proposed settlement any time the doors were open; at others, the process was clearly discouraged in all but the most compelling instances. Some judges took great pains to go through each and every document in the case file during the settlement review process, while others barely gave even the agreement itself more than a passing glance. At some offices, DORs that were already screened and were waiting for an MSC date had sat in the calendar clerk's inbox for nearly a month; at other locations a conference date would be assigned a day or two after the document had been date stamped. None of these differences were ones we could measure by analyzing the CAOLS data system or learn about from those who were not intimately familiar with the inner workings of particular branch offices.

Ideally, we would have visited the sites in person and collected the data ourselves. Resource and time constraints made this impossible. One concern we had regarding a survey approach was that the Presiding Judge might attempt to frame his or her responses in the best possible light, especially if more honest answers would imply straying from the requirement of across-the-system uniformity. But as in many other aspects of this work, we found that there was little reluctance on the part of Presiding Judges to air dirty laundry if necessary or to voice extremely frank complaints.

There were actually two surveys posed to Presiding Judges. The first was conducted on our behalf early in the course of our research by DWC administration through their Regional Managers. At the time, we needed to gather some basic information about every office in the state in order to assist in the selection of our site-visit courts and going through the DWC as an intermediary allowed us to get results in the shortest time possible. The second survey was conducted in late 2001 after we had identified some important issues needing additional information, most of which regarded calendaring approaches and processing delays. The judges who responded (and we indeed received responses from all 25 courts in both instances) to the second survey

were informed that their answers would likely be included in the report when published. The specific questions asked and the actual results can be found in a number of tables contained within the ***Technical Appendices***, with the different offices grouped by decreasing number of authorized judges. Because the first survey did not contain a similar warning regarding publication, we consider the PJs' responses to that questionnaire to be confidential in the same way all other outside communication with project staff during this research has been characterized. However, a number of questions asked in the second survey paralleled the first, so much of the information contained in the initial data collection can be found in the tables in any event.

It should be remembered that we systematically collected a considerable amount of information during the site court visits (and to a much lesser extent, the familiarization court visits) about office procedures, facilities, equipment, staff levels, and the like. But this process took many hours to complete and required the complete attention and cooperation of the Presiding Judge and staff supervisors over the course of a number of days. We felt that there would be little benefit to surveying the PJs at other locations with a similar amount of questions and detail, primarily because we had already observed a wide range of variation in policies and resources in the sites we visited.

Below is only a brief selection of just some of the considerable amount of information we received from the second survey, sometimes supplemented with background data from the initial PJ questionnaire. The reader is strongly urged to refer to the ***Technical Appendices*** for a full description of both the questions we posed and the answers we received in the second survey. The information we collected from both sets of questionnaires was critical to many of the recommendations in ***Part III*** of this report. The discussions below do not go into great detail about how particular policies or office characteristics affect the adjudication of workers' compensation disputes, nor how they shaped our recommendations, but are presented only for a quick glimpse into how great of a degree offices can differ.

Answers in both surveys were essentially free form and the PJs could provide as little or as much information as they desired. This

made categorizing some responses difficult and so some of the counts of courts set forth below would change with a different interpretation of the meaning of the answers. We also believe that some of the information would have been characterized differently had we been able to personally visit each site and collect the data based on observation of actual practices and discussions with staff members and local practitioners. As such, the following is only intended to illustrate the extent of variations found at DWC's district offices and not to provide precise counts of particular practices or policies. Again, more detailed information can be found in the ***Technical Appendices***.

SAMPLING OF OFFICE COMPARISON DATA

Conference Calendars

We wanted to learn of the extent to which offices were requiring practitioners to appear at a single morning conference calendar, in part to give us a better understanding of the way in which conferences are scheduled might be impacting an office's ability to hold MSCs (for more information, see ***Conduct of the MSC and Trial Calendars*** in ***CHAPTER 13***). However, most offices have conference calendars in both the morning and afternoon, with single calendar offices generally restricted to small offices or those where the MSC-to-judge ratio is modest.

"Calendar density" is probably the most remarkable difference between the offices we observed.[118] At some locations, a judge would have ten or fewer MSCs or other conferences to conduct during a three-and-a-half-hour period, while at others up to 30 were not unknown. When the number of half-day calendars per week per judge are factored in (typically but not always two), one judge might handle as many as 60 scheduled conference sessions in a single week, while others processed as few as 20. Denser calendars allow offices to get a case from DOR to

[118] Calendar density is simply the average number of conferences or trials to be heard by a judge during any calendar setting. DWC judges' calendars are typically three-and-one-half hours long (either 8:30 a.m. to 12:00 p.m. or 1:30 p.m. to 5:00 p.m.). At an office where just ten conferences are to be heard during the morning or afternoon calendar, the density is much "lighter" than one where 30 cases are scheduled to be completed.

MSC quicker, but the shorter time available for each individual meeting (seven minutes on average when 30 cases are scheduled versus 21 minutes when only ten cases are on the calendar) means that the judge will have less time to help the parties move toward settlement or narrow the remaining issues for trial.

Trial Calendars[119]

One distinctive north-south difference that clearly exists is the use of a single 8:30 a.m. setting for all trials in most locations outside of the Northern Region. This was somewhat surprising as a number of attorneys told us following the publication of the ***Candidate Recommendations*** that it would be impossible to practice at a branch office where it was likely or even possible that morning trial settings would slip past the lunch hour (for more information, see ***Trial Calendar Start Times*** in ***CHAPTER 13***). It turns out that most practitioners already work in such an environment. When 8:30 a.m.-only sessions are used, at about eight locations there is an expectation that the parties will have to remain on site for the entire day if necessary to complete their scheduled trials; at about seven other offices with 8:30 a.m.-only sessions, a continuance will be granted in the afternoon if the party has other commitments.

We also wanted to know whether splitting the trial day into two separate calendars (i.e., one in the morning and a later one in the afternoon) had the potential of increasing the number of "discontinuous" trials where portions of testimony are heard on different days. In about seven of the ten "dual trial calendar" courts, a trial that starts in the morning will be continued to another day if it does not complete by the lunch break. Of the other three, two require the parties to return in the afternoon and the other handles the situation on a case-by-case basis. A similar policy is used if the trial does not get

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[119] The term "trial calendar" is used in a number of ways. It can refer (as it does in this section) to the period of time in a single day designated for holding trials and other hearings (e.g., "Judge Smith's afternoon trial calendar"), but it can also refer to an office or individual judge's overall schedule for trials (e.g., "When is the next available slot on the trial calendar?"). The term "conference calendar" also has these dual meanings.

started by noon, though in many instances this was reported as being an unlikely possibility.

Decision Days

One issue that was raised by a number of practitioners and judges during our discussions was whether the DWC should use a single, uniform decision day (for more information, see ***Decision Days*** in ***CHAPTER 13***). For example, some felt that it would give an attorney the ability to freely schedule depositions on a day that no hearings were possible. Some judges liked the idea as well because the office was quieter, which in turn made for a more conducive environment for writing decisions. On the other hand, a uniform "dark day" for an office means more judges will be in trial simultaneously the other four days, a problem noted by a number of PJs because of potential shortages of hearing reporters or courtrooms. It may well be that with collective bargaining agreements increasingly requiring a more flexible workweek that a uniform decision day will become a reality in any event.

At the time of this writing, ten offices have Friday as the sole uniform decision day and about three are dark on Mondays. The other offices spread their judges' decision days across multiple days of the week, so in effect there are at least some trials and conferences taking place Monday through Friday.

Judicial Assignment

Offices differ as to their philosophy regarding judicial assignment. While at just about every location the MSC judge is assigned by the calendar clerk who processes new DORs either to judges on a rotating basis or to the judge with the first available opening, trials are another matter (for more information, see ***Trial Calendaring and Judicial Assignment*** in ***CHAPTER 13***). Just under half of the offices (primarily those outside the Central Region) always use the same judge for both MSC and trial. Of the remainder, some will always use a different judge in every instance while others will set the trial before the first available judge regardless of whether he or she presided over the MSC.

Most branch offices keep the same judge for all pretrial conferences once a judge has presided over the first conference. A few will set all conferences other than the MSC before the PJ. A few others assign conferences on the basis of the next available conference slot.

DOR and MSC Time Lines

Most offices report that the fact of DOR receipt is entered into the CAOLS database within a few days after arrival. At a few locations, the time for initial handling is much longer, typically because they do not do the data entry until some preset period of time has elapsed to let the case "age" (in order to wait long enough to receive and match up any Objections from the responding party before processing the DOR).[120] Next is the effort needed to get the DOR before a staff member who would screen the pleading for compliance with applicable regulations, have a calendar clerk set the matter for an MSC, and then enter the date into CAOLS. Overall, it typically takes about 13 days (an unweighted average of midpoints of estimated ranges for large and medium offices) to get the DOR from the date stamp machine into an actual setting. With the initial handling after DOR receipt, that would leave (again, this is an approximation) about 15 days remaining until the 30-day limit for holding an MSC after DOR filing is reached. But depending on the office, total receipt-to-setting time can range from five to 40 days; at the locations where the upper end of the range is common, LC §5502 compliance is an impossibility no matter how many judges they have to hold conferences. Because this legislatively mandated activity is generally performed solely by nonjudicial staff, we believe that the time from DOR receipt to setting is a good indication of clerical resource levels or performance (for more information, see ***Clerks and the Pace of Litigation*** in ***CHAPTER 11***).

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[120] Interestingly, four branch offices have a rule that a DOR filed over the counter (as opposed to being mailed in) will not be accepted until ten days have elapsed from the date of service. This makes the filer a warehouser for "aging" purposes and perhaps improves those offices' DOR filing-to-conference time interval statistics. It is not clear, however, whether such an approach conforms to the Labor Code and associated regulations.

In contrast, the time from setting to MSC essentially reflects available judicial resources and calendar density. Again, using an unweighted average of midpoints of estimated ranges for large and medium offices, PJs reported that new MSCs were typically being held some 32 days from the date of setting the conference. These averages ranged from about 15 days (about the minimum possible given the requirements of adequate notice to the litigants) to as much as 60. At the offices with the lengthiest times from setting to conference, the density might need to be increased, judges might need to make more time available for conference calendars, the office might need more judges, the formula used for assigning MSCs to judges might need to be adjusted, or some combination of the above is perhaps indicated.[121]

DOR Screening

The filing of a new case is of relatively lesser importance to the overall workload of a branch office than are requests for placing the case on the trial calendar. The DOR then becomes the primary trigger event for judicial involvement (other than settlement) and some have suggested that the DWC should do a much better job of screening newly filed DORs for compliance with applicable statutes and regulations (for more information, see ***Streamlining the DOR Screen*** in ***CHAPTER 14***). The idea is that by rejecting requests for trial in cases that are clearly not ready for a regular hearing, courts will be spared an unnecessary waste of judicial resources and litigants will not have to appear at an MSC only to have the matter continued or the case taken off the trial calendar. By acting as aggressive "gatekeepers," judges who screen DORs would in theory be reducing both the private and public costs of litigation. It turns out, though, that most offices do not have judges review new DORs: At 14 locations, nonjudicial support staff do the screening of DORs, at two, screening is not done at all. At seven

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[121] These examples of some possible solutions to the problem of lengthy times from the moment the calendar clerk assigns a judge and a date to the actual day the MSC is to be held assumes that the demand for conferences will remain unchanged. Conceivably, the DWC could work to decrease the need for conferences, especially in regard to continuances of MSCs begun on another day. See ***Addressing the Problem of Conference Continuances and OTOCs*** in ***CHAPTER 14***.

offices, screening is done by the PJ or a single judge with this task, and at two more, it is done by the assigned judge or rotation of judges.

Another part of the process of evaluating DORs is the consideration of formally filed "Objections to Declaration of Readiness to Proceed" (for more information, see ***Formalizing the Pre-MSC Objection Review*** in ***CHAPTER 14***). Under BR §10416, a party responding to a DOR can file a document containing the reasons why the case should not be set for trial (or why the requested proceedings are inappropriate). In theory, a valid Objection should prevent a premature MSC from ever taking place. But at least five branch offices clearly do not act on Objections prior to the MSC (the rest will take the matter off calendar under appropriate circumstances).

Expedited Hearing requests are a different matter. It appears that such requests (a specialized version of the DOR) are typically screened by the PJ before setting.

Whether a case is set for an MSC or some other type of conference affects what sorts of outcomes are expected from the meeting. MSCs, as described elsewhere, are in theory intended to result only in settlement or setting for trial (in actuality, continuances and orders taking the case off the trial calendar are common—though officially discouraged—results). Generic "pretrial conferences" do not have a similar mandate and so these sessions are better suited for hearing and ruling upon discovery-related motions (such as requests to compel attendance at a deposition) or acting as a type of "status conference" (such as those used in other state and federal courts to map out the progress of the litigation and solve any problems impeding an expeditious resolution). The problem is that the current official version of the DOR does not seem to cover situations where the filer is only seeking judicial intervention on interim discovery disputes or to address other case management needs prior to the point at which the case is ready for trial. As such, even when DORs list discovery matters (or other similar interim issues) as the only disputes needing resolution by a judge, they can still be set for a formal MSC. Because the outcome of such MSCs (in actuality being held solely to rule on the discovery issue or to engage in other case management chores) would be neither settlement nor a trial

setting, the MSCs would be counted as uncompleted sessions and the branch office's workload processing statistics would suffer. For more information on this issue, see ***The Use of Specially Designated Status Conferences*** in ***CHAPTER 14***. Interestingly, offices differed markedly in how they handled discovery-only DORs. If there is screening taking place at the office at all, discovery issues (or other similar nondispositive needs) listed in the DOR *might* result in having the matter set for a Conference Pre-Trial rather than an MSC, though it did not appear that there were hard and fast rules in this regard.

DOR Batch Settings

Because individual MSCs are relatively brief events, it is not difficult for a single attorney to participate in multiple conferences on a single day. As such, having a batch of new DORs set for MSCs on the same day might save an attorney from making repetitive trips to a DWC office. Accommodating such desires, most of the larger offices will allow "block" MSC settings of three to seven per day for the same filer. Branch offices differ, however, as to whether such block settings would go to the same judge. That can be a concern to an attorney trying to juggle as much in-court work as possible because if the MSCs are spread across the judges of a single office, it may mean a morning or afternoon of sprinting from hearing room to hearing room.

Special Conferences

Some members of the workers' compensation community contacted us during the course of this research to suggest that the use of mediation and other alternative dispute resolution processes would be effective in resolving relatively difficult cases prior to reaching the trial stage (conceivably, this would be in addition to whatever settlement efforts are already expended during the MSC). Though "one conference-one trial" seems to be the universally accepted model for the ideal workers' compensation litigation process, we were aware that some offices had been experimenting with additional meetings with a judge in order to spend increased effort in ridding the trial calendar of particularly thorny cases. Also, some had suggested that there be special calendars devoted solely to hearing discovery-related motions in order to better

focus the MSC calendar only on cases that were indeed ready for trial and we wished to see the extent to which this was an existing practice.

In just three offices, an additional type of settlement conference is routinely used if the trial is likely to go a half day or longer. The results are a little more mixed as to whether voluntary mediation sessions would be available if the parties so desired; the enthusiasm ranged from reports of an office where the judges were ready, willing, and able to assist on trial day if needed, to another office where it was claimed that there would not be sufficient staff available to take on the extra work.

Special “Law & Motion” calendars (which can involve discovery matters or just about any other motion or request) are rare events, with only one office specifically designating a part of its calendar for this purpose. A small number of offices assign such hearings to the PJ, but more often than not, Law & Motion issues are handled by the assigned judge as part of a regular conference calendar.

The Ability to Provide a Trial Date Following the MSC

LC §5502(d)(1) requires the DWC to hold a regular hearing within 75 days of the filing of a DOR. Complying with this mandate is made somewhat more problematic because it is not the filing of the DOR that triggers a trial setting but rather the completion of an MSC in a nonsettled case (a “completed” MSC is one that did not result in a continuance or order taking the case off the trial calendar). It is only at that point that a trial date is chosen by a judge or calendar clerk. There is no official policy for the maximum number of days following the MSC in which to hold a trial, but given the official 30-day limit between receipt of the DOR and the holding of the MSC (also required by LC §5502), an interval of 45 days between most MSCs and trials would then be a good target for administrators. Using a midpoint of the ranges the PJs gave us, about 20 of the offices claimed to be able to provide a trial to the parties within 55 days of the end of the MSC (and most of these locations could deliver a trial at or under the “magic” 45-day mark). This is an important measure of the judge-to-workload ratio and trial calendar density. The figures suggest that

while the DWC is clearly experiencing problems in getting cases moved through the system expeditiously, the current level of judges at most offices appears able to handle the workload related to holding trials reasonably well.[122]

But not all judges had new trials being set at about the same time out from their MSCs. The largest offices had one or two judges with settings more than a week before or a week after other judicial officers. These were generally branch offices where they were setting on the "next available judge" concept, but given their size, it is not surprising that through challenges and the like, there would be some noticeable differences with a small number of judges. At medium-size offices, however, the reason for the unbalanced calendar seemed (though this was not always true) to be related to the lack of flexibility in trial scheduling because the same judge typically conducted both the MSC and the trial. For more information on this issue, see ***CHAPTER 13***.

Judges Pro-Tem

"Judges protempore" (JPT) typically are local attorneys who have been appointed by the PJ to serve as temporary judicial officers without pay. Authorized under LC §123.7 back in 1982, the practice has fallen into disfavor in recent years despite the potential for providing some relief to the workload of WCJs by having volunteer attorneys presiding over routine conferences. JPTs could also be used in the role of volunteer mediators in appropriate cases. Nevertheless, only two branch offices have regular sessions where a JPT handles some aspect of the conference calendar.

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[122] Obviously, this only speaks to holding trials, not necessarily completing the considerable amount of work required following the receipt of live testimony. See ***Trials and Judicial Time Expenditures*** in ***CHAPTER 13***. The delivery of timely decisions and opinions might suffer unacceptably even though the trials themselves were held within a reasonable length of time after the MSC. Also, an office might be able to schedule trials promptly at the expense of other work such as holding conferences or reviewing settlements.

Pro Pers

Branch offices differ in the way they approach the special needs of unrepresented applicants. At a handful of offices, for example, pro per matters are exclusively assigned to the PJ rather than to other judges.

Offices also differ as to whether a DOR from a pro per that requests a regular trial setting is automatically scheduled for an MSC (as it would be if it were filed by an attorney) or instead is set for some other sort of pretrial conference. While most offices indeed set the matter for an MSC, in three locations it appears that most pro per DORs will first be set for a special conference (at a few other offices, the person screening the DOR decides if some sort of special scheduling is required).

Walk-Throughs

The "walk-through" process allows litigants to receive judicial scrutiny on settlements and other requests without the need for a formally scheduled conference or hearing (for more information on this issue, see ***The "Walk-Through" Process*** in ***CHAPTER 15***). Typically, an attorney will first obtain the official case file from a clerk and then wait until a judge has a free moment between MSCs or during in-office paperwork duties before approaching the judicial officer for approval or some other action that might take only a few minutes. Though all offices are required to develop procedures to allow for walk-through settlement approvals (see, e.g., P&P Index #6.6.2), locations differ markedly on the hours and particular days a walk-through might be available (though this seems to be more of a reflection of clerical support levels rather than of policies for or against the concept), whether the attorney[123] must arrange for file pickup prior to the day in

[123] While nonattorney litigants are not prohibited from walking-through orders and settlements on their own, in actual practice it is a process used almost exclusively by practitioners who are familiar with the specific requirements. Moreover, many of the requests are made ex parte with the presenter's personal assurance that the other side in the litigation is in agreement or at least does not oppose the request being made. Judges are less likely to accept such assurances from someone who is not a member of the bar and as such is not subject to professional ethical standards. Settlements involving pro per applicants can be

which the settlement or proposed order is presented, and a number of other details. The most important distinctions revolve around what sorts of matters are allowed to be walked-through and whom they can be presented to. Eleven offices only allow settlements, seven more will also allow requests for attorney's fees and similar simple orders, while the remaining seven locations allow any workers' compensation matter of any kind to be walked-through (the judge, of course, would have the option of declining to make a decision and instead set the matter for a formal hearing). These differences reflect the diversity of opinions among segments of the workers' compensation community as to the proper scope of the walk-through process fueled in part by the fact that P&P Index #6.6.2 only speaks of settlements.

Local DWC offices also differ as to whether a judge other than an assigned judge can handle the walk-through. This has also raised some concerns, mostly over the hot-button issue of "judge shopping" for a more favorable or less contentious review of proposed settlement agreements. Some locations allow any judge in the office to be used during his or her conference day, others only allow the judge assigned to the case to hear the request (or, alternatively, the Presiding Judge), others have a clerk randomly designate a judge to handle the matter, and still others will have a rotating "Officer of the Day" for this purpose.

Robes

There is a shared sense among many of the judges we spoke to that the WCAB is truly a "people's court" and as such should dispense with unneeded or antiquated trappings of formal judicial settings and inflexible procedures whenever possible. This is reflected in the approach taken by some 13 offices whose judges never wear a robe for any occasion, even when in trial. On the other hand, all the judges at five offices always wear robes while conducting trials, and in the remainder, there is no set policy and the choice is left up to the judicial

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walked-through, but in every instance we are aware of, it is done by the defendant's representatives (though the applicant can appear as well).

officer. Robes are generally never used for conferences at any office. For more information on this issue, see ***The Use of Robes*** in ***CHAPTER 18***.

Computers and Facilities

The facilities available to judges and their staff as well as the general public have long been criticized as inadequate given the importance of dispute resolution in the overall workers' compensation process. For example, four offices in 2001 have no DWC-provided personal computers available whatsoever for their line judges for editing their own trial decisions and opinions (though the PJ would have one for e-mail); a fifth office has computers, but only because the judges there drove to another location that was throwing old models away and salvaged them. At five other locations, the advanced age of the computers was claimed to make serious electronic legal research impossible. For more information on this issue, see ***Individual Computing*** in ***CHAPTER 17***.

Offices vary from relatively open environments to crowded, cramped work spaces. For example, six offices have more judges than available hearing rooms, so some type of courtroom-sharing process is needed. For more information on this issue, see ***Facilities*** in ***CHAPTER 18***.

Staffing Needs

Discussions with local court judges and supervisory personnel elicited concerns about chronic staff shortages. We asked the PJs what particular classification they would most want to add on to their current staff. Fifteen of the 25 offices indicated that another clerk would be their number one choice. For more information on this issue, see ***CHAPTER 11***.

Bifurcation

We decided to include a question as to whether an office allowed cases to be "bifurcated" as a informal test of just one aspect of unambiguous procedural nonuniformity (most of the other questions we posed in our survey spoke to aspects of office policy such as calendaring and staffing needs that do not bear directly on a litigant's due process rights). Bifurcation involves the holding of a trial on

threshold issues such as AOE/COE at an early point in the life of a claim, and once that hurdle is cleared, focusing the litigation and subsequent trial on the extent of the injury. Some defense attorneys have suggested that they are unable to obtain a bifurcated hearing even when the claim is questionable and so wind up paying for expensive medical treatment unnecessarily right up until the time of a regular hearing in which they expect to receive a “take-nothing” order. Whether or not a WCJ grants such interim hearings is entirely within his or her discretion, but we learned that one office has an *express* policy against bifurcation of such threshold issues, and at five where there is no set policy, most judges will decline to hold these hearings.

CHAPTER 8. JUDICIAL TIME EXPENDITURES

INTRODUCTION

A common rule of thumb used in DWC judicial resource allocations is to assign most judges to a simple three-one-one schedule: three days spent in trial, one day devoted to conferences, and one day set aside as a "decision day" to draft findings of fact, decisions of law, and supporting opinions following trial. One might assume then that a judge spends some 21 hours a week hearing testimony (based on seven hours in a day possible for hearing calendars), seven hours a week holding MSCs and Conference Pre-Trials, and the rest of the time taking care of paperwork and associated DWC chores.

In reality, a WCJ's workweek is far more complicated. Conference calendars are interspersed with substantial periods of "dead time" where nothing is really happening (at least from the perspective of litigants requiring immediate judicial attention). Trial days are filled with walked-through settlements on unscheduled cases that are squeezed in during moments when the hearing reporter changes the tape in the steno machine. Decision days, which should be quiet moments for deliberation, can dissolve into an endless series of telephone calls and attorney meetings. While the start times of the conference and trial calendars might be written in stone, what takes place thereafter is not.

We felt that it was important to better understand what the WCJs of the DWC do in performance of their duties in a way that went beyond the three-one-one concept. Areas that consumed an inordinate amount of judge time would be prime targets for possible reforms; freeing up judges from unnecessary tasks would in turn allow the WCAB to better handle the demands of its workload. We would also be able to learn more about the extent to which clearly important duties such as settlement approval and the conduct of trials affected the level of available judicial resources.

We initially considered an approach that has been used with much success by the Federal Judicial Center (FJC), primarily in assigning

“case weights” to different types of litigation for the purpose of calculating future judgeship requirements. If the average amount of time a judge might spend on any particular case type could be determined, then as the number of such cases filed in each year changes, so would the probable total number of judges needed to process them. The technique involves sampling new filings during a particular window of time and then tracking all the time a judge might devote to the case until it is terminated.

Unfortunately, this type of workload study needs to be conducted over a very long period because for the most accurate results possible, the cases must be tracked all the way until final disposition. The study period is reflected by the fact that the last update to the official District Court case weights, despite their importance to the federal judiciary, was done in 1993. Even with the much faster disposition times found in the California workers’ compensation courts, the interval from the filing of an Application through trial, reconsideration, and postdisposition events such as lien resolutions in some sampled cases would have been far too long for our research approach and the needs of the target audience.

While this situation meant that we would not be able to perform the same sort of detailed resource calculations used by the Federal District courts, we felt the next best option would be to conduct a “snapshot” time study of the workings of the DWC’s trial judges. By recording all time spent during a particular period and associating it with different types of tasks, we would know how judges were spending their work day, though we would not know how much total time any particular type of case would ultimately require. On the other hand, we would have the opportunity to track non-case-related activities; unlike what was done in the FJC’s data collection, the WCJ would be recording all minutes spent on any DWC-related task.

The judges at our six site courts were asked to use a set of forms to track every case they worked on during a five-day period and to describe every task they performed for those cases. Additionally, time not spent working on any particular case but still in the furtherance of their official duties would be recorded as well. In order to promote

the most accurate responses possible, judges were assured that their answers would be kept confidential and would only be reported in the aggregate. All active judges at the six sites were included.

A recording instrument and list of task codes (copies of which can be found in the ***Technical Appendices***) were developed for this purpose. The basic design of the instruments followed that of DWC-conducted workload studies that took place in 1998 and 1995, though few of the judges at our site courts had participated in the earlier efforts and we greatly expanded the scope of the original inquiry by including specific information about the cases and the setting in which the event took place. Beyond the recording of case number, time spent, and task category, we also asked if the matter involved a pro per; if it was related to a settlement at all and if so, what decision was made as to the agreement; and if it was related to a conference or trial, what was the disposition (concluded, continued, or taken off calendar) of that hearing.

A number of important caveats should be noted at the outset. First, we asked the judges to do the very best job possible in capturing information about non-case-related activity and we believe that the data shown below reflects a conscientious effort to do so. But the sometimes chaotic environment against which WCAB cases are processed understandably means that some unknown amount of “down time” would not have been recorded. This would especially be true, for example, of the numerous but brief periods of time where judges must wait during the MSC calendar for attorneys to approach when cases were ready for discussion. Also, routine social interaction with staff was not likely to be picked by judges who were more concerned with recording events directly related to their work. As such, the average minutes expended per judge reflected in, for example, ***Table 8.1*** are not likely to total to a 40-hour workweek. On the other hand, we feel that the information presented is the best available regarding the *relative* expenditures of a judge’s time.

Second, the data should not be used for the purpose of estimating judicial resource needs. While the data was collected from six medium and large offices, each judge who contributed was given equal weight in

the tables that follow. As such, the experiences of the far more numerous judges from the Van Nuys and Los Angeles offices dominate the contributions of those from Pomona, San Bernardino, and Stockton. Moreover, the period of time in which data was collected was just a single week that may or may not be representative of work performed throughout the rest of the year. Extrapolating the data contained in the tables to systemwide or annual levels is not reliable nor should the time expenditures reflected here be used to evaluate the performance of other DWC judges.

Third, one should not assume that time expenditures for events such as trials or conferences always reflect sessions formally *completed*. The 8.45 “trials” per judge per week average in ***Table 8.1***, for example, include sessions that might have consisted of no more than the parties appearing to announce that the case had been settled and requesting that the trial be canceled.

Finally, judges could have worked on the same case to perform the same task on multiple occasions during our data collection period. If it happened on the same day (such as a judge first meeting with the parties for a few minutes in the morning as part of an MSC and then getting back with the litigants for another few minutes for the same purpose later in the day), we aggregated the individual time expenditures into one single “event.” But if it happened on separate days (such as a judge working on the decision in a case on Monday and returning to the task on Thursday), we counted the time expenditures separately. The average of about four tasks per judge per week related to decision writing could therefore have involved four different cases or the same case worked on four different days.

TIME STUDY RESULTS

Overview

It is clear that the single day currently assigned to decision drafting is only a part of the total time needed to produce Findings and Awards, Findings and Orders, and Opinions on Decision as well as responding to Petitions for Reconsideration. Over a quarter of a WCJ’s workweek is spent on these chores alone (***Table 8.1***). Activities related

to actually conducting the trial itself, which in theory might take three-fifths of the week (most judges have three days a week set aside for live trial work), only require 19% of the judge's overall time when both the time needed for testimony and the Summary of Evidence are included.[124]

Table 8.1

Judicial Task Category Time Expenditures

Task Category	*Mean Minutes Per Event*	*Median Minutes Per Event*	*Minimum*	*Maximum*	*Frequency Per Judge Per Week*	*Average Total Minutes Per Judge Per Week*	*Percent of Total Judge Time Per Week*
Trial	38.39	20	1	330	8.45	324.29	17%
Conference	9.96	7	1	93	24.83	247.33	13%
Adequacy	8.98	6	1	83	13.64	122.50	6%
Posttrial	26.59	20	2	120	1.52	40.34	2%
Orders/ Opinions/R&R	68.26	36	1	605	7.19	490.78	26%
Review	6.96	5	1	235	29.93	208.24	11%
Prepare	12.76	8	1	414	11.66	148.67	8%
Meetings	10.20	7	1	120	3.55	36.22	2%
Administrative	36.29	20	1	289	6.41	232.74	12%
Travel	30.00	30	30	30	0.02	0.52	0%
Other	20.72	11.5	1	260	2.76	57.16	3%
Unknown	28.40	16	3	195	0.43	12.24	1%

More detailed information can be found in ***Table 8.2***. It should be noted that each event recorded comprises a single case-task combination. Thus, a judge might have reported multiple tasks for a single case or performed the same task on different cases; as such, the sums of the "Frequency Per Judge Per Week" column do not indicate the number of cases the judge worked on during the five days. However, the figures in that column are a rough indication of the number of cases in which any particular task was performed.

[124] As will be seen later, the 19% figure underestimates the total impact of trials on the workweek of a WCAB judge when the time needed to prepare the written decision and respond to Petitions for Reconsideration are included.

Though MSCs took up 10% of a judge's total work time, the individual amount of time each case required was very small, with a mean average of only 9.6 minutes. The number of total conferences (about 25 for the week, which would include both morning and afternoon sessions) each judge conducted is smaller than might be expected from the estimated calendar density reported in our Presiding Judge survey (see ***CHAPTER 7***), but not all calendared MSCs actually take place. Many are canceled prior to the day of the conference.

Table 8.2

Specific Judicial Task Time Expenditures

Task	*Mean Minutes Per Event*	*Median Minutes Per Event*	*Minimum*	*Maximum*	*Frequency Per Judge Per Week*	*Average Total Minutes Per Judge Per Week*	*Percent of Total Judge Time Per Week*
Trial—Expedited Hearing	21.40	15	1	70	0.83	17.71	1%
Trial—Regular	42.49	20	1	330	6.07	257.84	13%
Trial—Lien	22.56	14.5	1	170	0.83	18.67	1%
Trial—Discovery	40.40	22	10	130	0.09	3.48	0%
Trial—Special Issue	60.69	37.5	5	158	0.28	16.74	1%
Trial—Other	27.19	16	2	132	0.36	9.84	1%
Conference—Mandatory Settlement Conference	9.61	7	1	82	20.34	195.60	10%
Conference or Hearing on adequacy of Settlement	13.83	12	3	52	0.41	5.72	0%
Conference—Lien	7.48	5	1	44	0.97	7.22	0%
Conference—Law & Motion	12.46	10	1	35	0.22	2.79	0%
Conference—Discovery	22.00	9	2	90	0.12	2.66	0%
Conference—Pretrial	11.43	6.5	1	93	1.93	22.07	1%
Conference—Rating	8.00	7	2	21	0.09	0.69	0%
Conference—Mediation	10.64	10	2	20	0.19	2.02	0%
Conference—Other	15.50	12	1	87	0.55	8.55	0%
Evaluate adequacy of Settlement not presented at walk-through	9.28	6	1	60	7.93	73.59	4%
Evaluate Adequacy of Settlement presented via walk-through Process	8.57	7	1	83	5.71	48.91	3%
Dictate or Prepare Summary of Evidence	26.59	20	2	120	1.52	40.34	2%
Prepare or Edit Opinion on Decision	76.99	50	1	605	3.88	298.66	16%
Prepare or Edit Orders on F&A/F&O	16.89	10	1	141	1.62	27.38	1%
Prepare or Edit Report & Recommendations to WCAB	97.50	65	2	430	1.69	164.74	9%
Review/Screen	3.13	2	1	35	5.97	18.66	1%

Task	*Mean Minutes Per Event*	*Median Minutes Per Event*	*Minimum*	*Maximum*	*Frequency Per Judge Per Week*	*Average Total Minutes Per Judge Per Week*	*Percent of Total Judge Time Per Week*
Declaration of Readiness for Sufficiency or Objections							
Review/Screen Requests for Expedited Hearings	5.01	4	1	20	1.60	8.03	0%
Apportionment Review	12.82	13.5	5	25	0.38	4.86	0%
Review or Respond to Discovery Petitions	7.39	5	1	37	1.83	13.50	1%
Review or Respond to Motions, Petitions, or Other Requests for Interim Orders	6.69	5	1	70	7.62	50.98	3%
Review File and Prepare Notice of Intention	7.98	5	1	20	0.71	5.64	0%
Review Settlement	6.26	5	1	34	2.09	13.07	1%
Review or Respond to Miscellaneous Petitions	7.28	5	1	66	4.60	33.53	2%
Research and Writing Regarding Specific Case	23.21	12	1	235	0.91	21.21	1%
Review or Prepare Letters and Correspondence	8.00	5	1	60	3.02	24.14	1%
File Organization or Maintenance	12.11	9.5	2	65	1.21	14.62	1%
General Case-specific Preparation for Conferences	8.99	5	1	147	5.22	46.95	2%
General Case-specific Preparation for Trial	15.82	11	1	414	6.43	101.72	5%
Case-specific Meeting or Phone Call with Counsel	10.46	7	1	52	1.76	18.40	1%
Case-specific Meeting or Phone call with any Other Party to the Case	8.00	5	2	20	0.29	2.34	0%

Task	*Mean Minutes Per Event*	*Median Minutes Per Event*	*Minimum*	*Maximum*	*Frequency Per Judge Per Week*	*Average Total Minutes Per Judge Per Week*	*Percent of Total Judge Time Per Week*
Case-specific Meeting or Phone Call with DWC Staff	10.27	7	1	120	1.34	13.81	1%
Case-specific Meeting or Phone Call with Other Person	10.78	10	1	28	0.16	1.67	0%
Administrative—Public or Community Relations	19.43	11	1	92	0.36	7.03	0%
Administrative—Staff Meetings	30.64	18.5	2	160	0.38	11.62	1%
RAND Study Tasks	25.21	12	1	200	1.17	29.55	2%
Education or Training	48.40	30	2	269	1.43	69.26	4%
Administrative Tasks Not Covered Elsewhere	37.56	19	1	289	3.07	115.28	6%
On-the-Road Travel Time Related to Road/Field Calendar	30.00	30	30	30	0.02	0.52	0%
Other Task	20.72	11.5	1	260	2.76	57.16	3%
Unknown	28.40	16	3	195	0.43	12.24	1%

Pro Per Applicants

One important issue is the amount of time a judge might spend on matters involving pro per applicants (***Table 8.3***). It does not appear that a lot of the total week is devoted to pro per cases generally, but the average time per event is much greater. Conferences that take an average of less than ten minutes when dealing with an applicant’s attorney balloon into 23-minute affairs with pro pers.

Table 8.3

Effect of Self-Representation on Judicial Time Expenditures

Task Category	*Pro Pers Not Involved --- Mean Minutes Per Event*	*Pro Pers Not Involved --- Frequency Per Judge Per Week*	*Pro Per Involved --- Mean Minutes Per Event*	*Pro Per Involved --- Frequency Per Judge Per Week*
Trial	37.89	8.22	56.62	0.22
Conference	9.54	24.07	23.20	0.76
Adequacy	9.46	9.02	8.06	4.62
Posttrial	26.54	1.45	27.75	0.07
Orders/ Opinions/R&R	68.67	7.05	47.50	0.14
Review	7.08	28.05	5.16	1.88
Prepare	12.81	11.28	11.14	0.38
Meetings	9.87	3.22	13.42	0.33
Administrative	36.77	6.31	7.00	0.10
Travel	30.00	0.02	0.00	0.00
Other	20.82	2.71	15.67	0.05
Unknown	28.40	0.43	0.00	0.00

Trials

We were very interested in determining how much time is spent on particular aspects of the trial process, especially in the drafting of Summaries of Evidence. In total, about 16 hours a week are needed to prepare for and handle the trial calendar including the time required to respond to posttrial events (***Table 8.4***).[125]

[125] Not all Report & Recommendations prepared as a result of a filing of a Petition for Reconsideration involve decisions made during or following trials. Our data collection methodology was not designed to capture the underlying reason for the errors alleged in these Petitions. However, discussions with judges during our research suggest that “R&Rs” are almost exclusively trial-related in some way and as such, we include them here.

Table 8.4

Trial-Related Judicial Time Expenditures, All Cases

Trial-Related Tasks	*Average Total Minutes Per Judge Per Week*
General Preparation for Trial	102
Conducting Hearing	324
Dictate or prepare Summary of Evidence	40
Prepare or edit Opinion on Decision, Orders on F&A/F&O	326
Prepare or edit Report & Recommendations to WCAB	165
Total	957

But not all time classified as trial-related involves actual hearings. In a large number of instances, a settlement is reached on the day of trial, perhaps with the assistance of the judge. Also, some trials are canceled after arguments from both sides are heard regarding the need for further medical evaluation. When we eliminate these uncompleted trials from the averages, we can calculate the relative importance of various pre- and posttrial activities. In ***Table 8.5***, judges spend an average of about two hours each week actually taking testimony. These are *averages* and there certainly may have been judges who were in trial for something approaching all 21 available hours, but many other judges in our data collection did not actually start a single trial that week.

Using a single hour for the taking of testimony as a benchmark, a “one-hour” trial will require about 20 minutes to prepare a Summary of Evidence, two-and-a-half hours to actually produce the decision, and about an hour and 20 minutes to respond to the Petition for Reconsideration. Note that these figures do not include the time needed to prepare for trial as it was not possible to determine how many minutes were spent on this task for cases that indeed made it through the testimony stage; as such, the average total amount of time spent for all activity related to completed trials is actually larger than shown in ***Table 8.5***.

Table 8.5

Trial-Related Judicial Time Expenditures (other than for Pretrial Preparation), Completed Trials Only

Trial-Related Tasks	*Average Total Minutes Per Judge Per Week*	*Average Minutes Compared to One Hour of Hearing*
Conducting Hearing (completed)	125	60
Dictate or prepare Summary of Evidence	40	19
Prepare or edit Opinion on Decision, Orders on F&A/F&O	326	156
Prepare or edit Report & Recommendations to WCAB	165	79
Total	656	315

As such, only about six hours of total testimony could be heard in a single week if the rest of the three trial days and the entire decision day would be devoted solely to handling the balance of trial-related tasks.

Settlements

We also looked at the number of settlement events by the outcome of the review process (***Table 8.6***). The category “Settlement Approved” meant that a settlement that was on the table was approved without changes being made that day (though it might have been changed at some earlier point in its life). By “Modified and Approved,” we mean that some terms of the settlement were indeed changed that day, and after such modification it was approved that day. By “Not Approved,” we only mean that for one reason or another, the judge declined to approve that day. It could have been rejected, it could have been reviewed and sent back to the parties for continued negotiations, or the judge could have simply decided to put the case file away and return to it at a later point in time. Nevertheless, of the average of 19 settlement events per judge during the week, 16 were approved on the day of review.

Table 8.6

Outcome of Settlement Reviews

Settlement Review Outcome	*Average Settlement Events Per Judge Per Week*	*Percent*
Settlement Approved	14.84	77.8%
Settlement Modified and Approved	1.60	8.4%
Settlement Not Approved	2.64	13.8%
Total	19.09	100.0%

A quarter of all settlements are being handled via a walk-through process, a bit less than a quarter of all reviews take place during an MSC, and about a third still are done the old-fashioned way—through a review most likely performed in the judge's office without the presence of the parties—which includes proposed settlements arriving through the mail or filed over the counter (***Table 8.7***).

Table 8.7

Judicial Tasks Involving Settlement Review

Task	*Average Settlement Events Per Judge Per Week*	*Percent of All Settlement Events Per Judge Per Week*
Evaluate adequacy of Settlement not presented at walk-through	6.24	34%
Evaluate adequacy of Settlement presented via walk-through process	4.66	25%
Conference—Mandatory Settlement Conference	4.14	22%
Trial—Regular	1.66	9%
Review Settlement	0.48	3%
Trial—Expedited Hearing	0.29	2%
Conference—Pretrial	0.28	1%
Conference or Hearing on adequacy of Settlement	0.26	1%
Review or respond to Discovery Petitions	0.12	1%
Review or respond to motions, petitions, or other requests for Interim Orders	0.12	1%
Trial—Lien	0.09	0%
Conference—Other	0.09	0%

How much time are judges devoting on the average to the review process during the most common settlement-related events? Regardless of where the review takes place, approvals are taking an average of ten

minutes or less to complete in the three most common scenarios for review (***Table 8.8***). Even when approval is not immediately forthcoming, the entire process takes an average of no more than ten to 16 minutes.

A related question we had was in regard to whether the walk-through process resulted in a higher approval rate because of the real or imagined pressures to dispense with a task that was possibly being squeezed in between other activities. This is difficult to determine because we cannot assume that the settlements being presented at walk-throughs are similar in every respect to those presented as part of an MSC or that are being reviewed at some other time. Nevertheless, the first-time approval rate for walk-through settlements is actually about the same as for those presented at the MSC. Both types of settlement review opportunities have a higher first-approval rate than seen in situations where the judge is evaluating adequacy in *other* than a walk-through or conference setting.

Table 8.8

Settlement Review Related Judicial Time Expenditures

Task Category	*Evaluate adequacy of Settlement not presented at walk-through*	*Evaluate adequacy of Settlement presented via walk-through process*	*Conference–Mandatory Settlement Conference*
Mean Minutes if Settlement Approved	7	8	10
Average Number of Settlement Approval Events Per Week	3.8	4.1	3.8
Settlement Approval as Percentage of All Settlement Events	61%	88%	91%
Mean Minutes if Settlement Modified and Approved	10	11	13
Average Number of Settlement Modification and Approval Events Per Week	0.5	0.3	0.3
Settlement Modification and Approval as Percentage of All Settlement Events	9%	6%	8%
Mean Minutes if Settlement Not Approved	11	10	16
Average Number of Settlement Nonapproval Events Per Week	1.9	0.3	0.1
Settlement Nonapproval as Percentage of All Settlement Events	30%	6%	2%

Continuances and OTOCs

We were also able to obtain information on the outcomes of hearings such as MSCs and trials (***Table 8.9***). Only 36% of the regular trials and 34% of the MSCs were concluded on the day they began. What was the reason for such a shortfall? First, a third of all trials and a quarter of all MSCs were continued for some reason. Second, orders taking the case off the trial calendar were issued in 30% of the regular hearings and 42% of the MSCs.

Not all of these postponements are necessarily "bad" despite admonitions to judges contained in the Labor Code and associated regulations that continuances and the like are not to be favored. Judges can and should take cases out of the queue for trial when settlement is imminent. Of the orders taking the cases off the trial calendar, 42% of those issued at a regular hearing and 30% of those issued at the MSC were indeed related to settlement.

So, what is the likelihood that a trial or MSC will actually result in either a concluded session or a settlement-related OTOC? Only 49% of trials and 47% of MSCs had an outcome that might be characterized as "desirable" from the standpoint of achieving the primary purposes of the event (for trials, that would be a completed hearing or a cancellation due to actual or impending settlement; for MSCs, that would be setting the matter for trial, settling the case, or a cancellation due to impending settlement). Put another way, about half the time for either session the outcome will be inconclusive and there would be a good chance that the parties would have to return on another day to complete the task.

Table 8.9

Judicial Time Expenditures at Conference or Trial, by Outcome of the Hearing

Outcome:	*Concluded*	*Concluded*	*Concluded*	*Continued*	*Continued*	*Continued*	*OTOC, Settled*	*OTOC, Settled*	*OTOC, Settled*	*OTOC, Other*	*OTOC, Other*	*OTOC, Other*
Conference or Trial Task	*Mean Minutes Per Event*	*Frequency Per Judge Per Week*	*Percent of All of This Event Type*	*Mean Minutes Per Event*	*Frequency Per Judge Per Week*	*Percent of All of This Event Type*	*Mean Minutes Per Event*	*Frequency Per Judge Per Week*	*Percent of All of This Event Type*	*Mean Minutes Per Event*	*Frequency Per Judge Per Week*	*Percent of All of This Event Type*
Trial-Expedited Hearing	23	0.3	53%	-	0.0	-	13	0.1	12%	13	0.2	35%
Trial-Regular	61	1.6	36%	33	1.4	33%	22	0.6	13%	30	0.8	18%
Trial-Lien	39	0.2	42%	9	0.1	24%	11	0.1	9%	15	0.1	24%
Trial-Discovery	16	0.1	60%	25	0.0	20%	-	0.0	-	-	0.0	-
Trial-Special Issue	87	0.1	1%	25	0.0	0%	18	0.0	0%	-	18.0	-
Trial-Other	25	0.0	11%	23	0.1	33%	0	0.0	0%	16	0.1	56%
Conference-Mandatory Settlement Conference	11	5.2	34%	10	3.6	24%	7	1.9	13%	8	4.6	30%
Conference or Hearing on adequacy of Settlement	15	0.1	57%	10	0.0	7%	-	0.0	-	11	0.1	29%
Conference-Lien	8	0.3	34%	7	0.1	17%	4	0.1	11%	7	0.3	38%
Conference-Law & Motion	18	0.1	67%	-	0.0	-	1	0.0	17%	7	0.0	17%
Conference-Discovery	48	0.0	29%	35	0.0	14%	3	0.0	14%	7	0.1	43%
Conference-Pre-Trial	13	0.3	35%	8	0.3	31%	6	0.1	16%	9	0.2	18%
Conference-Rating	-	0.0	-	-	0.0	-	2	0.0	33%	7	0.0	67%
Conference-Mediation	15	0.0	100%	-	0.0	-	-	0.0	-	-	0.0	-
Conference-Other	15	0.1	37%	18	0.1	32%	14	0.0	5%	8	0.1	26%

CHAPTER 9. CHARACTERISTICS OF TYPICAL LITIGATION

INTRODUCTION

As explained elsewhere, the DWC's primary resource for collecting transactional information about cases before its judges is its Claims Adjudication On-Line System (CAOLS). This nearly 20-year-old networked database has been the backbone of California's workers' compensation dispute resolution process and by and large, serves its most important function of providing notice to the parties of upcoming conferences and trials reasonably well. Other tasks, such as supplying district offices with lists of scheduled hearings each week and giving DWC administration the ability to track aggregate filing and disposition trends, are also performed at a level that is adequate for the needs of staff members.

The limits of CAOLS are pushed, however, when one wishes to understand what transpired in any single case before the WCAB. The data entry options that currently exist are restricted to recording only the most basic information about particular sorts of pleadings filed (what it was, who filed it, and when it was filed), about certain types of hearings (scheduled, canceled, or held), and about the litigants (name and address, representation, type of injury) but little else. Other information that may help interpret the timing of events and their sequence, such as extent of disability, issues at dispute, medical treatment provided, and claims and payments must be obtained from other sources. A staff member, even one who is experienced in interpreting CAOLS' sometimes obtuse codes and conventions, might be hard-pressed to completely describe what happened in a specific case and would find it very difficult to explain exactly why something happened when it did.

Some of this difficulty appears to be a reflection of the streamlined design used in CAOLS for record-keeping. The early 1980s design of CAOLS placed a high emphasis on reducing data storage requirements associated with the potentially unlimited number of transactions in the hundreds of thousands of new cases filed each year. For example, information about a scheduled hearing is overwritten if the

hearing is held or continued (and as such, much of the information about when a case was originally scheduled is lost). Moreover, only the fact of the scheduling (or holding or canceling or whatever) is retained; it is not possible to determine the reasons for a continuance or an order taking the case off calendar. While these features are understandable given the high costs associated with storage media at the time of implementation and the need to focus on the primary mission of providing notice at the lowest cost possible, the result is a system that supplements the case file but is not an electronic substitute. As a result, reference to the physical case file is usually indispensable for someone who is desirous of understanding what the current status is of a case, what has happened in the past, and where the litigation is headed.[126]

CASE FILE ABSTRACTION METHODOLOGY

In order for us to get the most complete information possible on case processing, it was clear that CAOLS could not be our only resource. Early on in our work, we felt that we also needed to look at a large sample of actual cases and "abstract" key information from the physical case file. However, because such a data collection effort would involve significant amounts of manual labor and would be very time-consuming, it was not possible to abstract from anything more than a small number of cases. In order to get a set of representative cases that would allow us to draw general conclusions about the system as a whole, we needed to carefully select the files to be abstracted.

Sample Selection

Our sample size of about 1,000 cases was imposed by budget constraints that allowed us the use of two full-time abstractors for six

[126] We have been told that this situation is a source of frustration for ancillary service staff who routinely review case files but who are not physically at the local office because they are either based at a Regional Call Center or provide services to two or more offices. Indeed, we have been told that those with cases at the San Bernardino District Office who contact the Regional Call Center for information are fortunate because I&A personnel can simply walk downstairs and retrieve the file personally when needed.

consecutive weeks. Assuming about 30 minutes per case (a minimal length of time to review a file and fill out complex forms), we estimated that at best, we could collect data from about 160 cases per week. Spreading those 960 cases among 25 branch offices would mean that only 38 cases could be abstracted from each location. We decided to sample the cases in clusters by doing this abstraction at the six courts we would already be present at anyway as part of our "site visits" (see ***CHAPTER 2***); as such, we would be able to do no more than 160 cases at each location. This allowed us to get more detail within a court, and, by judicious selection of these sites, get data that was informative for the whole system. Conceivably, the sampling of courts could be done randomly, as would the cases from each site, but after some analysis we decided to do purposive sampling in which the courts would be selected to give us contrasts in size and various performance measures. As such, our site visit court selection was driven by our abstraction sample needs (though other types of data collection efforts would be performed at these locations in addition to the abstraction).

In sampling cases from each of the six selected courts, we had to meet three constraints. First, the cases had to have been active in the past four to five years in order for the court to have the physical case file available for abstraction. Second, we wanted our sampled cases to mostly be complete so that we could relate the abstracted data to most of the events in the life of a typical case. Finally, we wanted cases that had most of their events occurring in the past few years so that their timing would be representative of current functioning of WCAB offices.

To satisfy these constraints, we decided to sample cases that began in 1998 or 1999. These cases would be available for abstracting even if they had terminated fairly quickly, there was a high probability that they would be largely complete (most cases reached at least their first decision within two years, although activity on lien claims and reopenings could last beyond that time), and finally, the sampled cases would be proceeding along together over a similar period of time.

We further restricted our sample in the following ways:

- We eliminated any cases that transferred between district offices. These constitute a small proportion of all cases and so would not be well enough represented in our sample. Moreover, if the transfer significantly lengthened the time between certain key events, it would bias our attempts to relate these times to other case characteristics.
- During selection, we did not add any case for which another case with the same applicant was already in the sample. This was a somewhat more difficult decision, as only about 68% of all open cases are unique in terms of applicant social security number. The problem is that events in concurrent cases for a single applicant are often related (hearings or final orders for a set of cases with the same applicant will take place or be issued together). We would then be overrepresenting those events even though they only involved a single judge and a single applicant. It should be kept in mind that we had no restriction on whether the sampled case was or was not one of a number of matters with the same applicant. As such, our 957 cases in the sample include 957 different applicants but may have been handled as part of a far larger number of total matters before the WCAB.
- We only looked at cases that opened with injury-related Applications, Compromise and Releases, or Stipulations with Request for Awards. This eliminated death cases and third party cases. Again, the rationale was that these latter types of cases were a very small fraction of the total and could not be studied well from our sample and could bias estimates if included with other cases that did not have these special characteristics.
- Due to a complex array of statutory and regulatory privacy protections, we did not include any case where the file was likely to contain information about an applicant who is thought to be HIV positive. Though it would have been useful to see whether such cases are being processed at the same speed as

others, the DWC was prohibited from allowing us access to their case files.

- Finally, we sampled only cases for post-1993 injuries. The procedures for this category of injuries are different than for injuries sustained before the end of 1993. These cases generated the majority of transactions during the sampling window of 1998-1999 and are responsible for even more cases being handled today. As such, this would be the relevant set of cases for monitoring the current performance of the WCAB.

We did not attempt to stratify the sampled cases by any other characteristics because of limited information available from CAOLS. We considered oversampling on cases that included trials but were concerned about reducing the reliability of data collected from nontrial matters.

Using the above criteria to define our sampling universe at the six branch offices, we selected 170 cases randomly for each. The first 160 were requested from each court for examination by our abstraction team, and the remaining ten were reserved in case the file from one of the first 160 was not available.[127]

Approach

Our coders were to pull information primarily from six broad categories of routine pleadings. Additionally, for those pleadings that generally led to the scheduling of a subsequent event (e.g., a Declaration of Readiness triggering a Mandatory Settlement Conference), we also coded information from the "Official Service Record."[128] The forms used to record information found in the files can be reviewed in the ***Technical Appendices***. These pleading categories included:

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[127] Final counts by office were as follows: Los Angeles: 163, Pomona: 160, Sacramento: 160, San Bernardino: 159, Stockton: 160, Van Nuys: 155.

[128] The Official Service Record is a printout, usually double-sided, that documents the notice that the WCAB sent to the parties related to a future conference or trial. Not every upcoming conference or trial is associated with an OSR.

- **CASE-OPENING DOCUMENTS:**
  - The first *Application for Adjudication* form found in the file.
  - Any proposed settlement documents used to open the WCAB file.
- **REQUESTS FOR CONFERENCE OR TRIAL:**
  - Any *Declaration of Readiness* forms and their associated *Official Service Records* (if any).
  - Any *Request for Expedited Hearing* forms and their associated *Official Service Records* (if any).
- **ORDERS FOR CONTINUANCE OR TAKING OFF CALENDAR:** Any order continuing a conference or trial or taking the matter off calendar was used regardless of its specific form. Depending on the type of document(s) the judge signed, we generally used the information contained in one of the following:
  - Any *Order and Decision on Request for Continuance or Off-Calendar* and/or any associated *Minutes of Hearing* and their associated *Official Service Records* (if any). In the late 1990s, many judges appear to have used a combination of an *Order* and a separate *Minutes* to memorialize their decision to continue a case or take it off calendar.
  - Any *Minutes of Hearing / Order / Order and Decision on Request for Continuance / Order Taking Off Calendar / Notice of Hearing* and their associated *Official Service Records* (if any). This single document was used more recently to eliminate the effort needed to execute an *Order* and a separate *Minutes*. It was revised extensively in early 2000 and is now generally known as a “Pink Form” due to its most common color.
  - Any other order or form used by the court to continue a matter or take the case off calendar and its associated *Official Service Record* (if any). On occasion, we

encountered continuances or OTOCs noted on only a *Minutes of Hearing* and sometimes on little more than a "Post-It note" or a more formal scheduling memo intended for a calendaring clerk. On other occasions, we used the information found on a generic *Order* form.

- **PRETRIAL STATEMENTS OF ISSUES THAT ARE STIPULATED OR STILL IN DISPUTE:**
  - All *Pre-Trial Conference Statements* (sometimes known as a *Summary of Settlement Conference Proceedings*) and their associated *Official Service Records* (if any).
- **APPROVED SETTLEMENTS:**
  - All approved *Compromise and Releases* and any accompanying *Order Approving Compromise & Release and Award*.
  - All approved *Stipulations with Request for Award* and any separate orders approving the request.
- **JUDGE'S DECISION FOLLOWING TRIAL:**
  - Any *Findings, Award & Order*.

We also gathered information from other pleadings and papers found in the file (e.g., claim forms, penalty petitions, the last medical report, and any earlier versions of proposed settlement documents). In addition, our coders referred to a printout of the CAOLS "history" database to help them understand what they saw in the file. On occasion, we had difficulty interpreting a judge's handwriting or what was being ordered and would request help from the Presiding Judge or some other judicial officer.

ANALYSIS

We had two main purposes for this data. First, the information extracted would be part of our work trying to identify those case characteristics associated with the pace of litigation. This task is primarily described in ***CHAPTER 6***. Our second purpose was to paint a detailed picture of what sorts of cases are filed in the present day

offices of the WCAB, what took place in them, and whether there is information contained in the pleadings found in the case files that would allow a judge or case administrator to better manage how the case moves through the system. The results of that work, including any information about cases in the abstraction sample that we were able to extract from CAOLS, is described below.[129]

General Case Characteristics

Case Opening

About one in five cases come to the attention of the WCAB as an already resolved matter (***Table 9.1***).

Table 9.1

Type of Case Opening (CAOLS data)

Type of Opening	*Frequency*	*Percent*
Regular	760	79.41
Settlement	197	20.59

Representation

Based on the information contained in the case file, it appears that about 20% of all applicants handle their case without hiring an attorney; in about 1.5% of cases an attorney was engaged, but by the end of the case the applicant seems to have proceeded alone (***Table 9.2***).

Table 9.2

Was Applicant Ever Represented by Counsel?

Represented?	*Frequency*	*Percent*
No Indication	193	20.17
Yes	749	78.27
Yes, though doesn't have a lawyer at end of case	15	1.57

This percentage is somewhat lower than would be expected based upon our analysis of CAOLS for systemwide counts. In WCAB cases (all

[129] Most tables are based upon our abstraction data; those that are from CAOLS are noted in the title. Some tables have "Unknown" values with extremely small frequencies dropped from display for the sake of convenience.

offices, not just the six study site courts) with some sort of activity in 2000 (ranging from simple address updates to trials), 86% indicated the designation of an attorney for an applicant at some point during the life of the case.

Applicant Characteristics

Interestingly, workers' compensation disputes are more likely to involve men rather than women (about a six to four ratio). The primary language spoken by the applicant was not as obvious, but it did appear that based on a variety of factors (primarily interpreter requests, medical reports, and applicant-written documents), English was the second language in at ***least*** 12% of all cases. This should be considered an absolute floor to the percent of non-English-speaking applicants; we were usually only able to determine this question with any confidence if an interpreter had been requested or was present at a conference or trial, and as almost 60% had no MSC, in most instances the issue of an interpreter never came up.

Multiple Cases

More than a quarter of all files have multiple cases being adjudicated simultaneously (see ***Table 9.3***), though not necessarily in concert. Each WCAB "case" relates to a discrete injury (usually defined by the date on which it occurred or became known, though this becomes more difficult to determine in continuing trauma cases) claimed by a single applicant. In many instances, multiple open cases that were filed at different times will be resolved at the same time through a single settlement or trial decision. Based on our conversations with judges, it does not appear that a case, for example, with two or four total open matters requires twice or quadruple the amount of effort on the part of the WCAB to resolve. This is reflected in the way CAOLS counts total case closures, since it collapses all cases for the same applicant with the same dispositive events taking place on the same day.[130]

[130] This convention of tracking multiple open cases for the same applicant can lead to problems if more than one applicant is using the same false social security number.

Table 9.3

Number of File Numbers Associated with This Case (CAOLS data)

Files	*Frequency*	*Percent*
1	723	75.55
2	113	11.81
3	62	6.48
4	30	3.13
5	10	1.04
6	7	0.73
7	2	0.21
8	7	0.73
9	1	0.1
11	1	0.1
35	1	0.1

In addition to the data from CAOLS, we also collected information on the number of additional cases noted in the Application for Adjudication (***Table 9.4***), but our count of multiple open matters (35%) was much larger than that found in ***Table 9.3*** (24%). In theory, the file numbers for all simultaneously open cases should be written or printed on all pleadings and papers in the file if they are being handled simultaneously. Courts and parties did not seem to be consistent in their attention to this requirement and we saw some files listing a different set of case numbers on almost every document where the information was required. Another, though less persuasive, explanation is that some fraction of the cases with multiple file numbers at the time of the filing of the Application had the other matters resolved piecemeal over time so that a snapshot of the cases at any single point would show a variable number of related cases.

Table 9.4

Number of Other Industrial Injury Cases

Related Case Files	*Frequency*	*Percent*
0	494	65.26
1	178	23.51
2	51	6.74
3	15	1.98
4	13	1.72
6	1	0.13
7	1	0.13
8	2	0.26
9 or more	2	0.26

Number of Defendants Involved

Only a handful of cases involve more than one employer (***Table 9.5***) or insurer (***Table 9.6***).

Table 9.5

Number of Employers Listed (CAOLS data)

Employers	*Frequency*	*Percent*
0	1	0.1
1	919	96.03
2	28	2.93
3	4	0.42
4	4	0.42
7	1	0.1

Table 9.6

Number of Carriers Listed (CAOLS data)

Carriers	*Frequency*	*Percent*
0	55	5.75
1	870	90.91
2	25	2.61
3	3	0.31
4	3	0.31
7	1	0.1

Psychiatric and Emotional Claims

Our abstraction found references to the state of the applicant's psychiatric or emotional health in 12.5% of the cases in the sample

(***Table 9.7***). However, not all of these involved *formal* claims for psychiatric injury (which likely is what those performing CAOLS data entry chores would have been looking for). This would explain why a smaller percentage of cases (about 8%) reflect a psychiatric injury in CAOLS as compared to our abstraction. Our intent was to determine the extent to which these sorts of claims exist informally as a backdrop to settlement negotiations.

Table 9.7

Any Indication of Psychiatric or Emotional Stress or Related Issues?

Psych/Emotional Issues?	*Frequency*	*Percent*
Yes (CAOLS data)	75	7.84
Yes (Abstraction data)	120	12.54

Indication of Allegations of Penalties and Enhancements

The problems with relying on CAOLS as the sole case management tool are well illustrated by the tables below. We looked at the effects of penalty issues using both our case file abstraction and the information contained in CAOLS regarding petition filings. Both suggest that about 1.6% of all cases involve allegation of “Serious & Willful” misconduct on the part of the employer in regard to how and why the injury occurred. But the abstraction also found a larger percentage of cases (5.2%) involving Labor Code §132a issues (workers’ compensation related discrimination) than did the CAOLS analysis (3%). Moreover, the abstraction team looked for other types of common penalties such as those available under Labor Code §4650 (late payments) and Labor Code §5814 (unreasonable delay or denial) that are not reported in CAOLS. Seven-and-a-half percent of all cases had at least the threat of a request for the 10% surcharge available under LC §5814, a potentially costly assessment because it applies to all benefits of a particular class, not just a single payment. Overall, about 15% of all cases we looked at had some sort of penalty as an issue (***Table 9.8***).

Table 9.8

Penalties Noted in File

Penalty Type (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
LC §132a	50	5.22
Serious & Willful	15	1.57
LC §4650	5	0.52
LC §5814	72	7.52
Penalties of an Unspecified Type	43	4.49
Any Penalties	147	15.36

Table 9.9

Indication of Penalty Petitions in CAOLS

Penalty Type (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Serious & Willful filings	15	1.57
LC §132a filings	29	3.03

Information Contained on the Application

About 750 of our sample cases contained an Application for Adjudication in the case file. This number is slightly less than what our analysis of CAOLS suggests are the number of cases that opened with an Application (760) rather than a settlement. We were interested in the information contained in an Application because it provides the equivalent of a “civil action cover sheet” or other generic term used to describe party-completed forms submitted at the time of case opening in traditional civil courts. These forms are used to not only collect basic information about the nature of the dispute and the characteristics of the parties, but also to determine whether the case should be placed on a special “track” for management purposes. Knowing whether a case is likely to involve complex issues or require unusual amounts of discovery right from the very start allows a judge or court administrator to tailor the process by which the matter is ultimately resolved.

The situation is somewhat different for the Application because unlike a civil court complaint, it does not request immediate judicial intervention (typically, that is done by the filing of a Declaration of Readiness or the submission of a proposed settlement); in perhaps most

instances, the dispute (if there indeed is one at the time of filing) is just in its earliest stages, with continued treatment and medical evaluation still in its future. However, some members of the workers' compensation community have suggested that this is exactly the time the DWC should get involved in order to anticipate and resolve disputes before they fester into situations where only judicial intervention will be effective.

Treatment and Monetary Benefits

About 4% of the Applications we reviewed indicated that no medical treatment had been received from any source. Given that this is a system primarily designed to treat injuries, explanations for the failure to obtain medical attention might include the use of the Application as a "place-holding" document filed almost immediately after the injury in anticipation of future disputes or possibly related to a refusal to provide medical services on the part of the defendant and a lack of funds on the part of the applicant to pay for it himself or herself. Self-provided treatment does seem to be very common as about a third of those who indicated one way or another reported that someone other than a defendant provided the health care services. With only about 2.5% of Applications indicating one way or another that MediCal benefits were received, "self-provided" health care may include having the applicants paying directly for treatment, having providers accept deferred payment through liens and the like, and the use of other private health care insurance such as that provided by a spouse's employer.

In contrast to medical care, a much smaller percentage of workers received wage-related benefits from a non-workers' compensation source. Nine percent of the Applications that indicated one way or another claimed to have received either unemployment insurance benefits or state disability payments subsequent to the injury.

Issues Requested for Adjudication

Applicants are required to indicate which issues are in dispute at the time of filing, though the generally liberal rules of pleading found in California workers' compensation practice do not bind the filer to

these initial assertions. There is no penalty, therefore, involved in checking off all the boxes in the “liability disagreement” section and as might be expected, one or more of the specific issues listed on the form are marked 87% of the time or more (***Table 9.10***).

Table 9.10

Issues Indicated in Application

Issues (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Temporary Disability Indemnity	685	90.49
Permanent Disability Indemnity	716	94.58
Reimbursement for Medical Expenses	686	90.62
Medical Treatment	715	94.45
Compensation at Proper Rate	675	89.17
Rehabilitation	657	86.79
Other	118	15.59

Information Contained on the Declaration of Readiness

While the Application is helpful, perhaps a more useful source of information to understand what the true nature of the litigation is would be the Declaration of Readiness. This pleading is a closer match to the case-initiating complaint and petitions used in traditional civil courts as it represents a clear and unambiguous request for placing the case on a track for trial.

The tables below do not include information from the DOR if it was also accompanied by a Request for Expedited Hearing. It was not always clear whether the party filing the Declaration and the Request simultaneously were doing so to accomplish distinct tasks (setting the case for regular trial plus also resolving an immediate need in the interim) or were, as was more likely, operating under the assumption that both forms were required to obtain just the Expedited Hearing.

Party Filing the DOR

While much of the policy debate over the proper use of the DOR seems to have revolved around the assumption that workers are the ones who file these documents, defendants and lien claimants make a substantial proportion of trial requests. Almost seven out of ten DORs

are filed by applicants while a quarter are filed by defendants (***Table 9.11***).

Table 9.11

Party Filing Declaration of Readiness

Party	*Frequency*	*Percent*
Employee or Applicant	419	67.36
Defendant	152	24.44
Lien claimant	47	7.56

Session Type

In theory, the current version of the DOR only allows the filer to request either a hearing, a special conference to resolve some particular issue, or a "Rating Pre-Trial" to get the immediate services of a DEU rater. It is intended primarily as the kickoff for the journey to case resolution and so parties need only tell the court that they want their case resolved by trial (i.e., "Regular Hearing"). Indeed, no matter what boxes are checked off, the filer is asserting in every instance that the case is ready for trial on at least some issues. In reality, parties are well aware that prior to a trial a Mandatory Settlement Conference will typically be held first. Moreover, the expectation is that the case will be resolved (presumably through settlement) at the MSC and so this is the actual judicial intervention being sought (and certainly not a trial, at least not yet). The resulting confusion leads to the situation shown in ***Table 9.12***. Nine percent of the DORs we encountered had "Mandatory Settlement Conference" or "MSC" written on the form somewhere near the area used for indicating the type of conference or trial requested. Sometimes this was in addition to checking off one of the three standard boxes, but on occasion it was the only type of hearing requested. In the end, it made little difference; the case was generally scheduled for an MSC if anything but the "Conference Pre-Trial" or "Ratings Pre-Trial" boxes were checked off and no other special indication (such as a request to resolve a discovery or lien issue or known pro per status) was made.

Table 9.12

Session Requested in DOR

Conference or Trial	*Frequency*	*Percent*
Unknown	15	2.41
Regular Trial	300	48.23
Conference Pre-Trial	213	34.24
Rating Pre-Trial	29	4.66
Conference (not specified or Pre-Trial)	1	0.16
Expedited Hearing	2	0.32
Lien Conference	1	0.16
Lien Trial	2	0.32
Mandatory Settlement Conference	57	9.16
Other	2	0.32

Issues

The issues indicated to be in dispute are somewhat more focused than what was found in the Application. Disability payments and medical treatment were most likely to be an issue at the time of filing (***Table 9.13***). Interestingly, a high proportion of DORs indicated that self-procured medical treatment was at issue. To the extent that such information in the DOR is reliable (and does not reflect a “defensive” move from the filer to check off all issue boxes to avoid being limited later), this suggests that for at least the population of claims that reach this stage in the dispute resolution process, a significant share of the responsibility for treating work-related injuries appears to be handled independently of employer- or insurer-controlled health care providers.

Table 9.13

Principal Issues Listed in DOR

DOR Issue (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Compensation Rate	284	45.66
Temporary Disability	395	63.5
Permanent Disability	444	71.38
Rehabilitation	279	44.86
Self-Procured Treatment	379	60.93
Future Medical Treatment	425	68.33
Liens (Including Medical-Legal)	74	11.9
Penalties	116	18.65
Attorney Fees	38	6.11

Compensation Status

In three-fourths of the cases in which we have sufficient information, applicants were no longer receiving compensation from the defendants at the time of the filing of the DOR.

Expectations for the Final Hearing

Trials at the WCAB are relatively short sessions with few witnesses anticipated and this is reflected in the data we collected from the DORs. The form allows the filer to estimate the number of witnesses he or she will present and the length of the hearing. Obviously, this information can only be based on the filer's expectations and is likely not to take into account the intentions of the responding party. Nor will it be as accurate as information found in the Summary of Settlement Conference Proceedings that would be generated closer in time to the actual trial. Nevertheless, in 14.5% of DORs where an indication was made, the party requesting trial did not expect to present any witnesses whatsoever and in 74% of DORs, only a single witness would be called (***Table 9.14***). Even more infrequent was the expectation that any medical witnesses would be needed; only 3% of DORs for which we had positive information indicated that they would present such testimony.[131]

[131] While medical issues loom large in the calculus of determining disability ratings, most such evidence comes in the form of written evaluations rather than live testimony. BR §10606 explicitly favors the production of medical evidence in the form of written reports and prohibits direct examination of a medical witness except on a showing of good cause.

Table 9.14

Number of All Witnesses Expected

Witnesses	*Frequency*	*Percent*
Not Indicated	69	11.09
0	80	12.86
1	407	65.43
2	51	8.2
3	11	1.77
4	2	0.32
5	1	0.16
8	1	0.16

The same limitations regarding reliability apply to the estimated length of the subsequent hearing, but it does appear that most trials are felt to require a quarter day or less of the court's time (***Table 9.15***). Two-hour trials were predicted 47% of the time (when a response was given), one-hour trials were expected in 35% of the DORs, and trials estimated to last three hours or more could be found in just 7% of the DORs.

Table 9.15

Estimate of Number of Minutes for the Hearing

Minutes	*Frequency*	*Percent*
Missing	69	11.09
"0"	4	0.64
"1"	1	0.16
"2"	1	0.16
15	4	0.64
30	43	6.91
60	192	30.87
90	6	0.96
120	262	42.12
150	1	0.16
180	14	2.25
240	20	3.22
300	3	0.48
480	1	0.16
640	1	0.16

Discovery

The DOR requires the filing party to attest to the fact that it has completed discovery and has served all medical reports in its possession

(at least in regard to the issues in question). The other side of the coin is whether the moving party has received any medical reports from the opposing side. In 18% of the DORs in which we have reliable information, no medical reports from the adverse party had been served on the DOR filer. In some of these instances, there may not be any medical reports to serve, but it is possible that the DOR is actually being used as a tool for *compelling* discovery rather than setting the case for trial. If so, the outcome of any MSC held as a result of the filing of this DOR is likely to be inconclusive; if such reports do exist and are served just before the conference, a good possibility exists that the party filing the DOR will ask for more time to evaluate the newly obtained report through a motion for a continuance or order taking the case off the trial calendar.

Events Subsequent to the Filing of the DOR

As indicated above, the hearing requested in the DOR does not always translate to the scheduling of that specific type of session. We were able to associate about 500 Official Service Records found in the file with the hearings requested in approximately 620 DORs. Of these, eight out of ten were scheduled for an MSC (***Table 9.16***) despite the fact that a somewhat smaller proportion of DORs (see ***Table 9.12***) requested either an MSC or more properly, a Regular Hearing. This lends credence to statements from some office staff members we spoke to who indicated that no matter what filers specifically requested, the matter would be set for an MSC by default and it would be up to the judge and the parties to decide how to characterize the conference.

Table 9.16

Hearing Type Following DOR Filing

Conference or Trial	*Frequency*	*Percent*
Regular Trial	19	3.78
Conference Pre-Trial	54	10.76
Rating Pre-Trial	2	0.40
Expedited Hearing	4	0.80
Lien Trial	20	3.98
Mandatory Settlement Conference	403	80.28

Some district offices “load up” the morning calendar so that any spillover, expedited hearings, or other matters requiring attention can be handled during a relatively light afternoon. This is reflected in the fact that three out of five of the OSRs we found for the post-DOR session were calendared at 8:30 a.m.

Time Intervals Associated with the DOR

The presence of an Official Service Record in the file also provided us with an accurate estimate of the time district offices needed to process the DOR. This type of interval data, critical for understanding where the problems are in a district office to meet the time mandates of the Labor Code, is not possible with CAOLS as that system overwrites information regarding the setting of a session when the event is actually held or is canceled or continued.

As can be seen in ***Table 9.17***, the median time from the receipt of a DOR to the scheduled date of the next event (90% of which are conferences) was 35 days, though a number of outliers were at the 56th day and beyond. Of this, it took a median interval of eight days to receive the DOR, subject it to whatever screening process is employed at the district office, deliver it to the calendar clerk, and actually have the clerk enter the date for the next session into CAOLS. While not all of the DORs are being handled in compliance with LC §5502, the situation is not a grim one. By and large, the initial conference is scheduled to take place about a month or so after the filing of the DOR at the district offices we visited (whether it is actually completed on that day or instead is continued or taken off calendar is another issue altogether).

This is not to say the situation is the same at branch offices all over the state. As described in ***CHAPTER 7***, we are aware of offices where the time to get the DOR to the top of the calendar clerk’s pile for finding an open slot and entering the scheduled date into CAOLS can take a month, not the eight days indicated in ***Table 9.17***. At such offices, it would be impossible to even approach the 30-day requirement of LC §5502, given the need to provide adequate notice and to find room on the calendar for the next available MSC slot. In the OSRs for the DORs we were able to examine, conference calendars were extended out a

median length of 26 days from the actual calendar setting. In order to get these cases to conference within 30 days, only four days could be allowed to elapse between the date stamp and the actual setting. In reality, this is not possible unless the district office dispenses with considering the Objection to Declaration of Readiness to Proceed required under BR §10416 before setting.

From the standpoint of the applicant, delay in case resolution is measured by a number of milestones, not only when a DOR is filed. Conceivably, the clock starts ticking on the claim immediately following the injury, but another significant event that might appear to signal the approaching end of the case would be when a doctor has issued a "Permanent and Stationary" report. Prior to that report, it would not have been possible to assess the potential value of the claim, settle the case, or request a trial on the case-in-chief and so arguably this is the moment from which any "delay" should be judged. Our review of information contained in the DOR suggests that many months elapse between the P&S report signing and the filing of the Declaration of Readiness, far more time than it takes the WCAB to provide a Mandatory Settlement Conference (***Table 9.17***). This is certainly to be expected because there is still the need for the parties to complete any needed discovery, get the report rated, and attempt negotiations to resolve the dispute informally. Nevertheless, the time that elapses from the P&S report to the filing of the DOR may play a role in the perception of some injured workers that the case is languishing "in the workers' comp courts" when in fact it was out of the direct control of the judges and branch offices of the WCAB.

Table 9.17

DOR-Related Time Intervals

Interval	*Mean*	*Median*	*90th Percentile*
Days from DOR date stamp to hearing-setting date	15.5	8	24
Days from hearing-setting date to scheduled date	28.8	26	40
Days from DOR date stamp to scheduled date	40.9	35	56
Days from P&S report date to DOR date stamp	165.5	122	337

Use of CAOLS data does allow us to see how key events might have been scheduled following the DOR trigger. For the cases in our sample, an average of 39 days elapsed between the filing of a DOR and the scheduled date of the first conference and 94 days from the DOR to the first scheduled trial. Although these figures are still above the legislative time mandates, they suggest that the DWC is at least approaching the target intervals.

Expedited Hearings

Generally

Based on our CAOLS data, expedited hearings are relatively rare and are conducted in only about 4.5% of all of our sample cases (and in only about a third of a percent of our sample was more than one Expedited Hearing actually held). The urgent nature of these sorts of matters often means that the request is filed simultaneously with ongoing negotiations for the case-in-chief; as a result, some fraction of cases settle completely on or just before the day of the scheduled hearing and make further litigation unnecessary. Also, the reason for the Expedited Hearing (such as authorization for certain medical treatments or the payment of temporary disability) might be addressed informally and resolved with the threat of an impending interim trial. Because of these reasons, the percent of cases that had a Request for Expedited Hearing filed and a hearing scheduled would be larger than the percent in which the hearing was actually held.

Issues to Be Heard

The priority calendar afforded by the expedited hearing process appears to be almost exclusively about medical treatment and/or temporary disability payments (***Table 9.18***). Our sample did not include a significant number of cases with expedited hearing requests over rehabilitation appeals or conflicts among multiple defendants.

Table 9.18

Issues in Question

Issues (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Entitlement to Medical Treatment	40	67.8
Entitlement to or Disagreement Re TD	34	57.63
Appeal from Decision & Order of Rehab. Bureau	1	1.69
Entitlement to Compensation in Dispute due to Disagreement between Employers and/or Carriers	0	0
No Indication	1	1.69
Other Specified	0	0

Time Intervals Related to the Request for Expedited Hearing

Our site visit offices appear to be able to review and set Expedited Hearings generally within the 15-day time frame mandated by P&P Index #6.2. They have a bit more of a problem in scheduling the hearing itself early enough to allow a decision to be rendered within the 30-day limit from the filing of the request required by LC §5502(b); the median time of 28 days from filing to scheduled date would not give a judge a lot of time to do anything except rule from the bench immediately following the conclusion of the hearing.[132]

Table 9.19

Expedited Hearing Related Intervals

Interval	*Median*	*90th Percentile*
Days from Expedited Hearing Request date stamp to hearing-setting date	6	34
Days from hearing-setting date to scheduled date	19	31
Days from Expedited Hearing Request date stamp to scheduled date	28	61

Continuances and Orders to Take the Case Off the Trial Calendar

Generally

A major source of concern regarding the California workers' compensation system is the frequency of continued or canceled

[132] Our CAOLS data for the sample cases indicated that the mean time from the filing of the request to the actual date of the Expedited Hearing was about 36 days.

conferences and hearings. We looked in the files for evidence that the matter had continued or been taken off calendar and for information about what happened and why using a variety of possible types of orders and minutes (see discussion in ***Case File Abstraction Methodology***, above).

A total of 461 "sets" of documents indicating a requested continuance or OTOC of either a trial, a pretrial conference, or an MSC were found; of these, most (272) actions following the request were documented in a single combined Order and Minutes form (the balance primarily used separate forms for orders and for minutes of hearing). Of the 461 sets, 247 were in relation to an MSC, 49 were for pretrial conferences, and 104 were for trials. An additional 61 document sets presumably related to a request for continuance or OTOC were also found, but the sometimes cryptic notations contained therein made it impossible to figure out what exactly was being changed (trial, pretrial conference, or MSC) even with reference to the history printout found in CAOLS (some could have been done far in advance of a scheduled session so at best we would have been guessing at the actual session type). We believe that the policy considerations for managing continuances and cancellations differ markedly depending on the type of session in question; a legitimate reason for continuance at an MSC, for example, might not be justification for a postponement at trial. As such, the tables below only describe schedule changes that took place in relation to a known type of session.[133]

Much to our dismay, we repeatedly encountered instances where it was difficult if not impossible to exactly determine what was being ordered and why. In theory, P&P Index #6.7.4 requires that if a continuance or request to take a case off calendar is granted, the judge must issue a *specific* and *legible* order containing the express reasons for same, the names of the parties making the request and those who concur, the position of any opposing parties, the terms of any stipulation, and the ruling itself. While what actually took place was

[133] Most of the unknown session changes were as result of requests made jointly or by the applicant only and none appear to have been denied.

no doubt well understood by the parties physically present at the conference or trial, it was the responsibility of the judge to create a clear record that can be referred to in the future by other judicial officers for ongoing management of the litigation and by administrators such as the Presiding Judge for ensuring that all the judges at the office are generally complying with BR §10548's directive that continuances are not favored and should only be granted upon a clear showing of good cause. Nevertheless, we again and again found orders and minutes that defied interpretation, even when the Presiding Judge or other experienced member of the workers' compensation bench provided help. In some instances, the judges skipped over whole sections of preprinted forms that were designed to capture this very sort of elementary information. At the extreme, we found orders that simply indicated "Hearing Continued" or "Case OTOC" and little else besides the case number and the signature of the judge. It should be noted, however, that many of the orders we reviewed were issued prior to the distribution in early 2000 of the redesigned "Pink" continuance form (see discussion below) and what appears to be an ongoing campaign to encourage judges to comply with the technical requirements of P&P Index #6.7.4. Unfortunately, in some of the tables that follow, a large number of responses are categorized as "Unknown" or "No Indication"; our abstractors were cautioned not to simply guess when the order was illegible, unintelligible, or incomplete.

Mandatory Settlement Conferences

Party Making the Request

If the actual distribution of the "Unknown" category is similar to that of the schedule requests for which the requesting party is known, then 63% of the MSC requests were made jointly, 20% were from the applicant alone, and 13% were from the defendant (***Table 9.20***). Even if all the Unknown group are assumed to be requests made at the defendant's sole insistence for a total of 47%, the figure would be roughly equal to the sum of the applicant-only requests and those in which the applicant joined with the defendant in making the motion (50.5%). As such, the commonly held (at least among the applicant's bar) notion that

defendants, over the strenuous objections of the applicants, are the source of most MSC continuance or cancellation requests may not be quite accurate.

Table 9.20

Mandatory Settlement Conference—Who Made Request for Continuance or OTOC?

Party Type	*Frequency*	*Percent*
Joint	95	38.46
Applicant	30	12.15
Defendant	20	8.10
Other	6	2.43
Unknown	96	38.87

Indeed, a large fraction of the requests, even if initiated by only a single party, appear to be made with the assent of the other side. At least half of all responding parties (90.5% if the distribution of the Unknown group parallels that for the other categories) agreed (or at least did not oppose) the motion (***Table 9.21***).

Table 9.21

Mandatory Settlement Conference—Position of Responding Party to Request

Position	*Frequency*	*Percent*
Agreed	124	50.20
Opposed	10	4.05
Unreachable	3	1.21
Other/Unknown	110	44.54

Type of Request

About six out of ten of the requests were to take the case completely off the trial track rather than to continue the MSC until another day (***Table 9.22***). This suggests that the reasons for the request are based upon the premise that the MSC is either premature (e.g., the case is not ready for trial because of changing medical conditions) or unnecessary (e.g., the matter has been or soon will be resolved) rather than a more temporary problem such as scheduling conflicts.

Table 9.22

Mandatory Settlement Conference—Type of Calendar Change Requested

Request	*Frequency*	*Percent*
Continuance	86	34.82
OTOC	147	59.51
Unknown	14	5.67

Reasons for Request

The standard forms used by the DWC have an extensive array of optional checkboxes for judges to indicate why the request was made. As described previously, there are two general variations of these forms: (1) a single combined Order and Minutes of Hearing (including the versions used before and after February 2000), and (2) individual forms for the Order and the Minutes. Each variation attempts to capture the reasons for the continuance or cancellation in different ways, so much so that we were unable to create a crosswalk between the two beyond determining whether the order was related to an actual or potential settlement (or an otherwise resolved dispute) or some sort of discovery issue. As such, for both MSC schedule changes and for the discussions relating to pretrial conferences and trials that follow, we present separate information on settlement-related reasons, discovery-related reasons, the full set of reasons available to judges using the single combined form, and the full set of reasons available to judges who used the older separate forms.

One possible explanation of why there are so many joint, agreed, or unopposed requests is that the parties are often close to settlement on the day of the MSC, but for one reason or another (including an inability to obtain final settlement authority) need more time to work out the final details of the agreement. But settlements (regardless of whether actually concluded or looming on the horizon) as well as disputes that have been resolved informally only constituted the reasons behind about 28% of all MSC continuances or cancellations in our sample cases. The other 72% of these postponements are therefore based upon circumstances that have nothing to do with an actual or impending settlement and as such should be the focus of efforts to reduce unnecessary court appearances.

It should be understood that our estimates of settlement-related postponements are not limited to situations where the judge indicated settlement, a resolved dispute, or no issues remaining as reasons for the scheduling change; they also reflect our interpretation of the order that goes beyond any limited preset choices on the forms. For example, the judge might have written a brief notation such as "30 days for C&R" on the order without checking off any settlement-related box. We interpreted this as evidence of a possible settlement (or at least a claim of one) because the judge appeared to be giving the parties a limited period of time in which to complete the settlement process.[134]

The other major reason seen again and again is related to a claimed need to continue to investigate the facts of the case. About a fourth of all MSC scheduling change requests appear to be related to the need to conduct further discovery. But other than settlement/resolved disputes and discovery-related issues, no single specific reason predominates on either the most recent forms used by DWC judges (***Table 9.23***) or the older separate Minutes and Orders (***Table 9.24***).

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[134] Interestingly, it wasn't always clear when the "XX days for C&R" (or "XX days for Stips") notation was used what exactly was taking place and what would happen if the parties failed to present a settlement agreement as anticipated. Some judges told us that their usual practice was to issue an order taking the case off calendar while holding the file on their personal shelves for the indicated number of days to facilitate the review when the agreement was filed. At the end of that period, their secretary would simply return the folder to the file room. Other judges that used the same notation preferred to continue the case to a certain date no earlier than the indicated period. Still other judges told us that they would take the matter off calendar and if no settlement had been received by the end of the period, their secretary would contact the parties to find out what happened (or schedule a conference on the judge's initiative). We spoke to other judges, who despite using the specific phrase, would either continue the case or take it off calendar depending on what served the needs of the case best, but in all circumstances, left it up to the parties to take the initiative to restart the process (as such, the "30 days" notation meant nothing).

Table 9.23

MSCs—Reason Indicated for Request ("New Continuance Form")

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Applicant Now Represented	0	0.00
Applicant Requests Representation	0	0.00
Applicant—Illness	0	0.00
Applicant—Vacation	1	0.65
Arbitration	1	0.65
Auto Reassign—Applicant	0	0.00
Auto Reassign—Defense	0	0.00
Auto Reassign—No Other Information	2	1.29
Bankruptcy Pending	0	0.00
Calendar Conflict—Applicant	5	3.23
Calendar Conflict—Defense	4	2.58
Calendar Conflict—Lien Claimant	0	0.00
Calendar Conflict—No Other Information	1	0.65
Consolidation	0	0.00
Defective WCAB Notice	2	1.29
Defense—Defense	0	0.00
Defense—Vacation	1	0.65
Dispute Resolved by Agreement	12	7.74
Disqualify Applicant	0	0.00
Further Discovery—AME	12	7.74
Further Discovery—App. Med.	9	5.81
Further Discovery—Def. Med.	14	9.03
Further Discovery—Deposition	12	7.74
Further Discovery—No Other Information	7	4.52
Improper DOR/Valid Objection	5	3.23
Improper/Insufficient Notice by Party	3	1.94
Insufficient Time—No Other Information	0	0.00
Insufficient Time—To Finish	0	0.00
Insufficient Time—To Start	0	0.00
Joinder	4	2.58
New Application	0	0.00
No Indication	20	12.90
No Issues Pending	9	5.81
Nonappearance—Applicant	6	3.87
Nonappearance—Defense	9	5.81
Nonappearance—Lien Claimant	2	1.29
Nonappearance—No Other Information	0	0.00
Nonappearance—Witness	0	0.00
No Other Information	0	0.00
Other Reason #1	27	17.42
Other Reason #2	1	0.65

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Reassignment—No Other Information	0	0.00
Reassignment—Not Available	0	0.00
Reassignment—Refused	0	0.00
Recusal	0	0.00
Service Defective	2	1.29
Settlement Pending	20	12.90
UEF Issues	0	0.00
Unavailability of Witnesses—Applicant	0	0.00
Unavailability of Witnesses—Defense	0	0.00
Unavailability of Witnesses—No Other Info	0	0.00
Venue	1	0.65
WCJ Not Available	0	0.00

Table 9.24

MSCs—Reason Indicated for Request ("Old Continuance Forms")

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Applicant Now Represented	0	0.00
Applicant/Witness Not Available	4	4.35
Attorney Not Available	5	5.43
C&R/Stips to Be Filed/Settlement Circulating	9	9.78
Further Discovery	14	15.22
Further Medical Evaluation/Need Further Medical	16	17.39
Injured Worker Not P&S	0	0.00
Judge Already Engaged in Trial	0	0.00
Lack of Notice/Insufficient Notice	3	3.26
Lien Issue Resolved	0	0.00
No Triable Issue/Dispute Resolved	7	7.61
Nonappearance of Attorney/Party	1	1.09
Other	24	26.09
Unknown	22	23.91

Pretrial Conferences

Interpreting the impact of requests for continuances and cancellation on pretrial conferences is a bit more difficult than with MSCs because it is not always clear what the intent of the session was. All conferences subsequent to the filing of a Declaration of Readiness can conceivably lead to the setting of a trial date regardless of what they are called. However, the term "pretrial conference" (often called

"conference pretrial") is usually reserved for any conference that is not strictly characterized as a settlement conference; this includes adequacy conferences, discovery conferences, law & motion conferences, lien conferences, and so called "fix-it" conferences held with pro per applicants in order to sort out any problematic areas prior to an MSC. There is a sense that by and large these sorts of conferences do not carry the same command imperative to either "settle the case by the end of the day or set it for trial" that the MSC has. Whether or not this is technically correct, the end result is that there seems to be less of a pressing need to avoid concluding the conference if one side or the other would prefer not to go to trial anytime soon.

Given the multiple purposes such conferences perform, the tables below should be interpreted carefully, especially in light of the small number of granted scheduling requests we encountered.

Party Making the Request

As with Mandatory Settlement Conferences, most requests (for which we have data) appear to be presented jointly (***Table 9.25***).

Table 9.25

Pretrial Conferences—Who Made Request for Continuance or OTOC?

Party Type	*Frequency*	*Percent*
Joint	14	28.57
Applicant	7	14.29
Defendant	6	12.24
Other	1	2.04
Unknown	21	42.86

Type of Request

About three-fourths of the requests are for the purpose of taking the case off calendar (***Table 9.26***).

Table 9.26

Pretrial Conferences—Type of Calendar Change Requested

Request	*Frequency*	*Percent*
Continuance	11	22.45
OTOC	36	73.47
Unknown	2	4.08

Reasons for Request

Settlements (and resolved disputes) are involved in three out of ten pretrial conference scheduling change requests. A similar percentage (almost 30%) of requests involves the need for additional discovery.

The low number of requests we encountered make the use of form-specific reasons (***Table 9.27*** for new forms, ***Table 9.28*** for old) problematic, but it does appear that nonappearances of one or more parties are the most likely specific reason cited besides dispute resolution or the need to conduct additional discovery.

Table 9.27

Pretrial Conferences—Reason Indicated for Request

("New Continuance Form")

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Applicant Now Represented	0	0.00
Applicant Requests Representation	0	0.00
Applicant—Illness	0	0.00
Applicant—Vacation	0	0.00
Arbitration	0	0.00
Auto Reassign—Applicant	0	0.00
Auto Reassign—Defense	0	0.00
Auto Reassign—No Other Information	0	0.00
Bankruptcy Pending	0	0.00
Calendar Conflict—Applicant	1	5.26
Calendar Conflict—Defense	1	5.26
Calendar Conflict—Lien Claimant	0	0.00
Calendar Conflict—No Other Information	0	0.00
Consolidation	0	0.00
Defective WCAB Notice	0	0.00
Defense-Defense	0	0.00
Defense-Illness	0	0.00
Defense-Vacation	0	0.00
Dispute Resolved by Agreement	7	36.84
Disqualify-Applicant	0	0.00
Further Discovery-AME	2	10.53
Further Discovery-App. Med.	0	0.00
Further Discovery-Def. Med.	0	0.00
Further Discovery-Deposition	0	0.00
Further Discovery-No Other Information	0	0.00
Improper DOR/Valid Objection	1	5.26
Improper/Insufficient Notice by Party	0	0.00
Insufficient Time-No Other Information	0	0.00
Insufficient Time-To Finish	0	0.00
Insufficient Time-To Start	0	0.00
Joinder	0	0.00
New Application	0	0.00
No Indication	4	21.05
No Issues Pending	5	26.32
Nonappearance—Applicant	3	15.79
Nonappearance—Defense	2	10.53
Nonappearance—Lien Claimant	0	0.00
Nonappearance—No Other Information	0	0.00
Nonappearance—Witness	0	0.00
No Other Information	0	0.00

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Other Reason #1	2	10.53
Reassignment—No Other Information	0	0.00
Reassignment—Not Available	0	0.00
Reassignment—Refused	0	0.00
Recusal	0	0.00
Service Defective	0	0.00
Settlement Pending	0	0.00
UEF Issues	0	0.00
Unavailability of Witnesses—Applicant	0	0.00
Unavailability of Witnesses—Defense	0	0.00
Unavailability of Witnesses—No Other Info	0	0.00
Venue	0	0.00
WCJ Not Available	0	0.00

Table 9.28

Pretrial Conferences—Reason Indicated for Request

("Old Continuance Forms")

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Applicant Now Represented	1	3.33
Applicant/Witness Not Available	0	0.00
Attorney Not Available	2	6.67
C&R/Stips to Be Filed/Settlement Circulating	1	3.33
Further Discovery	12	40.00
Further Medical Evaluation/Need Further Medical	4	13.33
Injured Worker Not P&S	0	0.00
Judge Already Engaged in Trial	0	0.00
Lack of Notice/Insufficient Notice	0	0.00
Lien Issue Resolved	0	0.00
No Triable Issue/Dispute Resolved	2	6.67
Nonappearance of Attorney/Party	4	13.33
Other	8	26.67
Unknown	2	6.67

Trials

Party Making the Request

It was not always clear from the order and minutes who exactly was requesting the continuance or cancellation as about 45% of the forms did not reveal the identity(s) of the moving party. Of the schedule changes

for which the requestor was indicated, 54% were joint applications, applicants initiated 19%, and 11% were defendant requests (the remainder were “other” litigants or entities). Put another way, the applicant was at least a part of 74% of these requests and the defendant was a part of 65%. Neither seems to be the ones primarily responsible for trial schedule changes.

Type of Request

Taking a case off the trial track just prior to starting the hearing, while disruptive to the district office’s ability to realistically set hearings, presumably could be the result of a settlement that benefits all concerned. But we found that when the type of change being requested was clear from the document,[135] 45% were for continuances and the balance were for OTOCs.

Reasons for Request

Only about four in ten requested postponements were related to either a concluded or anticipated settlement and in 17% of the trial-related requests, there was a claimed need for further discovery. While a settlement is a desirable alternative to trial, cases that progress to the point of a formal hearing without having all medical evaluations and the like completed suggest the need for greater control or oversight during the litigation process. Delay getting the case to trial following the last MSC might play a part as well; any additional time that elapses increases the chances that the applicant’s medical condition might change and require returning to the initial stages of the pretrial process.

One important conclusion that can be reached from the reasons listed in the new (***Table 9.29***) and old (***Table 9.30***) continuance forms is that so-called “Board” reasons (lack of an available judge, reassignment issues, defective notice that was suppose to be provided by the WCAB, recusal, and to a lesser extent, insufficient time available) only affect a small fraction of scheduled trials. This is critical because

[135] Nearly 8% of the orders were unclear as to whether the session was being continued or canceled.

courts must be able to guarantee—or all but guarantee—a firm trial date in order to manage cases effectively and efficiently.

Table 9.29

Trials—Reason Indicated for Request ("New Continuance Form")

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Applicant Now Represented	0	0.00
Applicant Requests Representation	0	0.00
Applicant—Applicant	0	0.00
Applicant—Illness	0	0.00
Applicant—Vacation	0	0.00
Arbitration	0	0.00
Auto Reassign—Applicant	0	0.00
Auto Reassign—Defense	0	0.00
Auto Reassign—No Other Information	0	0.00
Bankruptcy Pending	0	0.00
Calendar Conflict—Applicant	4	5.71
Calendar Conflict—Defense	3	4.29
Calendar Conflict—Lien Claimant	0	0.00
Calendar Conflict—No Other Information	0	0.00
Consolidation	0	0.00
Defective WCAB Notice	1	1.43
Defense—Defense	0	0.00
Defense—Illness	1	1.43
Defense—Vacation	1	1.43
Dispute Resolved by Agreement	14	20.00
Further Discovery—AME	4	5.71
Further Discovery—App. Med.	4	5.71
Further Discovery—Def. Med.	4	5.71
Further Discovery—Deposition	2	2.86
Further Discovery—No Other Information	4	5.71
Improper DOR/Valid Objection	0	0.00
Improper/Insufficient Notice by Party	0	0.00
Insufficient Time—No Other Information	1	1.43
Insufficient Time—To Finish	0	0.00
Insufficient Time—To Start	0	0.00
Joinder	0	0.00
New Application	0	0.00
No Indication	13	18.57
No Issues Pending	7	10.00
Nonappearance—Applicant	4	5.71
Nonappearance—Defense	0	0.00
Nonappearance—Lien Claimant	0	0.00
Nonappearance—No Other Information	1	1.43
Nonappearance—Witness	0	0.00
No Other Information	0	0.00
Other Reason #1	8	11.43

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Other Reason #2	1	1.43
Reassignment—No Other Information	0	0.00
Reassignment—Not Available	0	0.00
Reassignment—Refused	0	0.00
Recusal	0	0.00
Service Defective	0	0.00
Settlement Pending	5	7.14
UEF Issues	0	0.00
Unavailability of Witnesses—Applicant	0	0.00
Unavailability of Witnesses—Defense	0	0.00
Unavailability of Witnesses—No Other Info	0	0.00
Venue	0	0.00
WCJ Not Available	2	2.86

Table 9.30

Trials—Reason Indicated for Request ("Old Continuance Forms")

Reason (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Applicant Now Represented	0	0.00
Applicant/Witness Not Available	1	2.94
Attorney Not Available	1	2.94
C&R/Stips to Be Filed/Settlement Circulating	1	2.94
Further Discovery	2	5.88
Further Medical Evaluation/Need Further Medical	2	5.88
Injured Worker Not P&S	0	0.00
Judge Already Engaged in Trial	0	0.00
Lack of Notice/Insufficient Notice	2	5.88
Lien Issue Resolved	0	0.00
No Triable Issue/Dispute Resolved	4	11.76
Nonappearance of Attorney/Party	2	5.88
Other	10	29.41
Unknown	10	29.41

Other Analysis of Continuances and OTOCs

In January of 2000, a new form for recording the orders issued when a case is continued or taken off calendar was finalized and made mandatory beginning in February of that year. This form, with the somewhat awkward name of "Minutes of Hearing/Order/Order and Decision on Request for Continuance/Order Taking Off Calendar/Notice of Hearing"

(more familiarly known as a “Pink Form”) was intended to do a better job of documenting who requested a continuance or OTOC and why. The initial instructions for the use of the form required that a copy of the completed document be made in every instance and sent to the attention of the Presiding Judge at each office who in turn would tally up the information on a form developed by retired WCJ Walter R. Brophy, Jr. Judge Brophy was to also perform the analysis of the first set of data collected. The first “Statewide Continuance Report” was issued in June of 2000 and included about 1,100 total forms (the San Diego office was not included).

Because it did not differentiate between conferences and trials, the first Brophy Report is not directly comparable with the data we collected from our abstraction. Moreover, judges were well aware that their respective Presiding Judges were required to review each of the newly issued Pink Forms and count the responses. If there was any ambiguity, the Presiding Judge would have been able to simply request clarification from the judge responsible (who in turn would likely be able to interpret the notations given the fact that the order was issued no more than a few months before); this was not an option available to the RAND-ICJ abstractors. Finally, the new forms have a greater set of choices available for tracking reasons that are outside the control of either applicants or defendants; for example, it is possible to determine whether the request was due to the lack of a hearing reporter or interpreter.

Nevertheless, the Brophy Report data does suggest that neither the applicant nor the defendant are the primary “bad guys” when it comes to requesting continuances (***Table 9.31***). One clear difference from the data available to RAND-ICJ is the suggestion that 10% of such continuances are at the request of the court, though not all result from a physical or staff-generated inability to hold the trial (***Table 9.32***).

Table 9.31

Requesting Party, Statewide Continuance Report, February Through May, 2000

Requesting Party	*Percent of All Continuances*
Applicant	24.7
Defendant	22.4
Joint	39.2
Lien Claimant	3.0
Court	10.6

Table 9.32

Reason for Request, Statewide Continuance Report,

February Through May, 2000

Non-Board Reason	*Percent of All Continuances*	*Percent of All with Non-Board Reasons*
Further discovery by applicant	17.9	19.9
Further discovery by defendant	13.3	14.8
Calendar conflict by applicant	6.2	6.9
Calendar conflict by defendant	4.6	5.2
Improper/insufficient notice-party	5.2	5.8
Improper DOR/Valid Objection	1.3	1.5
Nonappearance: Applicant	5.3	5.9
Nonappearance: Defendant	3.4	3.7
Unavailability witness/attorney	5.7	6.4
Case settled, no issues	11.2	12.5
Joinder/Cons./Venue/New Party	1.8	2.0
Auto reassignment by applicant	0.2	0.3
Auto reassignment by defendant	0.1	0.1
Pre per; new attorney or needs one	0.8	0.9
Due Process	3.0	3.3
Lien Issue after settlement	1.4	1.6
Illegible; or no reason	2.7	3.0
Change of Circumstances/New Application necessary	5.0	5.5
Attorney unavailable	0.7	0.8
Board Reason	*Percent of All Continuances*	*Percent of All with Board Reasons*
Insufficient time to start	2.4	23.0
Insufficient time to finish	2.1	20.2
Recusal or Disqualify	0.2	1.7
Reporter/interpreter unavailable	0.8	7.4
WCJ not available	2.4	23.8
UEF issues/Service or joinder	0.8	8.3
Defective WCAB notice	1.3	12.9
Arbitration	0.2	1.6
Bankruptcy	0.1	1.1

Mandatory Settlement Conferences and Summaries of Settlement Conference Proceedings

MSC Frequency

A majority of cases filed with the WCAB never reach even the initial stages of serious litigation (at least from the court's

standpoint). In addition to the 20% that start life as a settlement, many more that might have begun as an Application never attract the attention of the courts until the parties request settlement review. As a result, almost 60% of all cases pass through the WCAB without ever experiencing an MSC (***Table 9.33***).

Table 9.33

Number of MSCs Held Shown (CAOLS data)

MSCs	*Frequency*	*Percent*
0	556	58.10
1	297	31.03
2	73	7.63
3	23	2.40
4	6	0.63
5	1	0.10
6	1	0.10

This does not necessarily indicate that nothing happens in these cases; on the contrary, they can be the subject of intense discovery with considerable effort expended on the part of litigants and their attorneys. Moreover, a DOR might well be filed and an MSC scheduled (though at some point, the conference is canceled or continued) with all sorts of activity taking place right up until the end. The ultimate result is, however, that these cases' only significant judicial action is for settlement review. On the opposite end of the spectrum, about 10% have more than one MSC and of these, about 3% have three or more.

Stipulations

Under LC §5502(d)(3) and BR §10353, parties who do not settle the case by the end of the MSC are required to jointly complete a pretrial statement that lists facts that are stipulated, issues still in dispute and in need of resolution at trial, estimated length of trial, the names of proposed witnesses, and a list of all exhibits to be offered.

Parties working on this statement are theoretically encouraged to trim down the number of issues to a bare minimum in order to limit the amount of evidence that must be presented at trial and the need for the trial judge to carefully deliberate matters that are really not in dispute. Some judges take an active role in this process while others

leave it to the initiative of the parties. The litigants themselves run the gamut from approaching the task aggressively to simply leaving everything on the table in the expectation that the case will settle anyway or from concerns that a waiver of a seemingly unimportant issue might ultimately impact their position at trial or during negotiations. Nevertheless, we can use the information contained in these pretrial statements to better understand what sorts of cases are making their way into the end stages of the trial track.

A somewhat surprising percentage (34%) of settlement conference summaries indicated that the question of whether the injury arose out of the course of employment was still a potential issue (***Table 9.34***). Conceivably, this aspect of the dispute could have been bifurcated and tried at an early point in the life of the case, though such a ruling to first decide threshold issues (and defer other matters until after a finding is reached in favor of the applicant) is solely within the discretion of the judge.[136]

Table 9.34

AOE/COE Stipulation

Stipulation	*Frequency*	*Percent*
Injury was AOE/COE	72	47.68
Applicant claims AOE/COE	51	33.77
No Indication	21	13.91
Other	7	4.64

Also, in 13.5% of the summaries the issue of the employer's status as an insured or uninsured entity for the purposes of workers' compensation was not indicated and presumably could still be a matter needing resolution (***Table 9.35***). One would imagine that by the time the matter had reached the MSC stage, the question of who might be the source of benefit payments would have already been resolved. Indeed,

[136] See, e.g., St. Clair (1996), p. 1422. It is possible that at least some of the conference summaries we saw related to trials that had been bifurcated, but given the apparent disfavor that the concept of bifurcation has with many offices and judges (see ***Bifurcation*** in ***CHAPTER 7***), it is likely that cases with AOE/COE issues still remaining are routinely reaching the regular trial stage for a decision on the case-in-chief.

insurance coverage questions are only a designated issue in dispute less that 1% of the time (see ***Table 9.38***). It is likely then that this table reflects the level of inattention paid to the requirements of the standardized form for conference summaries.

Table 9.35

Employer Status Stipulation

Indicated Status	*Frequency*	*Percent*
Insured	88	56.41
Permissibly self-insured	39	25.00
Uninsured	4	2.56
Legally uninsured	3	1.92
No indication	21	13.46

If the assertions in the stipulation section of the summaries can be believed, almost six out of ten applicants reach the MSC stage without any monetary benefit payments from the defendants (***Table 9.36***).

Table 9.36

Stipulations That Defendant Paid Any Compensation

Compensation Type (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
TD	60	38.46
PD	29	18.59
VRMA	16	10.26
Other type	1	0.64
No indication	89	57.05

Moreover, only a quarter indicated that any TD payments that had been made had been stipulated by all the parties as being adequate. This is also surprising since unlike permanent disability benefits, the size of TD does not depend on any evaluation of the extent or severity of injuries to the worker.

Finally, in 19% of the Summaries the parties completing the documents were unable to agree (or at least failed to indicate) whether or not the defendant ever furnished any medical treatment whatsoever (***Table 9.37***). Whether all of these were due to a legitimate issue in

the case over the source of medical services or simply a result of the parties skipping over required sections of the form is unclear.

Table 9.37

Stipulation Re Employer Furnishing Medical Treatment

Treatment Furnished?	*Frequency*	*Percent*
All	34	21.79
Some	59	37.82
None	31	19.87
No indication	30	19.23

Issues

A more realistic way of evaluating what the nature of the dispute might be is to look at positively identified issues rather than the extent of facts stipulated. The question of attorney's fees and the need for future medical treatment were indicated as remaining issues in the case in eight out of ten Summaries (***Table 9.38***). Other commonly cited specific issues were payment for previous medical treatment and lien-related matters.

Table 9.38

Remaining Issues

Issues for Trial (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Employment	2	1.28
Insurance Coverage	1	0.64
AOE/COE	66	42.31
Parts of Body Injured	63	40.38
Earnings	44	28.21
TD	85	54.49
P&S Date	74	47.44
PD Rating	115	73.72
Occupation/Group #	29	18.59
Need for Further Medical Treatment	127	81.41
Liability for Self-Procured Medical Treatment	108	69.23
Liens	106	67.95
Attorneys Fees	128	82.05
Liability for Medical-Legal Expenses	19	12.18
Other Issues	111	71.15

Events After the Conference

We matched up the Summary of Conference Proceedings with the Official Service Record and found that almost 40% were listed in CAOLS as a "Full Day" trial (***Table 9.39***). However, we are aware that it is the practice of a number of district offices to designate all trials as full-day events for the purpose of scheduling, as they calendar their cases by counting the number of hearings rather than total estimated hours. Additionally, almost all of the OSRs indicated that the trial was to be calendared for 8:30 a.m. (presumably to preserve the afternoon for any spillover).

Table 9.39

Estimated Length of Hearing or Conference

Duration	*Frequency*	*Percent*
1 hour	11	11.11
2 hours	30	30.30
Half Day	20	20.20
Full Day	38	38.38

Overall, the sites we visited did a reasonable job of getting a trial scheduled following the MSC to comply with the time mandates of the Labor Code. About 50 days elapsed on average from the signing of the Settlement Conference Summary (presumably done at the MSC) until the scheduled date of the hearing (***Table 9.40***).[137] The informal target interval is 45 days given that the trial is to take place no more than

[137] A different mean time of 61 days from "conference to trial" was seen in our analysis of CAOLS data. This figure was calculated using the length of time preceding a held trial from the last conference indicated in the database. The somewhat lower abstraction data figure is understandable given that it reflects the date the trial was scheduled to take place, not when it actually occurred. If the parties showed up on the day of trial to request a continuance, the additional time that elapses until the trial is begun is included in the CAOLS calculation. We feel that the abstraction data is a better indicator of local office performance and resources because the incidence of DWC-caused continuances at trial appears to be low (see ***Table 9.29***). Refusals to grant continuances made at the request of the parties, even when for good cause, would undoubtedly lower the average time from conference to trial reflected in CAOLS to that which we found in the abstraction data.

75 days after the filing of the DOR and assuming that the MSC will be held about 30 days from the DOR filing.

Table 9.40

"Stips & Issues" Related Time Intervals

Interval	*Mean*	*Median*	*90th Percentile*
Days from Stips & Issues signing to hearing-setting date	8	3	15.5
Days from hearing-setting date to scheduled date	41	37.5	72
Days from Stips & Issues signing to scheduled date	51	47	76

Settlements

Outcome of Review

One concern repeatedly voiced by some segments of the workers' compensation community is the claim that settlements are being rejected unnecessarily until some of their terms and/or overall value are changed to the arbitrary satisfaction of a judge. We were able to explore a part of this issue with our abstraction data. About 629 cases in our sample had a settlement agreement in the file that concluded some or all issues in the case (undoubtedly, a larger percentage of cases were ultimately resolved by settlement, but some were still open at the time of our abstraction). Of those that had settlements we were aware of, 94.4% were essentially approved without any modification of key terms (a small number of these had multiple settlement documents in the file that were duplicates of the original), 4.8% were approved only after some terms or dollars were changed, and less than 1% were rejected without any subsequent settlement surviving review (and being placed in the file) (***Table 9.41***).

Table 9.41

Indication Final Settlement Was Approved/Resolved

Settlement Changed?	*Frequency*	*Percent*
Unknown	10	1.04
N/A, no settlement agreements	318	33.23
N/A, one settlement agreement approved w/o modification	591	61.76
N/A, one settlement agreement rejected w/o resubmission	5	0.52
No, final approved settlement agreement is the same	3	0.31
Yes, final approved settlement agreement differs	29	3.03
Yes, judge’s order of approval has terms that are different	1	0.10

Though the number of cases where proposed settlements have been modified (presumably as a result of judicial review) is relatively small, it should be kept in mind that the incidence where this happens may well be much higher when the settlement is submitted at particular offices or before particular judges. The changes that result from the process mostly appear to be ones where the applicant receives additional compensation (***Table 9.42***). However, the difference in the gross amount of money being offered is not a lot with only an average increase of about $650, with most adjustments being much smaller than the mean (***Table 9.43***); overall, dollar increases ranged from just $8 to as much as $3,000 (with a drop in value of $2,244 in one case that appeared to be shifting the responsibility for covering the cost of future medical treatment to the defendant).

Table 9.42

Change in Settlement Provisions Noted in File

Settlement Change (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Changed from C&R to Stips	1	0.1
Changed from Stips to C&R	5	0.52
Net Funds to Applicant Increased	25	2.61
Net Funds to Applicant Decreased	1	0.1
Net Funds to Lien Claimant Increased	1	0.1
Net Funds to Lien Claimant Decreased	0	0
Total Fees to All Attorneys Increased	4	0.42
Total Fees to All Attorneys Decreased	1	0.1
Future Medical from Open to Closed	4	0.42
Future Medical from Closed to Open	1	0.1

Table 9.43

Settlement Value Changes

Outcomes	*N*	*Mean*	*Median*	*90th Percentile*
Difference from Original	27	$647	$395	$1,808

The settlements being approved by the judges of the WCAB are by no means small; overall, they had a median value of about $14,000 (***Table 9.44***).

Table 9.44

Outcomes from All Approved Settlements

Outcomes	*N*	*Mean*	*Median*	*90th Percentile*
Calculated Attorney's Fee Percentage	460	13.3%	13.9%	15.0%
Gross Amount of Award	637	$21,587	$13,795	$47,100
Permanent Disability Percentage	265	22.4%	18.0%	46%

Because the "Compromise and Release" and the "Stipulation with Request for Award" types of settlement documents are designed to achieve different goals, we present separate data for them below.

Compromise and Release Specific Information

One of the signature characteristics of the Compromise and Release settlement is that it can release the defendant from all future responsibility for medical treatment. Indeed, such a specific release was obvious in about 93% of all documents we reviewed (***Table 9.45***).

Table 9.45
Will Defendant Be Responsible for Future Medical Treatment in Compromise and Release?

Future Medicals?	*Frequency*	*Percent*
No	366	93.37
Unknown	23	5.87
Yes	3	0.77

As discussed elsewhere, the propriety of including certain types of "waivers" into the language of the settlement document can be a source of contention between attorneys and reviewing judges. As shown in ***Table 9.46***, *Sumner* waivers (releasing the insurer/employer from any death claims if the worker dies following settlement) are extremely common features of settlements and to a lesser degree, *Carter* or *Rogers* waivers (releasing the insurer/employer from any additional liability if the worker is injured during vocational rehabilitation participation) are also prevalent. Far less common are approved C&Rs where a *Thomas* waiver is included to close out the potential for vocational rehabilitation benefits altogether; presumably this is related to the ancillary requirement that the applicant must attest in good faith that a potential issue exists that might defeat his or her right to all workers' compensation benefits (a statement that some applicants are unable or unwilling to make or that some judges will not permit because of the undisputed facts of the case).

Table 9.46

Special Provisions in Compromise and Release

C&R Provision (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Thomas Waiver (or equivalent)	76	18.63
Sumner Waiver (or equivalent)	372	91.18
Carter/Rogers Waiver (or equivalent)	259	63.48
"Catch All" Waiver	16	3.92

C&Rs approved by the judges in our sample ranged from $500 to $350,000 in total gross value and had a mean average of $26,000 in value (***Table 9.47***). Fee awards generally hovered around 14% and the median PD percent award was 25%.

Table 9.47

Compromise and Release Outcomes

Outcomes	*N*	*Mean*	*Median*	*90th Percentile*
Calculated Attorney's Fee Percentage	345	13.1%	14.0%	15.0%
Gross Amount of Award	407	$26,070	$17,600	$57,000
Permanent Disability Percentage	57	26.9%	25%	50%

Overall, the gross value of the settlements embodied in Stipulations with Request for Awards was less than what was found in C&Rs (***Table 9.48***). This is not surprising as the value of future medical services is not included in the dollar award. However, the typical permanent disability percentage was also lower than those found in C&R agreements. Gross awards ranged from zero (medical treatment only) to $139,495.

Table 9.48

Stipulations with Request for Award Outcomes

Outcomes	*N*	*Mean*	*Median*	*90th Percentile*
Calculated Attorney's Fee Percentage	115	14.0%	13.0%	15.0%
Gross Amount of Award	230	$13,655	$8,691	$35,721
Permanent Disability Percentage	208	21.1%	17.5%	44.0%

Trials and Findings and Award/Findings and Order Following Trial

Trial Frequency

As shown in ***Table 9.49***, about 15% of cases in our sample had at least one "trial," though not all of them were intended as hearings to resolve the case-in-chief; about 4% involve multiple trials.

Table 9.49

Number of Trials Held Shown (CAOLS data)

Trials	*Frequency*	*Percent*
0	811	84.74
1	109	11.39
2	22	2.30
3	10	1.04
4	1	0.10
5	3	0.31
6	1	0.10

Outcomes

We found only 22 case-in-chief resolving Findings and Awards or Findings and Orders documents in the files for our abstraction sample, so one should view the information in this section with care. Of those, less than one in five (about 18%) resulted in a "Take Nothing" outcome in favor of the defendant.

The value of the judge-determined awards we found were smaller than those contained in the far more common approved settlements (***Table 9.50***).

Table 9.50

F&A/F&O Outcomes

Outcomes	*N*	*Mean*	*Median*	*90th Percentile*
Calculated Attorney's Fee Percentage	15	14.0%	15.0%	15.8%
Gross Amount of Award	16	$27,690	$29,833	$50,702
Permanent Disability Percentage	16	33.1%	36.5%	54.0%

Timing

The reliability of such a small sample is questionable, but there do seem to be indications of a serious problem in getting decisions out following trial (***Table 9.51***). LC §5313 requires the issuance of a decision within 30 days of the submission of a case and perhaps a more persuasive mandate is found in LC §123.5(a) that withholds a judge's salary if he or she has any cases pending for more than 90 days following submission. "Submissions" are defined under AD Rule §9711(d) as the point at which the record is closed and no further evidence or argument will be allowed in. This is *not* the same as the close of testimony of the formal hearing. By leaving the record open for such matters as obtaining an advisory verdict from a DEU rater, a judge could conceivably give him or herself a larger cushion of time to avoid the paycheck cutoff. Obviously, not all instances where a judge defers the point of submission to a later date are done with the sole intent of procrastination. But our extremely limited abstraction data suggests that much of the delay following the date of the hearing (at least from the perspective of an applicant waiting for a final decision) is due to the window provided by the submission rule. Typically, many weeks transpired from the time the case began to the point at which it was submitted and an equally long time elapsed until a decision was finally rendered. Though the average amount of time to get a decision out following the first day of trial was at the 90-day mark, the time from technical submission to order was much less. As such, the judges in these cases would not likely have been impacted by the sanctions contained in LC §123.5(a) even though their management of the trial and

posttrial period might have failed to meet the spirit of the rule and the specific mandates of LC §5313.

Table 9.51

F&A/F&O Related Time Intervals

Interval	*N*	*Mean*	*Median*	*90th Percentile*
Days from Start of Trial to Case Submission	10	43.2	20	145
Days from Submission to Order Issued	11	47.2	35	82
Days from Start of Trial to Order Issued	11	91.2	90	143

Postjudgment Activity

Another area where we were only able to identity a frequency "floor" involves events that took place after the matter had been resolved. Reopenings and commutation requests can occur years after the case-in-chief resolution, so the eventual numbers would be higher than those in ***Table 9.52*** had we conducted the case file abstraction for a number of years. A surprisingly low number of files contained a Petition for Reconsideration, especially given the approximately 3,700 Petitions received by the Appeals Board in 2000 (see ***Table 19.1***). It may be that with such a low number of cases actually reaching trial in our sample, it is not possible to accurately estimate the frequency of cases in which Reconsideration will eventually be sought.

Table 9.52

Postjudgment Activity

Activity (NOTE: Categories are not mutually exclusive)	*Frequency*	*Percent*
Petition for Reconsideration	7	0.73
Petition for Reopen	10	1.04
Petition for Commutation	2	0.21

CHAPTER 10. STAFFING AND RELATED BUDGETARY ISSUES

DETERMINING STAFF LEVELS

Authorized Judicial Staffing Levels

At the present time, there is no rigid formula used to determine the optimum number of judges and other staff members needed at any particular branch office. However, a general approach typically employed (though not always) by DWC management for adjusting authorized staff levels can be described.[138] Using the current level of judges as a starting point, management initially takes into account the number of opening documents of all types and averages them across all active judges across the state to see what the relative positions are of the individual offices.[139]

Perhaps even more important is how much "litigation" each judge is actually handling. One factor is the number of Declarations of Readiness filed at each office because many new cases come into the system simply as a settlement waiting for approval. While there are certainly expenditures of clerical time (opening up a new case number, entering the data into CAOLS, creating a new file jacket, transporting

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[138] Electronic mail message from Mark Kahn, DWC Central Regional Manager to Tom McBirnie, CHSWC, April 3, 2001. We appreciate the help of Judge Kahn in providing considerable insight into the details of the typical process used by the DWC to determine proper staffing levels. Errors in the description of this process that is contained in this section are solely RAND's.

[139] The counts of new applications come from CAOLS but are not collapsed for the same injured worker. Thus, ten applications filed by the same worker are counted by CAOLS as ten individual applications. In reality, unresolved multiple injury dates are often handled as a single "case" in conferences, trials, and settlements so the aggregate amount of work performed by the WCAB for that worker is typically less than if the applications had been filed by different people. CAOLS recognizes this fact in its reports by collapsing all cases with different dates of injury for the same worker if the disposition (such as approving a settlement or issuing a Findings and Award) takes place on the same day. Opening documents are not treated the same way and as such the number of new applications (or case-opening settlements for that matter) somewhat overstate the actual burden to the local office.

the file to a judge, entering the outcome of the review, and ultimately sending the case to the stacks) as well as some judicial activity required for the actual review, far more activity can be triggered if the case's initial contact with the judge involves a DOR that will likely lead to the scheduling (and perhaps holding) of a conference even if a settlement is presented at that time. Additional factors used in determining litigation levels are the number of MSCs set by the offices and the number of trials held. If a branch office had a per-judge average of these factors that was greater or lesser than the systemwide average, then it is a candidate for an upward or downward adjustment in judicial resources.[140]

Such offices with potential problems (either shortages or surpluses) are then visited by DWC management in order to get a first-hand look at the physical records kept by local staff. It should be remembered that the averages developed as described above are based upon statistics generated by CAOLS, a system felt by some to be less than perfect in producing reliable numbers.[141] As a test of the reliability of CAOLS-generated numbers, clerks would then be asked to hand count opening documents received in the mail for a one-month period in order to compare the information with the initial figures.

The next step for adjustment at these candidate offices is to look at the speed at which the offices were able to conduct MSCs and trials, the number of conferences and hearings that were being set for each judge each day, and any significant backlogs found in settlement

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[140] Other factors that are considered to add to the litigation burden for an office are the number of matters submitted on the record and the number of petitions for reconsideration. The former are trials that may involve a considerable amount of work even though there is no testimony taken. The latter require a substantial amount of judicial review of an already concluded trial and the drafting of a report on reconsideration that goes over much of the same ground covered by the decision and opinion.

[141] The problems with relying upon CAOLS data for management purposes stem from a number of sources including poor data entry procedures; ambiguous and difficult to use categories for documenting filings, judicial actions, and the like; and legacy analysis programs whose assumptions and methodology are unknown. Nevertheless, CAOLS generally performs as desired in its primary job of delivering notices of upcoming hearings to parties (though there are occasional glitches).

approvals or other areas. These determinations are typically made by reviewing the original hardcopy calendar ledger rather than any aggregated reports out of CAOLS. One problem with CAOLS is that the time intervals yielded by its reports do not distinguish between the delay caused by an inability to find an available calendar slot, the delay caused by a special request of the parties for a setting that is a better fit with their own schedules, or the delay caused by problems getting an old file back from the State Records Center. Direct reference to the calendar will determine what the typical setting times are for that office even though there certainly would be outliers in particular instances. Another method used is to look at the hearing reporters' own statistics for a better idea of how long judges were in trial both in the average and in the aggregate (as opposed to merely the number of trials being conducted).[142]

If the office appeared to be moving cases along at a reasonable pace and if the numbers of matters each judge was handling was fairly typical of others across the system, then it would be assumed that the current level of judges was adequate. Somewhat more problematic would be to determine whether a high number of MSCs that are being set for each judge is the result of heavy demand for conference settings (which needs to be addressed through additional staff) or fueled by an overliberal continuance policy (which would be best addressed through judicial training and supervision).

If all the factors listed above point toward the need for modifying the number of current judges, those responsible for making such an recommendation would then decide whether known future changes to office staff (such as retirement or transfer) might in turn impact filing

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[142] This approach is not perfect as there are a few judges who use the services of a hearing reporter for nontrial activities such as conferences (typically where problems are expected from one of the litigants), other judges who have reporters in their hearing rooms who routinely wait a considerable length of time for the start of the proceedings, and still others who request that a transcript be made of most conversations that take place between the judge and counsel prior to the start of official testimony. Nevertheless, reporters are generally thought to be an accurate source for determining how much time a particular judge might spend in trial each month.

patterns due to attorneys changing the office in which they do most of their business. This would be most true in counties where there is more than one office to choose from. Finally, space considerations need to be taken into account. A number of offices have no additional room available to add another judge without sharing hearing rooms or by acquiring space at another facility.

Authorized Nonjudicial Staffing Levels

Once the proper number of judges is estimated, the levels for other staff members are adjusted accordingly. Traditionally, the WCAB counted office resources by a "judge team" of one judge, one secretary, and one reporter, a concept reflected in SB 996:

> SEC. 65. The Director of Industrial Relations shall establish the following new positions for staffing of the workers' compensation courts:
> (a) Eight workers' compensation administrative law judges.
> (b) Eight hearing reporters.
> (c) Eight senior typists (legal).

As a general rule today, however, while almost all of the judges have a dedicated secretary assigned to him or her, there are only about three hearing reporters for every five authorized judges at medium and larger offices. This change appears to have been facilitated by setting trial calendars in such a way that not every judge is conducting formal hearings at the same time and by better technology and practices that allow a hearing reporter to turn out transcripts and the like more quickly. Smaller offices may have a ratio of reporters to judges that exceed six-to-ten simply because of the need to be able to provide a reporter for every judge on trial day; this is especially true at offices where judges share the same decision day.

As a rule of thumb, the number of authorized clerks at an office reflects the number of authorized judges plus one-half the number of Ancillary Services (DEU, I&A, and RU) consultants. This typically results in a systemwide average of about 11 clerks for every ten judges, though the ratio of clerks to judges (as with reporters) goes up considerably at some smaller offices. Some adjustment in total counts are made depending on whether or not the office has on-site ancillary

consultants (which affect the need for assigning clerks to those sections) and whether there is a Regional Call Center available to handle some of the telephone and front desk duties typically shouldered by clerks.

Deciding the numbers of ancillary staff such as Disability Evaluators, Rehabilitation Consultants, and Information & Assistance Officers is not as straightforward. A number of offices share the use of these professionals and in some offices, a single person will handle multiple roles simultaneously. The status of the Regional Call Center (which varies from region to region), a program designed to centralize the provision of ancillary services, also plays a part in figuring out how many are required at a branch office location.

Other Considerations Used for Determining Authorized Staffing Levels

In medium- to larger-sized offices, there is typically a Presiding Judge, an OSS-I, and an LSS-I to act as the designated direct supervisor for judges, clerks, and secretaries, respectively. The smallest offices might not have someone with the formal job classification of one of these supervisors, but typically someone performs in a similar role (such as an “Acting Presiding Judge”) though at regular pay levels. No “supervising hearing reporter” is named, though there is usually a single person designated as the office’s lead reporter (sometimes on a rotating basis). Similarly, ancillary service providers do not have a direct supervisor at branch offices, though the physical presence of a Supervising Workers’ Compensation Consultant who is working as part of a Regional Center or performing other DWC duties creates a situation that essentially results in a local supervisor at some locations. At all branch offices, the Presiding Judge is the ultimate supervisor of all staff members located at that facility. The situation for ancillary service consultants is a bit more complex because while the Presiding Judge oversees attendance and output for these consultants, professional guidance, training, and evaluation of technical work performance comes from supervisors based at other locations.

Another factor used to determining the proper number of authorized positions is whether one or more staff members is under work

restrictions, are working only part-time, or are performing some sort of special role as a result of a transfer, office closure, or reassignment. Two Presiding Judges, for example, are currently involved with DWC upper-level administration duties and have only limited contact with the day-to-day operations of their assigned locations. Other judges fill in for them as de facto Acting Presiding Judges.

In the end, the preliminary estimates for staffing changes are circulated among the Presiding Judges of the affected offices for comments and ultimately a set of final numbers are issued. However, the problem is that even if management is able to determine what any particular district office's necessary staff levels should be for any particular classification, getting a live human being into that position is another matter entirely.

FILLING VACANT POSITIONS

The Need to Hire

An ongoing fact of life at DWC offices is that some positions consistently exhibit a high rate of turnover and as such, there is a constant need to attract replacements. This lack of continuity translates into a less experienced staff, more time expended in training new hires (and therefore reduced output), and if the replacement cannot be found and brought onboard within a relatively short period of time, chronic staff shortages. As illustrated by the following table, some classifications clearly require more effort than others to keep a full complement at the office.

Table 10.1

DWC Classification Turnover Rates and Replacement Times[143]

Position	*Unit*	*Filled Positions, FY2000*	*Total New Openings, FY97-00*	*Four-Year Cumulative "Turnover Rate"*	*Average Days to Fill*
Hearing Reporter	C.A.	103.4	39	38%	118
Legal Support Supervisor–I	C.A.	16.2	5	32%	194
Office Assistant	C.A.	137.2	144	105%	178
Office Services Supervisor–I	C.A.	16.3	16	98%	228
Presiding Workers' Compensation Judge	C.A.	20.0	9	45%	142
Program Technician	C.A.	10.9	4	37%	187
Senior Legal Typist	C.A.	135.8	55	41%	213
Supervising Workers' Compensation Consultant	C.A.	1.0	1	100%	n/a
Workers' Compensation Judge	C.A.	148.6	57	38%	148
Office Assistant	DEU	23.1	12	52%	159
Workers' Compensation Consultant	DEU	29.8	12	40%	261
Office Assistant	I&A	17.5	11	63%	305
Workers' Compensation Assistant	I&A	3.0	2	67%	508
Workers' Compensation Consultant	I&A	32.7	12	37%	328
Office Assistant	R.U.	15.3	15	98%	118
Workers' Compensation Rehabilitation Consultant	R.U.	28.2	7	25%	111

As indicated elsewhere, the number of filled positions for any particular classification will vary from month to month and the number of authorized positions changes from fiscal year to fiscal year (with some occasional interim adjustments depending on budget and administrative policy). Nevertheless, the table above uses a snapshot in time during FY 2000 as a simple benchmark example for what might have been the *average* number of positions available for hiring staff members

[143] Figures for vacancies over Fiscal Years 97 through 00 and average days to fill are based on the DWC-provided Excel spreadsheet titled "*FullDWC.xls*" (see discussion in the ***Technical Appendices***). Figures for filled positions, position funding are based upon Department of Finance data as documented in the Excel spreadsheet titled "*Sched 7A-FY2000A.xls*," provided to Nicholas M. Pace by Judge Susan Hamilton, DWC, August 24, 2000.

during the previous four years. It also shows the *total* number of new openings experienced by that position over a four-year period from FY 1997 through FY 2000 and a "turnover rate" that compares the new openings to the average available positions.[144] Other measures could be used as well, but this particular one reveals the relative frequency for new openings by job title. Of the classifications with 15 or more available positions, the Office Assistant and Office Services Supervisor classifications in the Claims Adjudication Unit and Office Assistant classification in the Rehabilitation Unit are the most likely to experience a new opening over a period of time. At the opposite end of the scale are Hearing Reporters, Legal Support Supervisors, I&A Officers, Workers' Compensation Judges, and Rehabilitation Consultants.

While these numbers are for illustrative purposes only, they do suggest that on average, a DWC office might have to replace a quarter of its clerical staff each year.[145] They also suggest that the combination of incentives and working conditions for secretarial supervisors and rehabilitation consultants and some other positions appear to be conducive to retaining employees over a relatively longer period of time.

A high turnover rate would be less problematic if it took only a short amount of time to find a suitable replacement. Unfortunately, it takes nearly six months to fill an open Office Assistant position in the Claims Adjudication Unit and seven-and-a-half months to replace a clerical supervisor.

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[144] Because the total of new openings is cumulative, the "rate" can exceed 100%. For example, if a particular job classification has an average of one available position over the four-year period and during that time three different people who worked at that task quit, transferred out, or retired, there would be total of three new openings.

[145] This assumes that the 144 new openings for the 137 authorized Claims Adjudication Unit Office Assistant positions over the period in question would have been spread equally over each of the four fiscal years and that almost all of these positions would have experienced only a single vacancy at most. In reality, it is very likely that particular positions at particular local offices have a disproportional share of the turnover burden while other staff members remain employed by the DWC as an Office Assistant for many continuous years.

Form 1 Through the Initial Interview

What are the reasons why the process to actually fill a vacant position takes such a considerable amount of time? "Form 1s," more properly known as "Position Control – A2-2" forms, are typically prepared by a DWC staff member (typically at the request of a Presiding Judge or Regional Manager) and submitted to the Administrative Director for review and approval when a permanent opening occurs.[146] The DIR Budget Office is the next step in the chain and if they determine that the DWC has adequate funding to fill the position, the request eventually makes its way to DIR's Personnel Office to confirm that the vacant position is indeed eligible for replacement (e.g., that all accrued vacation time has been exhausted if the previous occupant has retired). Depending on staff availability within DIR, final approval from the Department typically takes place less than 30 days from the initial preparation.

The next step is to contact names already on a list of eligible candidates by mail. These are people who have already taken and passed a qualifying exam for a similar position in the past (or have otherwise qualified) but who either declined to accept whatever job was being offered or found themselves eligible for a job that was either still occupied or without adequate funding. Other steps taken initially are to post the opening on a special state website designed to notify state employees who are in danger of being laid off, and in certain instances, to publish the opening in a "transfer bulletin" to let all state employees know of the opportunity to apply as well. If there is interest from any of these sources, a "Certification List" of candidate names is prepared and given to the Regional Manager or other supervisor to start the interview process.

The Certification List is typically available 40 to 45 days after final DIR approval of the Form 1 if there has been any response to these initial efforts. The interview period following receipt of the list can

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[146] This description of the replacement process is primarily based upon Gannon, Richard, *Why Does it Take DWC So Long to Fill Vacant Positions?*, California Division of Workers' Compensation, DWC Employee Newsline, Issue #02-01, March 9, 2001. Errors in the description that is contained in this section are solely RAND's.

typically take anywhere between 10 and 15 days to complete. Final approval from Personnel can come within three days of the selection and the actual hiring into position will usually occur within 30 more days. All told, it might take nearly 90 days from the time the Form 1 is submitted to the date the new employee begins work if the process is uninterrupted by internal delays and if there is legitimate interest in the position.

The time line outlined above assumes that someone has actually been identified at an early stage in the process and is willing to take the job. In many instances, no existing eligible candidates or state employees are interested in the position when it becomes available and so DWC then has to make general announcements through posting of the notice at branch offices and by other means. This advertising process is regulated by State Personnel Board rules and other requirements and at a minimum will take an additional three weeks to complete. Even if there is interest resulting from the advertising process, interviews cannot begin in many instances until the applicant takes one of the periodic examinations required for the position. These exams are only given sporadically and if budgetary problems develop within the Division, it is not possible to hold them at all. In such instances, the only possible pool of potential applicants is one of existing employees at other state agencies or within the DWC. If the position's responsibilities, salary range, opportunities for advancement, and working conditions are not competitive with other state employment, the position will lie dormant.

Obviously, the position needs to be one that attracts qualified and serious candidates. This is not always the case. The experience in early 2001 of one district office in attempting to fill its vacant OA positions is illuminating. Though all the names on the existing Certification List were telephoned to see if they were still interested, only about one-third responded. Of that group, just three were still available, but none showed up for their scheduled interviews. In order to fill this position, it will be necessary to restart the procedures through general announcement of the opening. This is one reason why a

process that should take about 90 days at the most evolves into a six-month or more wait, as shown in ***Table 10.1*** above.

General Budgetary Considerations

Unfortunately, it is not enough that a position be authorized and that there be enough interest among potential candidates to find someone who can do the job. There must be sufficient funds at the time of hiring (as opposed to during the Form 1 approval process) to actually bring the person on board.

It is a common practice among state agencies to request funding for a certain number of positions but to not fill all of them in order to use the money for other purposes as needed. As a result of the 1989 reform legislation, the number of authorized positions devoted to workers' compensation jumped from 845.10 in FY 89/90 to 1155.60 in FY 91/92.[147] However, a substantial number of those positions (perhaps as many as 200) were intentionally kept vacant by the DWC at times in order to fund deficits in operating expenses.[148] Nevertheless, another 181 authorized positions were added as a part of the 1993 reforms. Even with the subsequent hiring of new personnel at that time, there were approximately long-term 200 vacancies remaining of which 93 were intentionally being kept open to balance the Division's budget. In FY 95/96, the Legislature decided to permanently eliminate the 93 positions and with other changes to the number of authorized positions over the years, the total number dropped to 1067.7 in FY 98/99 and 1074.7 in FY 99/00.

The late 1990s were generally characterized by budgets in alignment with expenses, in part because of the elimination of a number of district offices and positions and because of an additional $1 million

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[147] Figures for authorized positions taken from a DWC-provided Excel spreadsheet titled "*staffing history.xls*." Reports for authorized positions for any particular fiscal year vary depending on whether temporary help allocations and counts for the Managed Care unit of DWC are included.

[148] Memo from Peggy W. Sugarman, Chief Deputy Administrative Director, DWC, to Stephen Smith, Director, DIR, dated May 27, 1999; Sugarman, Peggy W., *Vacancy Issues in State Government*, Division of Workers' Compensation, dated April 27, 2000.

obtained for facilities costs.[149] With the more stable financial picture, the proportion of positions remaining vacant dropped so that only some 80 vacancies (39 of which were clerical in nature) remained in April 1999.[150]

A year later, the vacancy rate was about the same,[151] but the DWC was now projected to end FY 99/00 with a deficit that would have required nearly 150 vacancies to cover[152] (though it does not appear that many were open). Reasons given for the deficit included the "salary savings" budget planning principles to be described below, a required 5% salary augmentation for those workers' compensation judges who had undergone training provided by the National Judicial College, and steadily increasing costs for providing workers' compensation coverage for the DWC's own employees (reportedly rising $1.2 million since 1995).[153] As such, a virtual hiring freeze was put into place at that time. The next fiscal year was no better and by August of 2000, the projected deficit for the end of FY 00/01 was $1.3 million even without the filling of any vacant positions. Moreover, the state Department of Finance had performed a study to address the Legislature's concerns over unfilled vacancies at state agencies generally.[154] The result was a directive to permanently abolish 31 DIR positions in August of 2000 of which 16 were in the DWC. Of these, nine were to be OAs in various district offices and one was an I&A Officer.

After a series of belt-tightening measures instituted by the DWC, the situation looked a little brighter and accordingly the DIR Budget Unit authorized the filling of 17 vacancies in September, 22 vacancies in November, and 40 additional vacancies in January of 2001. However

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[149] Sugarman (2000).

[150] Memo from Peggy W. Sugarman, Chief Deputy Administrative Director, DWC, to Stephen Smith, Director, DIR, dated May 27, 1999.

[151] Memo from Peggy W. Sugarman, Chief Deputy Administrative Director, DWC, to Suzanne Marria, Assistant Director, DIR, dated April 26, 2000.

[152] Memo from Richard P. Gannon, Administrative Director, DWC, to Nicholas M. Pace, February 5, 2001.

[153] Sugarman (2000).

[154] Memo from Carrie Nevens, Budget Officer, Division of Administration, Department of Industrial Relations, to Richard P. Gannon, Administrative Director, DWC, dated August 16, 2000.

the budgetary situation was still unresolved, and as of February 2001, the DWC was only permitted to fill a maximum of 970 positions.[155] While this figure can fluctuate depending on whether additional funding is available, it is about 9% less than the total number of authorized positions that were potentially available in FY 00/01.

"Built-in" Staffing Shortages

Despite the pressure on the DWC to eliminate unfilled positions, as a matter of general policy the State of California relies on the fact that its agencies will not be able to fill **all** authorized positions at **all** times. Accordingly, it will effectively fund only 95% of authorized positions. First used in California during the 1943-1945 Biennium as a response to the high turnover caused by employees leaving to join the armed forces or work in war-related industries, "salary savings" is the Department of Finance's technique for adjusting budgets by taking into account the fact that some positions will inevitably remain vacant for long periods of time; rather than having any unused money revert back to the state at the end of the fiscal year, budgets are instead cut up front.[156] Regardless of whether this is a sound budgetary planning principle, the end result is that some state entities operating under tight fiscal restraints would find it nearly impossible to fully staff their offices.

Adding to the problem is another planning principle that significantly impacts the DWC. A related assumption the State uses is that the natural turnover of positions results in numerous new hires at the first salary step and so budgets are calculated at this lowest pay scale. As can be seen by the following, there is a wide range of salaries possible for DWC employees.

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[155] Memo from Richard P. Gannon, Administrative Director, DWC, to Nicholas M. Pace, February 5, 2001.

[156] California Department of Finance, *Salary Savings*, www.dof.ca.gov/fisa/bag/salary.htm, accessed July 14, 2002.

Table 10.2

Monthly Salary Range by Classification[157]

Class Title	*Salary Range (as of March 2000)*
Administrative Director	$9,941–$9,941
Area Supervisor, Rehabilitation Unit	$4,139–$4,992
Assistant Chief	$8,079–$8,892
Chief, Rehabilitation Bureau	$5,270–$5,809
Deputy Administrative Director, DWC	$5,652–$6,112
Hearing Reporter	$4,083–$4,961
Legal Support Supervisor–I	$3,001–$3,649 see note 1
Legal Support Supervisor–II	$3,001–$3,649 see note 1
Management Services Technician, Range A	$2,135–2,596
Management Services Technician, Range B	$2,411–2,932
Office Assistant (General), Range A	$1,775–$2,156
Office Assistant (General), Range B	$1,951–$2,370
Office Assistant (Typing), Range A	$1,835–$2,230
Office Assistant (Typing), Range B	$1,951–$2,370
Office Services Supervisor–I (General), Range A	$2,258–$2,746
Office Services Supervisor–I (Typing), Range A	$2,258–$2,746
Office Services Supervisor–II (General), Range A	$2,527–$3,072
Office Services Supervisor–III (General)	$2,874–$3,495
Office Technician (General)	$2,258–$2,745
Office Technician (Typing)	$2,258–$2,745
Presiding Workers' Compensation Judge	$6,795–$8,222 see note 2
Program Technician	$1,951–$2,546
Regional Manager, Claims Adjudication	$7,830–$8,632
Senior Legal Typist, Range A	$2,215–$2,693 see note 1
Senior Legal Typist, Range B	$2,476–$3,009 see note 1
Senior Workers' Compensation Compliance Officer	$4,136–$5,027
Staff Services Analyst (General), Range A	$2,411–$2,932
Staff Services Analyst (General), Range B	$2,610–$3,173
Staff Services Analyst (General), Range C	$3,130–$3,805
Stock Clerk	$2,070–$2,517
Supervising Program Technician–I	$2,349–$2,853
Supervising Workers' Compensation Compliance Officer	$4,772–$5,757
Supervising Workers' Compensation Consultant	$3,948–$4,810
Workers' Compensation Assistant, Range A	$2,411–$2,932
Workers' Compensation Assistant, Range B	$2,610–$3,173
Workers' Compensation Assistant, Range C	$3,310–$3,805
Workers' Compensation Compliance Officer	$3,952–$4,805
Workers' Compensation Conference Referee	$6,320–$7,646

[157] California Department of Industrial Relations, *Classes in Use List*, March 23, 2000.

Class Title	*Salary Range (as of March 2000)*
Workers' Compensation Consultant	$3,593–$4,368
Workers' Compensation Judge	$6,475–$7,831 see note 2
Workers' Compensation Manager	$5,282–$5,825
Workers' Compensation Rehabilitation Consultant	$3,764–$4,576

Note 1: Position is entitled to a 5% or 10% "Recruitment and Retention Pay Differential" in designated counties or areas.

Note 2: Position is entitled to a 5% pay differential for completing National Judicial College training courses.

The policies that result in budgeting DWC positions at 95% of the bottom step of the salary scale are especially troublesome for the DWC because 75% of all of its employees are already paid at the top step.[158] Where there is little turnover (such as has been the general experience with Workers' Compensation Judges), the budget shortfall is even more pronounced, especially if the longtime positions have relatively higher pay ranges. The ironic result is that policies that encourage stability in staffing have especially adverse consequences for the entire DWC budget under current State practices.

Even the high percent of vacancies (nearly 13%) is not enough to offset the impact of the State's budgeting requirements. As can be seen from the table below, there is a $9.5 million gap between what the State provides for authorized positions at just the four units (Claims Adjudication, Vocational Rehabilitation, Disability Evaluation, and Information & Assistance) most directly affecting cases before the WCAB and what the actual expenditures for the smaller number of filled positions are.[159]

[158] Division of Workers' Compensation, *Response from the Division of Workers' Compensation*, California Department of Industrial Relations, March 2001 (regarding the proposed elimination of excess vacancies).

[159] For the DWC as a whole, including other programs such as the Administrative Unit, Audit & Enforcement, and others, the total budget shortfall is about $11 million.

Table 10.3

Impact of "95%–First Step" Budgeting, FY 01/02[160]

Position	*Auth.*	*Filled*	*Available Funding*	*Estimated Final Expenditure*	*Current Shortfall*	*Percent Shortage from Funding for Filled Positions*	*Estimated Expenditures If All Positions Filled*	*Additional Funding Required to Fill All Positions*
CLAIMS ADJUDICATION								
Hearing Reporter	110.5	103.4	$5,348,686	$6,489,520	$1,140,834	82.4%	$6,935,125	$1,586,439
Legal Support Supervisor–I	19.0	16.2	$676,009	$860,830	$184,821	78.5%	$1,009,615	$333,606
Office Assistant (General)	2.0	2.0	$42,089	$56,880	$14,791	74.0%	$56,880	$14,791
Office Assistant (Typing)	172.0	135.2	$3,741,206	$4,643,634	$902,428	80.6%	$5,907,582	$2,166,376
Office Services Supervisor–I (General)	1.0	0.1	$26,767	$32,976	$6,209	81.2%	$329,760	$302,993
Office Services Supervisor–I (Typing)	21.0	16.2	$562,111	$662,470	$100,359	84.9%	$858,757	$296,646
Office Technician (Typing)	2.0	2.0	$53,534	$65,880	$12,346	81.3%	$65,880	$12,346
Presiding Workers' Compensation Judge	21.0	20.0	$1,691,840	$2,178,145	$486,305	77.7%	$2,287,052	$595,212
Program Technician	13.0	10.9	$300,698	$395,730	$95,032	76.0%	$471,972	$171,274
Regional Manager, Claims Adjudication	3.0	3.0	$278,491	$326,289	$47,798	85.4%	$326,289	$47,798
Senior Legal Typist	154.0	135.8	$4,044,902	$5,781,047	$1,736,145	70.0%	$6,555,826	$2,510,924
Staff Services Analyst (General)	1.0	0.8	$28,580	$30,372	$1,792	94.1%	$37,965	$9,385
Supervising Program Technician–I	3.0	2.0	$83,551	$92,949	$9,398	89.9%	$139,424	$55,873
Supervising Workers' Compensation Consultant	1.0	1.0	$46,808	$56,932	$10,124	82.2%	$56,932	$10,124

[160] Figures for net authorized levels of staffing, filled positions, position funding, and actual funding are based upon Department of Finance data, State Controller's Office data, and DWC estimates as documented in the Excel spreadsheet titled *"Sched 7A-FY2000A.xls,"* provided to Nicholas M. Pace by Judge Susan Hamilton, DWC, August 24, 2001. Calculations of additional funding required to fill all positions are based upon actual expenditures for filled positions extrapolated to authorized position numbers. Authorized positions are net of any reductions or additions such as those necessitated by Budget Change Proposals or the mandated elimination of longtime vacant positions. Figures for estimated final expenditures do not include adjustments for salary savings such as Schedule 2 Retention, the BCP Realignment, or the 97 BCP that eliminated 16 positions.

Position	*Auth.*	*Filled*	*Available Funding*	*Estimated Final Expenditure*	*Current Shortfall*	*Percent Shortage from Funding for Filled Positions*	*Estimated Expenditures If All Positions Filled*	*Additional Funding Required to Fill All Positions*
Workers' Compensation Assistant	1.0	1.2	$28,580	$41,758	$13,178	68.4%	$34,798	$6,218
Workers' Compensation Consultant	7.0	7.2	$298,213	$408,027	$109,814	73.1%	$396,693	$98,480
Workers' Compensation Judge	159.6	148.6	$12,252,109	$15,339,379	$3,087,270	79.9%	$16,474,865	$4,222,756
-- Total	691.1	605.6	$29,504,174	$37,462,818	$7,958,644	78.8%	$41,945,416	$12,441,242
REHABILITATION UNIT								
Area Supervisor, Rehabilitation Unit	3.0	3.0	$147,231	$178,442	$31,211	82.5%	$178,442	$31,211
Chief, Rehabilitation Bureau	1.0	1.0	$62,483	$69,708	$7,225	89.6%	$69,708	$7,225
Office Assistant (Typing)	22.0	15.3	$478,526	$649,395	$170,869	73.7%	$933,771	$455,245
Office Technician (Typing)	1.0	1.0	$26,767	$32,940	$6,173	81.3%	$32,940	$6,173
Workers' Compensation Assistant	2.0	2.0	$57,160	$71,608	$14,448	79.8%	$71,608	$14,448
Workers' Compensation Rehabilitation Consultant	29.0	28.2	$1,294,299	$1,585,210	$290,911	81.6%	$1,630,180	$335,881
-- Total	58.0	50.5	$2,066,466	$2,587,303	$520,837	79.9%	$2,916,649	$850,183
DISABILITY EVALUATION UNIT								
Legal Support Supervisor-I	1.0	1.0	$35,579	$48,276	$12,697	73.7%	$48,276	$12,697
Office Assistant (Typing)	26.5	23.1	$576,407	$747,174	$170,767	77.1%	$857,148	$280,741
Office Technician (Typing)	1.0	1.0	$26,767	$32,940	$6,173	81.3%	$32,940	$6,173
Supervising Workers' Compensation Consultant	3.0	2.5	$140,425	$151,896	$11,471	92.4%	$182,275	$41,850
Workers' Compensation Consultant	36.0	29.8	$1,533,665	$1,855,408	$321,743	82.7%	$2,241,432	$707,767
Workers' Compensation Manager	1.0	1.0	$62,620	$69,900	$7,280	89.6%	$69,900	$7,280
-- Total	68.5	59.4	$2,375,463	$2,905,594	$530,131	81.8%	$3,431,971	$1,056,508
INFORMATION & ASSISTANCE UNIT								
Management Services Technician	1.0	0.3	$25,308	$31,487	$6,179	80.4%	$104,957	$79,649

Position	*Auth.*	*Filled*	*Available Funding*	*Estimated Final Expenditure*	*Current Shortfall*	*Percent Shortage from Funding for Filled Positions*	*Estimated Expenditures If All Positions Filled*	*Additional Funding Required to Fill All Positions*
Office Assistant (Typing)	21.0	17.5	$456,775	$636,133	$179,358	71.8%	$763,360	$306,585
Supervising Workers' Compensation Consultant	2.0	2.0	$93,617	$114,288	$20,671	81.9%	$114,288	$20,671
Workers' Compensation Assistant	3.0	3.0	$85,739	$112,160	$26,421	76.4%	$112,160	$26,421
Workers' Compensation Consultant	38.0	32.7	$1,618,868	$1,953,982	$335,114	82.8%	$2,270,682	$651,814
-- Total	65.0	55.5	$2,280,307	$2,848,050	$567,743	80.1%	$3,365,447	$1,085,140
TOTAL ALL ADJUDICATION-RELATED UNITS	882.6	770.0	$36,226,410	$45,803,765	$9,577,355	79.1%	$51,659,483	$15,433,073

At the present time, the State only provides about 79% of the money needed to pay for the current level of authorized staffing in these units. Indeed, in order to provide adequate funding to fully staff the WCAB courts as anticipated by both Legislative authorization and by the DWC's own internal staffing analysis, current allocations would have to be increased by $15.4 million.

Anticipated Future Reductions

At the moment, the prospects for restoring many of the currently "lost" positions (from hiring freezes and reductions in authorized numbers) are not good. Even without the recent drop in state general revenues, the DWC was already posed to lose nearly 40 additional authorized positions in FY 01/02 because of an understanding reached in the late 1990s between the DWC and the Department of Finance (DOF).[161]

[161] In California, the state Department of Finance (DOF) is responsible for the preparation and administration of the state's budget and has general powers of supervision over all matters concerning the financial and business policies of state agencies such as DIR. See Government Code §13070 and California Department of Finance, *1997-98 Strategic Plan*, June 30, 1997. Essentially, the Department of Finance is the most important entity for all decisions regarding how much money each agency will be allocated in a fiscal year and the particular purposes for which that money will be spent (though the final budget

At that time, an augmentation of the budget was sought to underwrite the development of the Workers' Compensation Information System (WCIS), an electronic repository of information supplied to the DWC by insurers, self-insured companies, and third party administrators (see ***CHAPTER 17—COURT TECHNOLOGY*** for additional information on this system). The creation of WCIS was mandated by LC §138.6 and the hope was that by giving the DWC immediate information about work injuries and ongoing benefit delivery right from the very start instead of only when a dispute arises and the matter evolves into litigation, the agency would have better tools to provide the sort of regulatory oversight needed to address common problems in claims handling. From a practical management standpoint, the DWC is essentially unaware of individual injuries until an Application for Adjudication or other opening document is filed. Hardcopy forms such as "Employer's Report of Occupational Injury or Illness" (a one-page form that is sent to DIR's Division of Labor Statistics and Research) are completed soon after the injury occurs, but the overwhelming number of work-related injuries each year (perhaps as many as one million) prevent all of the information contained therein from being entered by hand at State expense into the DWC's computer systems. On the other hand, insurers, self-insureds, and TPAs do routinely collect this information and also generate additional data regarding benefit payments and the like in order to manage their claims. Moreover, these private entities already store claims-related information on electronic media (though each differ in what they collect and in the way it is arranged), often building upon data increasingly transmitted electronically from the worker's employer. The core idea behind WCIS is that such information could be extracted and organized in a way as to facilitate interchange with a central system available to the DWC while reducing the need for claims administrators to continue to send in paper-based forms that are of little use. Also, the data would provide a valuable analytic tool to the DWC, and "...will, for the first time, provide an overview of operations of the state's workers'

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must ultimately be approved by the Legislature and signed by the Governor).

compensation system, allowing policymakers to track its performance and determine the need for further improvements."[162]

In July of 1993, Governor Pete Wilson signed the original legislation (AB 110) that required the AD to develop the WCIS and to issue a report on its progress by July of 1995. But implementation was stalled in part because of "controversy over the specifics of the system"[163] and because the DWC still had to seek and obtain Department of Finance approval for any budget proposal associated with the system. Early requests for full project funding were rejected by the Department of Finance until 1997.

In February of 1997, the state Department of Information Technology approved the DIR's feasibility study for WCIS. The study projected that the system would cost $4.8 million over a four-year period of development and implementation but ultimately result in savings of nearly three million dollars to the agency by fiscal years 99-00 and 00-01 (it was also claimed that the electronic transmission of data from insurers and claims administrators would save those entities some $55 million annually). The estimates were based upon the assumption that access to such a massive amount of transactional data about routine claims handling procedures would allow the DWC's Audit Unit to better target problem companies. In turn, it was hoped that the more aggressive enforcement and regulation possible as a result of WCIS would lead to fewer claims evolving into disputes requiring the intervention of the Claims Adjudication Unit. A 5% annual reduction in new cases was projected to be the result of a fully developed WCIS system and so it was asserted that the proposed initial budget augmentation of around $1.5 million would be more than offset by lower workloads in the future (and would allow some number of current staff to be redirected to activities currently being given a low priority). With the assurance that the system would more than pay for itself, the Department of Finance finally approved the desired allocation and submitted a letter

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[162] California Department of Industrial Relations, *New State Workers' Comp Information System Now In Operation*, DIR press release IR# 00-03, March 2, 2000.

[163] Senate Rules Committee, *Analysis of SB 450*, Office of Senate Floor Analyses, State of California, September 10, 1997.

to the Senate Budget and Fiscal Review Committee in March of 1997 requesting that the Department of Industrial Relations' budget be augmented by $1,265,000 for 1997-98 in order to begin implementation. Reportedly, the budgetary increase was approved by DOF in exchange for a scheduled reduction of 34 claims adjudication staff members (including judges, secretaries, and clerks) plus four vocational rehabilitation positions effective in FY 01/02. Apparently, DOF's reasoning was that the reduction in disputed claims being filed (due to acting on the data received by WCIS) would eliminate any need for these staff members. In October of 1997, AB 1571 was signed by the Governor to require that DIR be given an additional $1,265,000 to begin funding WCIS.[164]

The projections of the effect of WCIS on the California workers' compensation environment now appear to be overly ambitious as to both the level of impact and its timing. As of January 2002, not all employers and self-insureds send in even the initial reports of injury let alone the more important data regarding benefit determination and delivery[165] despite the DWC's own requirement that they begin such transmissions by July of 2000. Hardware and software problems have frequently disrupted the back and forth transmission of data.[166] Any continued expectation that the Audit and Enforcement Unit will be able to turn information from a still-developing data interchange system into a significant reduction in the number of formalized disputes by the end of this fiscal year is clearly unrealistic. Nevertheless, the staffing reductions bartered to finance WCIS still loom large as of this writing.

MOTIVATION FOR STAFFING ANALYSIS

Regardless of whether the DWC's approach to the task of estimating the proper number of staff members necessary to handle the workload is

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[164] Another bill also signed by the Governor at about the same time (SB 450) required that WCIS be "cost-efficient."

[165] Benefit notices are required whenever benefits are started, suspended, stopped, changed, delayed, or denied; when claims are closed or reopened; and whenever there is notification of employee representation. WCIS' "Subsequent Reports of Injury" is the electronic version of these benefit notices.

[166] See, e.g., Division of Workers' Compensation, "Delays in WCIS Processing," *WCIS e.News*, Issue 20, California Department of Industrial Relations, November 27, 2001.

rational and effective, budgetary considerations, competition for a limited labor pool, and a maze of bureaucratic procedures work against the ideal of full staffing throughout the year. Shortages seem to be a predetermined feature of the personnel resources available to branch office administrators. In a real sense, they begin each fiscal year already scrambling to make up for the difference between what experienced professionals in the workers' compensation courts believe are needed and what they are actually given. The end result is a razor-thin margin for error.

We felt that it was necessary to better understand exactly what the available personnel resources have been in recent years and how effectively the offices have coped with this situation. As such, our research into staffing had two main objectives. The first was to simply provide insight into the DWC's staffing practices and experiences. With 25 branch offices across the state with a variety of sizes and capabilities, personnel needs (and therefore authorized positions) vary widely. As seen above, authorizing staffing positions are not a guarantee of adequate staff levels because they can go for extended periods of time without being filled due to budget constraints, slow hiring practices, or a high turnover rate. Furthermore, filled positions do not always guarantee a productive person in the office. Every month, employee time is lost to vacation, disability leave, and other absences. While reasonable absences are to be expected in any workplace, it is important to understand how much time is lost so those losses can be compensated for whenever possible. Our research in this area is in part intended to see how much productive time is actually available of each branch office's authorized person-hours.

Our second objective was to understand the impact of staffing levels on overall branch office productivity. Assuming that positions are authorized to each branch office based on the branch office's expected caseload, unforeseen increases in workload or deviations from these staff levels could result in significant delay in case processing. Pinpointing the staff and workload metrics more closely tied to branch office efficiency would indicate where staffing efforts should be concentrated in a situation of limited resources.

ANALYSIS APPROACH

Data Availability

All staffing research is based on data provided by the Division of Workers' Compensation. Our original request to the DWC was for three key fields of staffing data:

1. The number of authorized positions in a given year.
2. The number of these authorizations filled in a given month.
3. The number of actual employees in the office each month.

We requested this information for as long a history as possible, for each branch office, and on a monthly basis where available. (Authorizations are only issued on an annual basis.)

As data collection began, it became clear that these numbers were not readily available. We therefore used several proxy measures to estimate the fields that were not available. We used data from Schedule 8 forms for the annual average numbers of positions filled at each branch office. We also had details on positions vacated and filled over the past five years. However, since we could not reconcile the personnel transaction data with the Schedule 8 averages, we used the average given in the Schedule 8's as our monthly measure for the entire fiscal year, and reserved the personnel transaction data for supplementary analyses. Similarly, we found no formal record of the number of employees in the office on a given day, or in a given month. However, we did have data on employee absences and disability leave taken. To approximate the number of employees in each office, we estimated the number of hours lost to leave and other absences in each branch office each month, and converted these hours to absent Full-Time Equivalents (FTE) per month. We then subtracted the number of absent FTE from the number of filled positions, and used this difference as each branch office's actual staff level. Further details on the data received from the DWC are given in the ***Technical Appendices***.

Phases of Analysis

Our staffing analysis was conducted in three phases. The first phase involved synthesizing data on staff levels from a variety of sources to determine the monthly staff levels described above. With

this information, we were able to pinpoint the branch offices and positions with high levels of vacancies (positions authorized but not filled), or of absences (positions staffed but without a productive person in the office). Once staff levels were computed and the branch offices with staffing problems were determined, the second phase of our analysis attempted to explain why these branch offices had staffing problems. With the staff transaction data provided by the DWC, we were able to compute the number of positions vacated at each branch office in each year. We were also able to compute the average length of time any position stayed vacant. This helped us determine where efforts on staffing should be concentrated: If a position had an unusually high turnover rate, resources might be best spent on retention efforts, such as training, guidance, or compensation. On the other hand, if a position did not turn over frequently or if it did it was unlikely to be filled again for an unusually long time, effort might be better spent streamlining the DWC's hiring process or adjusting the entry-level salary floor. These relationships were assessed both graphically and using mathematical correlation coefficients. After computing staffing levels at branch offices across the state, and assessing the root causes of unfilled authorizations at any understaffed branch offices, our final phase of analysis studied the impact of staffing levels on branch office productivity. One step in this analysis was to examine the relationship between staffing levels and workload at each branch office. Even a branch office that might initially appear understaffed might run efficiently, if that office has a light caseload. Looking at the workload per staff member helps indicate which branch offices have the most significant staffing problems. Finally, to indicate which of these "staffing problems" have the greatest impact on branch office efficiency, we compared each branch office's staff levels and caseload to its performance from FY1997 to FY2000.

Time Frame and Variables of Interest

The maximum time frame for our analyses is July 1995 to June 2001 (FY 1996-2001). For these years, we have annual data on the number of authorized and filled positions at each branch office (Claims

Adjudication, Rehab, DEU, and I&A units), and can study how well branch offices fill their positions, and the rate at which positions turn over. We have performance data from FY 1997-2000 that measures the mean and median time from first conference to first trial in each quarter. However, our leave data does not begin until FY1999 and only deals with Claims Adjudication units. Therefore, while we can study the impact of authorized and filled positions on performance beginning in 1997, our analysis of actual staffing levels (i.e., employees actually present in each office) is limited to Claims Adjudication units, during FY 1999 and 2000.

In the first phase of our analysis, we studied variations in staffing levels by branch office and position. We focused our analysis on the Office Assistant (OA) and Workers' Compensation Judge (WCJ) positions, as our interviews suggested these positions to be the most pivotal to case processing, and so staffing shortages might have the greatest impact. To frame the staffing numbers, we also studied the number of cases initiated at each branch office in each quarter and the number of hearings held at each branch office. We compared these numbers to the number of OAs and WCJs authorized to ensure that the DWC's authorizations accurately reflect the workload at each branch office. We then looked at the average fraction of authorized positions filled at each unit, between FY1995 and FY2000. We also studied the number of authorized positions actually staffed (i.e., with a productive person in the office) in FY2000 and FY2001 at each branch office. We examined these fractions for each position at each branch office, and for each position across branch offices.

Once we pinpointed the branch offices and positions with lower staffing levels, we explored problems that may result in, or may be the result of, these low levels. To find the root causes of staffing disparities, we determined which branch offices and positions were subject to the greatest turnover rates, and which branch offices and positions were more and less likely to be filled quickly, by looking at the DWC's records of positions vacated and filled in the years of our study.

Finally, to gauge the impact of staff levels on performance, we looked at both the mean and median times from first conference to first trial in each quarter, at each branch office (the two positions of OAs and WCJs, at 25 branch offices, for the 14 quarters from 1997 Q1 to 2000 Q2, gives us 350 “board-quarters”). In all but two board-quarters, the mean times to trial are greater than the median times. The difference is almost always by more than 10% of the median (346 out of 350 board-quarters studied), and often by more than 100% (126 out of 350). Both median and mean measurements are used to gauge the central tendency of a distribution; median times are defined as the 50th percentile, whereas mean times are the mathematical averages of the trials held in each quarter. As a result, mean times are more likely to be influenced by outliers, or cases that take an unusually long time to move from conference to trial. The fact that the mean times are so much greater than the medians implies that a few cases, with long times from conference to trial, skew the quarterly averages. We therefore use the median times to trial to measure branch office efficiency.

We examined the relationships between branch office efficiency and several staffing and workload measurements:

- WCJ and OA staff levels (authorized, filled, vacant, in office, and absent)
- Cases Initiated
- Cases Initiated per staff member

We plotted each of these variables as a time series, along with the time series of our performance measure, for each of the 25 branch offices in the state. In this way, we hoped to graphically identify the series that were more closely tied to performance across branch offices. To quantify these ties, we also calculated the correlation coefficient of performance and workload or staff at each branch office to estimate a mathematical relationship between each series. Because of the variation inherent in studying 25 different branch offices, we also charted the changes in correlation values across branch offices, and identified the measurements whose correlation coefficients had more consistent relationships.

FINDINGS

Reporting Practices

The complications with our data collection made it clear that current DWC personnel tracking procedures are inadequate. Because staffing data has implications for resource allocation, branch offices are often reluctant to accurately disclose numbers that may cost them money or personnel allocations.[167] Furthermore, even when data is being tracked as accurately as possible, the technical capabilities at each branch office are so disparate that it is difficult to roll the individual branch office measurements up to a statewide system. Staffing data is collected with systems ranging from current computer systems to 3x5 index cards.[168] Due to these drastically different recording capabilities, we believe some branch offices' measurements to be far more reliable than others. To close the gaps in capabilities, we recommend standardizing personnel data collection across the state, and instituting a data validation procedure to ensure the data's completeness and accuracy.

Another potential problem we uncovered with current DWC analysis procedures are the discrepancies between results collected at the state level and at the individual branch office level. For example, when studying the number and percentages of positions vacant at each branch office, we find that a large number of positions go unfilled each year. Forty-two board positions have averaged more than 25% vacant in the past two years. When looking statewide, on the other hand, none of the positions appear that understaffed. This discrepancy is due in part to the large number of branch offices in the state. When aggregating data from 25 branch offices, those branch offices that are closer to full staff "balance out" the vacancies in understaffed branch offices. The statewide averages therefore fall someplace in the middle, and mask any problems in individual branch offices or positions. With little transfer of personnel from one branch office to the next, performance at

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[167] Memo from Tom McBirnie to Nicholas M. Pace, July 8, 2001.

[168] Electronic mail messages from Tom McBirnie and Susan Hamilton to Nicholas M. Pace, July 13, 2001.

the understaffed branch offices will still suffer, even if statewide staffing levels are acceptable. Therefore, we urge regular checks of staff levels at the individual branch offices, as well as at the state level.

Staff Levels

Our most important general finding on DWC staffing levels is that the number of positions a branch office is authorized for is a serious overestimate of the number of productive workers in the office. For example, in FY1999, of the 665.1 Claims Adjudication positions authorized throughout the state, 92% (613.5) were filled. A complete list of the average number of authorizations filled between FY1995 and FY2000 by job title, DWC unit, and branch office is listed in the ***Technical Appendices***. Continuing our example, an average of 79% of authorized positions in FY1999 (524.5) actually had a person present in the office. Likewise, in FY2000, only 89% (578.7 out of 650.1) of authorized positions were filled, and 77% of authorized staff's workdays were "productive" (502.6 positions were fully staffed year-round). ***Figure 10.1*** charts the number of positions authorized and filled over FY1999 and FY2000, as well as the number of staff members in the office.

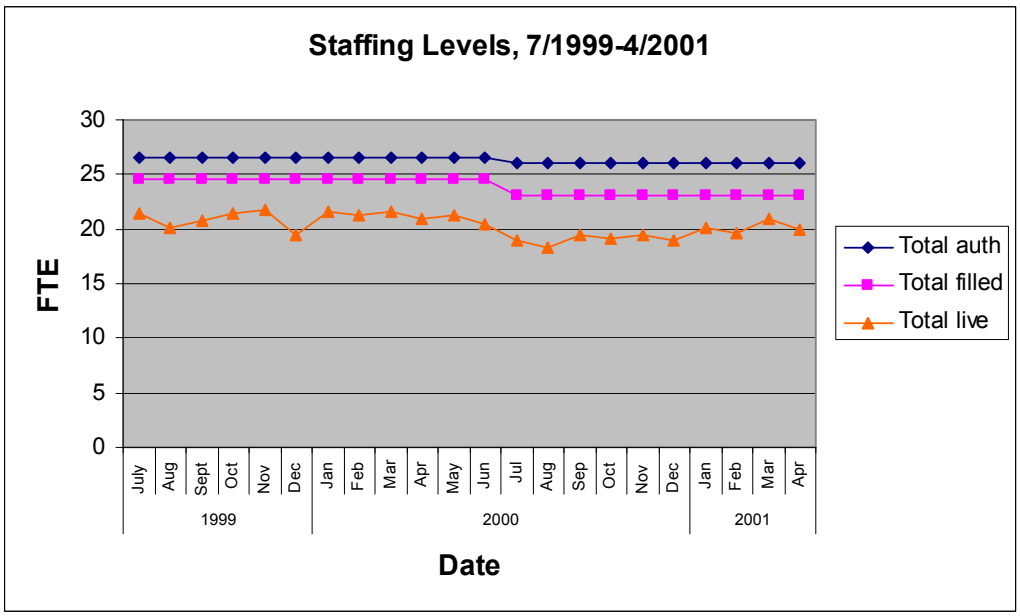

Figure 10.1 Monthly Staff Levels (All Units, All Positions)

We examined each branch office's staff levels (authorized, filled, and in-office) for each position over the past few years. There are tremendous disparities in the number of positions authorized per branch office. For example, when ranking branch offices by their authorization numbers (all positions), Van Nuys has consistently been the largest, with almost 18 times as many employees as Eureka, the smallest branch office. As intended by the DWC, this disparity is tied in large part to the workload handled at each branch office. On average, Van Nuys has almost 20 times as many cases initiated in each quarter as Eureka does. Of the branch offices with at least one OA authorization (i.e., all but Eureka), there is an 86% correlation (Correl = 0.859) between the average OA authorization level and the average number of cases initiated each quarter. This relationship is shown graphically in ***Figure 10.2*** with branch offices listed from the ones with the most OAs authorized to those with the fewest.

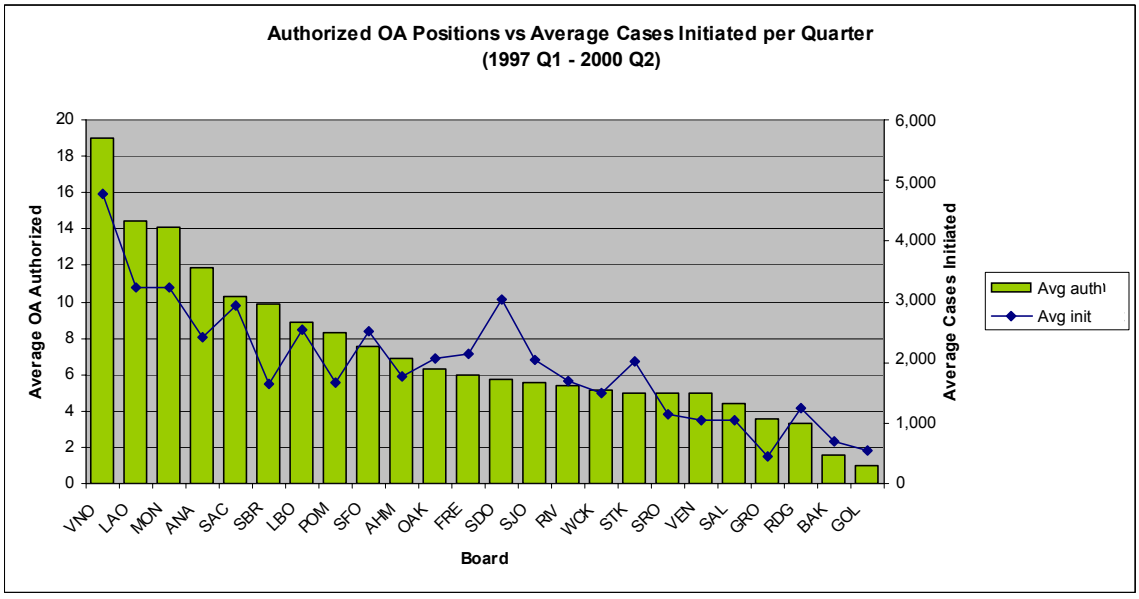

Figure 10.2 Authorized OA Staff and Cases Initiated per Quarter

In many cases, branch offices with fewer authorized positions have been more likely to convert their authorizations on paper into actual employees. This is shown in ***Figure 10.3*** where the branch offices with the most authorized positions (as shown by the tallest bars) have the lowest portions of those positions filled (shown by the cluster of triangles in the lower left corner).

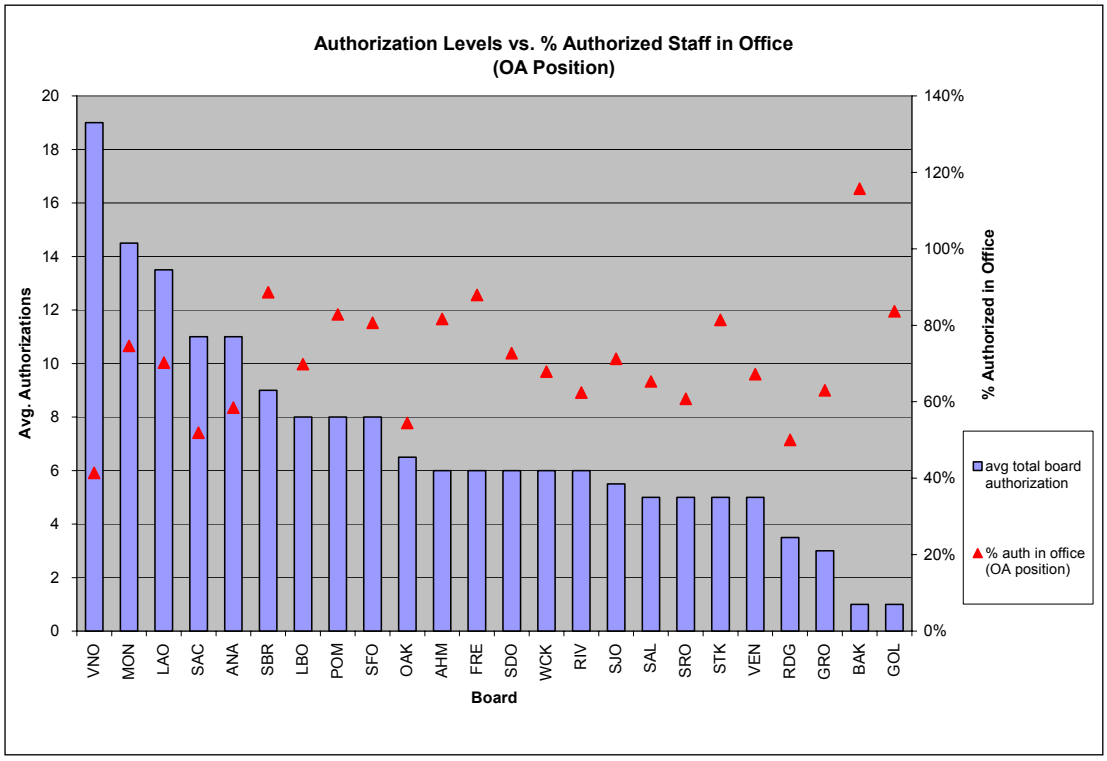

Figure 10.3 Authorized Clerical Staff vs. % in Office, FY 2000-2001

For example, Goleta is ranked 23rd out of 25 in the number of OA positions authorized in FY1999 and FY2000. However, Goleta has among the highest ratio of in-office staff to these authorizations, at 84%. This is due to two factors: In these two years, 100% of the positions authorized were filled. Furthermore, on average, very few of Goleta's employees were lost to absences. Goleta has the highest average percentage of their hired employees (filled positions) in the office on a given day.

On the other hand, Van Nuys has the largest number of OA authorizations, but these authorizations are met less consistently than at any other office. Van Nuys is ranked 13th in terms of authorized OA positions filled, and 25th in terms of the filled OA positions with employees in the office. This also leaves Van Nuys last in terms of Office Assistants in the office as a fraction of authorized positions. However, even with its disproportional number of vacancies and absences, Van Nuys has the largest clerical staff in the state. These examples indicate that with a greater number of authorized positions, larger

branch offices have some flexibility, so that even with a smaller portion of these positions in the office, they are still far larger than the others.

Causes of Staffing Disparities

As shown below in ***Figure 10.4*** and ***Figure 10.5***, the number of staff members in a district office is closely tied to the number of positions authorized to that office. In most branch offices, and for most positions, the number of staff members in office is between 65% and 95% of the number of authorized positions at each branch office or position. Assuming that the number of actual staff members in an office or position was based primarily on the number of staff members authorized to that office or position, we sought to explain this relationship.

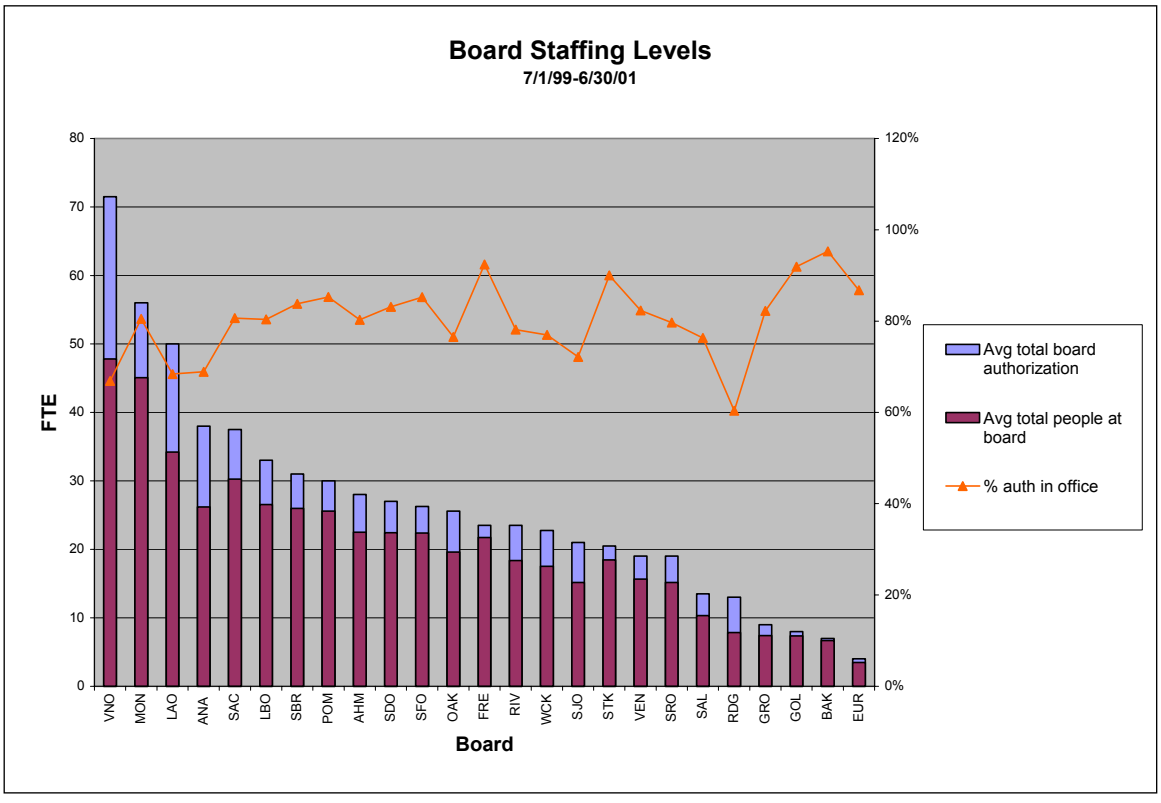

Figure 10.4 Percent of Authorized Staff in Office, by Location

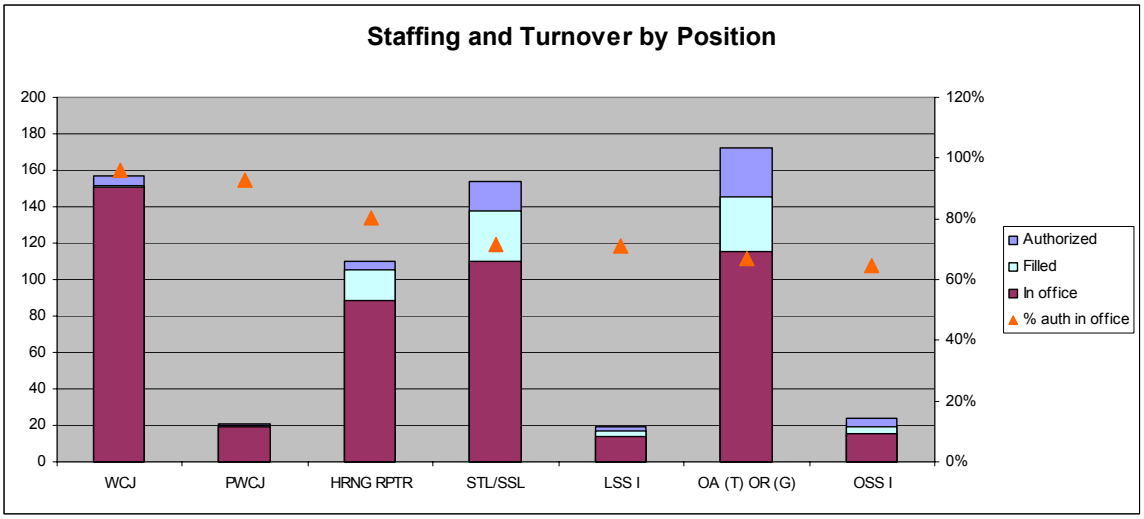

Figure 10.5 Percent of Authorized Staff in Office, by Position

As suggested earlier, and as will be discussed more fully in the next chapter, the most serious staffing shortages come in the clerical positions (OA and OSS I). Although the OA position has the largest number of positions authorized, only an average of two-thirds of these authorizations is converted to productive staff members. As discussed earlier, these shortfalls often result in unexpected shifts in staff responsibilities, and are often tied to delays in case processing.

To explore potential causes of the disparities in staffing rates (as measured by the percent of authorized slots with personnel in the office), we examined each branch office's hiring records from the past two years. As expected, and as reflected in ***Figure 10.6*** and ***Figure 10.7***, those positions with higher retention rates, and those positions that are filled faster when vacated, are also the positions with higher staffing rates.

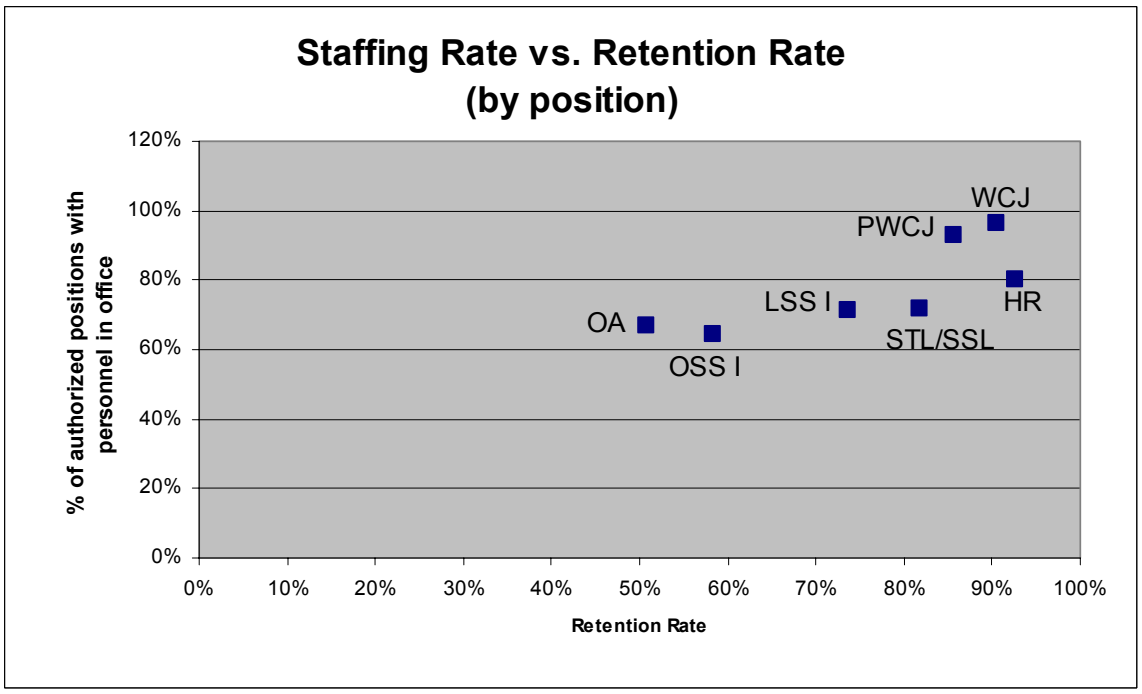

Figure 10.6 Percent of Authorized Staff in Office, as Compared to Retention Rate (by Position)

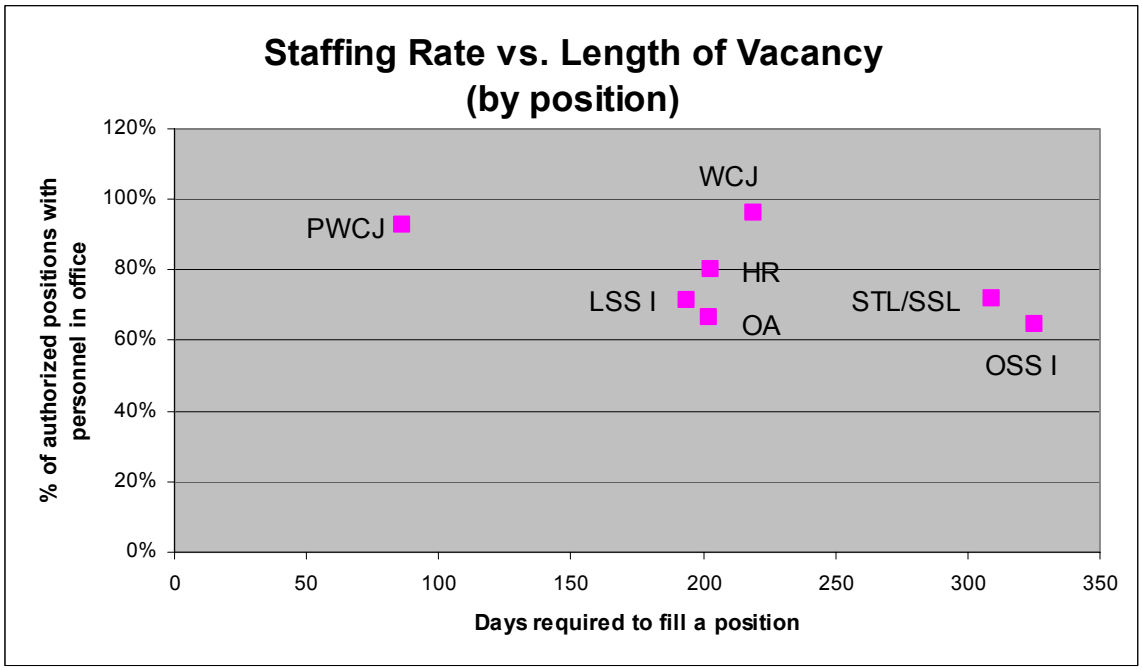

Figure 10.7 Percent of Authorized Staff in Office, as Compared to Time Required to Fill Vacancies (by Position)

However, while both factors contribute to the number of employees in the office, retention rate appears to be a more significant contributor. This is confirmed by the fact that the correlation coefficient between staffing rate and retention is of greater magnitude than that between staffing and the length of vacancies (.77 between staffing and retention, as compared to -.60 between staffing and length of vacancy).

We repeated this exercise to examine the disparities in staffing rates from one branch office to the next. As shown in ***Figure 10.8***, the tie between staffing rates and retention rates still holds, in that branch offices with higher retention rates are more likely to have higher staffing rates. ***Figure 10.9*** shows that the negative relationship between staffing rates and length of vacancy can still be seen, but to a lesser degree. The correlation coefficients for these relationships support the relationships shown graphically (.60 between staffing and retention, and -.29 between staffing and length of vacancy).

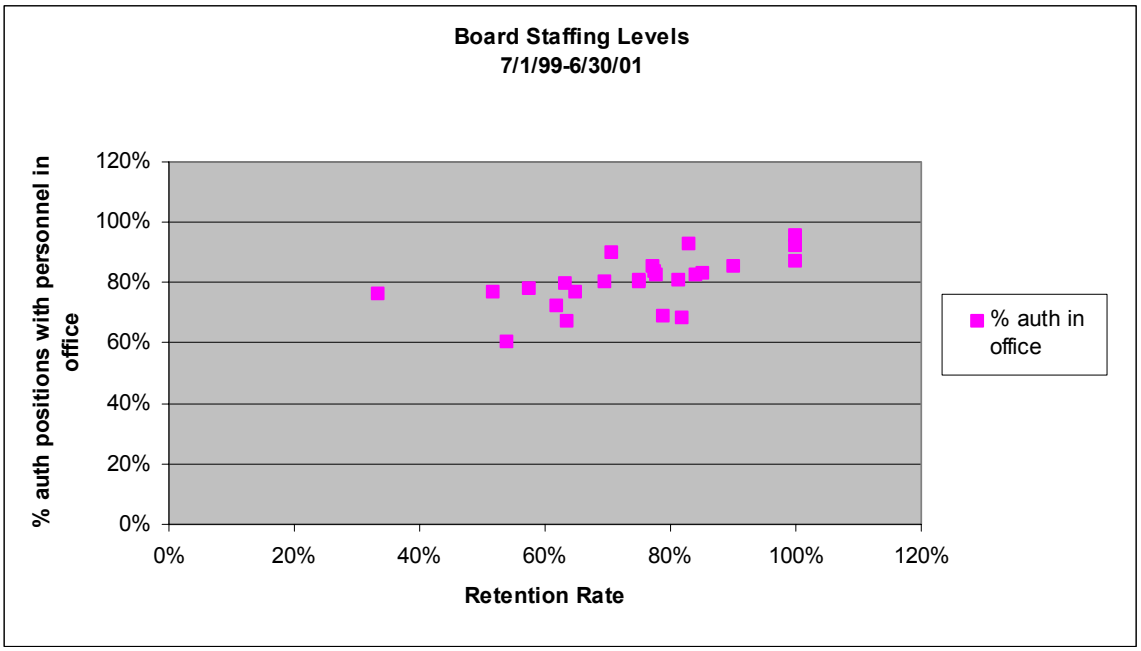

Figure 10.8 Percent of Authorized Staff in Office, as Compared to Retention Rate (by Location)

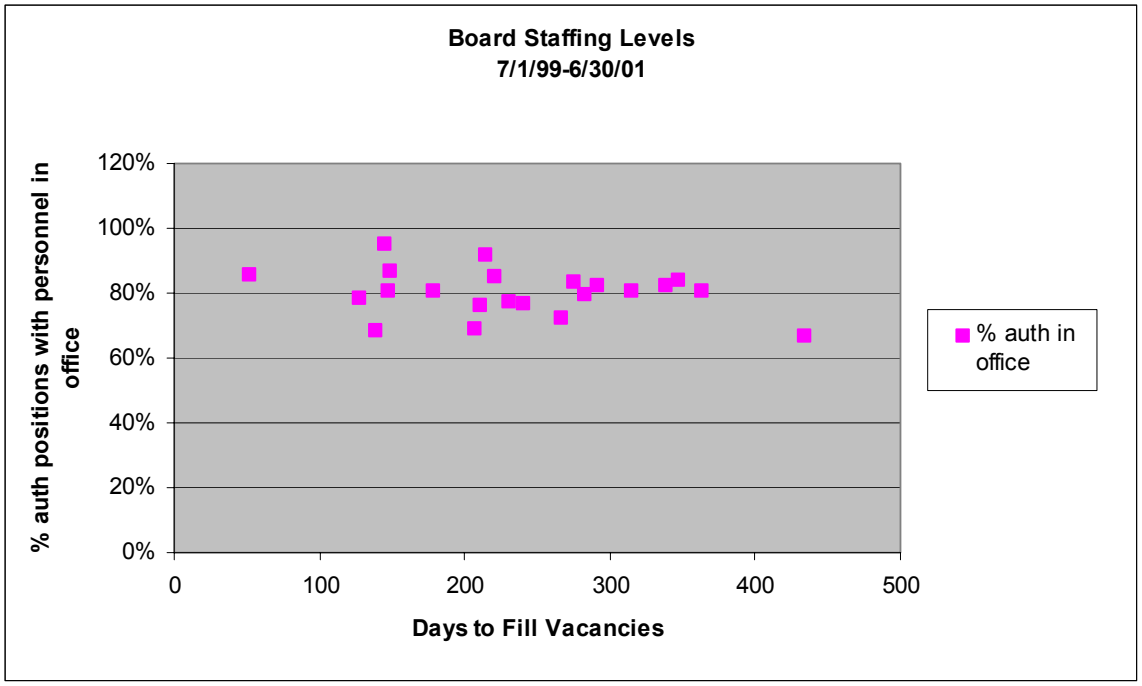

Figure 10.9 Percent of Authorized Staff in Office, as Compared to Time Required to Fill Vacancies (by Location)

Several factors cause retention to be a better indicator of staffing success. First, simply measuring the length of time positions are left vacant does not consider the number of authorized positions vacated. The measurement is therefore subject to being skewed by a single vacancy that sat unfilled for an unusually long time. Turnover and retention measurements are less likely to be biased. Furthermore, while this may not be reflected in the numbers, turnover is far more disruptive to office productivity than a position that might take a long time to fill. While an empty authorization detracts from office productivity, once that position is filled and the new staff member is trained, he or she can then become a productive part of the office. On the other hand, a high turnover rate causes turbulence, even if the position is not vacant for long. The time the new staff members spend in training and other new-hire bureaucracy detracts from the productivity of the branch office. Improving retention helps to cut down on these inefficiencies.

These relationships show that avoiding staff turnover, as well as efficient hiring practices in the event that positions become vacant,

will help to keep authorized positions as productive as possible. However, given limited resources, and limited opportunities to improve employment conditions, avoiding turnover is a more critical aspect of improving staffing rates.

As discussed earlier, there are more serious staffing shortages for the OA position than for any other (reflected by the number of positions turned over in the past two years). The OA position has one of the lowest retention rates out of any Claims Adjudication position. This implies that by improving employee retention, either through improved training, better pay, opportunities for advancement, or other incentives, overall staffing levels will likely improve as well.

Effects of Staffing Disparities

From interviews and first principles, we expected that each location's efficiency would be very closely tied to the number of in-office employees at the location. That is, with fewer WCJs or OAs at a branch office, or a greater number of cases processed per judge or OA, the workload would overwhelm the staff in the office and result in a greater delay to trial.

However, this was not always the case. While there were many branch offices in which the time from conference to trial was very closely tied to the number of WCJs or OAs, these relationships were not consistent from one office to the next. ***Figure 10.10*** and ***Figure 10.11*** show the changes in correlation values across offices. While there are many branch offices in which efficiency follows staffing levels very closely, there are also several offices where it is negatively tied. As a result, we conclude that there are other factors that also contribute to branch office performance.

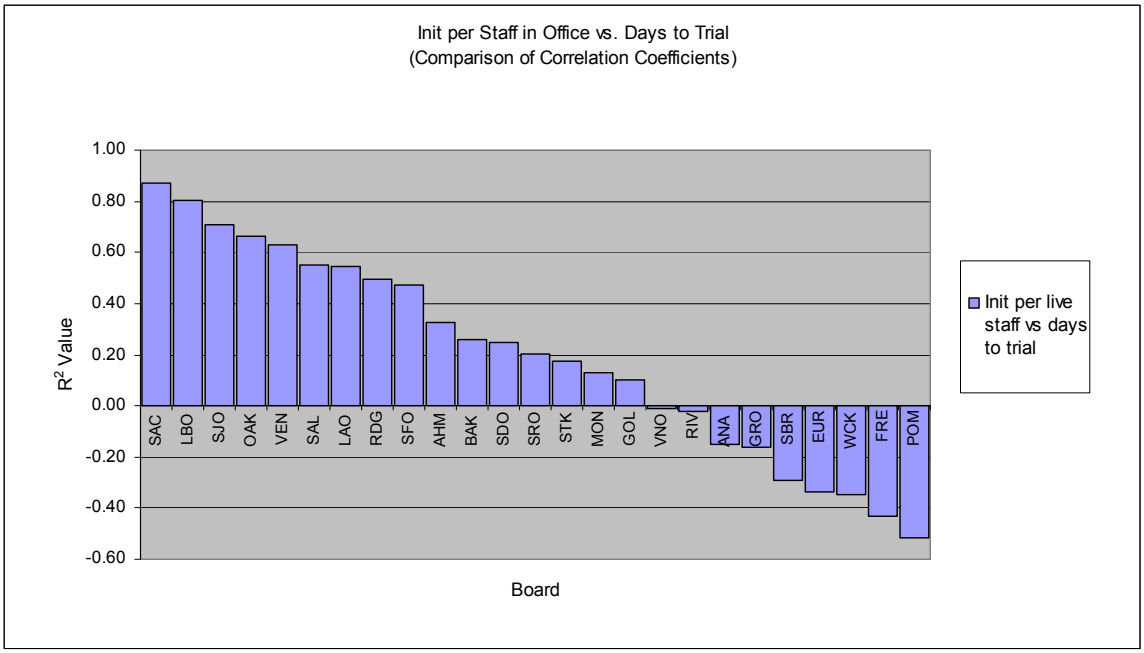

Figure 10.10 Correlation Values between Workload per WCJ in Office and Days from Conference to Trial, Variation across Locations

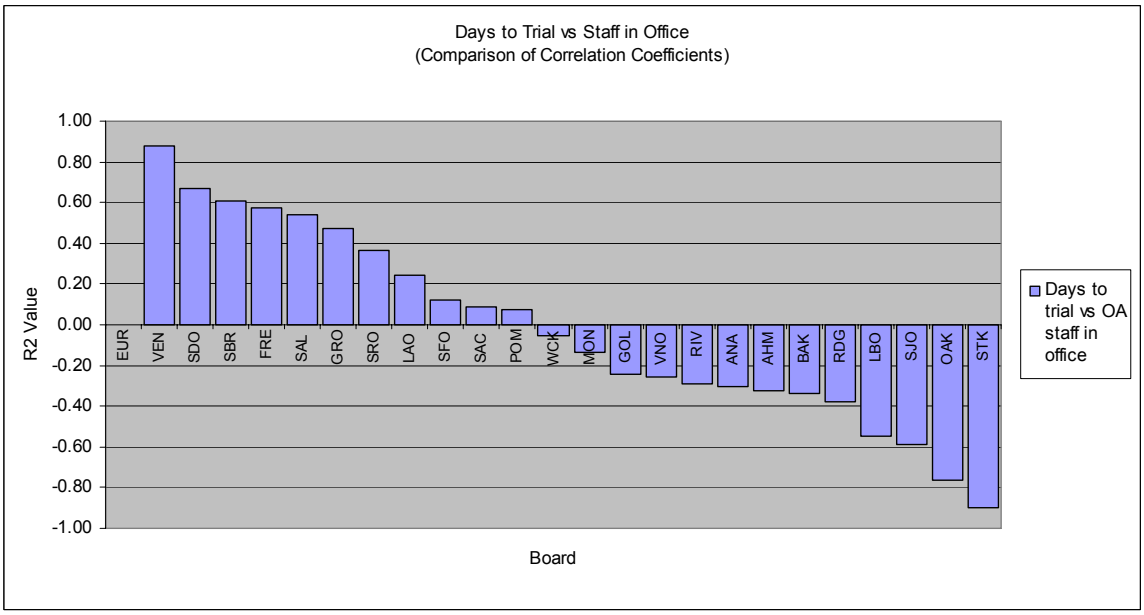

Figure 10.11 Correlation Values between OAs in Office and Days from Conference to Trial, Variation across Locations

For example, as discussed more fully in ***CHAPTER 11***, there is no clerical manual and so the lead clerk in each office is the sole vehicle

for training new clerks. Also, as discussed more fully in ***CHAPTER 7*** and ***CHAPTER 13***, offices differ in how they schedule future conferences and trials and in the number and length of conferences and trials to be assigned to each judge on any particular day. With no standardized, systemwide set of operating instructions, the mechanics of scheduling (including how events are recorded in CAOLS) will vary from office to office and even among staff members at the same location over time. It is also likely that attorneys, claimants, and defendants behave differently from one office to the next, resulting in increases or decreases in delay and time to trial that can be unrelated to the office's ability to handle the workload.

Furthermore, when branch offices experience staffing shortages, they often compensate internally, as staff members are aware of the DWC's lengthy hiring process. For example, the Presiding Judge at one office indicated that he was aware that the clerk position was understaffed, but at the time could not hire more clerks due to budget constraints. Instead, secretaries at that location had routinely taken on additional responsibilities to help the clerks. Practices such as these mitigate the raw impact of staff disparities and the extent to which other employees (including hearing reporters, ancillary services consultants, and even judges) "pitch in" makes it difficult to precisely pinpoint the number of employees of a particular classification needed to move the caseload promptly. While staffing problems may have a serious impact on the responsibilities of staff members at each branch office, staff levels at all positions would need to drop significantly before the effects of particular types of staffing problems are statistically evident in overall office efficiency measures.[169]

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[169] Another factor complicating matters is the use of unpaid help for some of the more routine clerical functions. Some district offices, for example, have occasionally used individuals performing community service as part of a criminal sentence to do routine filing. Interns from local schools and government aid recipients have also been part of the overall resource mix. Our analysis did not include counts for this type of help. Besides the difficulty of obtaining reliable figures for the use of these individuals, it is not clear whether their assistance in getting the office's work done is overshadowed by the need for training and ongoing supervision.

CONCLUSION

Short-term adjustments by staff members do much to offset the most obvious effects of temporary personnel shortages. When positions become vacant or employees are absent, the remaining employees often pick up the slack. Secretaries may help clerks with their work, clerks may take on the more administrative sorts of tasks usually designated for judges, vacations will be deferred, and some vital (though not always easily measured) chores will go undone during these times so a branch office's overall "efficiency" (as measured simply by the number of cases processed and the time needed to do so) does not suffer as much as it otherwise might. As a result, there does not appear to be a statistical correlation between minor rises and falls in the numbers of employees at each location and corresponding variations in the time required to process these offices' caseloads. Obviously, an office with five judges would be able to handle far fewer cases than one with 20, but a 10% drop in staff levels will not always translate into an immediate or commensurate increase in time to resolution.

Unfortunately, those who may be monitoring system performance may reach the erroneous conclusion that cuts of any size in staff levels have no effect on throughput and so may be induced to continue further reductions. That would be a mistake. The ability of remaining personnel to respond to these situations will be eventually compromised, even if, in the short run, the goal of efficiency as gauged by a few simplistic measures seems to have been achieved. Moreover, efficiency does not always translate into the quality of the decisionmaking process. If judges compensate for a drop in staffing by taking on more cases each month and therefore have less time to devote to each, their ability to decide matters in the most fair and judicious manner possible may be compromised even if the time to disposition remains stable.

How then to determine the optimal number of positions to authorize at each branch office? Other courts use a variety of measures to assess the need for judges that include the number of case filings (both weighted and unweighted[170]), the number of active pending cases, the

[170] A "weighted" caseload is calculated by using the relative amount of average judicial time needed to handle particular case types

number of dispositions, the extent of any backlogs, number of trials, and the number of cases not meeting required time standards.[171] As illustrated by ***Figure 10.2***, the number of staff positions in the WCAB authorized each year is very closely tied to the number of cases initiated per quarter, and consequently, per year. This demonstrates that the DWC bases their staffing authorizations on the number of cases processed at each branch office. While tying staffing to caseload may be a valid means of planning, this chapter has also shown that authorizations do not directly correspond to productive staff members in the office. The DWC's goal should therefore be to staff such that the number of productive employees at each branch office, after accounting for absences and vacant positions, corresponds to the core needs of the branch office's caseload.

We believe that the current procedures employed to estimate the numbers of each classification assigned to each branch office are a realistic approach given that no "magic formula" is possible for calculating the correct staff levels simply based on the information available in the DWC's centralized transactional databases. Too many factors that are not quantifiable or may be impossible to collect need to be understood in order to prevent wasteful overstaffing or dangerous understaffing. The local legal culture and the character of litigation being filed, the quality of an office's personnel, the availability of longtime employees for seamless training of new hires, ruthless prioritizing of tasks that get the most pressing work out now (but may lead to problems down the road), and district office staff that compensates for missing positions are just some of the ways that an

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to determine total workload for a court. Instead of counting each new filing equally, cases that typically consume more judicial resources are given additional weight (and those that consume less are given lesser weight) than the theoretical average. While an attractive idea, we were unable to calculate a set of weighted caseload averages because of the limited time frame for this project. The Federal Judicial Center, for example, will track all judge time spent on a sample set of Federal District Court cases from start to conclusion, a process that takes a few years to complete.

[171] See, e.g., Flango, Victor E., and Brian J. Ostrom, *Assessing the Need for Judges and Court Support Staff*, National Center for State Courts, Williamsburg, VA, 1996, Chapter II.

office can have statistics that evidence normal throughput despite anything but normal shortages. The hands-on approach currently used to calculate true needs, an approach that includes lengthy in-person observation by central management, appears to be a rational method to determine how many people an office ought to have. Even traditional civil courts that use weighted filings as the "best direct measure of demand for judges and court support staff" are cautioned to ensure that the numbers generated are "tempered by qualitative considerations."[172] The DWC appears to be taking these difficult-to-measure factors into account.

Moreover, the DWC's internal assessments, based on our observations of activity at offices where there were significant discrepancies between the authorized numbers and the actual filled positions, do not appear to be overly generous. In each instance where a significant shortage on paper existed, there were accompanying signs that the work product and the morale of the office was being disrupted, sometimes in ways that do not always immediately translate into easy-to-measure statistics. Employees told us of their future plans to transfer or retire, of frustration from months spent working out of their classifications, and of essentially eliminating lower priority tasks such as Declaration of Readiness screening or staffing the counter for direct public service. At offices where the shortages for certain classifications were less acute or nonexistent, the numbers being used for authorized positions often appeared to be extremely conservative estimates. At one office where nearly every authorized judge position was filled, the total number of new MSCs requested each week for the entire office demanded a calendar density where no more than seven minutes could be spared for each conference. Even with a "full" complement of judges at that location, trying to effectively promote settlement in such a short time would be extremely difficult; any future reduction in the actual number of judges at that location would transform the process into no more than a glorified roll call.

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[172] Flango and Ostrom (1996), Guideline 5, p. 20.

Our overall sense is that the DWC's current estimates of authorized positions are a reasonable target for administrators seeking to find an optimum level of personnel for current conditions. Once actual staff levels approach authorizations, a more accurate assessment of what is needed to operate the workers' compensation courts becomes an easier task. At the present time, gauging the "correct" number of staff members is made extremely problematic due to the difficulty in differentiating between individual or unit performance and the ripple effects of shortages at every position in the office.

But the problem is that even if the number of authorized positions needed is calculated with rocket science precision, formal approval of these optimum staff levels will not be enough to address the demand upon the services of the WCAB. Limited allocations from the State have insured that the numbers of filled positions have been considerably less than conservative estimates of the level of employees needed to do the job. At best, all administrators can do is to ensure that no particular district office bears a disproportionate share of the burden of the near-permanent budget shortfall. The result is year after year of personnel problems[173] and a crisis mentality among the staff.

We believe that the DWC should be provided with adequate funding to fill all existing authorized positions as long as the totals for each classification continue to reflect current system demand. It should be noted that there is nothing magical about the "authorized" label as those figured historically have moved up and down for reasons that have nothing to do with the level of demand upon DWC services. Should the number of Applications, Declarations of Readiness, proposed settlements, MSCs set, or trials set rise or fall from what we observed during our research in 2001, then the number of authorized positions could be adjusted accordingly. We certainly do not suggest that the authorized numbers be reduced immediately to match actual staff just to make it appear that there are no shortages on paper.

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[173] For example, enforcing staff discipline becomes problematic in the face of budget shortfall-related hiring freezes. Short of absolute incompetence, a poorly performing employee may be tolerated indefinitely because if the person is let go, it is not always possible to obtain a replacement.

Unfortunately, it is possible that the chronic shortfall in funds needed to fill authorized positions will not be addressed anytime soon. The questionable budgetary practices that have in large part led to this problem are well entrenched.

In the absence of adequate funding, there are three primary ways in which to minimize the effects of staff shortages due to budget constraints:

1. **Deliberate Overstaffing:** Given that employees will be lost to absences and turnover, overestimating the number of absences and vacant positions and staffing to allocate these losses will leave the DWC with more productive positions. However, there are several drawbacks to this approach. With high turnover rates and a lack of training tools, merely increasing the number of employees at each branch office does not necessarily improve the training level of these employees and so the quality of case processing may still suffer. Furthermore, drastically increasing the number of positions will have significant impacts on the DWC's overall payroll. Branch offices may not be financially able to handle significant staffing increases given relatively fixed budgets (or if they do, other budgetary allocations such as those for facilities will suffer) and so we therefore emphasize the importance of the next two approaches.
2. **Reducing Turnover:** As discussed in earlier sections, we have identified turnover as the factor most closely tied to staffing deficiencies not directly due to budget constraints. Despite variability in the amount of time required to fill positions, positions with higher turnover rates are also those more likely to have staffing problems. Therefore, we recommend that the DWC take whatever steps are required to reduce turnover at its branch offices. Several obvious steps may be taken toward that end. One key step is to improve compensation and opportunities for workers' compensation employees. Particularly among the clerical positions, employees are faced with tasks more challenging

than in similarly compensated positions in other state offices. With uncompetitive salaries for the work required and few opportunities for advancement, existing staff members wind up leaving for other offices.

3. **Reducing Absences and Their Effects:** In addition to the high turnover rates, the effects of rising workers' compensation claims against the DWC are a source of concern, although jobs at the branch offices do not appear to be unusually physically demanding (see The Impact of Internal Workers' Compensation Claims on the DWC in 0). Applying some of the very same principles for the prevention of work injury related lost time that the DWC recommends to other employers will allow these courts to keep a larger percentage of their employees in the office and on duty. In the event of unavoidable absences, there are also steps branch offices can take to mitigate their effects. Documenting uniform instructions through well-thought-out manuals will allow improved on-the-job training and in the event that a more senior staff member is absent, less experienced employees will be better equipped to handle his or her workload. Cross-training employees is another option as well.

How to address these chronic staff shortages has consumed the attention of DWC administrators in recent years, sometimes to the exclusion of developing solutions for other significant problems. The lack of comprehensive training manuals for clerical staff members, for example, is due in large part to the reluctance to assign supervisory personnel to the task of developing these documents because their services are needed simply to keep offices afloat that have been hit by 50% vacancies in authorized clerk positions. Moreover, a lack of personnel resources to meet workload demands can result, as described in ***CHAPTER 14***, in offices essentially ignoring carefully constructed rules designed to reduce unnecessary litigation costs. Though we discuss a number of recommended procedural and managerial changes in the chapters

that follow, until funding is made available to fill all authorized positions and encourage long-term stability in the ranks, such reforms may have little effect on the quality of services being delivered.

-- PART THREE: FINDINGS AND RECOMMENDATIONS --

Many of the procedural requirements of the Labor Code and Rules and Regulation...are not being complied with..... The requirement of Labor Code §5502 that hearings be held on applications not more than thirty days after the filing of the application is not being met in a substantial number of cases. Decisions which Labor Code §5313 directs be made within thirty days are delayed beyond that period.... The...policy, stated in Rule 10773, that continuances are not favored is not followed consistently throughout the state.... Other examples of failures to adhere strictly to requirements of the law and rules could be cited, but the point is already made. It would seem that the duty of the Chairman should be either to secure compliance with the law or in cases where changed conditions makes compliance unfeasible, to suggest appropriate changes in the statute and regulations.[174]

Report of the Workmen's Compensation Study Commission, April 1965.

[174] California Workmen's Compensation Study Commission (1965), p. 64.

CHAPTER 11. PERSONNEL AT DWC BRANCH OFFICES

CLERKS

Clerks and the Pace of Litigation

The first contact a case has with the Claims Adjudication Unit of the DWC is with the clerks' section. The clerks are responsible for receiving the case-opening pleading via mail or directly over the counter, accessing what we call the *Claims Adjudication Unit On-Line System* (CAOLS) and entering case and party information including addresses for automated service, assigning a case number, and creating the physical file. File movement throughout a branch office is typically the responsibility of clerks.

As additional pleadings and other documents, such as medical reports, arrive for that case, the clerks decide whether the new document requires immediate action after logging in on CAOLS (such as with a *Request for Expedited Hearing*, *Declaration of Readiness*, or settlement papers), logging in CAOLS and then filing without further action, or simply storing on the shelves ("drop filing" as it is called at some branch offices) whenever time permits. Updating the address records that are at the heart of the WCAB's duty to provide adequate notice is also a high priority for clerks. Depending on the branch office, the clerk may additionally be responsible for reviewing pleadings for sufficiency and compliance with regulations. Some clerks are responsible for scheduling future court dates; for example, MSCs are typically set by clerks after they have reviewed the DOR, and trials are often set by clerks following consultation with counsel. Delays or less than accurate performance in any part of these operations can mean a significant disruption in the progress of a dispute before the WCAB.

Clerks are often the only DWC employees with whom applicants and other litigants ever actually have live contact. Given that most cases never reach the trial stage, the most likely reason why an applicant would visit a branch office is the mandatory requirement to attend the MSC. Especially for first timers, that experience by and large consists

of arriving at the branch office, approaching the counter and asking what they are supposed to do, being given instructions by a clerk, and then sitting on one of the chairs provided in the waiting room until contacted by their attorney. The attorney usually chats with the applicant for a short while and then leaves to go to the hearing room for the MSC calendar. The applicant waits, sometimes for many hours, until his or her attorney returns with news of how the MSC has turned out. During that time, applicants often ask the clerks for additional information about their case or workers' compensation procedures generally. Despite the availability of an on-site I&A Officer at many branch offices, applicants use the clerks as a front-line resource for figuring out what to do and when. More savvy pro per applicants, and those who have no idea at all what to do following a work injury, are even more likely to view the clerk's counter as "the Board." A less than satisfactory experience with these clerks, including an inability to receive service over the counter in a prompt and courteous manner, results in a long-lasting negative impression of the entire California workers' compensation system. The unfortunate reality is that when clerks are consumed by other duties, they sometimes give the front counter less than their full attention.[175]

Clerks are also involved with other aspects of the branch office's operations. For example, when attorneys come to the branch office with documents requiring an immediate walk-through review by a judicial officer, clerks are responsible for pulling files upon demand or creating a new file when there is no existing case. These tasks are especially time-consuming as they cannot be efficiently processed in batches or during times when demands on the clerks' time are lighter. Attorneys expect that file pulling or file creation for walk-through purposes will be completed promptly, often within an hour of the request. Keeping at least one clerk tasked with responding to this sort of demand on an ongoing basis means that other duties such as dealing

[175] A number of clerks candidly indicated to us that they place their desk as far away from the front counter as possible to lessen the chance that they would be the ones to have to respond to public inquiries and as such, disrupt what they were doing.

with pleadings and other documents arriving by mail or received over the counter must be done by remaining staff. At branch offices with significant clerk shortages, walk-throughs have to be limited to times when clerk demands are fewer, such as on “dark days” when no hearings are held. For some attorneys, the ability to walk through matters upon demand, especially when they are at the branch office on other business anyway, is an indicator of the branch office’s commitment to serving the needs of practitioners. Having walk-throughs restricted to the one day of the week when they were not likely to be at the branch office at all (as there are no conferences or trials to be attended) was not felt by some attorneys we spoke to as very accommodating. Thus, levels of clerical staffing play a direct part in how “user-friendly” the workers’ compensation community perceives WCAB’s operations to be.

Because matters sent to the calendar clerk’s desk are by definition the ones that are on the trial track,[176] this position is one of the most important at the branch office. After a Declaration of Readiness has been screened, the calendar clerk must find the next available date for an MSC (often after consulting a myriad of “Post-It notes” and scattered correspondence that detail when local attorneys will be on vacation or otherwise unavailable) and enter the date into CAOLS in order to generate the necessary notices. A similar process is required when the request to set some sort of hearing comes in the form of a memo from one of the judges at the branch office. Finally, the calendar clerk must usually make him or herself available for addressing the needs of attorneys who approach the counter with a branch office file in hand following an MSC that contains a judge’s order to set the case for trial. The calendar clerk spends time attempting to find a mutually agreeable date that fits with the attorney’s availability, the judge’s order, and the policies of the branch office.[177]

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[176] In most instances, the opening of a new case file upon the filing of an Application is not a high priority. Applications are often filed simply to address statute of limitations requirements and so they are often filed within a year of the injury even if no dispute exists. Many months or even years may pass before either side comes to the WCAB to request that a judge take any action whatsoever.

[177] Board notices are not typically required in these situations as the parties generally waive notice because they are physically present

Unless the clerks' section's resources are sufficient to meet calendaring demands, the first casualty will be the prompt settings of MSCs that are supposed to follow the screening of a DOR. MSC settings lack the urgency of having a pair of attorneys standing around waiting for a trial date and the authority of a judge's hearing-setting memo, so if there are competing demands on the calendar clerk's time, they get pushed to the side. At one branch office we are aware of, the calendar clerk has a backlog of DORs to be set so deep that as much as a 30-day difference exists between the date the approved DOR is placed into the calendar clerk's in basket and the date the MSC date is entered into CAOLS and the parties notified of the conference. Because of the minimum time required for notice under BR §10544, the MSC cannot be held less than 15 days following mailed notice to the parties. The result is that, by definition, the WCAB cannot meet the mandate of LC §5502(d) to conduct an MSC within 30 days of the filing of a DOR if the delay at the calendar clerk's desk for setting is 15 days or more.[178] Again, clerical resources impact the ability of parties to receive the sorts of services expected of a fast turnaround court system.[179]

Clerks also review filed pleadings for compliance with specific statutory and regulatory requirements. For example, some branch offices have a clerk charged with the responsibility of reviewing the DOR for sufficiency before entering it into CAOLS. Pressures to complete this particular task and move on to other equally important areas essentially

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when the trial date is assigned. But the event of setting itself must be entered into the CAOLS by the clerk, so from the branch office's perspective (as opposed to the DWC's), there is no time savings.

[178] Realistically, the time lag at the calendaring desk must be much less than 15 days. Some length of time unavoidably elapses between the filing of a DOR and placing on the bottom of the calendar clerk's in basket due to the need to screen the DOR for sufficiency, especially if any objections to the DOR are taken into account. Also, the 30-day mark from the DOR filing might fall on a weekend, the day the branch office is dark, or a holiday so that something sooner would be needed to meet the requirements of the statute.

[179] Calendar clerk availability also impacts perceptions of a branch office's desire to accommodate the needs of its users. At one office, we observed attorneys becoming quite frustrated when they concluded their MSCs in the late afternoon and jointly went to the calendar clerk's window for a trial date, only to find the position closed due to limited hours.

result in the clerk dispensing with any sort of review and proceeding directly with data entry. The feeling is that if there is a problem, the party opposing the DOR can bring it to the judge's attention at the MSC. Whether this attitude is justified or not, it certainly is not the process envisioned when the rules for DOR screening were first drafted.

One of the most critical duties of clerical staff is to ensure that the address fields in CAOLS absolutely have the latest and most accurate information possible. Address data can be found on just about every piece of mail or over-the-counter filing and in times of relative quiet, documents are continually checked against existing entries in CAOLS and if needed, corrected. This helps minimize the potential that notices of hearings fail to get to the intended recipient. In times of clerical shortages, regular updates take a lower priority and the chances increase that a party will not appear and the conference or trial will have to be continued.

It is a mistake to assume that the sole cure for some of the problem areas noted above is to simply require the person responsible for supervising clerical staff (the Office Services Supervisor) to shift personnel away from less important tasks. Even when prioritizing duties in a way that gives immediate attention to vital areas such as calendaring and walk-through assistance, the fact remains that case openings, routine filing and data entry, file room maintenance, archiving older cases and shipping them to the State Records Center, and helpful contact with the public are all tasks that cannot be ignored forever. Halting the practice of case archiving, for example, means that valuable shelf space will be wasted and eventually files will become scattered throughout the branch office in various nooks and crannies, typically in a manner that increases the chance that some can never be located again (or at a minimum, wastes clerical time searching for the misplaced files). If case file openings are given less than the full attention of a clerk (who has been told to give higher priority to calendaring or other tasks), the possibility that increased errors in associating the correct address with parties may result (which in turn can cause a myriad array of problems with hearing attendance).

When stretched too thin, clerks at some branch offices place medical reports and other important pleadings and papers into the case files by simply opening up the jacket and dropping the documents inside. When a judge is given the file for review, valuable judicial time is wasted while this relatively high-paid professional two-hole punches each document and places it in the proper order on the proper divider; if the organization of the file takes place at the start of trial, then the time of attorneys, litigants, and hearing reporters is wasted as well.

In some offices, the current shortage of clerks is affecting not only the services available from that section but also the performance of other nonjudicial staff members. LC §123.3, for example, gives Presiding Judges the ability to reassign hearing reporters to perform clerical duties as necessary. In smaller offices where the impact of a missing clerk is most strongly felt, reporters are an important resource used to keep the work flowing. If the reassignment lasts for any length of time, certain tasks performed only by reporters (such as producing party-ordered transcripts) have to be postponed until the shortage ends. Long-term reassignment of secretaries and hearing reporters also has another cost: Though many staff members are willing to help out, some feel that working outside of their rightful classification is inappropriate or unfair. Further, they voiced concerns that the regular duties of secretaries and reporters will increase as personnel are shifted to help out in the clerical section and the number to handle the normal workload is reduced. Whether these attitudes are justified or professional is beside the point; covering long-term clerical shortages may eventually affect the performance of other sections of the office.

In many of the offices we visited, conference calendars were sufficiently “open” to the point where available judicial resources appear adequate to comply with statutory time mandates. In other words, a calendar clerk who is trying to set an MSC typically found an available time slot for a judicial conference about 30 to 40 days down the line. While this setting might not strictly meet the requirements of LC §5502, it comes fairly close. Unfortunately, the time from the setting to the hearing is only part of the equation. What caused these

and other offices to fall behind in reaching the goals of LC §5502 were delays from the moment the DOR arrived at the branch office to the moment that the calendar clerk entered the date of the scheduled MSC into CAOLS. The bulk of this delay is driven by the actions (or inactions) of clerical staff.

The duties of the clerks are the ones most affected by a failure to innovate with new technology. There is no reason, for example, for a calendar clerk to continue to waste time with paging through a large paper ledger to find the next available date, confirm that it does not conflict with individual requests sent in by law offices regarding vacations and the like, and then key all of this information into CAOLS. Conceivably, all of this could have been handled automatically with a contemporary case management information system (CMIS) with an automatic calendaring feature that would be triggered the moment the DOR was screened. But until DWC procedures and technology are brought up to the contemporary standards of similar-sized court systems, an adequate supply of clerks will continue to be needed to address labor intensive tasks.

In sum, clerical positions are at the core of the WCAB's ability to do business with the public. The extent to which clerical resources are unable to meet demand appears to directly affect the pace of pretrial litigation.

Clerical Position Priorities

As seen above, ongoing shortages in the clerks' area of District Offices have an extremely negative impact on the pace of litigation, overall office morale, the accuracy of the On-Line System, and the ability of the District Office to respond to the day-to-day needs of the workers' compensation community. Indeed, some clerical tasks are deemed so vital to the operation of a District Office that in times of clerk shortages, it is not unusual to see secretaries opening new case files or even judges doing routine filings in order to free up clerk time for critical activities such as receiving and sorting new pleadings and calendaring.

Remarkably, this view does not seem to be shared beyond the walls of the branch offices. In commendably addressing the need for additional WCAB resources, SB 996 provided for eight new “judge teams,” each consisting of a judge, a hearing reporter, and a secretary. Remarkably, no similar increases in authorizations were included for clerical positions. It is difficult to see how such teams could do their respective jobs without the actions of a similar number of clerks to handle the less-than-glamorous job of pushing the paper needed on the back end of the adjudication process.

Given that clerks can have such an impact on the time needed to reach various milestones on the litigation track, given the fact that the facilities and equipment needed for each additional clerk are fairly minimal compared to new judge teams (which usually require an enclosed office and a dedicated hearing room for the judge as well as cubicles for the secretary and the hearing reporter; clerks usually take up only a desk in a shared area), and given the fact that clerks are the lowest paid staff members at a branch office, it does not make sense to hold their numbers at an absolute minimum in the interest of cost savings or to routinely allow their numbers to fall below the maximum positions authorized.

Nevertheless, severe shortages of Office Assistants available to perform critical duties are the rule rather than the exception at most DWC offices, as ***Table 11.1*** suggests.

Table 11.1

Authorized, Vacant, and On-Leave Office Assistant Positions, Fall 2000[180]

Office	*Authorized OA Positions*	*Unfilled OA Positions*	*OAs on Leave*	*Total Absent OAs*	*Percent of "Live" OA Positions Down from Authorized Number*
Anaheim	12	6	0	6	50%
Bakersfield	2	0	0	0	0%
Eureka	1	0	0	0	0%
Fresno	11	1	0	1	9%
Goleta	2	0	0	0	0%
Grover Beach	3	2	0	2	67%
Long Beach	14	4	0	4	29%
Los Angeles	21	1	1	2	10%
Oakland	9	3	0	3	33%
Pomona	11	2	1	3	27%
Redding	6	3	0	3	50%
Riverside	7	3	0	3	43%
Sacramento	16	5	1	6	38%
Salinas	6	1	0	1	17%
San Bernardino	11	2	0	2	18%
San Diego	12	1	2	3	25%
San Francisco	12	0	1	1	8%
San Jose	7	1	1	2	29%
Santa Ana	14	2	3	5	36%
Santa Monica	17	3	1	4	24%
Santa Rosa	8	3	1	4	50%
Stockton	8	2	0	2	25%
Van Nuys	26	2	2	4	15%
Ventura/Oxnard	8	1	1	2	25%
Walnut Creek	7	4	0	4	57%

Table 11.1 is a snapshot of the extent to which each office had Office Assistants on duty during fall of 2000. Clerical Supervisors (OSS-Is) are *not* included. Of the 25 District Offices, only three relatively small locations (Bakersfield, Eureka, and Goleta) have a full

[180] Source: Glenn Shor, Department of Industrial Relations, provided to Tom McBirnie, CHSWC, March 2001. Counts for the Office Assistant positions include those assigned to the District Offices' Claims Adjudication Unit, Vocational Rehabilitation Unit, Information and Assistance Unit, and Disability Evaluation Unit.

complement of clerks available. Sixteen offices were down 20% or more from their authorized number of clerks and nine offices were missing at least a third of their clerks. Five offices had at least half of their clerks unavailable for duty at the time this data was collected.

Most of this shortage is due to an inability to fill the position for one reason or another. Of the 67 total absent positions, only 15 are due to employees on leave status. The balance is the result of either inadequate funding, a freeze on new hires, or difficulty in finding acceptable candidates for fully funded positions. Whatever the reason, it is difficult to imagine that an office can process the paperwork associated with its assigned cases in anything approaching a timely manner if half of the clerks are absent.

We believe that the WCAB cannot function at anything approaching full productivity if this current situation continues. But completely staffing the OA positions in the Claims Adjudication, Vocational Rehabilitation, Disability Evaluation, and Information & Assistance Units will not be inexpensive.[181] We estimate that in order to fully fund the 52 unfilled OA positions in all four of these units would require an additional $3.2 million budgetary allocation (based upon actual expenditures for currently filled positions; see ***Table 10.3***).

Are there other classifications more in need of an immediate and concerted effort to minimize the number of absent staff members? Our best assessment, based upon extensive person-to-person discussions with Presiding Judges at a variety of offices and upon direct observation at the locations we visited, is no. Clerical shortages seemed to adversely impact the activities of every other section of the office (with the possible exception of the hearing reporters) and those closest to the

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[181] It does not make any sense to try to limit an effort to fully staff Office Assistants to only those in the Claims Adjudication Unit. Within most local offices, OAs are routinely shifted between various sections depending on need and a clerk might, for example, handle incoming mail for the Claims Adjudication Unit one day, input case information into the Vocational Rehabilitation computer system the next, and then sit at the front desk for the I&A Unit the day after. Unless all four units have adequate clerical support, it is likely that shortages in the ancillary services sections will be filled at the expense of Claims Adjudication.

heart of the problem often volunteered that the number of other classifications on hand at the office were adequate for the workload demands. Our conclusion is underscored by the fact that 15 of the offices in the Presiding Judge survey indicated that an additional clerk would be preferred over any other position (in contrast, only four locations sought another judge, three wished for another secretary, a DEU rater was desired in one office, and an Office Technician was requested in another to help their I&A Officer with routine tasks).[182] Given the relatively low salaries commanded by this classification, the "bang for the buck" returned by staffing empty clerical desks would appear to be quite favorable. If decisions about which vacant positions are to be filled first must continue to be triaged, then we believe that primary attention should be given to clerical needs.

- ***Clerical staffing should be given the highest priority in future personnel resource allocation decisions; every effort should be made to minimize the number of vacant clerical positions.***

Clerical Staff Assessment

Given their importance in moving along the considerable amount of paperwork generated by workers' compensation cases, the number of authorized clerks at some branch offices, if simply set to mirror the number of judges plus a half position for every auxiliary service professional (the apparent rule of thumb for a number of years), may well be inadequate. It is possible that at some locations, more clerks than this formula would suggest are needed. We believe that the number of clerks at every branch office should be independently reassessed to determine the number best suited to meet current and expected demand.

- ***Clerical staff numbers at branch offices should be reviewed in light of actual workload demands, not simply calculated on the basis of the number of authorized or available judges.***

[182] One office indicated that no additional staff was needed.

Clerical Staff Compensation and Classification

Currently, clerks are classified as either an *Office Assistant – Typing* or an *Office Assistant – General* position at the District Offices, though almost all are of the Typing variety. The Office Assistant classification is considered an entry-level position for state employment in an office setting and the pay scale reflects that assumption. Indeed, the minimum starting salary for a "Range A" Office Assistant – Typing employee ($1,835 per month as of March 2000) is more than only the base salaries for the DIR positions of Student Assistant, Graduate Student Assistant (ranges A, B, and C), and Youth Aide.

Despite the relatively low base salaries, the demands placed upon OAs at the District Offices go beyond the duties expected of those in the same class at other state agencies. WCAB OAs are expected to review and prioritize legal pleadings, perform data entry tasks with a minimum of supervision, provide information regarding complicated legal processes to a sometimes difficult public, interact with legal counsel and schedule future conferences and hearings, and the like. Moreover, these tasks typically take place in offices where historical staff shortages have led to increased pressures upon remaining personnel to work harder and/or longer to reduce backlog.

DWC employees do not work in a vacuum. They believe they know how their jobs compare in both demands and in compensation to similar positions elsewhere offered by the State of California: Other state agencies often share the same buildings where DWC offices are located and relationships are struck up with fellow state employees, former DWC staff members who have transferred elsewhere keep in contact with their old coworkers, and information is made available through the collective bargaining unit and on State websites. It appears that many OAs believe that they are not being paid as much as other state workers in an office environment are for similar work. They also believe that, unlike some other agencies, there is no place for advancement in the future if they want to remain in a clerk's capacity (save the one position of Office Staff Supervisor). As such, many OAs leave their positions in a relatively short time after actively seeking transfer to another agency with either a better base pay or better chances for future increases,

obtaining employment elsewhere, or getting promoted to a secretarial position. It should be kept in mind that for a District Office, the impact of losing an OA is essentially the same regardless of whether that person became a judge's secretary or left the agency entirely. While there is no doubt that such promotions from within make the job of training new secretaries easier, there is still one less live body in the clerks' area.

A similar situation exists for those who might be qualified for an open OA position. Job announcements for various state agencies sometimes are posted in a way that allows easy comparison of salary ranges. While the details of what DWC OAs have to do each day may be a mystery to potential applicants, they can easily see that Office Technician positions and similar upgraded classifications offered elsewhere pay more though require about the same sorts of qualifications.

This state of affairs results in two major (and interrelated) adverse impacts on any particular branch office: As shown in ***CHAPTER 10***, there is likely to be a steady stream of OAs who leave relatively soon (after the many months of training is completed) and when they do, it is difficult to attract competent replacements. To address this situation, we suggest that existing DWC employees at the District Offices be reclassified as "Office Technicians" (OTs). If needed, some larger offices may wish to create a limited number of OA positions that would be responsible for tasks that do not require OT-level skills, such as filing.

The use of OT positions by the administrative law courts of other state agencies is a commonplace event.[183] For example, the Department of Social Services' Los Angeles office is staffed by about a dozen Administrative Law Judges, five OTs, four OAs, and an OSS-II supervisor. The OTs are tasked with the more analytical and interpretive duties of the office such as calendaring, case tracking, assuring proper service, maintaining the library, ordering supplies, confirming addresses, and

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[183] Flynn, Ellen L., and Kenneth B. Peterson, *OA/OT Reclassification Study*, California Division of Workers' Compensation, April 5, 2001.

filing reports. Many, if not all, of these tasks are similar to those currently performed by DWC OAs. Similarly, the State Personnel Board's Appeals Division uses both OTs and OAs to perform clerical duties, but even the reception area is staffed by OTs and higher. OAs are only used for general filing, pulling files when requested, and making copies. The process of opening new files, determining the proper form to use, and data entry of the opening document (all steps similar to those performed by current DWC OAs) is handled by an "Appeals Assistant," a position that pays $60 more a month than a WCJ's secretary. Only OTs staff the State Office of Administrative Hearing's clerical section; these individuals are used for reception area work as well as ordering supplies and placing service orders. The Oakland office of the Unemployment Insurance Appeals Board (UIAB) is staffed in part by 12 OTs and five OAs. The latter classification is generally restricted to performing only reception duties as well as opening and date stamping mail.

The common use of OTs by state administrative law courts in roles similar to those performed by DWC OAs is a clear sign that the DWC is undervaluing these workers. Moreover, it acts as a disincentive for potential employees to apply for new openings at the DWC when job announcements from other agencies offer higher pay for similar responsibilities. Worst of all, it acts as a magnet for experienced DWC OAs who do not wish (or are unable) to move into a secretarial role within the organization but still desire a more appropriate pay scale for their work. We believe that serious efforts need to be made by DWC administration to initiate and complete whatever process is required to reclassify most existing OA positions into the OT level. The price for continuing to lose valuable employees to other state agencies should be measured in the effects vacancies have in productivity and in the costs of hiring and training their replacements.

Furthermore, it appears that the State Personnel Board's own guidelines suggest that Office Technician is a more appropriate classification for DWC District Office clerical staff:[184]

> DEFINITION OF LEVELS
>
> OFFICE ASSISTANT (VARIOUS CLASSES)
>
> This is the entry, trainee and journey level for this series. Under close supervision as a trainee, incumbents regularly perform a limited range of duties that become routine, shortly after the initial training period; and/or learns to perform a variety of full journey level general clerical duties.
>
> Under general supervision, incumbents at the full journey level regularly perform a variety of duties requiring adaptation to various situations, judgment as to which learned work method to apply for the desired result, and the ability to communicate effectively. This level may have lead responsibility over less experienced employees in areas such as training and answering questions on work procedures.
>
> OFFICE TECHNICIAN (VARIOUS CLASSES)
>
> This is the advanced journey level which regularly performs a variety of the most difficult duties and is expected to consistently exercise a high degree of initiative, independence and originality in performing assigned tasks. Positions at this level regularly require detailed and sensitive public contact and/or independent origination of correspondence involving the knowledge and application of detailed regulations, policies and procedures (e.g., positions such as secretaries to major division chiefs and one-person field office assignments comprised of a wide variety of responsibilities). Good judgment and the ability to communicate effectively is of primary importance at this level. Typically, the work at this level is rarely reviewed. In addition, positions may have responsibility for functional guidance in training and assisting less experienced employees.

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[184] California State Personnel Board, *SPEC: OFFICE ASSISTANT/TECHNICIAN*, http://www.dpa.ca.gov/textdocs/specs/s1/s1441.txt, accessed August 20, 2001.

It is difficult to estimate what the effects of moving most or all of the current OAs into OT positions might be. One issue involves estimating the ability of the DWC to fill vacant positions. If it is assumed that an OT position would be more attractive to a potential candidate and that those OAs bumped to OT status would be more likely to remain in place rather than seek employment elsewhere, then the DWC should experience fewer vacant positions in the upgraded classification and for a shorter period of time. In the extreme case, all 250 or so authorized claims-related clerical positions might be filled (obviously depending upon other DWC budgetary considerations). Also, the limited data available to us for current OT expenditures within the DWC do not allow us to estimate actual per position costs.[185] It is also unclear where some longtime DWC staff members who are currently at the top end of the OA pay scale would move if they accept an upgrade to an OT.[186] Finally, a position-wide upgrade might have ramifications with other DWC positions (such as Office Services Supervisors) due to collective bargaining considerations.

Nevertheless, we can calculate a ballpark figure. The low end of the OT salary range is about 16% more than the low end for the OA (Typing) Range B ($2,258 versus $1,951). There is also about a 16% difference between the high ends of these positions ($2,745 versus $2,370). If this relationship holds true for total budgetary expenditures, then changing all OAs in the four dispute resolution units to OTs might increase costs by 16%. If the current number of filled OA positions remains steady, estimated total costs to the DWC would be $7.8 million for about 193 filled OT positions or a $2.5 million increase over the current budgetary allocation from the State. But the point of upgrade is to attract and retain qualified employees and so one would hope that all 245 or so authorized positions would be filled. If so,

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[185] There are only four OTs in the four units of the DWC primarily charged with handling claims and just another three in the Administrative Unit and other programs. Using experience data from such a small number to extrapolate to the nearly 250 authorized OA positions is risky.

[186] Office Assistant (Typing) has salary ranges of $1,835 to $2,230 for Range A and $1,951 to $2,370 for Range B. The salary range for an Office Technician (Typing) is $2,258 to $2,745.

$9.9 million might be the total cost for full upgrade (or $4.6 million over current State budget authorizations). It should be kept in mind that these are "real" dollars and do not use the "95%–First Step" State budgetary principles.

One alternative to the upgrade to OTs would be to use the Program Technician classification instead. The PT salary range ($1,951 to $2,546) provides a somewhat increased high end to the current Range B Office Assistant (Typing) salary range ($1,951 to $2,370). While such a move might save a considerable amount of money for the DWC, it should be kept in mind that attracting candidates for clerical positions is as important as keeping them. While there is greater potential for a clerk to earn more over the long run as a PT versus an OA (Range B), the starting salaries are the same. A candidate who is able to choose between competing positions will likely go with those agencies offering employment as an OT due to the higher starting pay. This is an important consideration because we have been repeatedly told of the experiences of many Presiding Judges where not a single acceptable candidate presented himself or herself for an open OA position despite a long and aggressive period of advertising. In terms of retention, the difference between the top end of the PT position and that of an OT is only about $200 per month. While the Program Technician position at the State Compensation Insurance Fund is a natural move for many current OAs who have gained workers' compensation experience through the DWC, OT positions at the Department of Transportation, Department of Health Services, Department of Corrections, Department of Consumer Affairs, Division of Labor Standards Enforcement, and Employment Development Department (all of which have hired former DWC OAs in recent years) and other state agencies would be even more attractive. The DWC must compete with all other agencies, not just SCIF, for qualified employees in a position that administrative law courts in this state have decided merited the OT classification. If the PT classification series is used as an alternative to the Office Technician grades, then DWC administration should seriously consider starting out new clerical hires as something other than the lowest level Program Technician. Unless the bottom-level salary offered to those who would be placed in a position

of such responsibility for processing workers' compensation disputes is roughly equivalent to an Office Technician, then new vacancies will continue to remain unfilled for unacceptably long periods of time.

Another alternative that on its face appears attractive is to create three or more grades within the clerical unit so that, for example, the clerk responsible for calendaring would be at one classification grade, the clerk working the counter would be at another, the clerk who generally supports the Vocational Rehabilitation Unit might be at a different grade, and so on. This would give clerks a series of increasingly better-paid steps to move through during their career and would minimize DWC expenditures required to compete with other agencies for staff. Our concern is that by doing an overly aggressive job of linking specific clerical duties with distinct pay grades, the DWC runs the risk of turning each separate task performed by the clerical section into a series of individualized specialties. While this might not be a problem in an office large enough to have two or more people generally tasked with the same duties, the constant ebb and flow of staffing levels means that on more than just an occasional basis, someone will have to step in and do a job that is out of his or her precise classification. It is our understanding that collective bargaining considerations play a role in discouraging long-term shifting of duties where a lower-paid staff member does the traditional work of a higher-paid person (though the reverse does not seem to be a problem except in terms of morale). Moreover, such a policy may play a role in limiting the opportunities for cross training so that when a particular clerk is absent, there may not be anyone able to fill in. While it might be prudent at the largest District Offices to classify a small number of clerks as OAs for file room maintenance and similar duties, the clerical section as a whole should be encouraged to work as a team so that if any particular area experiences a loss of productivity, other staff members are ready, willing, and able to help.[187]

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[187] It should be understood that we are not opposed to the use of multiple higher-grade classifications for supervisory personnel at larger District Offices or those with especially difficult workloads. It may be prudent, for example, to have both an OSS-I and an OSS-II as

➢ ***Compensation for clerical positions should accurately reflect the current responsibilities and demands of the job in order to encourage prospective employees to apply and existing employees to remain.***

Clerical Training Manual

Given the vital role that clerks play in everyday operations of the DWC, it was quite surprising to learn that there does not currently exist a complete manual to help clerks learn how to handle their duties and to provide guidance when novel situations are encountered. The training of new clerks falls almost exclusively to the Office Services Supervisor who must patiently explain the details of the position and answer any questions they might have. Thus, the duties of a clerk are passed from one "generation" of OAs to the next, much like the oral tradition of Navajo creation stories.

Besides the obvious problems that might arise when the OSS is unavailable to respond to inquiries, the lack of a uniform manual across the DWC encourages the development of procedures that are unique to each office. This in turn makes moving personnel on a temporary or permanent basis to meet unexpected absences more difficult.

There have been abortive attempts in the past by experienced OSSs at a number of branch offices to meet and develop such a manual. Such efforts have failed because of decisions by previous DWC administrations to end the costs of travel associated with these meetings. Nevertheless, we believe that the progress that has been made so far should not be lost and that these Supervisors be given the permission and the support to devote at least some part of their time to communicating with other members of the working group and completing a draft manual.

The considerable effort required to develop such a manual is not only intended to benefit the clerical section. By having OSSs from across the state discuss the regular practices followed at their own offices, the DWC would begin to understand the extent to which

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supervisors of the clerical unit or to install an OSS-II as the sole clerical supervisor at one office while OSS-Is are used elsewhere.

individual locations do things differently. For example, the DWC would need to ask some serious questions anytime there seems to be a need to make an exception to a standardized instruction in order to adjust for the historical practices at a particular office: Why does office X do this task differently? Does the practice affect in any way the adjudication of cases? Would allowing them to continue be in the best interest of system uniformity? Should the general rule be changed so that other offices will follow this possibly better idea? Without this sort of exchange, offices will, for better or worse, do things in the same idiosyncratic way year after year.

At the time of this writing, the draft manual process appears to have been restarted. This is a very welcome event and bodes well for the future training process, especially if vacancies in clerical supervisor positions continue.

- ***The creation of a statewide clerical section training and operations manual should be a high priority for DWC administration.***

Clerical Supervisor Compensation and Classification

Given the fact that at the present time the training of clerical staff is primarily oral, the need for retaining the Office Services Supervisor is critical. Perhaps no other single position—except the Presiding Judge—has such a wide-ranging impact on the day-to-day operations of the entire District Office. Loss of the knowledge and experience of an OSS, especially in the current environment where internal procedures vary from District Office to District Office, can have devastating effects on production and morale.

As ***Table 11.2*** shows, a number of offices periodically operate without the supervision of an OSS.

Table 11.2

Authorized, Vacant, and On-Leave Office Services Supervisor Positions, Fall 2000[188]

Office	*Authorized for OSS Position?*	*Unfilled OSS Positions*	*OSSs on Leave*	*OSS Absent?*
Anaheim	YES	0	0	NO
Bakersfield	NO	n/a	n/a	n/a
Eureka	NO	n/a	n/a	n/a
Fresno	YES	1	0	YES
Goleta	YES	0	0	NO
Grover Beach	NO	n/a	n/a	n/a
Long Beach	YES	0	0	NO
Los Angeles	YES	0	0	NO
Oakland	YES	0	0	NO
Pomona	YES	1	0	YES
Redding	NO	n/a	n/a	n/a
Riverside	YES	0	0	NO
Sacramento	YES	0	0	NO
Salinas	YES	1	0	YES
San Bernardino	YES	0	0	NO
San Diego	YES	0	0	NO
San Francisco	YES	0	0	NO
San Jose	YES	1	0	YES
Santa Ana	YES	0	0	NO
Santa Monica	YES	0	1	YES
Santa Rosa	YES	0	0	NO
Stockton	YES	1	0	YES
Van Nuys	YES	0	0	NO
Ventura/Oxnard	YES	0	0	NO
Walnut Creek	YES	0	0	NO

Four of the smallest offices are considered not large enough to justify the authorization of an OSS position.[189] Of the remaining 21, six were without an OSS available in the fall of 2000. It should be

[188] Source: Glenn Shor, Department of Industrial Relations, provided to Tom McBirnie, CHSWC, March 2001.

[189] We did not visit the smallest offices in the system and so do not have any credible information to determine whether the lack of a designated clerical supervisor with appropriate compensation affects the performance of these offices.

kept in mind that in these six locations, the offices were already down an aggregate average of 22% of their authorized OA positions.

At the present time, the DWC seems to be depending primarily on the loyalty of OSSs at the various branch offices to stay where they are and refrain from transferring elsewhere or becoming a judge's secretary. While many OSSs we spoke to indicated that they have stayed longer than they expected because of a personal commitment to the Presiding Judge, because they find the demands of the position a challenge, or because of something as serendipitous as convenient carpooling with a spouse to the same location, this state of affairs does not make for a stable environment.

It is not even clear that the current OSS-I designation is the appropriate one for most DWC District Offices. The State Personnel Board's specifications for the OSS (Typing) positions indicate that an OSS-I should be used only in the smallest offices, a situation that does not apply to many of the DWC's branch locations:[190]

> DEFINITION OF LEVELS
>
> OFFICE SERVICES SUPERVISOR I (VARIOUS CLASSES)
>
> This is the working supervisor level. Under general supervision, incumbents train new employees, supervise a small group engaged in difficult clerical work and personally perform the most complex work.
>
> OFFICE SERVICES SUPERVISOR II (VARIOUS CLASSES)
>
> This is the first full supervisory level. Under general direction, incumbents plan, organize, and direct the work of a medium-sized group engaged in difficult clerical work.
>
> OFFICE SERVICES SUPERVISOR III (VARIOUS CLASSES)
>
> This is the second full supervisory level. Under general direction, and through subordinate supervisors, incumbents plan, organize, and direct the work of a large group engaged in difficult clerical work.

[190] California State Personnel Board, *SPEC: OFFICE SERVICES SUPERVISOR*, http://www.dpa.ca.gov/textdocs/specs/s1/s1141.txt, accessed August 20, 2001.

Given the current structure of the typical DWC District Office, it is difficult to see what sort of position could be created (in all offices, not just the largest ones) to give longtime OSSs an opportunity to "move up" without losing him or her as a day-to-day asset for the clerks' area. We suggest that the top end of the scale be increased, perhaps to the same level of an LSS-I but certainly to that of an SLT, to the point where an OSS who has performed in this position for many years can feel comfortable enough to remain there until retirement.

One approach would be to upgrade existing OSS-Is to OSS-II positions (it is possible that this might be required anyway if one or more OA positions are upgraded to the OT level as suggested elsewhere). Other state agencies' administrative law sections, often with much smaller total clerical staff to supervise, routinely use OSS-IIs for duties similar to those of a typical DWC branch office OSS-I. The five OTs and four OAs at the Los Angeles office of the Department of Social Services are managed by an Official Services Supervisor at the OSS-II level. The OTs and the OAs of the State Personnel Board's Appeals Division are supervised by an OSS-II and higher classifications (such as an LSS-I). At the Unemployment Insurance Appeals Board, the OTs and OAs are supervised by Appeals Supervisors I and II, an even higher classification than OSS-II. Given that there are only, at most, 25 current OSS-Is at the various branch offices (and not all offices are even authorized for an OSS-I), it makes little economic sense to cap the salaries of these vital components of successful offices at an unrealistically low level.

At the present time, the State provides a level of funding for all authorized OSS-I positions in the District Office Units (Claims Adjudication, Vocational Rehabilitation, Disability Evaluation, and Information and Assistance) that is $106,568 less than what the DWC spends on its fewer number of filled positions (see ***Table 10.3***). We estimate that it would require about $600,000 more than the current State allocation to fully staff all potential OSS-I positions. Given their impact upon the training and supervision of clerical staff, we believe this would be money well spent, but it would not end the problem

of losing these experienced employees to positions where their knowledge of the clerical process would be relatively unused.[191]

As with upgrading the OA position to an OT classification, it is difficult to predict what the final numbers might be for moving all current OSS-Is to a salary level that would retain as many supervisors as possible. At the present time, a common experience within the DWC is to have an OSS-I move into a Senior Legal Typist position (with at least the potential of becoming a Legal Support Supervisor I). A Range B SLT has a salary range of $2,476 to $3,009 and an LSS-I has a salary range of $3,001 to $3,649, compared to the OSS-I (Typing) range of $2,258 to $2,745. One possible upgrade would be to OSS-II that has a range of $2,527 to $3,072, roughly equivalent to an SLT. The difference between the low ends of the OSS-I and OSS-II ranges (or the high ends for that matter) is approximately 12%. It would take an additional $190,000 over the current State budget allocation for all OSS positions to pay for the actual costs of the fewer number of filled positions if there was an upgrade to the OSS-II position. If all allocated OSS positions were to be filled completely and paid at the OSS-II rate, the State's budget for this position would have to be increased by $742,000.[192]

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[191] Obviously, the experience of an OSS-I who becomes a judge's secretary would not be "lost" to the DWC as a whole; indeed, we observed a number of former OSS-Is who had become SLTs "pinch hitting" in the clerk's office as needed (ironically because of the absence of a permanent clerical supervisor following their transfer). Moreover, a secretary with such intimate knowledge of the inner workings of the clerical department would hopefully make for an especially effective employee in the new position. Nevertheless, the former OSS would no longer be in a supervisory role.

[192] Arguably, paying the clerical supervisor the equivalent of a secretary's salary would not completely end the intraoffice migration problem. Some would still believe that it would be in their long-term best interest to make the switch because of the possibility to make even more by eventually advancing to the LSS level. Using the OSS-III classification (rather than an OSS-II) might be one answer. The salary range of an OSS-III is $2,874 to $3,495, which is just slightly less than an LSS-I ($3,001 to $3,649). If all OSS-Is are moved up to an OSS-III, we estimate that the total increase over current state budget allocations would be $294,000 for currently filled positions and $921,000 for full authorized position staffing (the OSS-III position is about 27% more that an OSS-I at the highest and lowest ends of their respective salary ranges). One possible option to minimize the financial impact would be to limit the offices that would have an OSS-

➢ ***Top-tier pay levels for the Office Services Supervisor should be increased to retain longtime employees.***

Clerical Staff Cross Training

Perhaps no other staff members at a branch office wear as many hats as do the clerks. Judges generally do the same things day in and day out as do other judges, and within their classifications, various secretary and hearing reporter positions are essentially interchangeable. This is not the case with clerks in some of the larger offices. At such locations, some clerks are solely assigned to work the calendar desk, some concentrate on opening new cases, others handle receptionist or counter duties, and still others provide clerical assistance to the ancillary service units. While there are no doubt efficiencies to specialization (some clerks are clearly better suited for certain tasks), the relatively small number of clerks at a typical branch office means that should the calendar clerk or the DEU clerk be unexpectedly absent, the responsibilities at that position either have to be performed by the OSS or go unaddressed until the specific clerk returns. The nuances of some types of clerical assignments make it difficult for other clerical staff to fill in productively unless they have been thoroughly trained in that job. It should be kept in mind that there are three different online data systems in use at DWC offices and to operate effectively at stations in Claims Adjudication, Vocational Rehabilitation, and Disability Evaluation sections, a clerk would have to know how to successfully operate all of them. Indeed, we occasionally observed clerks whose primary duties were in the Claims Adjudication Unit sitting at a desk of an ancillary services clerk who was gone and because this person did not know what was needed beyond answering the phones and responding to walk-in clientele, there was very little actual work being performed.

The OSS cannot always substitute for missing staff, especially if the problem continues for any length of time. We believe that all

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III rather than an OSS-II to only those that have relatively larger numbers of clerical staff.

clerks should be given some sort of rudimentary training in all aspects of the duties of all positions they might conceivably fill. Furthermore, it may be beneficial to occasionally rotate clerks to other desks during relatively slow times in order to provide experience prior to the day that they would actually be called to substitute for the duties of another.

Cross training is not just a precaution for times of unexpected staff shortages. It gives a branch office some much-needed flexibility for times when the demand upon any one position is greater than existing resources. For example, having all of the staff familiar with the procedures of setting conferences and trials means that should an unacceptable backlog develop, other clerks can pitch in to help the primary calendar clerk as needed. Such cross training will also assist in giving each OA exposure to the clerk's areas as an integrated whole, for understanding what others do, for understanding how their own job affects the work of their fellow staff members, and for assisting in their career development should they eventually seek a position as a supervisor.

- ***"Cross training" clerks should be a high-priority task for Office Services Supervisors.***

Community Service Workers in the Clerical Unit

A number of branch offices are the occasional recipients of additional help provided by a variety of sources such as social service agencies and schools at no cost to the DWC. Typically, the temporary help (often during the summer months only) is put to work in returning case files to the shelves, preparing files for shipping to the State Records Center, inserting papers into the proper file jacket, or photocopying.

While these aides can provide much-needed relief to clerical staff already stretched thin, a number of office supervisors have told us of repeated problems in the quality of service provided. On occasion, it has been the experience that such volunteers and assigned individuals sometimes require more work in supervising by regular staff members than

is returned to the District Office in the form of additional help. Moreover, filing errors can result from temporary help who have little motivation to do the sort of job needed by a court with such an important mission. The end result can range from mere inconvenience to significantly impacting the time to resolution in some cases.

There is no question that temporary unpaid help should be used when possible, both as a help to existing staff and as a service to the community. It would be a mistake, however, for DWC administrators to regularly rely on the donation of such services as a justification to fail to hire enough line staff.

- ***Use of interns or community service workers should be in addition to existing clerical resources, not as a long-term substitute.***

Local "Office Administrators"

Presiding Judges spend a large amount of time on the most routine matters such as supervising attendance, approving absences, resolving personnel disputes, determining the availability of judges to handle overbooked trials, and assigning tasks to various staff members (we even observed some on occasion ordering supplies and moving furniture). Another ongoing responsibility is to respond to requests for special audits, reports, and other tasks (described to us as "DWC busywork") requested by Regional Managers or the Division's administrators. Some, though certainly not all, of these duties are routinely delegated to both the Office Services Supervisor and the Legal Support Supervisor (and on occasion to one of the ancillary services consultants).

The use of clerical or secretarial supervisors to perform tasks that affect all office staff has some drawbacks. The various sections at an office consider themselves nearly autonomous units with precisely defined duties and lines of authority. Some secretaries, for example, told us that they did not appreciate "taking orders" from an Office Services Supervisor who is thought to be at a lower grade than they. Some clerks felt that secretaries did not understand what is required to move cases through the clerical section and so would turn to the Office Services Supervisor for confirmation of any requests made of them by a

secretary or Legal Support Supervisor. Moreover, we observed some serious problems at some branch offices where the OSS and LSS intentionally did not act in concert with each other and so the Presiding Judge was often called upon to spend a considerable amount of time acting as a "referee." Unfortunately, there is generally no one except the Presiding Judge to coordinate the services of clerks, secretaries, hearing reporters, and others.

It seems natural to suggest that a single nonjudicial staff member be tasked with many of the administrative duties and responsibilities that take up a large amount of the Presiding Judge's time and do not involve the supervision of trial judges. In many other judicial systems, each court has a lead administrator (sometimes called a "Chief Clerk," "Court Administrator," or "Court Executive") who has direct oversight and authority over all nonjudicial staff (clerks, secretaries, hearing reporters, bailiffs, technical personnel, and the like), and court operations. The Presiding Judge (or equivalent) at these courts is therefore free to concentrate on the extremely important tasks of providing professional guidance to the court's judges, supervising their activities and productivity, and implementing upper-level management's policies. In many instances, this Chief Clerk typically answers only to the Presiding Judge.

The DWC's largest District Offices seem ideal candidates for a Chief Clerk (or "Office Administrator" or "Staff Supervisor" or whatever name is felt to best describe the duties). Not only would this person free up some of the time of the Presiding Judge for more essential duties, but he or she would also allow the OSS and LSS to concentrate on key tasks within their separate sections. There would also be a better opportunity for coordinating and integrating the workflow of clerks, secretaries, and hearing reporters rather than the current experience of three separate sections sometimes operating independently and sometimes operating at odds with each other. It might also provide the sort of enhanced environment where individual staff members see themselves as part of a unified team with a single goal regardless of classification. Finally, it would allow the Presiding Judge to confidently transfer some of his or her current routine administrative responsibilities to a

qualified nonjudicial staff member. As we suggest elsewhere, the primary job of a Presiding Judge is to supervise and enhance the performance of the Workers' Compensation Judges at the District Office. Freeing up additional time for this important task would benefit office uniformity in judicial procedures and decisionmaking.

Nevertheless, we do not think it would be a good idea to spend a lot of effort and expense creating such a position in the current DWC environment. At the present time, PJs at most larger branch offices already use some combination of the OSS and LSS to act as a de facto "Office Administrator" and at some of the smaller ones, the LSS (typically the PJ's own secretary) is the person who communicates and implements the PJ's wishes to nonjudicial staff members. While there can be problems from these sorts of arrangements (and we certainly observed personality conflicts, especially between the secretarial and clerical sections at some District Offices), on the whole the current arrangements seem to do an adequate job though improvement is clearly possible.

A more practical consideration involves how such a position would be designed and funded. There is little point to creating a new classification with a high level of responsibility if the end result is a problematic turnover rate. Because under the most likely scenario this Office Administrator would supervise both the OSS and the LSS, the salary range would have to be at least that of an LSS-I to discourage downward movement whenever there is an opening in the lead secretary position. As described more fully elsewhere, the DWC is without sufficient funds to pay for all of the OSS and LSS positions already authorized. Moreover, while an Office Administrator would be a much-appreciated addition to a number of offices where staff members already have a difficult time meeting the demands of the office, it may well be that the money would be better spent, for example, hiring two additional clerks rather than adding one relatively expensive top-level supervisor. Additional line staff such as clerks or secretaries would also give Presiding Judges an enhanced ability to assign some of their more routine tasks to existing OSS and LSS supervisors as needed.

In the event the DWC ever approaches anything close to full staffing of all authorized clerical and secretarial positions, pilot testing of the Office Administrator concept at the largest District Offices may well be prudent. Until such time, our concern is that the creation of an Office Administrator classification in the current environment might well come at the cost of existing positions and divert attention from more pressing issues. As attractive as such a concept might be, the DWC can ill afford to lose any more staff members to do the basic and sometimes unglamorous tasks that are vital to the smooth operation of a District Office. We believe that a prudent delegation of authority by the PJ to the OSS and/or the LSS of nonjudicial administrative duties is an adequate approach in the near future.

It should be noted that our position does not dismiss the idea of creating more than one level of either clerical or secretarial supervisor at the largest District Offices. It may well be desirable, for example, to have both an OSS-I and OSS-II at an office where there are 15 or more clerks working, adequate funding is available, and the demands of the workload justify the additional supervisory position.

Notwithstanding the foregoing, a number of staff members we spoke to felt strongly that giving a single person supervisory powers over all nonjudicial staff would address many ongoing problems at some offices, especially where clerks, secretaries, and hearing reporters have traditionally been working at odds with each other. Though the exact details of such a plan have not been worked out completely, one alternative that we encountered had the Office Administrator acting as the primary liaison with DWC Headquarters for most matters, thus freeing up the Presiding Judge to concentrate on judicial concerns. But it would be ironic for the DWC to create an Office Administrator position at some District Offices with the intention to provide better coordination of office activity and then build in separate lines of authority that wind up making the problem even worse. We believe that this would be the case if Office Administrators reported directly to someone outside of the branch office rather than the Presiding Judge. A similarly negative experience led to changing the lines of supervision for ancillary services consultants from managers at the regional or

central level to the Presiding Judge (though professional guidance still comes from these managers). For the sake of accountability, Presiding Judges need to be ultimately responsible for every aspect of the District Offices under their control and as such must be the final arbitrator for administrative decisions affecting its operations. At best, it would be inefficient to have Office Administrators routinely contacting DWC headquarters in San Francisco whenever a matter needed addressing and at worst, the authority of the Presiding Judge would be undermined. We believe that if Office Administrators are created, they should be under the PJs' supervision in the same way OSSs and LSSs are today.

- ***While the idea of a formal "Office Administrator" position with supervisory responsibilities over all nonjudicial staff at each branch office has merit, limited funds should be used for more pressing WCAB clerical and secretarial staff needs. If such positions are nevertheless created, their immediate supervisor should be the Presiding Judge, not a Regional Manager or other DWC administrator.***

SECRETARIES

Secretaries (technically *Senior Legal Typists*) are typically assigned to a judge on a one-to-one basis, though at some offices, one or more judges may have to share a single secretary's services due to staffing shortages. They are typically tasked with handling a judge's telephone calls, correspondence, and meetings; entering the results of conferences and trials into CAOLS and scheduling future hearings; preparing and editing decisions such as settlement approval orders, Findings and Awards, Findings and Orders, Opinions on Decision, Reports on Reconsideration, and other documents; preparing case files for the judge's review; and other tasks. The degree and manner in which a judge uses his or her secretary appears to vary considerably among individual judge teams. In some instances, secretaries will create the initial draft of decisions and orders based on a minimum amount of specific instruction from the judge and will act in the role of a "case manager" by fielding most of the questions and requests from attorneys and the

like. Other judges use their assigned secretaries for only the most routine duties such as mail handling, file movement, and data entry, preferring instead to compose all documents themselves on their personal computer and contacting litigants directly (subject to limitations on ex parte communications) if needed.

In most offices, a Legal Support Supervisor – I serves as both a judge's secretary and as the staff supervisor of all other secretaries. By tradition or design, the LSS-I is typically the secretary assigned to the Presiding Judge, although this is not always the case. The LSS-I (and less often, another secretary) is typically the *Attendance Reporting Officer* (ARO) charged with relaying regular reports about absences, personnel requests, and other employee information to DWC central administration. The close professional relationship that many LSS-Is have with the Presiding Judge when they are also his or her assigned secretary often results in the LSS-I acting in a de facto role as the head nonjudicial staff member (though in theory the clerks and the hearing reporters report directly to the Presiding Judge).

At the District Offices we visited, the relative staffing of secretaries to judges appears to provide an adequate level of support for the judicial officer's activities. Typical delays in getting out a judge's work product when secretarial support is part of the process, on the whole, appeared to be related more toward issues involving the judge's own practices than with backlogs at the secretary's desk. While there are occasional staff shortages that do affect the ability to handle the stream of documents coming out of the judge's office and courtroom, the position (if funded) is generally filled within a reasonable period of time.

Overall, secretarial positions at the branch offices are relatively stable compared to the DWC experience with clerical staff. While there is a shortage (including both unfilled positions and those on leave) of 27% and 29%, respectively, for authorized numbers of OAs and OSS-Is, the comparable numbers for the SLTs and LSS-Is are 18% and 20%.[193] The effective "turnover rate" (see ***CHAPTER 10***) for both secretaries and

[193] Source: Glenn Shor, Department of Industrial Relations, provided to Tom McBirnie, CHSWC, March 2001.

their supervisors are at a low level comparable to that of WCJs and PWCJs. The salary differential between clerks and secretaries is one of the reasons why an adequate pool of potential replacements exists. The relative prestige of the position, its marketability to outside law firms and other courts should employment be sought elsewhere, the opportunity to work one-on-one with a single judge, the more comfortable or desirable workspace compared to the layout of the clerical section (at some locations, the LSS-I has a private office and most secretaries' desks are in a quieter part of the office), and a commonly held perception that the workload is less stressful than that experienced in the clerical section also appear to contribute in attracting new hires and intraoffice transfers. Though there is just one upward movement available for SLTs (to LSS-I), many longtime secretaries we spoke to were satisfied with their current positions and opportunities for advancement (or lack thereof) within the DWC.

➢ ***At a minimum, the current rate of filling authorized secretarial positions should be maintained. It is not an area needing the same level of immediate additional funding we believe is required for the clerical unit.***

HEARING REPORTERS

Generally

Under LC §5708, the WCAB is required to have the services of a "competent phonographic reporter" to record testimony, objections, and rulings at all hearings.[194] In actual practice, production of a fully finalized, official transcript of testimony is not the primary demand on a DWC hearing reporter's time. Every trial results in the creation of a free hardcopy version of the *Summary of Evidence* and the *Minutes of Hearing*. Because these Summaries are well detailed, are turned out relatively quickly, and are highly focused on the most important aspects of oral testimony provided at trial, litigants typically find them to be

[194] This also includes the judge's narrative of any films shown at trial.

an excellent substitute for a formal transcript (they are a more economical alternative as well: the cost of formal transcripts are borne by the requesting party). The Summary is usually dictated by the judge in private to the reporter following the conclusion of testimony and the production of the Minutes is often left to the reporter to complete on his or her own (the reporter is also responsible for tabbing exhibits included in the Minutes). As a result, creating and/or transcribing Summaries and Minutes are the main tasks performed by reporters in addition to actually recording what happens at trial,[195] while producing transcripts has becomes a secondary priority (though an important one when a Petition for Reconsideration has been filed).

It is not unknown for reporters to record more than just what goes on at trial. Besides the occasional need for hearing reporters to cover public hearings of various workers' compensation related agencies, some judges are more prone than others to request the reporter's presence during a conference. Judges we spoke to generally indicated that this was done only on the rare occasion when a particularly troublesome litigant was expected to appear (though we observed this take place on more than one occasion) or when an order issued following the conference was especially complex or lengthy. Nevertheless, it was reported to us that some offices and some judges were especially likely to have a reporter present during a conference.

Unlike other staff members at DWC offices, hearing reporters are generally unable to finish the work begun by another. While there are standard techniques employed by reporters, each has individual practices (and tailored software-driven "dictionaries") that make transcribing another's notes problematic.

Transcripts

ADR §9992 and §9994 allow parties to order transcripts on demand (though PJs have discretion under P&P Index #6.13.1 to deny the request). When questions of oral evidence presented at the hearing loom

[195] Less typically, the reporter will transcribe the Findings and Award or Findings and Order and the Opinion on Decision if the judge has reached a conclusion immediately following trial.

large in the minds of litigants who believe the decision and opinion ultimately rendered by the judge was flawed, official transcripts are a vital component of ensuring that the trial and associated decision was conducted and reached in a way that is in accordance with the law. But the State should not be in the business of routinely subsidizing transcriptions of trials, especially in light of the current requirement that judges summarize all testimony before them. At the moment, transcripts are a relatively inexpensive purchase for litigants and there are little disincentives for an attorney to order one "just in case." While Summaries remain the exclusive reference to trial proceedings relied upon by most litigants, each additional transcript requires a significant allocation of time from hearing reporters whose primary responsibility is to be available to *record* trial testimony. Even though producing transcripts for parties is given a lower priority than other duties, there are associated costs with such word processing tasks, especially in regard to cumulative trauma for sometimes overworked hearing reporters. The DWC should never be in the business of viewing its hearing reporter unit as a profit center, but given that transcripts are an *optional* purchase for litigants, seeking to simply recover the costs for providing this service seems to be a reasonable goal.

- ***The costs charged to litigants to obtain transcripts from hearing reporters do not currently reflect DWC expenditures and should be adjusted. We believe that an audit should be conducted on a regular basis to determine a per page charge (or other fee structure) for the production of transcripts by DWC hearing reporters. Included in such costs would be the salaries and benefits of the hearing reporters, the salaries and benefits of those who supervise such staff members, and the costs of providing DWC facilities and equipment.***

Real-Time Reporting

If the DWC is to use its hearing reporters in a more creative or flexible manner, then it is likely that "real-time" training is required. Proposals to eliminate the creation of formal Summaries of Evidence by judges, for example, sometimes assume that it would be

fairly easy to have reporters produce a rough draft transcript suitable for use by litigants or the trial judge within an extremely brief time following the end of trial. While these transcripts would not be admissible and would undoubtedly contain errors, they could be adequate enough for the judge to be able to review testimony in conjunction with his or her relatively brief handwritten notes that focused on areas thought to be of greatest import to the underlying issues (rather than the exhaustive record required by a Summary). Such a rough draft would also provide counsel with a roadmap of the trial and would be invaluable as a guide for whether the ordering of an official transcript would be worth the cost. Even if the use of a court reporter real-time transcript is in addition to, rather than instead of, the Summary of Evidence process, the rough copy produced would still give all involved an excellent tool for reviewing the proceedings in a way that is nearly immediate and at minimal cost to the DWC and the parties.

Another important use of real-time reporting is in providing services to litigants, attorneys, and others who are hearing impaired. A court system that by definition deals with a population whose health is compromised cannot ignore such needs (even if it was not already mandated by the Americans with Disabilities Act and by Civil Code §54.8(a)).

Unfortunately, such innovations are not possible with the current makeup of the hearing reporter staff. Few of the reporters we spoke to indicated that they had had real-time training before coming to the DWC. Having such skills at the time of hiring appears to be the key; the costs of giving real-time training to a current hearing reporter are likely to be more than the DWC can or should spend. Furthermore, while many reporters told us that the regular hours required by this sort of government position was a major factor in their decision to seek employment with the DWC (it is not uncommon for private hearing reporters to work weekends and substantial amounts of overtime), providing current reporters with essentially no-cost real-time training would likely have negative consequences for the currently low turnover for reporters. Not only are real-time reporters in demand in a private setting, other government agencies prefer them as well.

In order to prepare for the future, DWC hiring policies should give existing real-time skills a high priority. This may require creating a pay differential for reporters with such training. Without a workforce that can be flexible enough to adapt to changing technology or new procedures, there can be no change in the way trials are conducted in the foreseeable future nor in the way assistance is given to the hearing impaired.

- ***New DWC hearing reporters should have real-time capabilities when hired. Current DWC hearing reporters should not be given real-time training at DWC expense.***

Audio Court Reporting

A number of limited jurisdiction courts, especially those where the likelihood of needing a transcript of the proceedings for appeal is small, have embraced the concept of using electronic audio voice recording devices in place of the routine assignment of a live court reporter. If a transcript needs to be created, a reporter will use the recorded audio testimony as the source. The technology in this area is constantly improving with the use of digital recording systems, mass storage devices with capacities unheard of just a few years ago, and backups to digital tape and CD-ROM. In the most sophisticated setups, a single court reporter can monitor the proceedings in multiple courtrooms to ensure that the recording is adequate for future use. One Florida court was able to reduce the number of court reporters it needed from 28 to 18 by using such audio recording techniques.[196] Even when cost savings is not the primary goal, audio recording can act as a backup system for existing court reporters and if freely made available to litigants in digital format over the Internet, would allow parties to review critical testimony of hearings on their own without requiring the reporter to perform the labor-intensive task of transcription. Much of

[196] See, e.g., Ninth Judicial Circuit Court of Florida, *Automated Court Reporting*, http://www.ninja9.org/courtadmin/mis/automated_court_reporting.htm, accessed August 20, 2001.

the same technological setup could be used to facilitate off-site translation of testimony on a real-time basis.

Despite the possible long-term advantages, converting DWC hearing rooms into digital audio-ready facilities is a daunting proposition. A modern system requires more than simply setting up a tape recorder and a couple of microphones on a desk. A system that does not consistently deliver a product capable of being transcribed by a court reporter is, arguably, worse than no recording at all. Rooms must be soundproofed, parties at trials must sit at designated locations, cables have to be strung from hearing rooms to servers, requirement must be put in place to give the judge control over the recording process, etc. It must be kept in mind that some of the branch offices we visited lacked even a single telephone line in every hearing room. Installing such sophisticated equipment at older branch offices with leased facilities or at offices where some judges currently do not have access to a PC in their own office would be ironic in light of more pressing technological needs.

Ideally, new DWC locations will be designed in a way that would facilitate the use of modern digital audio recording for at least some limited purposes (such as memorializing conference proceedings). At the moment, however, reducing the dependence of the WCAB on live hearing reporters through electronic means does not seem to be a viable option.

- ***The use of audio court reporting should be explored, but at the present time, implementation is not a realistic option.***

Chief Hearing Reporter

Hearing reporters are a specialized profession in the workers' compensation world with specialized needs; in that light, they are similar to raters, judges, vocational rehabilitation counselors, and I&A Officers. It is not realistic to assume that a Presiding Judge or a Regional Manager will always understand the professional, technological, and workflow problems of hearing reporters at their branch offices or in their regions. While we do not believe that parallel or remote supervision of hearing reporters is a cost effective way to increase

productivity, there is little doubt that someone at the DWC should be in a position to advise upper-level management as to the technological requirements, professional development, and personnel issues of the hearing reporters at the 25 branch offices.

At the moment, one staff member voluntarily acts in the role as the DWC's "Statewide Lead Hearing Reporter" though is not compensated beyond the normal hearing reporter salary range. She is the one who is called in to resolve problems in reporter output and personnel issues at the various offices, develop training programs, make decisions about technological upgrades and equipment purchases, advise on hiring decisions, fill in at remote locations during difficult-to-resolve shortages, and serve as a continuing resource for DWC management regarding the use of hearing reporters. The significant travel demands and responsibilities for this de facto Chief Hearing Reporter go far beyond what is required for others in her classification.

Like many of the OSSs we spoke to, it is unclear why she continues to serve in this role when other state agencies (or outside entities) could conceivably offer additional compensation or room for advancement for the same amount of work. At some point in time, she will either leave or retire and it may be difficult to attract or retain someone to execute the same duties on a voluntary basis.

Other professional classifications in use at the DWC's District Offices have at least one person in a designated central leadership position to help implement and explain administration policy but to also voice their sometimes specialized concerns to DWC management. The hearing reporters currently have such a person, but it is unclear whether there will be continuity in this role over the long term. As such, we believe that there should be some special classification authorized and funded within the DWC for a statewide lead reporter. It should be understood that we are not suggesting that the statewide lead reporter be given supervisory control over local hearing reporters; that duty must remain the responsibility of the Presiding Judge.

- ***Adequate incentives should be given to attract and retain a statewide "chief hearing reporter."***

Hearing Reporter Training Manual

Similar to the situation with the clerical section, there is no single, uniform reference text for hearing reporter duties at the present time.[197] While variation in reporter practices from office to office do not have the direct impact that nonuniformity does in a clerical setting, there is still a need to have an approved set of well thought out policies in the event that unfamiliar situations develop and the Statewide Lead Reporter cannot be immediately contacted. Moreover, such a document would be useful in promoting uniformity across all branch offices in the format and approach to the Summary of Evidence and Minutes of Hearing. How reporters interact with judges in creating these legally required products of hearings appears to impact the amount of time judges devote to this task. Reporters at various offices also differ in how they format their transcripts which in turn affects the amount parties are charged for their production. Finally, the manual would be a necessary first step in giving each reporter a clear understanding of what the expectations are regarding performance.

We believe that tasking the current Statewide Lead Reporter or a committee made up of hearing reporters from the various regions with the job of drafting such a manual is an important safety measure should there come a time when no individual to provide centralized professional guidance is available.

- ***The creation of a statewide hearing reporter section training and operations manual should be a high priority for DWC administration.***

[197] As with the clerks, there clearly are already a number of directives in the Policy & Procedural Manual that speak to the duties of the hearing reporters. Unfortunately, the organization of the P&P Manual makes it difficult to use as a daily reference tool for reporter-related questions.

JUDGES

Priorities for Presiding Judges

Strong Presiding Judges are the key to running a successful District Office.[198] Given the far-from-immediate threat of administrative disciplinary proceedings as they are currently structured,[199] much of the influence PJs have over individual judges is psychological at best. The personal and social relationships between PJs and WCJs appear to be the most persuasive method of getting relatively unproductive judges to conform to expectations. Peer-to-peer influences between WCJs do not seem to be sufficient to get a problem judge to modify longtime behavior. Indeed, many judges of the WCAB are sometimes quite in the dark about how other judges at their own office handle similar issues, respond to requests for continuances, conduct MSCs and trials, and the like. In our discussions, many judges focused on “my caseload” and “my cases” rather than viewing the matters before them and other WCJs as a shared responsibility. A strong Presiding Judge is in the best position to gauge whether the workflow of the entire court is being affected by the actions of any particular judge, to successfully convince such judges to change their style or

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[198] We did not visit the few District Offices of the DWC where a permanent Presiding Judge position is not funded, though one judge is tasked with performing in that role without additional compensation. As such, we can make no determination as to whether the ongoing use of “Acting Presiding Judges” at these locations is a prudent decision.

[199] State agencies are required to extensively document the performance or behavioral problems of an employee before taking any “adverse action” such as dismissal, suspension, or formal reprimand. It must also give the employee advance notice of the decision and copies of the documentation used as its basis. If the employee disagrees with the action, an informal hearing is first held and a subsequent appeal to the State Personnel Board is available that may include an evidentiary hearing before an administrative law judge. California State Personnel Board, *Administrative Appeals*, Appeals Division, February 2001. In order to ensure that any adverse action will be upheld by the SPB, it is vital that the documentation in the agency’s file be sufficient to prove its charges against the employee by a preponderance of the evidence. As such, agencies may be reluctant to discipline their employees for isolated incidents or for actions that have not been directly witnessed by supervisors. Acquiring adequate documentation of poor performance takes a considerable amount of time and effort.

procedures, and to impart group responsibility upon the various judges at a District Office.

As such, it may be that the abilities to manage judges and other staff and to take care of the relatively mundane details of administration should be a more important criteria for selecting new Presiding Judges than brilliance in legal reasoning. Only a small part of any PJ's overall responsibilities for effective operation of the branch office are case-related and while extensive knowledge of case law and statutory requirements are obviously important for someone in charge of a court (who is often turned to for answering questions or resolving disputes between the bar and a judge over interpretation of rules), the individual judges of a District Office benefit less from the PJ as a legal research resource than as someone to provide them with guidance to handle the bar and the demands of the cases before them. Moreover, the requirements and responsibilities associated with supervising not just judges but clerks, secretaries, hearing reporters, disability raters, rehabilitation consultants, and Information and Assistance Officers (sometimes totaling anywhere from 50 to nearly 100 DWC employees) means that a Presiding Judge who gives first priority to handling his or her own caseload is in danger of ignoring the overwhelming bulk of activity taking place at the office.

We believe that Presiding Judges need to get out of their personal offices and make the rounds by sitting in the courtrooms (or the offices of the judges if that is where the business of the court is being conducted) and observing how WCJs interact with the bar and litigants, how they rule on motions, how they manage their time during MSCs, how they conduct trials (as well as posttrial work such as drafting Summaries of Evidence and decisions), and how they do all the other tasks on their plate. It is not sufficient to review statistics at the end of the month to decide whether a problem exists; PJs have to know about potential areas needing improvement (or justifying commendation) long before trends are spotted amongst a dizzying array of tables and charts. Clearly such monthly reports are important (as are Appeals Board decisions on reconsideration for cases originally handled by the office's judges, information contained in petitions for reassignment,

and other documentation), but there is no way for a PJ to know what is going on in the trenches without making regular visits to the troops.

Aggressive management styles carry a price. Few judges (or other staff members for that matter) welcome the increased scrutiny required to ensure that each District Office is operating on the same page. It is likely that many judges would take offence to being monitored in their own courtrooms by someone who, but for a decision made by DWC management, would be an anonymous judge at another office, often with fewer years of judicial experience and private practice. And the demands on a PJ's time cannot be minimized by limiting supervision to a limited number of problem staff members. Monitoring is needed for *all* the judges at an office, not just the ones about whom problems have been noted in the past. Observing judges both "good" and "bad" gives the PJ benchmarks for assessing the behavior of all and also avoids the potential for appearing to be singling out some for special treatment. Moreover, watching all judges at an office as much as possible can place the sometimes misleading statistics produced by DWC administration into context. For example, a judge who issues many more decisions than his or her colleagues is not necessarily conducting more regular hearings; only by watching what takes place can a PJ find out that the particular judge routinely generates separate Findings for a multitude of relatively minor issues in each case.

Another aspect of the monitoring process that sometimes gets overlooked is simply listening to the concerns of the local bar. PJs need to make a concerted effort to let attorneys know that their opinions matter and that complaints voiced to the PJ in confidence will remain so. No PJ can be everywhere at the same time and so by using attorneys as an important source of data, idiosyncratic or counter-productive actions by judges can be identified at the earliest point. Obviously, not all attorney complaints are valid ones, but they can serve to point out differences in judges' approaches and philosophies that may need addressing (even if only to point out that what a judge did or did not do was both within his or her discretion and in line with the PJ's express wishes). A widely publicized open door policy is one way to encourage this process, but so is moving through the hallways and

sitting in hearing rooms during busy calendars and showing that the PJ is personally concerned with the business of the court and the professionalism of the judges.

The importance of providing enough time for constant supervision and auditing of the work of staff judges by the PJ cannot be minimized. For new judge hires, the Presiding Judge's evaluation is vital to determining whether termination is warranted during the initial probationary period. If the PJ's attention is elsewhere, the possibility increases that the careful assessment needed to prevent clearly substandard judges from obtaining permanent employment might not be made. For established judges, performance reviews generated by a Presiding Judge who is stretched too thin will be perfunctory at best and will do little to provide needed professional guidance. At the extreme, the reviews of judges who are working at a sub-par level will reflect a generic satisfactory rating, thus frustrating any possible disciplinary action in the future. The current civil service disciplinary process is based upon the ability of a supervisor to have developed adequate documentation of any problems, the corrective measures taken in the hopes of resolution, and the results (or lack thereof) of those measures. Ideally, the Presiding Judge would be able to detect undesirable behavior on the part of his or her judges at an early stage, personally investigate any allegations brought to his or her attention, and to remedy it informally. That cannot take place if the PJ is generally unaware of what is going on in courtrooms and the judges' offices. If early, informal resolution is not possible, then formal disciplinary measures are required but not until the required documentation is generated. If delayed too long, the result is that the number of litigants who failed to receive due process and the number of attorneys who are treated unprofessionally will grow unnecessarily.

At District Offices where resources are adequate to meet demand, and where individual judges all appear to share a vision to move the court's entire caseload (rather than just their own) as a team, the PJ can manage with a far lighter touch. Indeed, interference with the day-to-day activities of the WCJs in faster courts with a good relationship with the bar is probably counter-productive. But only a few District

Offices in 2002 are in a position where a WCJ who is failing to work efficiently and effectively would not have an adverse impact on the workflow of the entire office.

Given the above, it seems obvious that Presiding Judges need to place great priority upon the tasks associated with actually "presiding" over a District Office and less upon handling a large part of the incoming caseload. We certainly realized that some downward adjustment is already made so that PJs have fewer cases assigned to them than other judges at the same office. The problem is that with both short-term and long-term shortages among the judicial officers at some locations and the need to make up for other delays at the office (such as those at the calendaring desk), the PJ has little choice but to take on a greater share of the load in order to prevent the individual judges from becoming overwhelmed or the time to key intervals to lag further behind.

Presiding Judges clearly relish the opportunity to perform hands-on management of individual cases because of the greater immediate reward of settling or adjudicating real-life disputes as opposed to performing routine bureaucratic chores. Nevertheless, PJs who reduce their supervisory role to the minimum in favor of handling a greater caseload do so at the risk of negatively impacting the performance of the entire office over the long run. We believe that Presiding Judges need to keep in mind that their primary responsibility to both the DWC and the parties who turn to the WCAB for help is to effectively manage the operations of the judicial officers and staff members of the branch office, not simply to conduct conferences and trials.

- ***Presiding Judges need to place greater emphasis on supervising the conduct of the overall business of the District Office even if doing so means that some of their existing caseload will be shifted to other judges at the same location.***

Presiding Judge Qualities

The job of Presiding Judge is a difficult one, especially in light of the fact that many of the skills needed to oversee an office do not grow naturally out of any prior experience as a workers' compensation

judge. Absorbed in an all-consuming effort simply to handle assigned cases in a professional manner, WCJs may not always realize what it takes to coordinate the actions of multiple judges against a backdrop of support staff supervisory needs, administrative directives from DWC headquarters, litigant demands, and resource constraints.

Ideally, the DWC would have a comprehensive program in place to provide newly appointed Presiding Judges with training that focuses on the sometimes conflicting subtleties of court management and personnel supervision. As the turnover in Presiding Judges is thankfully low, we did not have the opportunity during our research to observe on a firsthand basis the way new PJs develop into their roles. Reportedly, the Regional Manager and other PJs from nearby offices will attempt to informally provide guidance through on-site help during the early days of the new administration. It does not appear, however, that this training and support process is a uniform or formalized one.

Certainly, the DWC would be well served to survey its current Presiding Judges with the goals of learning of any past deficiencies in how it helps new PJs get up to speed and of designing a core program for the future to remedy such shortcomings. Because there is but one Presiding Judge at any local office, no one else is around on a daily basis to act as a mentor, to provide ongoing supervision during the initial transition period, or to take over part of the duties until he or she is more comfortable. On-the-job training is important, but even from the very first day, the decisions a PJ makes have profound impact both on the people who work under his or her command and on the litigants whose lives and businesses are impacted by the actions of such staff. Standardizing the new PJ training process would minimize any early problems in this regard and provide greater uniformity in management styles throughout the system.

Assuming that the PJ eventually acquires the skills and knowledge to handle the technical and administrative side of his or her new duties, something more is still needed if problems of excess delay, nonuniformity, and unnecessary costs are to be minimized across the system. Every new PJ must share with DWC management a *commitment* to moving cases through the system in the most judicious and expeditious

manner possible. A PJ with strong management skills who is cavalier about the problem of delay may well exacerbate the problem far more than one who tends to be reactive rather than proactive in presiding over the office. It is not enough to run the office efficiently or with a strong hand; it must be done primarily for the purpose of getting well-reasoned decisions out on cases as quickly as possible and at minimal cost to litigants.

Part of that commitment can be proven even before hiring by reviewing how the judge previously processed his or her workload. If the judge consistently failed to get out decisions following trials within 30 days (while others were doing much better), if the judge was notorious for allowing cases to drift into limbo for years, and if the judge's trial calendar was routinely extended out weeks or months longer than others then it is likely that similar actions on the part of the trial judges he or she will eventually supervise will be tolerated as well. A good Presiding Judge candidate is not necessarily one whose primary quality is an extremely low frequency of being overturned on Reconsideration by the Appeals Board; a far better approach for the DWC would be to identify those who already possess the skills and desire to move cases through expeditiously and who are willing to share those techniques with others.

- ***Management skills and a commitment to cutting delay and unnecessary costs should be the primary characteristics of new Presiding Judges.***

New Judge Hires

A number of PJs we spoke to told us that the most important accomplishment of their term has been finding and hiring new judges who they feel are adequately skilled, and even more critically, would work well with both the PJ and their fellow judges. The PJs are comfortable with these new choices primarily because they come into the District Office with an attitude that what they do as individual judges is a part of a larger picture and that their personalities are ones that will integrate well with the current staff.

But the high expectations the PJs have for these new judges also come from the investment the Presiding Judge has made in their professional evolution. The PJ is often the one training the new judge, sits by his or her side for a significant time in the early months, is a continuing resource for fine points of procedures and practice, and generally acts as a mentor even after the WCJ is operating alone. And on the other side of the relationship, some of these relatively new judges told us that they were very concerned about not disappointing the PJ who "hired" them, even though they were clearly aware that as civil service employees, the disciplinary process would have little immediate effect on their day-to-day behavior.

We think that PJs who are committed to moving cases through the system should have considerable influence over the selection of new (and transferred) judges for their courts. A PJ who feels that a choice has been made without his or her input or over his or her objections is unlikely to take a firsthand interest in the new judge's development. This can evolve into a situation where the WCJ is left hanging without needed support in the early days and, perhaps more importantly, without a sense that the PJ's observations, suggestions, and criticism should not to be taken lightly.

Even if the DWC gives Presiding Judges greater discretion in choosing new judges, there are limits. Current State Personnel Board rules restrict selection to those who have ranked in the highest three groups based on scores received on the WCJ exam, a test that is presently focused on assessing familiarity with workers' compensation law. Other skills vitally needed for processing a caseload such as aptitude for mediation efforts, efficiency in work habits, writing skills, and the ability to meaningfully counsel litigants are not a high priority (or are completely absent) on the exam. Some have called for modifying the testing process to take into account these requirements. This certainly sounds like an approach meriting further investigation because expertise in the rules of practice and procedure and the body of case and statutory law alone cannot guarantee that a new hire can handle the significant demands of the job; we make no specific recommendation about the current exam process because it was not an area in which we

collected comprehensive data. The bottom line though is that even if the scope of the exam is made more relevant to the actual duties of a judge, the PJ must still have a personal investment in assuring that new hires do the very best job throughout their careers. By giving him or her great input into the selection process, that investment is possible.

- ***Presiding Judges should be given significant input into the selection of new judges for their District Offices.***

- ***The judicial testing process should be regularly reviewed to ensure that it identifies successful candidates with all of the skills and knowledge needed to be efficient and effective judges.***

Judicial Training

Depending when they were hired, some WCJs indicated to us that they received no formal training whatsoever and others said they were given two weeks at the most (this should be distinguished from "on-the-job" training where they initially only handle particular types of cases or where another judge, typically a PJ, reviews decisions for a period of time). Realistically, most new WCJs are adequately familiar with the nuts and bolts of workers' compensation practice and probably have little trouble with understanding applicable rules and regulations. But the world of an attorney-advocate is very different from that of a WCJ. Attorneys do not have to know how to efficiently take notes during testimony in a way that can be communicated effectively to a hearing reporter,[200] they do not have to know how to promote settlements between sometimes contentious parties, they do not have to know the best ways to manage a crowded conference calendar, and they do not have to know how to issue decisions quickly and expeditiously. It is sometimes easier to be a zealous advocate for one viewpoint than it is to be someone who has to decide between equally compelling positions, and it is sometimes easier to write an exhaustive brief that is laden with the latest case

[200] Many attorneys do take copious notes during depositions, but they are primarily for their own use and often skip over more mundane details that might be important for a complete Summary of Evidence.

law and creative arguments than it is to effectively draft a responsive Opinion and Decision in the shortest time possible following trial. Moreover, workers' compensation practice does not provide many opportunities for the sorts of routine exercises in legal reasoning required by law and motion work in the civil courts. Even attorneys well versed in the complex subtleties of Labor Code and Title 8 procedures may not often have had a need to do much in the way of traditional legal research and writing. Once they become WCJs, some may find the task of crafting a well-reasoned Decision quite daunting.

From our discussions, it appeared that few if any new WCJs were instructed at the outset on how to ***manage*** their caseloads and how to ***streamline*** the tasks before them. Because of the fact that the exam process reportedly does only a minimal job of assessing a candidate's capabilities beyond procedural competence, and because the choices for selection are limited to the top three scores on the exam, the possibility exists that a new judge may not have any natural aptitude whatsoever for the day-to-day details of the job. A new WCJ who is placed into a position of authority without the tools for executing the details of his or her responsibility has the potential for developing habits that will adversely affect the movement of cases before him or her for years to come. As one authority put it succinctly:

> Newly appointed judges need orientation to their role, which is novel even for lawyers with long experience as advocates. They also need training in the administrative and collegial responsibilities of judicial office, which are quite unlike the ordinary professional experience of lawyers.[201]

Another way of viewing the situation suggests that the lack of managerial experience can potentially have a number of adverse consequences:

> Most judges come to the bench with little experience in the area of management, and thus are at their worst when faced with "management duties" or working with administrators. This probably accounts for why so many judges leave managerial functions to administrators; ignore this responsibility; or

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[201] Judicial Administration Division, *Standards Relating to Court Organization, Volume I*, American Bar Association Press, 1990, p. 64.

> come across like “Attila the Hun” or a similarly loved despot.[202]

One judge who commented to us on the need for job-specific training suggested that the lack of instruction on process was a direct cause of wasted effort:

> “Each judge is allowed to do anything they want to get the job done. Because of this we have some judges spending an inordinate amount of time mailing miscellaneous nonsense documents out to the parties.”

Ongoing judicial training does take place, typically before all the judges in each region, three or four times a year. But the topics discussed are often related to new developments in case law or in DWC administrative requirements. What does not appear to be a high priority is instruction on how to handle the day-to-day tasks of being a WCJ. Opinion writing, handling difficult litigants, knowing when to grant continuances and OTOCs, interfacing with hearing reporters and other staff, understanding the DWC’s On-Line database and how their actions are translated into recorded events, and the like are absent from the agendas of most of these training sessions. The result seems to be that absent influences from the PJ, WCJs tend to operate in the very same way year after year because they have not been presented with alternatives on how to be more effective jurists.

It is interesting to note that a DEU rater might be given many months of intensive training while the person charged with the task of translating those ratings into a decision that will affect the lives of workers and the bottom lines of employers for many years to come are provided a negligible amount of professional education. We believe that every new WCJ should receive a similar and an adequate amount of training in judicial caseload management and that such lessons should be continued on a systemwide basis for all judges, no matter how long they have been on the bench. And it must be emphasized that the training must have as its focus how to best manage the specific demands of the

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[202] National Conference of State Trial Judges and the National Judicial College, *The Judge’s Book*, Second Edition, 1994, p. 172.

caseload. It is not enough to instruct judges simply on the fine points of case law, regulations, and statutes; judges need to be instructed on how to be efficient judicial officers.

Such training does not have to be delivered by highly paid consultants or stints at far-off judicial education centers. Thankfully, there are WCAB judges who already know how to move through a conference calendar and still get the job done, how to preside over trials so that matters involving only a single witness do not spill over into all-day affairs, and how to turn out a decision following that trial in a matter of days rather than months. The DWC should identify these effective judges, request their assistance in developing a training program, and have them frankly discuss their personal approaches with their colleagues.

- ***Current judicial training for handling the court's business, both for new judges and on an ongoing basis, is inadequate and needs significant improvement.***

Reinforcing a Common Goal of Effective Case Management

Besides doing a better job in judicial hiring and training, the DWC would be well served by making available to the public information regarding the performance of all judges at every office. In this regard we are not referring to special audits of individual judges or individual case files but rather the sorts of general measures of throughput and success at meeting time mandates that speak to the Legislature's repeatedly enunciated demands that the system work as rapidly and with as little cost as possible. There is already a set of "monthly reports" issued by the Division broken out by each office and judge that gives the number of trials conducted, the number of conferences held, the number of findings issued, the number of settlements approved, and similar information. Other important reports show the names of cases assigned to each judge where no decision has been rendered more than 60 days following the end of trial or the presentation of a proposed settlement. After reaching a consensus as to a limited number of measures that best reflect the most important tasks

of a judge, a set of useful statistics could be placed on a website that would allow easy comparison by both DWC staff and the public.

This idea is not some sort of cruel and unusual measure directed at the trial judges of the WCAB, a group that does not always receive the respect it deserves. Even the judges of the Federal District Courts are the subject of a "...report, available to the public, that discloses for each judicial officer–(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending; (2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and (3) the number and names of cases that have not been terminated within three years after filing."[203] There is evidence to suggest that this one aspect of a comprehensive reform package for the Federal District Courts had more effect on reducing pending caseloads than did the package as a whole or than was seen in a variety of other procedural changes including the use of early pretrial conferences, joint status reports, and early referral to arbitration.[204]

The DWC monthly reports already go beyond the hands of upper-level administrators. A number of judges we spoke to indicated that they review the documents closely and use them to see how they compare with their colleagues. But not all judges will take the time to pore over these complicated and confusing reports and many of the measures displayed are useless or do not reflect current WCAB trial judge duties. Moreover, the public has a right to know whether cases are being unnecessarily delayed and if needed, bring that situation to the attention of the Presiding Judge or the Regional Manager. It is also important to provide consumers of DWC services and other members of the workers' compensation community the basis for judging for themselves if the problems of delay reflect the actions of just a few judges or the system as a whole.

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[203] 28 USC 476(a).

[204] Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and Vaiana, *An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (1996), p. 85 and Table 10.1, p. 89.

➢ ***A key set of performance measures for each judge should be made available on the DWC website, including the names of cases assigned to that judge that have not been resolved or acted upon in a timely manner.***

Judicial Classification

While not a major concern on the level of providing enough clerks, judges, raters, and other personnel to perform the core business of the workers' compensation courts, we do believe that settling the issue of what to call the judicial officers of the WCAB once and for all would be in the best interests of overall morale of the trial judges. At the moment, the Labor Code and the California Code of Regulations contain a mix of titles that include "Workers' Compensation Judge," "Workers' Compensation Referee," and "Workers' Compensation Administrative Law Judge." There does not seem to be any reason to use multiple designations nor does there seem to be any reason to insert the unnecessary phrase "administrative law" into an already lengthy title.

One provision[205] of the earlier 1993 reform package mandated that the term "workers' compensation judge" would henceforth mean "workers' compensation referee." The bill's sponsor apparently believed that WCJs had overstepped what was felt to be their limited duties: "They are not judges. They are not appointed by the governor.... They are like traffic referees.... I wanted them to have a title that was more fitting and reflected their true accountability."[206]

In 1994, an attempt was made to restore the classification back to workers' compensation judge. The bill (SB 1945) was passed by the Legislature in September of that year with the support of the Judicial Administration Division of the American Bar Association, the National Conference of Administrative Law Judges, and the Association of California State Attorneys and Administrative Law Judges. However, Governor Pete Wilson vetoed the measure on the basis that the

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[205] Stats. 1993, ch. 121, §12.

[206] Betsworth v. Workers' Comp. Appeals Bd., 26 Cal.App.4th 586, Cal.App. 4th Dist., 1994 (repeating statements of State Senator Bill Leonard originally cited in *Special Report, Legislature Says: "Judge Means Referee." Now What?* (1993) 21 Cal. Workers' Comp. Rptr. 309).

"...legislation would reverse an important aspect of the 1993 workers' compensation reform. The term 'judge' should be reserved for individuals who are accountable to the electorate. By contrast, workers' compensation referees are not subject to any confirmation or election process by the people or their elected representatives."[207] Moreover, the Governor felt that "...referees are also not subject to the same disciplinary procedures that apply to judges."

The Governor's concerns seem misplaced. He did not also propose that the judges who are part of the Unemployment Insurance Appeals Board, Office of Administrative Hearings, State Personnel Board, Public Utilities Commission, and many other state agencies change their title to a perhaps more fitting version. Also, none of the civil, criminal, and appellate judges in the states of Delaware, Hawaii, Massachusetts, New Hampshire, and Rhode Island are either selected or confirmed by direct election or decisions made by the Governor or the legislature. Like California's civil and criminal trial judges, WCJs must abide by the same Code of Judicial Ethics[208] adopted by the state Supreme Court. WCJs are no less a judge in these respects than any other judicial officer in the state.

In 1998, LC §27 was amended so that the term "workers' compensation administrative law judge" would now apply as well. But one questions whether WCJs are truly administrative law judges in the classic sense. While they clearly are responsible for adjudicating cases on the basis of agency regulations, the legislatively enacted Labor Code is the primary source of authority. Litigants before a WCJ are not appealing the decision of some bureaucrat within the DWC but instead are in a dispute with some other individual or entity. And unlike decisions made by many administrative law judges, those of a WCJ do not need to be formally adopted by an agency head such as the Administrative Director but instead have the force of law once issued. Even as far back as 1962, a time when litigating workers' compensation disputes was arguably far less complex than it is today, a number of California Supreme Court

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[207] Wilson, Pete, *SB 1945 Veto Message* (1994).

[208] *California Code of Judicial Ethics*, California Rules of Court, Division II, effective December 13, 2000.

justices essentially asserted that the work of a WCJ "...is comparable in every particular to that of a trial judge."[209]

It seems ironic that with so many calls for reform in the area of nonuniformity, the designation for the trial-level judicial officers of the WCAB would continue to exhibit a variety of names in the statutes and regulations that form the foundation of the workers' compensation system. This problem was not addressed one way or another in some recent legislation affecting the workers' compensation adjudicatory system. SB 71, passed by both houses of the California legislature in September of 2001 (though subsequently vetoed), continued to use "workers' compensation judges" in Section 31 and "workers' compensation administrative law judges" in Section 32.[210] If the Labor Code is ever again the subject of another sweeping set of changes, standardizing the title to "workers' compensation judge" would at least indicate that someone is aware of these sorts of routine internal inconsistencies that exist throughout the system's statutory framework. A similar effort should be made regarding the AD Rules and Board Rules. The change would also send a message to the bar and the general public that these judges are indeed fully empowered judicial officers who operate within a court of specialized jurisdiction, not some sort of low-level hearing officers buried in the recesses of a faceless state bureaucracy.

➢ ***The title of a WCAB trial judge should be uniformly referred to as "Workers' Compensation Judge" in statutes, regulations, official forms, and informal policy directives.***

REGIONAL MANAGERS

A number of judges and Presiding Judges we spoke to complained that throughout the years, "San Francisco" (the generic term used to encompass DWC upper-level administration) has sometimes been ignorant of

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[209] California Assembly Interim Committee on Judiciary, *Final Report of the Assembly Interim Committee on Judiciary*, January 7, 1963 (citing written testimony of Supreme Court Associate Justice Paul Peek).

[210] SB 71 also makes reference to "settlement conference referees" and "referee" in Section 81. However, such individuals are only used to preside over conferences.

or unconcerned with the realities of day-to-day operations at the branch offices. Again and again we heard of stories where a request form or complaint letter was sent to the Division's main offices without ever receiving a response or even an acknowledgement of its receipt and of special surveys of case files ordered and data collected with some considerable effort though, it was claimed, the results of the work were never disseminated to the originating offices. It was also asserted that personnel decisions (both new hires and transfers) were typically being made with little input from the people at the front lines. Moreover, top-level administrators were felt to know little or nothing about what it actually took to run an effective court. Whether these complaints were justified is unclear, but they do serve to underscore the need for effective communication between the 25 offices scattered across the state and DWC headquarters.

In recent years, the Regional Manager concept has been used to address the problem of a disconnect between line staff and top supervisors. The state was divided into three regions and a DWC administrator (typically a former Presiding Judge) was charged with overseeing and coordinating the operations at each office within the assigned region. The Regional Manager would work under the supervision of the Assistant Chief for Claims Adjudication and in turn, through the individual Presiding Judges, direct the work of the staff at the branch offices. While the PJ would still be the ultimate supervisor of his or her trial judges and other DWC personnel, the Regional Manager would have the ability to shift staff around from office to office as needed to address immediate problems, to help decide proper personnel levels and provide input on new hires, to gather information regarding personnel problems, to inform DWC headquarters of problems and needs at the branch offices, and to manage and standardize spending at the various branch locations.

Regional Managers clearly spend a considerable amount of their time shuttling from office to office and as acting as a sort of ombudsman or liaison between the branch offices and upper-level administration. The Regional Managers appear, based upon our discussion with line staff, to be the only people in a position to actually know how one office

compares to another in terms of procedures and policies and in staffing requirements. Presiding Judges and WCJs are consumed by the tasks needed to address their own caseload and often have little actual knowledge of how other DWC offices—even ones in close geographical proximity—operate. While upper-level DWC administrators do visit the various branches, such appearances seem to be primarily triggered by either significant problems that need to be investigated or periodic educational conferences. Regional Manager visits, on the other hand, are a routine occurrence and from what we could observe, staff essentially ignore their presence unless they have something they wish to complain about or are contacted directly by the RM. Thus, the RM has an excellent sense of actual operating conditions in both absolute and relative terms.

The concept of having a mid-level supervisor for a manageable collection of Presiding Judges and their branch offices (based on some reasonable geographic division) seems to be an attractive one. While a few staff members we spoke to had personal or professional differences with their assigned Regional Manager, they also felt that despite those reservations, at least there was a knowledgeable, sympathetic, and available person out there who would understand what they were going through and do all that was possible to address those concerns.

From our standpoint, it does seem that the DWC needs someone who can make informed and ongoing decisions about staff-level assignments and who can identify problems in procedural uniformity that would be transparent to a PJ who is too close to the situation as well as being off the radar scope of an administrator based solely in San Francisco. Other research has suggested that Regional Managers "...have had a generally positive effect on improving operational consistency within each region."[211] Eliminating the Regional Manager concept as a cost-cutting idea seems to be a false economy in light of the need to more closely supervise and conform branch offices.

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[211] Commission on Health and Safety and Workers' Compensation, *CHSWC Profile of DWC District Offices* (1997), p. 5.

➢ ***Some form of a midlevel regional supervisor should be retained for the purpose of coordinating operations among a manageable group of individual District Offices.***

DWC ANCILLARY SERVICES

While the core focus of our work was on the Claims Adjudication Unit, we do have a number of observations regarding DWC ancillary service units such as DEU, RU, and I&A.

Pay Levels for Ancillary Service Staff

The Workers' Compensation Consultant (WCC) position was established in 1981 to cover I&A Officers in the Information and Assistance Unit and raters in the Disability Evaluation Unit.[212] One of the requirements of entry into the position of a WCC is at least three years experience as a Workers' Compensation Claims Adjuster (WCCA) with the State Compensation Insurance Fund (SCIF). Initially, WCCs were to be paid at a rate equivalent to SCIF's Workers' Compensation Insurance Supervisor IIs (WCIS II). At the time, WCISs were tasked with supervising SCIF's WCCAs. The Workers' Compensation Rehabilitation Consultant (WCRC) was established in 1975 for Rehabilitation Unit personnel. A WCRC must also have at least three years experience as a SCIF WCCA plus also have additional experience in vocational rehabilitation. In 1978, WCRCs were paid at a rate that was 5% higher than WCIS IIs.

Over the years, there was a natural progression where SCIF adjusters who sought to gain additional experience in the industry but were unable to move into one of a limited number of supervisory positions at the carrier found such opportunity in the DWC as a WCC or WCRC. But in recent times, the relative salary level position between the DWC's ancillary service providers and SCIF's claims adjuster supervisors shifted. By 1990, a SCIF WCIS II made 10% more than a DWC WCC. Moreover, in 1993 SCIF created a new position of Senior Workers' Compensation Claims Adjuster (Sr. WCCA), thus allowing claims adjusters

[212] WCCs are also found in the Uninsured Employers Fund Unit, the Subsequent Injuries Fund Unit, the Self Insurance Plans Unit, the Office of the Director – Legal, and the Industrial Medical Council.

to move into a position paid as well as a WCIS II without having to take on supervisory duties. This situation now meant that some regular claims adjusters at SCIF are paid more than the specialized professionals of DWC's ancillary services units.

WCCs and WCRCs we spoke to repeatedly mentioned this salary difference as a source of much frustration. While employment at the DWC as a DEU rater or RU consultant presents opportunities for professional growth and personal satisfaction perhaps not available in the claims department of SCIF, some told us that their former jobs with the carrier offered the potential for more money with fewer pressures. This was less true for I&A Officers for whom the interaction with the public as a type of ombudsman or counselor was often claimed as a very attractive benefit that would not be found in a claims adjuster position.

This is a problematic situation because despite the requirement of at least three years experience in the industry, the DWC expends a considerable amount of time and effort in training WCCs and WCRCs. The most extreme example is that of a DEU rater. The general feeling among DWC management is that it takes about a year to properly train a rater from scratch. Because the training must be done in person, the DWC must also cover the travel and living expenses of the trainee during a significant portion of that period. A loss of one of these professional consultants simply because of a 10% pay differential with SCIF claims adjusters constitutes a significant setback for the DWC and impacts both the settlement process (through increased delay in delivering consultative and summary ratings) and in the trial process (through increased delay in delivering formal ratings).

Clearly, the DWC is in no position to get into an unlimited bidding war with private industry (or even a quasi-public entity such as SCIF) for potential WCC and WCRC candidates. Because employment with the state is a very appealing option for many people given the relatively stable work environment, regular hours, and competitive benefits, the DWC need not exactly match the salaries offered by private insurers in order to attract an adequate pool of applicants for these types of jobs. On the other hand, SCIF personnel are already within the state umbrella and are likely to move only if they believe that the new position within

the state bureaucracy has the potential for more money, has the potential for greater or faster advancement, or offers a more pleasant work environment. SCIF is a state entity that the Division depends upon as a primary source of new ancillary service staff and if SCIF claims adjusters decide that the negative financial consequences of a lateral transfer to the DWC are too great to bear, the pool of potential employees will eventually begin to dry up.

At the very minimum, the DWC should return to a situation where WCC and WCRC positions are paid at a level equal to a Senior Workers' Compensation Claims Adjuster.

- ***The DWC should eliminate the gap between the salaries it pays to ancillary service consultants and those offered by other state agencies for similar positions.***

Perceived Problems in Rater Variation

We did not attempt to determine the extent to which raters of the DEU differ over their evaluation of similar conditions. However, the frequency of complaints in this area suggests that additional investigation is needed to see whether DEU raters' decisions are affecting the ability of WCJs to reach uniform results regarding settlement value and trial decisions. It should be kept in mind that rating is an inexact science at best and that variation is certainly not limited to the professionals of the DEU; private ratings we saw in files that were offered by opposing sides often differed by a surprising margin.

Judges give great weight to DEU evaluations, especially when presented with competing private ratings that have been essentially "purchased" by attorneys. To the extent that there is variation in DEU rating practices, there will also be variation in trial decisions and settlement approvals. We believe that a study of DEU rating uniformity should be undertaken as quickly as possible and if significant variation is found, addressed as quickly as possible. If a minimal level of variation is found, the results need to be communicated to the workers' compensation community immediately in order to remove DEU ratings as a

source of concern. If this topic is debated endlessly without justification, the necessary level of trust in a valuable component of the dispute resolution process will be eroded.

Concern over consistency and predictability over DEU ratings is nothing new. Interviews with participants and stakeholders conducted during previous RAND-ICJ research "often revealed concerns about the difficulty of determining disability ratings and inconsistencies among raters."[213] To address those concerns, the researchers suggested that occasional reliability checks (essentially having the same file rated by multiple DEU evaluators) might go far toward identifying troublesome or particularly difficult-to-rate injuries, identifying raters whose practices differ from others, developing training materials, and providing "a measure of the overall reliability and consistency of the DEU rating process."[214] Over three years later, the same sorts of concerns continue to be voiced by some segments of the workers' compensation community. Again, we make no claim as to whether or not there are indeed any significant differences in how DEU raters currently evaluate injuries, but unless the question is either put to rest forever or if there is a problem, addressed effectively (perhaps through amendment of the Permanent Disability Rating Schedule, development of specific guidelines for difficult-to-rate injuries, better instructions to doctors for writing medical evaluations, or additional training for DEU raters), there will continue to be grumbling about a core component of the entire workers' compensation process.

- ***Some segments of the workers' compensation community are concerned over the potential of significant variation in the way DWC disability evaluators rate similar injuries; the DWC should investigate whether such variation indeed exists.***

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[213] Peterson, Mark A., Robert T. Reville, Rachel Kaganoff-Stern, and Peter S. Barth, *Compensating Permanent Workplace Injuries: A Study of the California System*, RAND, Santa Monica, CA, MR-920-ICJ, 1998, p. 125.

[214] Peterson, Reville, Kaganoff-Stern, and Barth (1998), pp. 179-180.

Rating Turnaround

We did not evaluate the average time the DEU needed to respond to a form DEU 101 request for a summary rating, but by many reports, it can take months to complete when staffing is short. This is clearly a cause of unacceptable delay. Unrepresented workers deserve a quick and judicious turnaround on their cases and the complex safety net the Legislature has created to protect the interests of pro pers depends on the availability of summary ratings. Even if no specific time interval benchmarks for ratings exist, not having adequate resources available for a reasonably prompt turnaround runs counter to the Constitutional mandate for speedy resolution of disputes.

What then should be a reasonable goal for the DWC in terms of providing summary ratings to pro per applicants? One way to view the issue is to look at the time lag between the day the Permanent & Stationary medical report is issued and the day a Declaration of Readiness is filed. While that period of time is not directly under the control of DWC's Claims Adjudication Unit (i.e., nothing need be done by judges and their staff until the DOR requests an MSC setting), it does add to the overall "delay" in claim resolution as seen through the eyes of an injured worker. From their perspective, the P&S report essentially is the point at which the matter can finally be put to rest and all further paperwork, bureaucratic snarls, and unnecessary waiting is delay personified. Our analysis of typical cases (see ***CHAPTER 9***) suggests that a median average of 122 days transpired between the P&S report and the DOR filing. If this average is representative of pro per applicants as well, the extent to which the magnitude of that period is due to the inability to generate a summary rating promptly and provide the parties with the basis for informed settlement negotiations is a matter directly under the control of the Disability Evaluation Unit of the DWC. A summary rating turnaround of even just 30 days would constitute about a fourth of the median P&S-DOR period.

This 122-day period should be compared to the median average of 155 days needed by the Claims Adjudication Unit (see ***CHAPTER 5***) to deliver a final case-in-chief resolution to a case after a DOR or proposed settlement has been filed. If indeed such ratings can sometimes take

months to complete (as was reported to us by a number of sources), then such DEU-specific delay constitutes a significant share of the total time elapsing from the P&S report to final resolution.

We believe that minimizing this “front-end” delay to disputed claim resolution is just as important to the overall goals of the workers’ compensation system as turning out case-resolving orders once a DOR has been filed (i.e., the “back end”). As an initial starting point, the DWC should attempt to provide a summary rating within two weeks of the request and also attempt to collect detailed statistics on delivery times so that problem offices can be identified and assisted. If the two-week target is unrealistic or if it can be shown that the turnaround period has no effect on the pre-DOR settlement process, then this initial time line can be eased in the future.

- ***As an initial benchmark, rating resources should be sufficient to provide summary ratings to unrepresented workers within two weeks. The DWC should investigate whether summary rating is being performed at an adequate pace.***

Similarly, we did not evaluate the average time the DEU needed to produce either consultative or formal ratings. The former is vital as an aid to a settlement that would remove the case from the overall workload of the WCAB. Delays in providing the latter type of rating directly add to the length of time a judge will take to issue a decision following trial. In either instance, the end result is that litigants will have to continue to wait for a resolution that should have been delivered at the earliest possible opportunity.

We believe that a one-week turnaround should be the outside target for DEU raters performing these tasks. LC §5313 asks judges to deliver their Opinion and Decision no later than 30 days after the final receipt of all evidence and arguments following a trial. Litigants expect a prompt decision in a case that has finally jumped through numerous procedural hoops and made it to a formal hearing. But delays in delivering formal ratings add to the total time needed to get that very decision out and every moment that parties wait for a resolution in a case where all testimony and medical reports have already been presented

to the trier of fact reflect poorly on the DWC. If judges indeed need an entire month to review the file and rating and thereafter draft the decision, then even a week delay in getting a rating out adds 25% to the overall waiting time.

As for consultative ratings, the ideal would be to produce a rating the very day it is requested. That is the time when both attorneys are typically present at the office, the case file is available for joint review, and judges are available for a walk-through settlement approval. In a system where settlement is to be encouraged at every opportunity, then getting a rating as soon as possible into the hands of litigants who are apparently eager to resolve the matter informally should be a top priority for administrators. We do understand, however, that nearly immediate turnaround is not always possible and so as an initial benchmark for assessing performance, the DWC should attempt to deliver consultative ratings no later than a week after the request (though a far shorter period is clearly preferable).

- ***Rating resources should be sufficient to provide consultative ratings within the shortest possible turnaround and as an initial benchmark, to provide formal ratings no later than one week after the request. The DWC should investigate whether consultative and formal ratings are being performed at an adequate pace.***

I&A Officers and Pro Pers

Pro per litigants are a fact of life in the WCAB. Unlike other court systems, workers' compensation statutes and regulations have traditionally reflected an aggressive policy of protecting the interests of unrepresented workers at every opportunity. Despite these precautions, the fact remains that moving a case from Application to trial without specialized knowledge of the process is a risky business. Without I&A Officers to provide needed assistance, workers who become mired in the system will either fail to receive the benefits they are entitled to, be forced to seek representation even though the workers' compensation system historically attempts to avoid this step, or reach dangerous levels of frustration.

A commendable policy at some branch offices we visited was to first send any pro per applicant arriving at the clerks' counter during a conference calendar to an I&A Officer. This gives the I&A Officer a chance to explain exactly what is going on and what will happen. The I&A Officer as such substitutes for the judge who would be forced to repeat the same words at the conference.

No matter how simplified the rules and regulations might be compared to traditional civil courts, prosecuting one's own workers' compensation claim without benefit of specialized training or background is a daunting proposition. Applicants (and prospective applicants) need to have someone they can speak directly to, help review forms and notices they have received in the mail from the DWC or from their employer, and place a human face on an otherwise impersonal bureaucratic process. They also need someone to frankly discuss the advantages and disadvantages of moving forward without counsel and especially to go over their medical records and the like when a proposed settlement has been put on the table.

While some aspects of such customer support can be done by phone, I&A service for those who choose to proceed without counsel needs to be live. Because of direct lack of access to the hardcopy case file, I&A staff at a Regional Call Center cannot do much more than review and recite the sometimes cryptic event histories found in CAOLS. While such information would no doubt be helpful to an injured worker, the case cannot be properly understood and interpreted without the worker's being able to read medical reports, ratings, pleadings, and the like. If WCAB files were stored electronically as they will no doubt be someday in the future (see ***Electronic Filing of Pleadings*** in ***CHAPTER 17***), then off-site counseling may well turn out to be both efficient and effective. Until then, we believe that adequate in-person I&A staffing is required (though a permanent five-days-a-week presence at all 25 offices may not be necessary).

Some have expressed their concerns that I&A Officers are especially vulnerable to cutbacks because they are not a "production oriented position" (in contrast to clerks, raters, judges, and the like). Based on our observations and discussions with litigants, the perception that

the I&A section does not help to move the workflow is inaccurate. Given the repeated legislative desires that workers' compensation in California should be as "nonlitigious" as possible and given that the Labor Code and associated regulations are clearly designed to assist and protect those workers who decide to proceed without counsel, providing pro pers with an independent source of information and guidance is a core component of the system's operations. It makes far more sense, for example, for confused pro pers to ask questions of an ancillary services staff member than to do so of a judge during an unproductive and lengthy Mandatory Settlement Conference. I&A Officers act as a safety valve for pro per litigants and help concentrate the work of judges to those matters that primarily require judicial decisionmaking.

- ***The DWC should provide an adequate number of Information and Assistance Officers at each branch office so that every pro per applicant has had the opportunity for face-to-face counseling at least once prior to the MSC.***

GENERAL STAFFING AND PERSONNEL ISSUES

The Impact of Internal Workers' Compensation Claims on the DWC

Ironically, DWC employees at the various branch offices (including judges, secretaries, hearing reporters, and clerks) have a commonly held reputation of having one of the highest rates of workplace injury claims at any state agency in California. The experience of the DWC in comparison to similar California employers and other state entities is illuminating. In Fiscal Year 1999/2000, for example, workers' compensation costs (including direct compensation, medical benefits, service fees, industrial disability leave, and premium costs) for the Division of Industrial Relations as a whole constituted $5.2 million compared to a total payroll of $127 million for a "cost versus payroll" percentage of 4.14%.[215] In Fiscal Year 1998/1999, the Division of Workers' Compensation accounted for 78% of all workers' compensation

[215] Mentzer, Keith, *Workers' Compensation Payments, Fiscal Year 1999-2000*, California Department of Personnel Administration, March 9, 2001.

expenditures associated with the DIR,[216] so the experience the Department has had with workers' compensation costs are in large part due to claims from within this single Division. In other words, for every $100 in payroll, the DIR (and presumably the DWC) spends an additional $4.14 to cover the costs of workers' compensation expenses. If the $4.14 figure holds true for DWC staff members generally, then the agency appears to be experiencing losses far greater than might be expected for an organization performing similar work. According to the Workers' Compensation Insurance Rating Bureau, the loss portion of the 2001 pure premium rate (i.e., the estimated ultimate cost of workers' compensation benefits on 2001 policies per $100 of payroll) for clerical employers in California was just 65 cents, for banks it was $1.10, for attorneys it was 96 cents, and for accountants and auditors it was 34 cents.[217] But private employers are not necessarily an accurate benchmark for governmental workers' compensation costs because state employees have additional benefits available to them such as "Industrial Disability Leave" that go beyond bare bones insurance and so total costs should be higher, all other things being equal. But as can be seen in ***Table 11.3***, the DIR spends more for workers' compensation costs per payroll dollar than any other major agency save the departments of Forestry, Corrections, Mental Health, Developmental Services, and other entities whose day-to-day operations depend to a great extent upon physical or dangerous work.[218]

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[216] Facsimile from Christine Baker, Executive Officer, Commission on Health and Safety and Workers' Compensation, to Robert T. Reville, June 25, 2002. It should be noted that the DIR counts among its staff a number of Cal/OSHA and Labor Standards Enforcement inspectors, investigators, safety engineers, hygienists, and others who regularly visit businesses and other sites and so expose themselves to nonoffice conditions. Nevertheless, workers' compensation expenditures by the DWC are by far the largest of any division within the DIR.

[217] Electronic mail message from Dave Bellusci, Workers' Compensation Insurance Rating Bureau, to Robert T. Reville, July 12, 2002.

[218] The agencies in ***Table 11.3*** include only those with $1 million in total costs for FY 99/00, but they nevertheless account for 96.6% of all workers' compensation costs for the state. There are other agencies with higher costs per payroll dollar than the DIR that are not shown in this table because their overall payout is relatively small. For

Table 11.3

State of California Workers' Compensation Costs, FY 99/00

(Departments with Over $1 Million Total Paid Costs)

Department	*Cost Experience as a % of Total Payroll*
Inmate Claims	37.843%
Prison Industry Authority	9.508%
Cal. Highway Patrol	7.754%
California Conservation Corps	6.620%
California Youth Authority	6.354%
Developmental Services	5.924%
Mental Health, Dept. of	5.465%
Corrections, Dept. of	4.793%
Forestry, Dept. of	4.531%
Industrial Relations, Dept. of	4.136%
Motor Vehicles, Dept. of	3.959%
Rehabilitation, Dept. of	3.857%
Veterans Affairs	3.768%
Parks & Recreation, Dept. of	3.484%
Employment Development Dept.	3.431%
Fish & Game, Dept. of	2.729%
General Services, Dept. of	2.520%
Transportation, Dept. of	2.232%
Water Resources, Dept. of	2.128%
Justice, Dept. of	2.071%
Consumer Affairs	2.062%
Education, Dept. of	1.922%
Food & Agriculture	1.887%
Insurance, Dept. of	1.864%
Health Services	1.705%
Equalization, Dept. of	1.531%
Social Services	1.356%
Franchise Tax Board	1.008%

Measured against state entities whose primary functions are also the delivery of judicial services, the relative situation is even worse. The Unemployment Insurance Appeals Board has a cost-versus-payroll percent of 2.595%, about 37% less than the DIR's. The Office of

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example, the State Senate spends $8.67 in work injury costs for every $100 of payroll (a figure that exceeds even the CHP), but its total payroll is much smaller.

Administrative Law's percentage is 1.316%. The state Appellate and Supreme Courts (which include clerical and professional staff as well as judges) have percentages of .424% and .585%, respectively. Superior Court judges as a group (with a total payroll almost as large as the DIR's) have a cost-versus-payroll percentage of .055%; this figure is roughly 99% less than what the DIR pays in workers' compensation costs per payroll dollar.

Certainly, the impact of workers' compensation claims within its own agency from clerks, judges, secretaries, hearing reporters, and ancillary services staff has been an ongoing source of concern to the DWC administration. If nothing else, the DWC spends millions of dollars each year simply to handle such claims, dollars that could conceivably be spent on other resource needs. Perhaps more important is the devastating impact upon productivity these absences can have at branch offices already operating on razor-thin margins. At many of the offices we visited, desks and offices normally occupied by filled positions were reportedly empty for weeks or months at a time due to disability leave. A number of other employees were present only part time as a result of medically ordered work restrictions. For a variety of reasons, the DWC is unable to fill the position of a worker out on disability leave even when it is clear that the likelihood of the worker's returning to work anytime soon is slim.[219] Thus, long-term disability leave can have a greater negative impact on productivity than would an unfilled authorized position (which at least has the chance of being staffed in the foreseeable future).

To the casual observer, the physical demands of working at the WCAB do not appear to be greater than those of like-sized offices of other agencies or even private businesses (save for the specialized needs of hearing reporters). It has been cynically suggested by some that the extensive exposure to the inner workings of the workers' compensation

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[219] Staff from other branch offices can sometimes be shifted to temporarily fill in during extended absences, but the great distance between many offices makes long-term reassignment difficult. Branch offices in large metropolitan areas have a somewhat easier time making such adjustments, but they are less vulnerable to the impact of disability leave problems due to their larger size.

system, the familiarity with the benefits available to an injured employee, and the ability to identify and retain particularly effective applicant's counsel may serve to encourage the filings of substantial or repeat claims against the DWC. Others we spoke to suspect that a DWC employee who makes a workers' compensation claim does so in a "home field" environment where any dispute resolution needs would be addressed and accommodated by one's own coworkers and professional colleagues. Others have suggested that DWC staff are simply exercising their rights for protection under the workers' compensation system, rights that many other workers in California are failing to assert due to ignorance or timidity. It may well also be that the extensive data entry and file movement duties of clerks and secretaries, the requirements that judges take detailed notes of testimony, the need for hearing reporters to spend hours recording and transcribing trials, and the stresses associated with long-term staffing shortages all play a role in driving up claim frequency.

Whatever the reason, the current level of disability leave is undoubtedly affecting the DWC's ability to deliver timely adjudicatory services. We believe that this situation needs to be addressed by DWC management by determining the primary sources of the high claiming rate, taking steps to address the underlying causes, and getting employees back on line as quickly as possible.

In dealing with its own workers' compensation losses, however, the DWC cannot afford to simply sit back and hope that things get better. We believe that the agency needs to take an approach that is simultaneously aggressive, progressive, and extremely public. The DWC is the primary entity that employers look to for guidance in addressing their own workers' compensation problems and as such, there is no better showcase for "cutting edge" return-to-work and loss prevention programs. Instead of quietly cleaning its own house, the DWC should hold itself out as a very visible example of the benefits proactive responses to workers' compensation problems can return. Research currently underway by the Commission on Health and Safety and Workers' Compensation into the best practices for improving return-to-work of injured employees may be helpful in this regard. By operating at the forefront of modern

workers' compensation thinking, and doing it in a way that others can assess its viability, the DWC will be helping both itself and other California employers at the same time.

- ***Investigate and address the issue of the rate of workers' compensation claims made by DWC staff members. Use the opportunity provided to act as a role model for all California businesses in preventing workers' compensation losses and in reducing their effect upon productivity and employee income.***

Budgeting Practices

As discussed more fully in ***CHAPTER 10***, one of the ongoing reasons for the DWC's staffing troubles over the past few years is the traditional practice employed by the Department of Finance to effectively fund only 95% of authorized positions at the first salary step. The problem is that some of the most highly paid positions at the DWC (especially judges, Presiding Judges, and upper-level administrators) have the lowest turnover rates and few currently employed would still be making entry-level salaries. Indeed, 75% of all DWC staff members are already paid at the very top step for their respective classifications. The relatively high level of stability for these better paid staff members also means that a key assumption of the budgeting practice—that at least 5% of the positions will remain vacant—may not be an accurate reflection of reality.

The end result is that the "95%/first step" rules effectively yield only enough money to fill about 79% of existing authorized positions. While this sort of budgetary principle might be prudent for other types of state agencies, the branch offices of the DWC can ill-afford to operate with only four staff members on duty for every five authorized positions.

Obviously, changing long-standing practices of the Department of Finance is not within the powers of the Administrative Director of the DWC, but DOF does have the ability to make adjustments in an agency's salary savings level.[220] A concerted effort should be undertaken to

[220] California Department of Finance, *Salary Savings* (2002).

make a case with DOF and other related administrative entities that until actual staff levels reach the minimum amount required for effective operation, some traditional budgeting notions should be bypassed in favor of methods that are more accurate.

- ***Take the steps necessary to change the current practice of designing personnel budgets that automatically result in the DWC's inability to adequately staff its courts.***

CHAPTER 12. INTEROFFICE AND INTERJUDGE VARIATION IN PROCEDURES AND DECISIONMAKING

GENERAL CONSIDERATIONS

Background

Labor Code §5500.3 clearly states that forms, procedures, and even the hours of operation are to be set forth by the Commissioners and not the staff at the branch offices:

> The appeals board shall establish uniform court procedures, uniform forms, and uniform time of court settings for all offices of the appeals board. No branch office of the appeals board or workers' compensation judge shall require forms or procedures other than as established by the appeals board.

This policy differs from those found in other court systems where local rules are a fact of life. The Los Angeles Superior Court's local rules for its general jurisdiction division, for example, are so extensive that they are divided up into over 20 separate chapters, while the local civil rules for the United States District Court for the Central District of California are over 100 pages in length. Moreover, judges at some civil courts have great discretion in developing their individual rules of practice; the website for the federal Central District of California, for example, lists a set of specific requirements for each judge, listing their personal preferences in a variety of matters such as the service of courtesy copies of pleadings, ex parte application filing procedures, use of electronic equipment in the courtroom, the preparation of verdict forms, exhibit tagging, and the manner in which requests for continuances may be made. In contrast, there is a generally shared feeling among many stakeholders that a similar plethora of local and individual rules is antithetical to the notion that workers' compensation dispute practice should have minimal procedural hurdles. The volume of cases being handled by practitioners and the variety of offices in which a single attorney may make appearances (especially on the defense side of the equation) makes

tailoring the prosecution or defense of a case depending on where it was filed problematic. There is also an expectation that an appearance at an unfamiliar branch office should bring with it no unexpected surprises.

The intensity of the demand for uniform procedures and forms may be an outgrowth of problems experienced by some practitioners in years past. We were repeatedly told of branch offices and individual judges that once seemed to operate almost independently of others in mandating the use of specialized forms, in the way conferences and trials were conducted, and in their requirements for filing pleadings. A part of the historical problem may have been related to the two major sea changes in the way the system operated in the early 1990s. While the legislative reforms of 1989 and 1993 were sweeping in scope, the statutes left many of the fine details as to how to administer the new requirements up to the DWC and the Commissioners of the Appeals Board. There was little time between the passage of the reform packages and the effective dates of operation so that by and large, forms and procedures from the previous regime were still being used by default even though some of them no longer were completely relevant to the new system. The confusion of trying to adapt to these new requirements without a clear and coordinated response from higher-ups no doubt led many offices and judges to make whatever changes they felt prudent under the circumstances. Unfortunately, one judge’s innovation was not matched by another’s and so a patchwork of (usually) unwritten rules began to develop.

Another source for a lack of uniformity over the years would have been the lack of a comprehensive review of Appeals Board rules. Some minor changes took place as a response to the two reform phases, but by and large, there has not been an across-the-board reassessment of Board Rules for decades. Some of the slack was taken up by Administrative Director Rule changes, but the formal rulemaking requirement process meant that there would sometimes be a considerable lag time between the realization that current rules no longer were relevant or workable and the point of official adoption. The Policy & Procedural Manual process was able to move a bit quicker in this regard, but the scope of the

areas covered by the P&P Manual is not comprehensive. Moreover, the P&P Manual is not widely distributed beyond the offices of the Presiding Judges (the usual location for the single copy at each branch office) and it is not uncommon to find trial judges who have never seen the entire document. Into this vacuum of authority, judges and branch offices stepped in to come up with workable procedures.

One area that exemplifies this process of creating on-the-spot procedures to cover areas that have not been properly addressed is in regard to how exhibits should be arranged in a case file at the time of trial. There clearly has been much frustration on the part of judges who told us of valuable time wasted at the start of many trials simply to organize the file into some sort of coherent order. Attorneys echoed these sentiments but also expressed concern over the instances in which they have had to completely reassemble an otherwise useable file simply because it did not meet with a judge's personal preferences for exhibit order. The response to this situation has been the posting of a much circulated, multigeneration photocopy of a set of informal rules for organizing exhibits:

NOTICE

The CHAIRMAN OF THE WORKERS' COMPENSATION APPEALS BOARD HAS MADE THE FOLLOWING SUGGESTIONS:

1. ALL EXHIBIT SHEETS MUST BE TYPED OR PRINTED.
2. ALL EXHIBIT SHEETS MUST LIST MEDICAL REPORTS IN REVERSE CHRONOLOGICAL ORDER.
3. ALL MEDICAL REPORTS MUST BE SEPARATED BY DOCTOR AND/OR SPECIALTY AND LISTED ON THE EXHIBIT SHEETS THAT WAY.
4. IT WOULD BE APPRECIATED IF ALL EXHIBITS WERE TABBED.

We saw these notices at many branch offices we visited (though certainly not all) and in the courtrooms of many judges (though again, not all) and so asked the current Chairman of the Appeals Board whether indeed this document reflected official policy. We were informed there was no official stand on this issue and that the origins of the notice were unknown. Whether or not these suggestions actually express the desires of the Appeals Board is less important than their role in giving both judges and litigants a well-defined and preexisting framework in which to conduct their business.

A final reason for nonuniformity is that there are some branch offices and individual judges who, despite clear and unambiguous rules and directives to the contrary, have decided that their own individual needs and desires mandate the use of tailored forms and procedures. In these instances, the underlying reasons for adopting different rules range from a sincere desire to make the practice of workers' compensation law before them more efficient to a sometimes confusing and vexatious attitude that as independent jurists, they had the unfettered right to shape and control any and every aspect of the cases before them.

Some of these sorts of problems may have been ameliorated by the use of new uniform forms at branch offices in early 2000. Indeed, most of the practitioners we spoke to who had been in business for many years and had appeared at a variety of branch offices told us that the worst aspects of procedural nonuniformity had been tempered in recent years. The most notorious examples of idiosyncratic behavior had disappeared with the retirement of the worst offenders and with a more fluid bar that was demanding and expecting greater uniformity. Increased resources relative to demand may have played a role in this as well. Offices had more opportunities to standardize practices even if it meant using personnel in a manner that was not always the most efficient given local conditions and local customs. It may have also been clear that rampant individualism would be subject to greater scrutiny. The Commission on Health and Safety and Workers' Compensation began a canvassing of the workers' compensation community in May of 1999 to determine where procedures and forms differed from office to office and judge to judge. The current AD had also repeated his commitment to minimizing nonuniformity and eventually a set of newly standardized forms were developed in early 2000.

Whatever the reasons, it appears that many of the war stories repeated again and again about rogue branch offices or judges are far less relevant. That does not mean that all of the DWC is operating in lockstep, though it does imply that the potential for undesirable results as a result of individual rules is more likely to be on a judge-by-judge basis than on an office-to-office basis.

Sources of Authority for the Workers' Compensation System

We often heard variations of the complaint that "How can I follow the rules if nobody knows what the rules are?" from WCJs in every branch office we visited. Practitioners too voiced their frustrations in not having clear and explicit guidance when the Labor Code, Board Rules, Administrative Director Rules, and the Policy & Procedural Manual either do not address issues that are commonly faced every day or are in conflict. A major concern also was voiced to us that the Policy & Procedural Manual is being repeatedly used as a convenient substitute for the structured rulemaking process required when Board Rules or AD Rules are created or revised. Over time, it was claimed, P&P directives had moved beyond their original function as simply a set of administrative documents that help to run a branch office into something with the force of law.[221] The ease of issuing such edicts, a process characterized as "haphazard" or "overnight," meant that they were often in conflict with statutes and formal regulations or were unrealistic in terms of actual everyday practice. Regardless of the P&P question, it is clearly true that the separate sources for key authorities (i.e., the Legislature, the Appeals Board, and the Administrative Director) are generating new rules (both formal and informal) on a regular basis without much in the way of coordination with each other.[222] Without clearly defined and logically consistent rules and regulations, the potential for unacceptable variation in pretrial and trial decisionmaking will be exacerbated. Curing the inconsistencies in the various rules and regulations covering the adjudication process should be a top priority if uniformity in all aspects of the decisionmaking process is desired.

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[221] Some attorneys characterized the P&P Manual as some sort of all-powerful bible that mere mortals are not allowed to view. There is usually one dusty copy back on a shelf in the PJ's office, so to be able to review its contents, an attorney would essentially have to have the PJ's permission.

[222] Another key source of authority for judges and litigants is the body of case law developed by the Commissioners of the Appeals Board and the California courts of appeal. We do not discuss this source because it is derivative of any written authority and is not subject to modification simply by administrative rulemaking.

One indicator of the current situation is that there has not been a major revision to Board Rules since 1981 except for sporadic amendments designed to cover the reform acts of the early 1990s. In light of the needs of the system, this is simply inexcusable. We believe that the Commissioners and the Administrative Director should immediately begin the process of conforming the three major nonlegislative sources of WCAB rules, policies, procedures, and forms to each other, to existing statutory requirements, and to the realities of modern workers' compensation practice. Such an effort needs to include the input of working judges, attorneys, and litigants, not just DWC administrators.

Some steps in this direction have already been taken. In 1999, an internal DWC working group of judges and Presiding Judges developed a number of revised forms including a pretrial conference statement, a Minutes of Hearing for recording the reasons for continuing a conference or trial or taking the matter off calendar, and a set of guidelines for submitting settlement documents. In December, a "Workers' Compensation Community Task Force on Uniformity" consisting of applicants and defense attorneys, insurers, self-insureds, and medical provider groups met and gave their input into early drafts of the forms and guidelines. Final versions were distributed for use in January and made mandatory in February of 2000.

While this is a welcome development, it does not go far enough. The forms are an attempt to reflect existing statutory and regulatory requirements but do not speak to the question of whether the underlying authority is out of touch with current realities. The input of the community was a "one-shot deal," limited only to a review of a nearly completed document. The guidelines for settlement approval are not mandatory and are merely suggestions the litigants are free to accept or ignore and the judges who ultimately rule on the agreements are not bound to follow the criteria. The cover letter to judges announcing the settlement guidelines indicates that judges "may find these guidelines helpful in forming requests for information in particular cases" but does not mandate their use.[223]

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[223] Memo from Dick Gannon, Administrative Director, to DWC judges, dated January 14, 2000.

At least the beginnings of a comprehensive revision effort are currently underway. In the exercise of its formal rulemaking powers, the Appeals Board is considering a number of extensive changes and updates to its rules of practice and procedure,[224] many of which are outgrowths of ideas shared through the distribution of our *Candidate Recommendations* in the fall of 2001. This is an excellent start, but just as important to the overall process is a need to view the development of controlling authority for the workers' compensation adjudicatory function as a shared responsibility of both the Appeals Board and the Administrative Director of the DWC. Changing the set of procedural rules contained in CCR §10300 through §10999 (the Appeals Board section) without considering the equally important set in §9720.1 through §10021 (the AD's section) may not end the problems noted throughout this report.

What is needed is an ongoing and coordinated effort to review all of the various sources of rules covering the adjudication of workers' compensation cases, eliminate or correct sections that no longer apply or are in conflict or are so vague as to be useless, and then revise the forms accordingly. All of this should be done with continued input from the workers' compensation community.

➢ ***Conflicting, vague, or out-of-date rules, procedures, and policies appear to be at the root of discontent over uniformity voiced by the bar and bench; a panel of judges, commissioners, and DWC administrators—with significant input at all stages from the workers' compensation community—should jointly update, coordinate, and conform existing Board Rules, AD Rules, and Policy & Procedural directives as well as official forms.***

Public Access to the Policy & Procedural Manual and Its Scope

The P&P Manual at most offices is often hidden away and available for inspection only at the discretion of the Presiding Judge. If it is

[224] California Workers' Compensation Appeals Board, *Notice of Proposed Rulemaking–Rules of Practice and Procedure*, http://www.dir.ca.gov/WCAB/wcabregulations/WCABNotice%20ofRuleMaking10300_10999.doc, accessed November 4, 2002.

to be a living part of practice before the WCAB judges who must follow its directives, then attorneys must know about its contents to bring violations to the attention of the PJ, the Regional Manager, and upper-level DWC administration.

Availability to practitioners will also minimize the chances they will feel blindsided by an important rule they could not have possibly known about. Even judges who are the subject of many of the provisions in the P&P Manual have only limited access to the document: Few have a personal copy and if they do, it is not always the case that the version is complete and up-to-date. As part of any update, it seems logical that the Manual be placed on the DWC's website, much as links to the Labor Coder and Tile 8 CCR are now. If nothing else, the laborious process of editing the Manual to make it ready for distribution should bring the most obviously outdated or overreaching sections to the attention of DWC and WCAB administrators. By bringing the edicts to the light of day, the community will also be able to help policymakers decide what needs to be changed and what needs to be considered for formal adoption.

This does not mean that the P&P Manual should be elevated to the level of authority that formal regulations or statutes provide. In the end, it is still just a vehicle for transmitting the desires of upper-level administrators to the employees of the DWC, not a recitation of rules and procedures that should take precedent over the wishes of the Legislature or the formal rulemaking process. Ideally, it should never stray into areas that affect a party's due process rights or tell a judge how a case should be decided. That is the exclusive province of the Labor Code, Title 8 of the CCRs, and the body of case law that has arisen since the early part of the 20th Century. The checks and balances for passing statutes, promulgating regulations, and deciding cases are not available when the administrative directives found in the P&P Manual are adopted. As such, the comprehensive review process we suggest above should include the critical task of deciding which P&P Manual orders ought to be pulled from this informal document and formally included in Title 8. The P&P Manual should never be used as a

quick and easy alternative to the more complex and lengthy rulemaking process.

Administrators should realize that one of the major downside risks of attempting to "promulgate" rules of practice and procedure solely through the P&P Manual is that the considerable effort to craft workable rules can be wasted if the only vehicle for dissemination is a cumbersome and often ignored warehouse of ancient orders. An excellent example of this problem can be found in P&P Manual Index #6.7.4 (effective date 12/18/95). The entry appears to require that copies of all orders for continuance or to take off calendar are to be served on the actual parties of interest (workers, employers, insurers, third party administrators, etc.), not just their counsel. As far as we could determine, service of these orders on individuals and organizations is practically unknown. By burying this explicit command to judges deep in the middle of the P&P Manual, any chance of achieving the routine notification of clients regarding the reasons for delay in case resolution is essentially dead on arrival even if the new policy was widely publicized.[225] If a procedural or administrative rule is thought to be an important weapon in the fight against delay, excess costs, and nonuniformity, then it belongs in the California Code of Regulations.

Removing rules of practice and procedure from the P&P Manual also allows that document to be more flexible. The review and rewrite of the P&P Manual we suggest does not mean that all discretion must be eliminated or that across-the-board uniformity must be imposed immediately. The Manual could present a menu of allowed options for PJs to choose from when deciding, for example, how to best implement a walk-through settlement process. This provides the administration with a ready made opportunity to compare the advantages and disadvantages of any one policy and decide at a later time whether the range of options should be limited further or even expanded as needed. By giving some leeway at the outset, the move toward uniformity in policies that do not

[225] See, e.g., Division of Workers' Compensation, "New WCAB Procedures Adopted," *DWC Newsline* (Bulletin 95-22, November 28, 1995), California Department of Industrial Relations, http://www.dir.ca.gov/DWC/dwc_newslines/Newsline_95-22.html, accessed November 4, 2002.

directly or indirectly affect litigant rights can be achieved at a more measured, and perhaps less disruptive, pace.

- ***Because of its impact and influence on day-to-day workers' compensation practice, the Policy & Procedural Manual should be made readily available to the public.***

- ***Directives affecting procedural rules or substantive rights should be removed from the Policy & Procedural Manual and become subject to the formal administrative rulemaking process used in promulgating Title 8 regulations.***

UNIFORMITY IN PRETRIAL DECISIONMAKING

By "pretrial decisionmaking," we primarily mean the criteria used to oversee the progress of a case as it moves through the system up to the trial stage rather than those decisions used to adjudicate the rights of the parties in a case. There is, unfortunately, no bright line to distinguish what constitutes the procedural versus dispositive aspects of a case and in many instances, the two are inexorably linked. Generally, those decisions that are designed to constitute a "judgment" of the WCJ are discussed in ***Uniformity in Trial Decisionmaking***, below. Everything else is the subject of this section.

"Acceptable" Interoffice and Intraoffice Procedural Variation

It is not always prudent to have every branch office operating in lockstep with each other. It may be impractical or inefficient to require smaller branch offices to adopt procedures that are clearly intended to respond to the needs of the larger offices that handle the bulk of litigation before the WCAB; even offices of similar sizes can have different sorts of demands upon its resources that require a response tailored to local needs.

Moreover, total uniformity discourages or prevents experimentation and innovation at the local level that is vital for the continuing evolution of the WCAB. While the results of such innovations may be less than hoped, they at least demonstrate the effects of possible

alternatives to current procedures (or forms or whatever) that may be outdated or less than optimal.

Calendar times are one example. Under P&P Index #6.7.5, trial calendars are to be set at either 8:30 a.m. or 1:30 p.m. This rule appears to be a response to the complaint that there was too much variation in the times various branch offices were beginning the work session. But the reality is that for a District Office such as Eureka, many practitioners are located out of the area and will fly into town in the early morning for conferences and trials. Thus, the branch office has 10:30 a.m. calendar settings in order to accommodate scheduled air service from Redding that arrives at 9:20 a.m. Forcing practitioners to always appear at 8:30 a.m. might be more convenient from the branch office's standpoint and might also be more in line with a philosophy of total uniformity, but the end result is that it would require attorneys to arrive the previous night and incur the costs of lodging in Eureka. This is a reasonable accommodation to local needs.

Another example is the use of a "master calendar" for expedited hearings at the Santa Ana branch office. The PJ requires those with a scheduled expedited hearing to appear in his hearing room at 8:00 a.m. when the District Offices open. The PJ determines which of the scheduled cases actually require a trial that day (most are likely to have already resolved the issue prior to the appearance or will do so within a short time that morning). The PJ then assigns remaining expedited hearings to one of the branch office's judges depending on availability and the hearings begin promptly at 8:30 a.m. Most of these will conclude within an hour or so, thus freeing the individual judge for trials or conferences at 9:30 a.m. (which is when much of the morning action for conferences and trials actually begins anyway). While we believe there may be merit in such a procedure and that it deserves serious consideration by those branch offices that are experiencing a glut of expedited hearing requests, a too literal reading of P&P Index #6.7.5 would prohibit this sort of interesting technique.[226]

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[226] One knock on the 8:00 a.m. holding of a master calendar procedure is that it requires practitioners to appear 30 minutes before

At the individual judge level, determining when variation in procedures can be useful as a way to encourage new ideas or address evolving demands is more problematic. Attorneys can generally adapt to some differences from office to office because with few exceptions, significant modifications of typical procedures are usually common knowledge to both the local bar and to those who are likely to appear on an infrequent basis. But on an individual judge level, these variations are often not apparent until a problem has resulted from an inadvertent failure to follow the preferences of that particular judicial officer. Nevertheless, some individual customization of procedures may be reasonable. For example, just about every hearing room we visited had a set of trays containing oft-used WCAB or DWC forms where the name of the judge has already been inserted into the appropriate locations. Some amount of time is saved by this approach, though it appears to fly in the face of the goal of minimizing variation in pleadings. As long as such blank pleadings were offered as a convenience and as long as litigants were not discouraged from offering their own pleadings in a WCAB approved format, there can be little harm done by preprinting.[227]

Another practice that in one light might seem to fly in the face of Labor Code 5500.3 is the creation of "form letters" for the judge's use in a variety of circumstances. One judge-designed form we found was a letter addressed to claims administrators in unrepresented cases who have presented settlement agreements that the judge has deemed defective. These defects (for post-93 injuries) include failing to seek a ratable report from the treating doctor pursuant to AD §9785; failing to advise the worker of such PD rating or its monetary equivalent or of the right to seek a second opinion from a QME; failing to include earnings information; failing to file and list original medical reports; failing to serve copies of the medical reports; failing to indicate

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the time that they might at another branch office. It is hard to argue, however, that matters so important to the well-being of the applicant as to result in a request for a priority setting do not deserve some additional attention or effort on the part of litigants.

[227] One potential *inefficiency* that might arise from preprinting judge's names would be that at an office where not every judge has an assigned courtroom, the specialized forms must be carried from room to room as needed.

whether the worker or the adjuster chose the QME; or a host of other problems. The letter indicates that should the defect(s) (indicated by circling on the form) not be addressed or responded to within a predetermined period of days, the settlement will be set for a hearing on the issue of adequacy. The form letter saves the time of both the judge and his or her secretary from having to produce a handwritten or printed version from scratch. It might be a "form" in one sense of the word, but because litigants are not required to fill it out or file it, and it does not substitute for any official pleading or document, it is simply a convenience that should not be thought of as violating LC §5500.3.

A less clear situation involves replacing less-than-useful official forms (or parts thereof) with something that a judge considers more relevant to current workers' compensation practice. We observed some judges substitute their own customized pages on certain forms because of their desire to eliminate the laborious task of handwriting in language on pleadings or other documents that they would have to insert in anyway. One example we saw was the use of a revised last page for the Pre-Trial Conference Statement. In it, a number of commonly used orders (such as how to organize the file, the closing to discovery, the need to provide an interpreter, ensuring the ability to fast-forward surveillance videos, or describing when exhibits not described with specificity should be served) are available for indicating via a check mark. Compared to the use of form letters, the practice of page substitution is more difficult to give blanket approval as merely a convenience to a judge who does not want to waste valuable time as a highly paid scribe. When thoughtfully crafted by administrators with the ongoing input of line judges and working practitioners, "official" forms are designed to address the most common needs of litigants in an easy-to-use, uniform (though flexible) format, to assist data entry personnel when recording important data into a case management information system, and to focus both judges and litigants toward policy goals. Extensive modification of official forms on a *routine* basis (though some situations clearly demand jettisoning any highly structured

pleading form in favor of a tailored approach) can play havoc with these goals.

Adding to the puzzle is the question of varying levels of resources available to each office. Does the concept of "uniform court procedures" require that each office perform the same task in exactly the same way even when there might not be adequate staff and equipment available at some locations to do so without seriously disrupting other aspects of court operations? While elsewhere in this document we indicate our belief that the benefits of a "walk-through" settlement approval process[228] outweigh the drawbacks, it is unlikely that each of the 25 branch offices could easily establish such a program to operate under exactly the same procedures. Some offices do not have enough clerks available to staff the front counter full time for the purpose of pulling case files upon demand. Doing so would mean that those clerks would be unable to keep up with opening new case files, processing newly filed pleadings, and other chores that require sitting at a desk in front of a computer terminal.[229] As a result, some offices have currently decided to require that the walk-through file request be made at least a day before the approval is actually sought in order to allow their clerical staff the opportunity to pull files during lulls in the work day. While this does temper some of the attractive aspects of the walk-through process from the practitioner's standpoint (two trips to the office are needed instead of one), the basic goal of the program to move settlements through rapidly would be met.[230] But an overly strict reading of Labor Code §5500.3 would mean the DWC would have to either

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[228] "Walk-through" approvals allow litigants to obtain the case file from the clerk's section on demand and present a settlement agreement along with the file to an available judge for immediate review without the need for a scheduled conference. See ***The "Walk-Through" Process*** in ***CHAPTER 15***.

[229] In addition, they would also be unavailable to respond to the inevitable stream of applicants who approach the counter with questions during the initial hours of the morning or afternoon calendar.

[230] The vast majority of attorneys who might utilize walk-through settlement approvals are likely to be frequent visitors to the particular office in question. As such, an "extra" trip is really not necessary (despite the requirement of advance file-pull request) because they would have been at that court on other business anyway.

(1) require every office to staff the counters for immediate file pull (thus disrupting operations at some offices), (2) require every office to only allow walk-throughs with advance notice of at least a day (unnecessary at most locations), or (3) dispense with the program altogether because exact uniformity is impractical or impossible.

The key difficulty for court administrators is to decide when individuality at the branch office or judge level can be tolerated (or even encouraged) and when it needs to be reined in for the sake of systemwide uniformity. It does seem that mandating exact duplication of every procedure and internal process in both the Eureka and Van Nuys offices would do little to advance the underlying mission of the workers' compensation adjudication process in this state. Moreover, what is contemplated by the Labor Code's reference to "uniform court procedures, uniform forms, and uniform time of court settings" is not exactly clear. Certainly litigants have the right to expect that the formal process for requesting WCAB dispute resolution would be the same no matter where the injury took place: An Application for Adjudication or a case-opening settlement agreement must be filed first (and not rejected simply because it was drafted using a form approved only at some other office), a Declaration of Readiness must be filed in order to have the case placed on the regular trial track (and the criteria for evaluating the sufficiency be the same statewide), and after a Mandatory Settlement Conference, a trial is ultimately held (and practitioners should be able to prepare for the hearing in the same way regardless of which office or judge is assigned). Beyond the basics of workers' compensation practice though, litigants should not expect that all 25 offices will operate in lockstep and have exactly the same facilities, staff levels, and internal processes unless, of course, those differences begin to affect their due process rights. Until Labor Code §5500.3 is amended and made more specific about what exactly is required regarding uniformity, the DWC has to take a realistic and practical approach toward standardizing office procedures.

The answer may be found in the language of the statute itself. The Labor Code calls for uniformity in ***court*** procedures, a distinction that suggests that each office conform to those aspects of the Labor Code,

the Appeals Board Rules, and the Administrative Director Rules that involve how a case is ***adjudicated*** in exactly the same way: e.g., the required time for notice of the parties for an impending hearing should be the same throughout the state, the criteria used to evaluate a settlement agreement should be the same throughout the state, and the pleadings required to be filed to move the case toward resolution should be the same throughout the state. But to suggest that each office have the same number of clerks at the counter for the same number of hours, have exactly the same process set up to handle the mechanics of walk-through settlement approval, have the same day of the week designated as a "dark day" when no trials are held, or place the case list for the morning or afternoon calendar in exactly the same relative position in the waiting room seems like a waste of time and energy for DWC administrators and in the end, does not serve to benefit litigants in any tangible way.

We believe that the primary criterion for evaluating whether a particular interoffice variation in internal practices violates the goals of Labor Code §5500.3 is to assess whether the rights of a litigant to an *expeditious*, *inexpensive*, and *unencumbered*[231] resolution of their case would likely be affected if they were unaware or unfamiliar with the procedural difference (having previously litigated elsewhere). In that light, a process that causes a case to take longer than it might have at more "typical" offices, costs the litigants more time and money that it might have at more "typical" offices, or that results in an outcome (such as settlement approval or a trial decision) that is different than what it might have at more "typical" offices is one clearly in need of addressing. On the other hand, we see no reason for prohibiting an office from meeting the unique needs of the area it serves or attempting to offer more streamlined or cost-efficient services to its customers simply in the name of mindless uniformity in all things.

That is not to say that it is up to each branch office to decide whether slavish attention to particular statutes and regulations is

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[231] California Constitution, Article 14 ("Labor Relations"), Sec. 4.

required to achieve the goals of Article 4, Section 14, of the California Constitution and if the answer is no, tinker with the rules as they see fit. Labor Code §5500.3 is unambiguous in its prohibition against requiring "forms or procedures other than as established by the appeals board." In other words, parties who are relying on the procedures as described in the written law for litigating their case should have no fear that they will be ambushed by an idiosyncratic application of the Labor Code or Chapter 4.5 of the California Code of Regulations. It is reasonable and prudent for a practitioner to expect, however, that Office "A" will operate a little differently than Office "B" in areas that do not fundamentally affect the due process rights of their clients.

Greater concern should be placed on minimizing interjudge procedural variation. Office procedure distinctions presumably affect ***all*** the cases before ***all*** the judicial officers at any location. Administrative monitoring of whether due process rights are impacted is certainly possible (assuming the Presiding Judge is responsive to complaints from litigants and trial judges) and if change is required, modification of the procedure is relatively easy as well. But if individual judges begin to require litigants to move through specialized hoops and jump over specialized hurdles, the odds are increased that adverse effects upon individual cases or particular litigants will escape the attention of the Presiding Judge, the Regional Manager, and DWC upper-level administration. Unless procedural innovation at the individual judge level is preapproved by the Presiding Judge and closely monitored in what almost constitutes an experimental setting, the potential drawbacks outweigh whatever immediate benefits are realized.

- ***Some variation in district office procedures may enhance system productivity, be cost effective from the WCAB's standpoint, and be within the guidelines of Labor Code §5500.3 as long as the result does not increase litigation costs or time or impact fundamental fairness; variations in individual judge procedures within a branch office are more likely to pose problems and always should be viewed with suspicion.***

Determining When Procedural Nonuniformity Poses Problems

Given the foregoing, *reasonable* uniformity in procedures should be the goal of the WCAB whenever possible. Individualized processes that result in side effects described by the following categories are by definition unreasonable and counter-productive:

Nonuniformity that is unfair to litigants and their representatives.

When litigants before a particular judge or branch office are not able to avail themselves of procedures and policies generally found elsewhere, and if those procedures and policies are inseparable from the exercise of their rights, then this type of variation is intolerable.

Nonuniformity that is costly to the branch office and the DWC.

Judges whose particular management approaches result in an inordinate amount of time needed for trials and the like affect not only the litigants at those hearings: Other cases pending before that judge are delayed and even cases that are assigned to others suffer because the branch office as a whole has fewer judicial resources for holding trials available. Also, such approaches can impede changes that may be of benefit to the entire branch office. For example, shared courtroom arrangements might be more efficient in larger branch offices, but such procedures could be difficult to implement if judges had to cart around stacks of personalized forms or switch desks wherever they go. In extreme cases, applicants' attorneys with a choice of venues for filing the same case will decline to use branch offices that are perceived to operate in a way that is not the norm and the business of the branch office will decline to the point that it no longer makes economic sense to keep it in operation.

Nonuniformity that poses traps for attorneys and pro per litigants who are unfamiliar with the quirks of a particular branch office or judge.

This can run the gamut from being a mere inconvenience, to delaying the resolution of the matter, to actually affecting the outcome of the case. Even when such specialized rules and practices are relatively minor deviations from the norm, they can affect whether litigants perceive the court to be a place where justice is served. For example, the ever-present concern over "hometowning" is exacerbated when a judge reprimands an attorney in open court for failing to follow specific procedures demanded by that judge and no other. A common example is a request that attorneys organize their exhibits in a certain manner, sometimes broadcast via a notice on a wall in a hearing room, sometimes just a preference commonly known by local attorneys after years of interaction with that judge. Hopefully, the judge will not rule any differently on other aspects of the case after he or she makes a big deal over the fact that the exhibits are not numbered and bound in a way the judge believes best suits his or her purposes. But it is hard to believe that there will not be some residual animosity over what may be felt to be an unfair blindsiding by this judge.

Nonuniformity that undercuts the authority of the Legislature, the Commissioners, or the Administrative Director.

The most undesirable variations (and perhaps the easiest to identify) are those that clearly do not follow statutes, regulations, and court rules. While judges can and should have the ability to make the occasional exceptions or waive certain requirements in the interests of justice, continual flaunting of explicit directives undermines respect for the very institutions the judge is attempting to uphold. This practice is especially dangerous when exercised by judges because of the relative inability of their supervisors to control behavior outside the norm; though WCJs do not have life tenure as do Federal District Court Judges, their civil service status provides them with substantial protection from termination or discipline absent extreme circumstances such as fraud or incompetence. Policymakers and the public thus depend on the judge's voluntary commitment to

following the law at every opportunity. If that commitment is not realized, even for matters that appear trivial, then carefully crafted policy goals have little chance of being achieved.

- ***Uniformity in procedures should be of the highest priority in areas where variation may (1) affect the ability of litigants to receive a fair day in court, (2) result in additional and unjustified expense to the branch office or prevent officewide innovations in procedures, (3) provide unknown pitfalls for practitioners, or (4) not be in compliance with explicit statutes, regulations, and rules.***

Areas of Potential Concern

As stated elsewhere, we believe that much of what passes for nonuniformity is the result of internal conflicts in statutes, regulations, formal policies, and official forms and that the process to resolve those conflicts should be begun immediately. Nevertheless, there are certain areas that can be identified as causing branch offices and judges to appear to operate in nonuniform and often disruptive ways.

Lien Resolution

Different standards appear to be applied by judges for the resolution of liens. This situation is discussed in ***Lien Procedures*** contained in ***CHAPTER 14***.

Attorney Fees

Different standards appear to be applied by judges for the awarding of attorney's fees. This situation is discussed in ***Standards for Fee Awards*** in ***CHAPTER 15***.

Walk-Through Orders

Walk-through procedures appear to differ from office to office. This situation is discussed in ***The "Walk-Through" Process*** found in ***CHAPTER 15***.

DOR Acceptance

Some branch offices appear to be setting their own rules for when a DOR will be accepted for filing. At least one branch office will refuse to accept a DOR until some number of days has elapsed from the date of

service on opposing parties. The idea is that this gives the branch office the time necessary to collect and assemble any Objections to the DOR with the DOR itself for the purposes of review. While this practice does enhance the ability of the branch office to review DORs without an adverse impact on statutory time standards from DOR to MSC (because the DOR can be reviewed and the MSC set almost immediately after the DOR is filed), it is a clear example of an individual office making a significant change to existing statutes and regulations.

Exhibits and File Organization

The marking of exhibits and organization of files is completely up to the preferences of the judge. As such, there does not appear to be any rule covering how attorneys should prepare the Board File and exhibits for a trial. "Suggestions from the Commissioner" as described above do not substitute for Board Rules and there should be a single standard throughout the system. Even if some aspects of this issue are already covered in the P&P Manual, whatever new set of requirements are developed need to be effectively communicated to both judges and practitioners in order to eliminate misunderstandings.

Enforcement of the "Representative with Settlement Authority" Rule

Board Rule §10563 requires that the defendant have some sort of representative with "settlement authority" either in person or "available" by telephone at the MSC and the trial. While some applicants' attorneys we spoke to claimed that defendants routinely ignored this rule, there does not seem to be any uniform effort by DWC judges to confirm compliance and if lacking, sanction the offending party (though some certainly do). We believe that some of the reluctance to enforce BR §10563 is related in part to the lack of guidance contained in the regulations as to what constitutes sufficient authority and acceptable channels of communication. See ***Settlement Authority at the MSC*** in ***CHAPTER 14***. When some judges attempt to verify and enforce this important rule while others do not, the end result is discontent among the bar on both sides.

Perceived Rater Variation Problems

There is widespread belief among some segments of the workers' compensation community that official ratings can vary wildly depending on which Disability Evaluation Unit staff member reviewed the file. Our study was focused on the actions of DWC's Claims Evaluation Unit and as such, we cannot say with any certainty whether this claim is with or without merit. This sort of variation is not really a "procedural" variation per se, but it does affect filing choices at branch offices where venue is essentially a decision made by the applicant's counsel. For further discussion on this topic, see ***Perceived Problems in Rater Variation*** in ***CHAPTER 11***.

Minimizing Undesirable Nonuniformity in Practices and Procedures

Some variation in individual judges' actions is understandable because many laws and procedures are subject to different interpretation. However, we believe that the best way to encourage uniformity in practices and procedures is as follows.

Resolve Ambiguity in Controlling Authority

The law is replete with imprecise terms ("good faith," "best interests," "good cause") and given that jurists sitting on appellate courts can and do differ about what a particular statute or regulation means, it is not surprising that competent and committed judges wind up operating in dissimilar ways. We believe that the best way to handle this situation is to have a standing committee of leading and respected WCJs and Commissioners (with substantial input from the workers' compensation community at every stage of the process) suggest changes to Board Rules, Administrative Director Rules, and the Policy & Procedural Manual that would clarify what is intended to be done. See ***Sources of Authority for the Workers' Compensation System***, above.

One way to provide reasoned guidelines would be to explain how often tersely written regulations fit into the framework of actual day-to-day practice. It would be extremely helpful for the drafters involved in the revision process we recommend to also include supplemental commentary for each rule much like that found in the "Notes of Advisory Committee on Rules" for the Federal Rules of Civil

Procedure. Such comments would not have the force of law, but they would be extremely helpful for judges attempting to interpret difficult standards such as “good cause.”

- ***Minimize the instances when the actions of individual judges are due to unnecessary differences in interpretation; a standing committee of WCJs and Commissioners with community input should jointly clarify problem areas. Commentary from the drafters for all new rules should be made available as well.***

Monitor Interjudge Variation

Over the past few years, there have been a number of internal attempts by the DWC to gauge the extent to which procedural nonuniformity is taking place. These efforts have included having the PJ collect copies of all orders continuing hearings or taking the case off calendar, having the PJ audit a sample of files from his or her office, collecting data for a number of time studies, and others. We believe that these practices should continue, not only for their benefit in helping identify potential problem areas but because the mere fact that they are taking place sends a message to judges that supervisors place a high premium upon standardizing the way the WCAB operates.

This suggestion does not mean that Presiding Judges will need to spend all of their free time going over every file in the office or every decision made by their judges with a fine-toothed comb. These reviews can take place on selected samples of actual files and they can be done periodically. The important aspects of such audits are that they realistically assess performance, the fact that they are being conducted is widely publicized, and that they are not one-time events. Judges and other staff should expect that what they do in terms of case management and other tasks will have at least a realistic chance of being reviewed by a superior. The intent here is not to discourage innovation or orders tailored to the individual needs of a case; by inserting adequate documentation into the case file of the reasons for any nonstandard orders, judges should be confident that their actions will not be misinterpreted during an audit.

➢ ***Perform regular audits of case files, orders, and branch office and judge practices.***

Provide Feedback and Incentives

One area that the DWC appears to have been less than successful in is sending the results of these audits back to the people who would benefit the most. Repeatedly, we listened to statements like "they collected a bunch of stuff from us a while back, but we've never heard anything." This creates the image that the DWC's own audits are either a waste of time or can safely be ignored, both of which are the exact opposite of what is needed. We believe that regardless of the findings, any auditing, time studies, or internal investigations should be distributed among the DWC community in order to receive helpful feedback and encourage debate and act an incentive for improvement.

➢ ***Disseminate the results of any regular audits in order to "close the loop" for helpful feedback.***

UNIFORMITY IN TRIAL DECISIONMAKING

> *The independence of referees in deciding cases must be maintained.*[232]
>
> *Report of the Workmen's Compensation Study Commission*, April 1965.

Generally

By "trial decisionmaking," we primarily mean the criteria used to reach decisions involving the key issues of workers' compensation claims that affect applicants, defendants, and lien claimants: AOE/COE, the rate of compensation, disability ratings, reimbursement for self-procured medical treatment, whether particular types of medical treatment should be provided in the future, whether penalties should be awarded, and other similar issues. In other words, how much (if anything) are applicants and lien claimants owed by the defendants.

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[232] California Workmen's Compensation Study Commission (1965), p. 69.

Typically, these matters are decided upon through the settlement review process, through a Findings and Award or Findings and Order following trial (including expedited hearing), or through an order of dismissal (though settlements actually comprise about 90% of all case-ending decisions, we use the term “trial decisionmaking” for the sake of convenience and because even settlement approval can be the result of an adequacy hearing). Arguably, matters such as discovery rulings, reviews of DORs for sufficiency, or continuances also have an impact upon the compensation that an applicant might receive, but these decisions are better characterized as procedural in nature rather than substantive.[233] An adverse ruling on a DOR might delay a final resolution, but it generally will not affect the ultimate legal relationship between the parties.

Settlement Adequacy Review

Despite its inclusion in this section, settlements are a special version of a dispositional ruling. Unlike trial decisions, settlements are not typically the subject of a review by the WCAB and so much of the discussion below about built-in safeguards against inappropriate decisional variation does not apply. In order to address the special issues regarding settlement review, we have explored the question of nonuniformity more fully in ***Settlement Standards*** found in ***CHAPTER 15***. Nevertheless, our suggestions to minimize variation in trials (see ***Promoting Trial Decisionmaking Uniformity Through Training***, below) are equally applicable to settlement review.

Determining When Trial Decisionmaking Variation Is Inappropriate

Judges need to have the ability to decide matters before them in a way that serves the interest of justice and is in compliance with the law. Once those trial decisions fall outside the parameters of the statutory, regulatory, or procedural requirements, then justice by definition will not be served. While it may be permissible or even

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[233] Attorney fee requests fall somewhere in between these ill-defined areas as they indeed affect the net compensation paid to the applicant. Because they are rarely opposed by applicants or defendants, we are treating them as procedurally related.

desirable from the standpoint of efficiency or fairness for judges or offices to occasionally waive, bend, or even ignore rules of procedure under appropriate circumstances, the same cannot be true for decisions that directly affect the relief sought by the parties. Allowing judges to apply shifting or idiosyncratic standards to trial-related decisions brings with it the very real risks of engendering disrespect for the entire judicial process and undermining the foundations upon which public confidence is built. The bottom line is that variation in trial decisionmaking is always unacceptable when it goes beyond legal boundaries. If the rule itself is fatally flawed, then it is up to the Appeals Board or the appellate courts to remedy an unjust situation.

Theory Versus Practice in Trial Decisionmaking

If an explicit and mandatory criterion for trial decisionmaking is routinely sidestepped or misinterpreted by judges, then it is up to policymakers to swiftly decide whether to vigorously enforce compliance with the rule, to modify it in order to make it more effective or realistic, or to abandon it altogether. In other words, either every judge should be able to follow a particular rule for trial decisionmaking or the rule should not exist at all.

An excellent example of this appears to be in the realm of final offer arbitration (also known as “baseball arbitration” and created as part of the 1993 reforms) wherein judges are limited to choosing only between two conflicting ratings offered by the applicant and the defendant when based on QMEs’ comprehensive medical evaluation.[234] In other words, if the applicant’s submitted rating is 50% and the defendant’s proposed rating is 30%, the judge cannot (under most circumstances) reach a result that is neither 30% nor 50%. This concept can run afoul of the understandable desire of many judges to “split the difference” in order to achieve an outcome that lies somewhere between the applicant’s perhaps overly generous evaluation of his or her own injuries and the defendant’s perhaps overly conservative response. As professionals skilled in performing their own ratings, judges may also decide that the evidence in the file demands a very different result

[234] Labor Code §4065.

than either side is proposing if real justice is to be accomplished. Not surprisingly, some judges told us frankly that they simply ignore LC §4065 whenever they believe its application would result in an inappropriate award.[235] This appears to confirm the findings of the Commission on Health and Safety and Workers' Compensation's 1999 report into the effectiveness and experience with baseball arbitration, which determined that both judges and parties are equally adept at avoiding this statutorily defined criteria for trial decisionmaking.[236] Appropriately, the Commission voted unanimously to recommend the repeal of LC §4065 in December of 1999.

Clarifying standards (as opposed to eliminating or radically revising them) appear to be required in other areas as well. Labor Code §5814 penalties are to be imposed whenever compensation is unreasonably delayed or denied; in such a situation, the judge must order the defendant to pay an additional 10% penalty for all payments (including those that were paid on time) within that class of benefits, both past and future. The key is whether the delay or denial was *unreasonable*, a criterion defined by both statute and appellate cases but one that is thought by some to be "confusing, difficult to interpret and complicated to apply,"[237] especially in light of appellate decisions that have not

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[235] Similar and somewhat related issues revolve around the presumption of correctness for treating physician reports that was imposed as a result of the 1993 reforms. Some judges told us that they have little trouble sidestepping this presumption whenever they felt it would require them to reach an undesirable result. Because the impact of the presumption is the subject of ongoing and more focused CHSWC research (see, e.g., Commission on Health and Safety and Workers' Compensation, *Report on the Quality of the Treating Physician Reports and the Cost-Benefit of Presumption in Favor of the Treating Physician* (1999)), it is beyond the scope of this work. But regardless of whether the presumption is a beneficial feature of the workers' compensation process, placing judges in a position where they routinely employ legal fictions to accomplish their jobs cannot help but undermine respect for other provisions of the Labor Code and associated regulations.

[236] See, e.g., Commission on Health and Safety and Workers' Compensation, *Preliminary Evidence on the Implementation of Baseball Arbitration* (1999).

[237] Commission on Health and Safety and Workers' Compensation, *1999-2000 Annual Report* (2000), p. 18.

clarified key issues.[238] Whether or not penalties of this nature should be available at all is a question for policymakers (and would be beyond the scope of this work as would the question of whether the sanctions should be enhanced or cut back), but if so, then a judge should be equipped with clear and understandable standards in order to use them when appropriate. Clearly, if the current legal boundaries for trial decisionmaking are unworkable, then they must be changed.

Tolerating Trial Decisionmaking Variation

It is unrealistic to assume or require that two judges hearing the same evidence or presented with the same motion will always reach the same trial decision. As long as such trial decisions are made using some sort of identifiable standards, as long as the judge making the decision does not stray beyond clear legal boundaries, and as long as no impermissible bias has entered the equation, such variation is a natural and acceptable byproduct of the underlying design of our justice system. We give our judicial officers great leeway to make tough decisions because it is impossible to draft precise rules that cover every possible situation or that will always achieve desirable results. If uniformity in trial decisionmaking is mandated to an extreme degree, then there is not any reason to continue to use human judges. Nevertheless, safeguards should be in place to ensure that similar matters are given similar treatment as much as reasonably possible.

Adequacy of Current Checks and Balances in the Trial Decisionmaking Process

Trial decision uniformity can and should be encouraged. We believe that the best ways for the WCAB to ensure that its judges are following the law and rendering fair and reasoned trial decisions are through adequate training of judicial officers, a sufficiently detailed deliberation process, and liberal review of trial decisions.

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[238] See, e.g., Commission on Health and Safety and Workers' Compensation, *Issue Paper on Labor Code Section 5814*, California Department of Industrial Relations, 2000.

- ***Training:*** As mentioned elsewhere, there is wide variation in the length and depth of training new WCJs receive. Without providing the proper technical, legal, and procedural foundation for judges to use throughout their careers, their early years will be marked by considerable variation in trial decisions. Additionally, bad habits may be difficult to break later even if education and training are provided sporadically. WCJs should have similar levels of training and ongoing education.
- ***Trial Deliberation:*** "Shooting from the hip" often results in a trial decision that failed to take into account all the evidence available to a trial decisionmaker. The more time one has to consider the facts and law surrounding an issue, and the greater the amount of access to evidence that should be examined, the better the chance that the trial decision will be as accurate as possible. While in some circumstances, such as in an Expedited Hearing, it may be more important to rapidly deliver some sort of trial decision rather than none at all or one that is too late to address the underlying issue, generally a longer and more thorough period of deliberation is preferred. It should be kept in mind that "period of deliberation" refers to the time actually expended reviewing the file and deciding the matter; letting a case lie dormant following trial for months at a time does nothing to encourage a better or more reasoned decision.
- ***Liberal Review:*** Judges should not operate in a vacuum. When justified, the trial decisions they make should be reviewed by others who have the power to override the original trial decision.

By design or by chance, except for deficiencies in judicial training, the WCAB trial decisionmaking process is already characterized by a wealth of safeguards that promote uniformity. Perhaps as a result of the origins of the WCJs as hearing officers who passed on evidence to Commissioners who in turn made the final trial decision, there actually exists a labyrinth of checks and balances (many of which are not present for most civil jury cases) to increase the chances that a decision following a trial is as fair and reasoned as possible:

The trier of fact is a judge rather than a jury.

Civil trial juries, or even most trial judges, do not have the experience and training that WCJs do to help them review complex medical reports and ratings.

Judges are required to take copious notes during testimony.

This forces a WCJ to pay rapt attention to the questions and answers being given during trial and thereafter organize his or her notes before dictating them to the court reporter. Moreover, it allows the judge to later review the most salient parts of the testimony when reaching a trial decision without having to dig through transcripts or try to interpret cryptic handwritten notes. This is especially important when trials are discontinuous. Other civil court triers of fact do not have this requirement.

Complex medical testimony typically comes in the form of thoughtful, detailed written reports.

In other civil trial systems, the testimony of doctors and other forensic experts are usually given as witnesses on the stand during trial or during a deposition. Their responses tend to be brief and usually shaped by the lawyer's questions subject to the rules of evidence. Important issues may not be addressed or explored fully and the nature of live testimony may result in critical information being missed or forgotten by the lay members of a jury. This is not true in the California workers' compensation system. As a result of formal (e.g., BR §10606) and informal (e.g., IMC medical-legal report guidelines) requirements, written medical reports considered at trial are typically well organized, extremely detailed and comprehensive, and designed for thoughtful and deliberate review by a judicial officer long experienced in health care issues.

Judges have the authority and the obligation to develop the record.

Appellate courts have long held that the judges of the WCAB can require the parties to produce additional evidence in order to make meaningful findings. Other civil trial judges have only

limited powers in this capacity. This ability helps ensure that the ultimate trial decision will be based on all the relevant evidence possible, even if the parties fail to offer it.

Judges are required to provide detailed explanations of their findings and how they reached their trial decision.

A civil jury that has reached a decision in matters of critical importance, even after a multibillion dollar antitrust trial, need only announce their verdict in a few sentences and disappear. WCJs, on the other hand, are required by BR §10782 to set forth, "clearly and concisely," the reasons why they ruled as they did. Even when sitting as a trier of fact, other civil judges are not always required to document exactly how they arrived at their trial decision.

Snap trial decisions are rarely required.

Except in the context of Expedited Hearings, judges have a lengthy opportunity to carefully go over all evidence in the case. While there is no reason, absent sending the case out for ratings or gathering additional evidence, why trial decisions should take longer than 30 days to produce, the liberal amount of time allowed does mean that a judge can fully review the entire case file and controlling authority.

Appeals of trial decisions can be made to the Commissioners based on errors of fact, not just law.

The most common ground raised in Petitions for Reconsideration is that the evidence did not justify the findings of fact.[239] In other civil trial systems, appeals are typically limited to reviewing errors of law made by the judge.[240] The more liberal rules allowing appeal mean that formal review of a judge's trial decision is very common.

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[239] St. Clair (1996), p. 1535.

[240] It is possible to appeal the judge's failure to overturn the jury's decision or a failure to add or subtract from the award when requested, but successful appeals on that basis alone are not common.

For purposes of appeal, the Summary of Evidence clearly documents how the judge viewed the testimony and the Opinion on Decision clearly documents the judge's reasoning.

These requirements provide parties seeking to appeal on the basis that the evidence did not justify the findings or on other grounds additional weapons not available to practitioners in other civil court systems. If the Summary of Evidence is in conflict with a transcript or if the Summary is at odds with the judge's findings, then the appeal has a better chance. A similar result can occur if the Opinion's logic does not explain clearly and concisely how the trial decision was reached.

Judges are required to re-review their trial decision on appeal as well as address the issues contained in the Petition for Reconsideration.

This process of self-examination can lead to amending, modifying, or rescinding the original trial decision. It also acts as an incentive for judges to carefully consider the evidence before them on the first go-around. Civil trial juries are not required to go back into the jury room, review what they've done, and justify or reverse their original trial decision.

The Commissioners have wide powers to overrule a judge.

Finally, while the Commissioners must usually give "great weight" to the trial judge's findings on credibility determinations, they have the power to take a different view of the written record including medical reports that make up the bulk of the Board File.

The Costs of Trial Decisionmaking Uniformity

Taken as a whole, such checks and balances upon WCJs' trial decisions promote uniformity in a way often unknown in other civil court settings. It is difficult to imagine what more could be done, outside the area of providing increased education and training, to encourage the rendering of trial decisions that are—on the whole—acceptably uniform across judges. That being said, these procedures without question require a stiff price in terms of personnel costs and in delaying the

ultimate resolution of cases. The extra work and costs for a judge rather than an unpaid jury to be the trier of fact, for a judge and hearing reporters to produce Summaries of Evidence, for a judge to take the initiative in developing the record if needed, for a judge to draft lengthy Opinions, and for a judge to respond to appeals are not insignificant. Moreover, the length of time given to reach the trial decision and the additional time required by an appeal can add months to an already extended time to disposition.

However effective at promoting uniformity, fairness, and accuracy in trial decisionmaking, the current process with its wealth of safeguards is both expensive and slow. By cutting out many of the features of this system outlined above, case processing as a whole might speed up as judicial resources are freed to conduct streamlined trials with a restricted opportunity for review. But such an approach would not likely be acceptable to those who seek the highest quality in trial decisionmaking. Uniformity at trial comes at a stiff price not always understood by those who see inefficiencies and waste in the current lengthy process. Balancing the sometimes competing desires for a system that would be equally low cost, rapid, and fair is a difficult task for all segments of the workers' compensation community.

- ***Policymakers need to be in agreement regarding whether increased uniformity in trial decisionmaking is worth the additional demands upon public costs and case resolution time; whether some existing trial decisionmaking safeguards can be safely dropped in the interest of public resource savings; or whether the existing process should be fully funded to achieve the highest level of uniformity.***

Promoting Trial Decisionmaking Uniformity Through Training

At the present time, the initial education of WCJs is fairly haphazard and depends greatly on the time, abilities, and interests of the Presiding Judge at the branch office to which the new judge is assigned. In later years, continuing education may be limited to a group session on a regional basis every few months where over the course of a day, a few recent topics of interest are discussed as well as new

administrative directives. Neither is sufficient to give each judge the background needed to rule effectively and accurately. Nor can the DWC always depend on judges at individual offices taking up the initiative and discussing among themselves new developments in case law and procedural issues they have recently encountered.

Education should be seen as an ongoing process for the DWC, not a four-times-a-year event. There is little reason to ignore this need any longer. Though live instruction is costly (especially when travel costs for the audience are taken into consideration), it may not always be necessary. Internet-based training modules could be developed that allow WCJs to study from their home or office or, for example, compare how they might rule on hypothetical fact patterns or medical-legal reports with other judges.

Variation in trial decisionmaking within the context of the California workers' compensation system may well be exacerbated by the insulated nature of each judge's workload. Without some way to compare their reasoning with their colleagues, judges will never really know if they are ruling in a way that is "standard" or "uniform." The feedback loop provided by a review rendered by the Commissioners of the Appeals Board is slow and sometimes unhelpful. Building a routine mechanism for reaching a shared consensus on how to evaluate issues in a case is an important goal for any education program.

We believe that it makes more sense for the DWC to develop a comprehensive and regular education and training process for its judicial officers than to deal with the side effects of ill-equipped judges such as disgruntled litigants, increased frequencies of appeals to the Commissioners, and disciplinary proceedings. The DWC has a substantial investment in its trial judges and like any valuable resource, regular "maintenance" is vital to ensure top-level performance.

- ***Judicial education at the beginning and throughout the career of the WCJs is an effective way to increase trial uniformity.***

CHAPTER 13. PRETRIAL PRACTICES AT DWC BRANCH OFFICES

TRIAL CALENDARING AND JUDICIAL ASSIGNMENT

Trial Date Assignment

Following the MSC, a trial judge is formally assigned to the case[241] at the time a trial date is chosen, though at many branch offices, the identity of the trial judge is normally the same as the MSC judge. The actual process can vary from case to case, though generally the method is the same for the majority of cases at any one branch office. Sometimes the calendaring (encompassing the formal judge assignment and the selection of a trial date) is done when the parties jointly visit a specially designated window where a clerk handles the calendaring chores; in other instances the MSC judge is managing his or her own calendar and works with the parties to find a mutually acceptable date when he or she will hear the trial; finally, the request for a trial setting can sometimes be forwarded to the clerk's office and the parties later notified by mail of the assigned judge and date. The first two methods are preferred as they better avoid the possibility that the proposed date conflicts with preexisting commitments of the counsel or litigants and they also allow for the expedient handling of peremptory challenges under BR §10453 (the clerk or the MSC judge can immediately identify the new judge and because the challenge is made orally, there is no need for written notice). Of these, the first method also has the advantage over the second of removing litigants from the awkward position of having to assert the peremptory challenge directly to the MSC judge.

- ***Whenever practical, trial dates should be assigned in the presence of the parties to avoid calendaring conflicts.***

[241] See, e.g., BR §10347.

Trials and Judicial Time Expenditures

Even on the days judges have theoretically devoted to conducting trials, a casual observer who walks through the branch office's hallways will observe that many hearing rooms are dark in the later hours of the morning and afternoon calendar. Because judges generally work in their offices when not in session, an incorrect impression may be reached that the judges have taken the day off. In reality, judges appear to be conscientious in their work habits as they must be given the fact that for every hour spent taking testimony, about four additional hours are needed to take care of posttrial concerns (see ***Table 8.5***).

This may seem to be wasted time, but in reality, it is the legal community and the litigants that benefit. The typical WCAB trial has been reduced to the bare bones necessary to give applicants (and occasionally employers and defendants) an open and public "day in court" while dispensing with the expensive need to have live medical testimony. Essentially, much of the trial is conducted in private where the judge reviews the sometimes extensive amount of written documentation and medical records. Parties and attorneys are not present and so can spend their time elsewhere.

Judges in civil trial courts are sometime criticized for failing to compress as many trial hours in a single day as possible.[242] In such systems, lengthening the trial day at every opportunity is a reasonable response from a court's standpoint because the *direct* cost to the forum is primarily the additional hours spent by judges and associated staff in the courtroom itself during live testimony. Once the trials are over, juries are traditionally the ones who must retire to deliberate their decisions; as their time is essentially "free" as far as the judicial system is concerned, it is not typically figured into the time and resources needed to complete a trial. A judge in a civil court can do other tasks during the deliberation process. In the WCAB, on the other hand, a judge's time expenditures for a tried case do not end at

[242] See, e.g., Kakalik, James S., Molly Selvin, and Nicholas M. Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, RAND, Santa Monica, CA, R-3762-ICJ, 1990, pp. 75-76.

the close of testimony. Our time study estimated that for every hour spent hearing testimony, four other hours are needed for the Summary of Evidence, Minutes of Hearing, drafting the Decisions and Opinion, and responding to the Petition for Reconsideration. Indeed, if WCJs actually spent seven full hours per day (8:30 a.m. to 12:00 p.m. and 1:30 p.m. to 5:00 p.m.) in trial hearing testimony for three days a week each and every week, we estimate that over 100 total work hours would be required for trial-related chores (21 hours in court, 84 hours for other trial tasks). Obviously, this figure does not include any time spent whatsoever to hear conference calendars, review the adequacy of settlements, or any other tasks.

If these figures are correct, and unless there is some effort expended to reduce the effort needed to handle posttrial activity, then a judge of the WCAB can really only be in actual trial for about six full hours a week if the rest of the three trial days as well as the "decision" day are to be devoted to issuing decisions and addressing appeals (assuming a 40-hour workweek). This is **not** to suggest that 6 hours is an appropriate target for calendaring purposes. Some of the extra time needed to handle trials as reflected by our time study might be, arguably, wasteful, duplicative, or the result of poor work habits. But it does explain why many judges who are less than efficient at drafting decisions and the like wind up with a backlog of submitted cases even when they aren't in trial all day long for three days a week. As explained elsewhere, we believe that appropriate tools must be given to WCJs to reduce the amount of time associated with each in-trial hour.

In any event, nearly half of all time spent by judges is directly related to the conduct of trials and the duties that are associated with such hearings (pretrial case review, preparing the summaries of evidence, researching and drafting Opinions and Decisions, preparing Reports on Reconsideration, etc.). Every additional trial that a WCJ holds thus reduces the amount of time available for performing other duties of the position, including drafting Opinions and Decisions for already concluded hearings. At worst, the judge's ability to get decisions out in a timely manner may impact his or her salary due to the 90-day cutoff contained in LC §123.5(a). It is not surprising then that

a judge might have an incentive to limit the number of trials he or she actually conducts.

There are other benefits to minimizing assigned trials. A judge whose schedule is such that he or she has no calendared trials that day can devote the open time to other tasks that might include issuing decisions in already concluded trials, reviewing settlements, or preparing for upcoming hearings. With the additional luxury of open time, issues can be researched more thoroughly, medical reports pored over rather than simply scanned for highlights or buzz words, and advance sheets can be read and the rulings applied in future decisions.

Clearly, it would be a mistake to assume that open trial time is wasted time. The "business" of the WCAB is still done regardless of whether judges have two, five, or even no cases scheduled on their regular trial days. But getting matters to trial as soon as possible following the filing of the Declaration of Readiness is such an important feature of California workers' compensation that the Legislature has seen fit to codify its desires as part of LC §5502. To accomplish this goal, all cases ready for trial must be heard as soon as possible and each judge must shoulder a realistic and proportional share of the trial-related workload. If that does not happen, a backlog in the trial queue will begin to grow. Though there are clearly limits to the maximum number of hours a judge can hear trial testimony in a week, administrators must understand that overly light trial calendars (both in terms of scheduled trials and those actually held) result in increasingly longer waits for an open trial slot. At some point, the statutory maximum of 75 days following the DOR will be exceeded. When the average for an entire office or any individual judge indeed climbs above the 75-day limit, then Presiding Judges need to seriously rethink their office's current calendaring practices.

- ***The workers' compensation community needs to be cognizant of the fact that in-courtroom time spent conducting trials is only a portion of the total time needed to issue a decision. The idealized model of a WCJ in his or her hearing room with nonstop testimony during all open business hours three days a week is unrealistic and unworkable. Trial-related responsibilities are a significant demand on judicial resources and as***

such, judges have understandable incentives to minimize the number of trials they actually conduct.

Trial Scheduling and the Use of the Same Judge for the MSC and Trial

Making sure that each judge has an appropriate trial workload scheduled on his or her regular hearing day, making sure that each judge actually hears cases ready for trial and does not needlessly defer consideration to another time, and making sure that the combined judicial resources of an entire office are used efficiently when unexpected demand develops is a difficult task for a Presiding Judge. The problem is made more complex because the question of calendaring is not always in the hands of the PJ (or clerks operating under his or her direct supervision). At some branch offices, WCJs have a significant amount of control over what cases will go to trial before them and the dates of those hearings either directly through decisions he or she makes or indirectly as a result of office procedures and judicial assignment strategies. Understandably reluctant to take on a trial burden that would consume an inordinate amount of all available hours during the rest of the workweek, such judges have an ability to limit or at least influence their daily trial load.

Individual control over one's own trial calendar can be achieved either with the judge in a position to act as a gatekeeper for deciding which cases he or she will try or with the judge having at least some influence over the scheduling of trials set for particular days. At a district office where judges are first assigned the duty of presiding over the MSC for cases but separately assigned the duty for actually trying the cases, such control is difficult. At these locations, any decisions a judge might make at an MSC, whether to set a hearing date, grant the parties a continuance or OTOC, or approve a proposed settlement, does not affect his or her chance of presiding over a trial in same case. Once the MSC is concluded and the parties request a trial setting, someone in the clerk's office will choose a "new" judge for the case. Depending on the office's internal procedures, that new judge will either <u>always</u> be a different judge from the one who conducted the MSC or <u>usually</u> a different judge because the assignment will be given to

the judicial officer with the *first* available trial opening (which may or may not be the MSC judge). The actual scheduling of the trial date also rests in the control of the calendar clerk. Fourteen of the 25 offices had such a "multijudge" policy in place at the time of our Presiding Judge survey; of these, six follow the "first available judge" version.

At 11 other offices, the MSC judge will always be the trial judge.[243] In other words, the case stays with a single judge throughout its entire life. In at least five of these offices, the MSC judge typically will also be the only person who will work with the attorneys to find an agreeable date for any required trial. At all of these "single-judge" offices, judges know that many of the decisions they make at the MSC will in large part determine whether they will see these same parties again at trial.

These types of judge assignment policies are not set in stone. A number of offices have shifted from one version to another over the years. Generally, the trend over time has been in favor of a move toward multijudge assignment.

Early on in our research, we became aware that some observers considered such differences in judicial assignment policy as the primary litmus test in assessing an office's overall case management "style." Advocates of single-judge assignment felt that keeping the case with just one judge throughout its life was a reflection of the special responsibility a judge has in moving cases toward resolution. Assigning different judges to preside over conferences and trials for the same case was seen as an unfortunate compartmentalization of what are essentially interrelated components of a single process. Multijudge offices, in this view, transformed a difficult search for truth into an impersonal assembly line operation. In that light, a judge would have

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[243] The policies described for both those offices that use the same judge for MSC and trial and those that generally do not are by no means absolute. A challenge to the judge's trial assignment by one of the parties, vacations and other judicial absences, special requests to retain control over a case, assignments of particular case types such as asbestos-related litigation to a single judge, and other considerations routinely generate exceptions to these rules.

little personal investment in any particular matter because each conference or trial he or she presided over would be both the first and last contact with the case in most instances. Moreover, there would be no incentive for judges at a multijudge office to do an especially good job in facilitating settlement at the MSC because his or her pending trial calendar would be unaffected by any subsequent reduction in demand for formal hearings. By and large, the most strident voices for such comments came from the ranks of judges who work at single-judge locations.

Advocates of a multijudge approach saw the situation differently. While agreeing that a judge's role is critical in achieving outcomes that are both fair and expeditious, in their view what judges ought to do in a conference setting does not depend on the remote possibility that he or she will preside over any subsequent trial. Judges should execute good case management skills in every instance because it is the right and professional thing to do, not because of the attractive potential for a lighter trial schedule down the line. As the number of cases requiring trial at the end of each judge's MSC calendar will inevitably vary, so will the length of time needed before open trial slots can be found. In addition, the control over their personal calendars afforded to judges at a number of those locations might lead to underscheduling trials and therefore add to overall delay. Single-judge practices could result, it was claimed, in some judges having trial calendars extended out weeks or even months longer than their colleagues. Only if trials could be assigned as circumstances required and in a way that would be balanced among all available judges could limited resources be allocated efficiently. Single-judge offices were felt to be unaffordable luxuries during a period of time when the record in meeting legislative mandates regarding time to trial has been dismal. By and large, those coming from the ranks of Presiding Judges now working at multijudge locations as well as DWC administrators were the strongest advocates for this line of thinking.

This section attempts to review the issues involved in trial judge assignment with a special focus on the question of whether the potential for unnecessary extension of the trial calendar indeed suggests a change

in the minority practice. As the examples given above of differing viewpoints suggest, the issues are quite complicated and the advocates are quite zealous in their beliefs; unfortunately, precisely measuring how well each claim mirrors reality is also quite difficult. A comprehensive and definitive analysis of trial judge assignment practices that would be able to control for the substantial differences between offices in staff levels (especially including vacancies and absences), variations in workload demands, the office's other management practices, individual judge performance, and a variety of other factors would rival the time and resources we had available to us for the entire research agenda. Clearly such a project is warranted in the future if there absolutely must be a single approach used throughout the system. Until that time, we feel that a discussion of the issues involved and, based upon what we observed and what we were told, a *tentative* recommendation in this area would be beneficial to the workers' compensation community in their ongoing debate over the policy. Ignoring the question altogether is not an option because our primary role in this research is to provide the basis for decisions by policymakers even if any recommendations must be more narrowly drawn than might be desired.

Judicial Trial Calendar Control

How can the use of the same judge for both conferences and trials provide the MSC judge with any heightened level of control over calendaring? To understand how this is possible it should first be remembered that at all but the tiniest branch offices, just about every judge at the same location will have about the same number of MSCs in a week (this is not necessarily true for PJs with their reduced caseloads and it is not true for a few judges across the system who for some reason or another are assigned a slightly larger conference calendar). Trial assignment is another matter. At single-judge locations, the cases a judge will preside over at trial are by design a subset of the ones he or she saw at the MSC. If a judge at one of these offices holds 20 MSCs and of these 15 request a trial setting, then 15 new cases must be accommodated on his or her pending trial calendar. Another judge at the same office might see just five cases requesting trial out of a

similar number of MSCs on the same day. The obvious hope is that over time, the number of new trial requests will balance out across all of the office's judges.

At the multijudge locations, the outcome of an individual judge's MSC calendar has only minimal effect on the number of new regular hearings that will be added to his or her trial schedule. The cases that request a trial setting at the end of the conference calendar will be doled out more or less evenly to all the judges at the same office.

Multijudge and single-judge offices differ as well in how those upcoming trials will be calendared. In the former, the number and total estimated length of trials to be assigned to any one judge on any one day is a decision made by a calendar clerk using guidelines presumably approved by a Presiding Judge. An example of such a guideline might be to schedule each judge with a total of six hours of trials (perhaps a pair of one-hour trials and a pair of two-hour trials). As these estimates of trial length result from an assessment made by the MSC judge at the end of the conference, they typically will not have been made by the judge whose trial schedule the clerk is working on.

At single-judge offices, judges have additional input into the actual calendaring process. Because the parties seeking a trial date at the end of the MSC are already standing before the very same judge who will ultimately try the case, at some single-judge offices the trial calendaring is done right in the MSC judge's hearing room or personal office. A judge at such locations would have physical control over his or her individual schedule and so can decide the number and sorts of cases he or she will hear on any specific day (though the Presiding Judge's formula is supposed to be used here as well). At other offices, the judge's estimates of trial length developed at the MSC will be factored into the calendar clerk's decisions.

Possible Problems with Single-Judge Office Trial Calendaring

Discussions we had with a number of Presiding Judges, DWC administrators, and practitioners suggested that the level of direct and indirect control over an individual judge's trial calendar afforded at single-judge locations had occasionally led to problems in moving cases toward resolution. We heard claims that certain judges would do

anything to minimize their pending trial workload, that close examination of the daily trial calendar for a few others revealed a large percentage of cases scheduled had settled almost immediately following the MSC (but were nevertheless still booked), that some judges (often characterized as being “obstructionists”) were avoiding setting for trial all but those cases with the most simple and straightforward issues, and that some judges consistently scheduled just one or perhaps two cases to be heard on their regular hearing days despite a lengthy trial queue. Many of the sources of these comments have visited, worked at, or practiced before both single-judge and multijudge offices. Presiding Judges at single-judge locations we spoke to typically said that while such consequences were certainly possible, diligent oversight over individual trial calendars on their part minimized the number of instances that they happened. It should be noted that judges working at single-judge locations generally indicated to us that these sorts of problems would never affect their own personal trial calendars.

It is easy to see why a judge might indeed want to keep the number of new trials he or she actually hears down to the fewest possible. As suggested by our time study data, each hour spent hearing testimony typically requires another four hours of trial-related chores. Spending more than just a few hours in the hearing room on each of the three days judges generally devote to trials can result in an overwhelming demand upon the rest of their workweek. But are there ways for a judge to influence the size and timing of their individual trial calendars?

To illustrate how the claims noted above might indeed be possible, all of the following examples assume the office is one where the judge assigned to the MSC will always preside over any trial as well. The first example also assumes that the MSC judge is solely responsible for constructing his or her future trial calendar while the remainder have the calendaring done by a clerk (based in part on the MSC judge’s estimation of trial length).

- *The judge might consistently underschedule the number of cases he or she will hear on any future trial date.*

At some locations, the judge is in complete control of his or her trial calendar and alone decides whether any particular day is completely booked up or whether it is still available for additional scheduled trials. While offices generally have some sort of trial-setting formula for all staff members to use as a starting point in calendaring (see ***CHAPTER 7***), there is little after-the-fact oversight over individual calendar decisions. As such, the definition of what is a "reasonable" trial workload for any particular day or week then becomes the sole decision of the judge in question.

- *The judge might deny a request at the MSC for an OTOC or a continuance in a case where all parties have claimed that settlement is reasonably expected to take place within a short time.*

Such an action would likely be in compliance with LC §5502.5,[244] but it would also force the parties to go through the motions of completing the joint Pre-Trial Statement of stipulations and issues and to have a trial date set even though it is unlikely that the trial will actually take place. A trial date is then assigned, usually immediately following the MSC. In theory, a subsequent settlement might allow the slot assigned for the trial to be reassigned to another case; in reality, the 10-day notice requirement (plus the additional five days for mailing) means that settlements occurring in the two weeks prior to the scheduled trial date are unlikely to open any additional trial slots for the branch office's calendars.[245] Also, it is not always the case that the fact that a previously booked trial slot has opened due to settlement is communicated to the calendar clerk

[244] As well as P&P Manual §6.7.4 and BR §10548.

[245] Even if the parties inform the court far in advance of the scheduled trial date that a settlement has taken place, the released slot is not always reassigned. Attorneys who are given the option of a quicker than "normal" trial setting may well decide to go with the later date in order to give them additional time to prepare and perhaps settle the case.

or whoever is setting trial dates.[246] If the MSC judge is the trial judge, then the real number of scheduled trials on any particular day that have any chance at all to start is effectively reduced.[247]

- *The MSC judge might be overly permissive in granting requests for continuances or OTOCs or may make such orders on his or her own initiative in complex or "messy" cases where the potential for settlement is highly unlikely.*

Most cases will settle over time with only a fraction being resolved through a Findings and Award or Findings and Order. There are strong incentives on both sides to resolve any dispute before the WCAB through compromise rather than risking the crapshoot of a trial and investing considerable resources into preparation and attendance. If particularly thorny cases are diverted off the trial track by an endless sequence of

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[246] Even if communicated, it is not always a sure bet that the ledger book will reflect the newly opened slot. The paper-based calendaring methods we observed, while adequate for routinely setting dates in the future, did not appear to lend themselves to editing existing entries. Also, a clerk attempting to find an open date is more apt to choose one somewhere around the point where the calendar is relatively empty rather than taking the time to study each and every possible day including those previously closed.

[247] There is no question that parties should be kept focused on resolving their dispute by setting a case for trial whenever settlement is not a sure thing. There is a significant difference, however, between a situation where both parties announce that settlement is imminent (though not possible to complete at the MSC) and a situation where one or even both litigants claim that with just a little more time they will eventually reach agreement. In the former case, the problem is merely technical and taking the matter off calendar is in the best interests of all concerned. Failing to issue an OTOC when a settlement is all but signed off and instead calendar a trial can lead to an empty trial slot. In the latter case, there is no "settlement" at the present time, just vague assurances that the parties will negotiate further following the MSC. Delaying the trial date in such situations removes any serious pressure to settle until the next DOR is filed. It should be kept in mind that the parties already had the period from the DOR filing to the MSC to meet and confer about settlement and at least get the details worked out if not the actual approval and signatures. Judges should not hesitate to keep parties in such cases on track by setting an early and firm trial date.

continuances at the MSC or orders taking the matter off calendar so that the Joint Pre-Trial Statement is never completed and the case never set for trial, there will indeed be an excellent chance that the parties will eventually present a settlement anyway even if the result is additional costly appearances for counsel and unreasonably delaying final adjudication for the applicant.

By virtually forcing the parties to settle before trial when the case involves complex issues or multiday trials, the remaining cases on a judge's trial calendar would be comprised mostly of those that can be handled with minimal effort after testimony is taken.

- *The judge might consistently overestimate the length of time of future trials.*

Many people we spoke to seemed to take it as a matter of faith that attorneys were notorious for underestimating the amount of time a trial will take. Inevitably, it was felt, there will be significant pretestimony time on the day of trial needed to narrow issues and otherwise prepare for the actual business of conducting a trial, time that many attorneys who are focusing only on the period the witnesses will be answering questions will overlook. Also, many attorneys, it is claimed, fail to realize that the other side's examination of their witnesses may be unexpectedly detailed and extensive. Finally, attorneys may not always be cognizant of the time required for judges to dictate the Summary of Evidence, an event that is as much a part of the trial day as the giving of testimony.

That being said, judicial officers ought to have a fairly accurate picture about the total time needed to conduct a case before them and generally are the ones making the final decision as to the estimated length of trial (the calendar memos they issue to clerks indicate that assessment). But at nine of the 11 single-judge offices, estimates of trial length are the primary factor used by calendar clerks (or judges when following the office's setting formulas) to decide whether a judge has had a

sufficient number of trials scheduled for him or her on any particular day. If a judge overestimates trial time in the calendar memo and the hearing is in fact shorter than predicted, his or her total number of hours actually spent hearing testimony that day would be less than another judge whose schedule was more realistic.[248]

Are These Common Problems?

Clearly there is a potential for judicial control over the calendar at single-judge offices to have negative consequences, but we were unable to empirically assess the frequency with which these situations take place. Our research design did not allow us the luxury of observing hearing room events for the same case throughout its life. Review of the case file will not give us an accurate assessment of whether judges have inappropriately moved near-settlement cases to trial, have obstructed parties who wished to go to trial from doing so, have overestimated trial length to reduce the total length of trials they are scheduled for in any one day, or have underscheduled trials when they have direct control over the calendar. Individual judicial statistics gleaned from CAOLS may not always tell the complete story because some of the actions mentioned above do not easily translate into obvious reductions in productivity.[249] It is likely that only ongoing monitoring of judicial behavior in the courtroom by someone who is familiar with the details of the cases before the judge or at least who is in a position to compare the judge's actions with his or her peers

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[248] It should be noted that of all the possible avenues by which judges might exert undesirable influence on their trial calendars, overestimation of trial length was not reported as a common problem.

[249] Even with a random assignment of new cases, there can be great variation in the characteristics of the caseloads for individual judges, especially when viewed during relatively brief periods such as over a month or quarter. This situation is exacerbated by the ability of litigants to reject initial assignments through a judicial challenge and by the ability at some branch offices for litigants to choose the judge who will handle their "walk-through" matters. As such, the use of judicial statistics as the only indicator of calendar influence may well cover up potential problems or falsely appear to identify individuals needing guidance.

could appropriately address this question for any particular judge. Another approach would be to regularly review the future trial calendars for every judge who has direct or indirect control over his or her schedule. Unfortunately, the magnitude of such a task was also beyond the time and resources available to us.

Nevertheless, the extent to which we were told the same story from different corners of the stakeholder community leads us to believe that in some instances, there indeed are judges who on occasion manage their own calendars from time to time in order to reduce their trial day workload (and that a few do so with notorious regularity). Moreover, problems related to trial calendaring are not limited to those who may be consciously avoiding a heavy schedule of formal hearings; even judges who are trying in good faith to process as many trials as possible may well be setting their own calendars in an inefficient or nonuniform manner. Even at single-judge locations where the Presiding Judges were confident that any adverse effects of the trial assignment practice were kept to a minimum as a result of their ongoing monitoring of calendars and the rulings made at MSCs, an awareness that the problem did occur from time to time was in large part behind this heightened level of scrutiny.

Even though the exact extent to which certain judges are shouldering a lighter-than-average trial workload as a result of direct or indirect influence over their trial calendars could not be determined through the research approach we chose, three points are clear. First, these behaviors do occur from time to time; second, they can result in cases ready for trial having to wait longer than they ought to for an available trial slot; and third, they are only possible within a single-judge assignment setting.

Should All Offices Move to a Uniform Approach?

As has been already described, more than half of the offices have adopted the practice of assigning the trial to either someone always other than the MSC judge or to any judge having the first open trial slot. Of the remaining 11 single-judge offices, four are the smallest ones in the system with just two judges at three and a single judge at the other. Trial judge assignment schemes are essentially a nonissue at

such locations because there are so few judges to choose from when calendaring cases. The question that remains is whether some or all of the seven medium- and large-sized single-judge offices should shift to the more common approach used in 14 other locations or whether each office should be free to adopt its own methods of assignment.

Why are we not considering a third alternative of moving all DWC offices to a single-judge setting? Our concerns here primarily relate to the issue of getting parties to trial as soon as possible following the conclusion of the MSC, a requirement clearly mandated by the Labor Code and associated regulations and one of our key measures of how well offices and judges are minimizing delay. The admittedly anecdotal evidence we have of judges "gaming" the system so that their trial calendars remain lighter than others', solely concerned instances taking place at single-judge courts. At no time have we been told of similar incidents at a multijudge office; this is not surprising as the way trials are distributed among judges at those locations does not appear to have the same potential for unbalanced calendars or disproportional workloads.

But is change required? It is not easy to see whether such a shift is manifestly necessitated by LC §5500.3's mandate that "court procedures" be uniform throughout the system. On their face, calendaring methods do not seem to impact upon the rights of litigants to an expeditious, inexpensive, and unencumbered resolution of their case (a test suggested in ***CHAPTER 12*** for determining whether LC §5500.3 applies to differences in internal office policies). But if the type of judicial assignment system used at an office does indeed push the time needed to get to trial beyond statutory limits for some cases, then the DWC should clearly consider modifying the practice. The reverse is true as well: If cases are getting to trial within the mandatory time frames, it should make little difference to anyone how judges are assigned to a trial. Indeed, some local offices already find that they can generally meet the requirements of LC §5502 in calendaring MSCs within 30 days and trials within 75 days of a DOR filing. As such locations, there seems to be no urgent reason to change; moreover, modifying calendaring procedures can be disruptive in the short run as

well as requiring additional effort on support staff to complete the change.

Given that no existing study of this issue definitively answers the question of whether one trial assignment approach is clearly better than another for aspects other than minimizing unbalanced trial workload among judges (such as greater personal investment in case outcome, etc.), it makes little rational sense to change when things seem to be working just fine; in other words, if it "ain't broke, don't fix it." Moving to a new system can be justified only at offices where trials are set an average of more than 45 days from the MSC (45 being a reasonable figure given that it would take about 30 days to get to the MSC following the filing of a DOR), where a number of judges have trial calendars extended out significantly more than 45 days while others are able to set far sooner, or where such problems have been experienced in the recent past.

- ***Modification to current calendaring practices should not be made at branch offices where average conference and trial time intervals meet statutory guidelines and are balanced among the judges.***

Is a Move to a Multijudge Approach the Only Safeguard?

Can the potential problems associated with single-judge courts be avoided without changing the assignment system? One possible check would be to keep a close tab on the density and quality of a judge's calendar. The one person in a position to monitor whether an individual judge is generating an overly light trial schedule is the Presiding Judge. The PJ is also the one who, ideally, would provide the guidance for the judge in question to reduce the frequency of and the need for such behavior. But none of this can happen from the vantage point of the PJ's office. He or she must spend a considerable amount of time observing in-courtroom activity, listening to comments and complaints from the local bar, regularly reviewing the calendars for each judge (and comparing them to what actually took place), and auditing case files. In sum, the PJ needs to get an accurate feel for what is going on with the setting of trials at his or her District Office.

Some PJs at relatively smaller branch offices we received comments from or spoke to directly indicated to us that they were able to perform this sort of monitoring by simply “making the rounds” each day, stopping into individual courtrooms and observing the action in the morning or afternoon. Such rounds also appear to give the local bar a greater sense of access to the PJ and perhaps make them feel more comfortable in bringing their complaints to the attention of a problem judge’s immediate supervisor.

But it is not easy to see exactly how this sort of monitoring could possibly happen at one of the medium or larger branch offices. PJs have other responsibilities including handling their own calendars and executing the various duties required of the top administrative supervisor for sometimes dozens and dozens of staff members. A PJ at a branch office with, for example, nine or more judges to supervise may find it difficult to keep track of disproportional drops in trial workloads and identify the actions that allowed such a situation to develop. Focusing only upon those judges who have been previously identified as having these sorts of problems is not the answer either; good management practices dictate that monitoring needs to be universal if conducted at all.

There is another issue at these larger branch offices. Even if problem judges are identified, the task remains for the PJ to provide the guidance necessary to modify such behavior (and if need be, help the judge develop better skills for reviewing testimony and drafting decisions in order to reduce the need for fewer or simpler trials). Because of the lack of an expedient disciplinary process, PJs must rely primarily on the personal nature of their relationship with the judge in question to successfully address the situation. But the day-to-day social contact between PJs and some WCJs appears to be quite limited, especially when there is considerable physical distance between them. Some branch offices are spread over multiple floors or separate buildings and conceivably some judges may not have a face-to-face meeting with the PJ for days at a time. It is far more difficult for a PJ to nurture the sort of mentoring relationship required if he or she has to do so with 10, 15, or even 20 different judicial officers.

In sum, constant vigilance on the part of the Presiding Judge is needed if the single-judge assignment process is to avoid the types of problems that we have heard about from a number of sources. This suggests that an assessment of whether to even consider a change should go beyond simply determining if the 45-day limits mentioned previously are being exceeded; even if they are not, a PJ still needs to decide whether the additional effort being expended to guard against unbalanced or overly light trial calendars could be better directed elsewhere.

Key Issues Related to Judicial Assignment

Complicating the question of which assignment system should be employed at DWC offices where delay getting from the MSC to trial has been the experience is the fact that the issues involved mirror those in an area much debated in traditional court management research: the relative advantages of "individual" versus "master" calendars. Like the branch offices of the DWC, civil courts also differ in assignment strategies, with some having a single judge responsible for presiding over all pretrial and trial activity in a case while others use different judges for different tasks (there are also a wide range of "hybrid" systems being used as well). Despite decades of research on this issue, the evidence is mixed as to whether goals for overall processing times in civil courts are best served by the use of either type of calendar.[250]

It is not exactly clear whether the situation in civil courts and the WCAB are exact parallels. Much of the debate in traditional forums revolves around the impact on resolution times resulting from dispersing responsibility for pretrial control to multiple judges. At master calendar civil courts, each subsequent appearance for a conference or to conduct motion practice stands a good chance of being assigned to a different judge. With the multitude of appearances required before trial is actually held (e.g., status conferences, scheduling conferences, discovery conferences, settlement conferences, final pretrial conferences, hearings to rule on interim motions, etc.), a case that has wound its way through the system all the way to the trial stage

[250] Steelman, Goerdt, and McMillian (2000), p. 154.

will have seen a variety of judges during its lifetime. But even at a multijudge office within the WCAB, the number of judges who have worked on a file are generally few. Cases where the "one conference, one trial" ideal was realized would have had contact with at most two different judges. Moreover, within the context of "pretrial" management, only a single judge was actually involved. Even in situations where multiple appearances are required following the initial MSC (presumably one where the matter was not set for trial), half of the multijudge offices continue to assign subsequent conferences with the original MSC judge. As for trials themselves, we are aware of no WCAB office that will routinely assign one judge for the initial hearing and another for any subsequent matters such as lien trials.

Regardless if the lessons learned from the civil courts would easily translate to the situations experienced in workers' compensation forums, we did hear arguments for and against single-judge courts that duplicated those debated at length in classic court management literature related to calendaring. The discussion below attempts to place the concerns we heard within the context of the other information we gathered during our research.

Insight and Responsibility

One strenuous argument we repeatedly heard from advocates of a single-judge system for the California workers' compensation courts is that assigning a case to one judge through the life of the litigation gives the judicial officer both deeper insight into the case and a greater sense of responsibility for shepherding the matter to disposition.

It is difficult to see what sort of additional insight a WCJ can gain into one of his or her trials just because the MSC in the case was one of many that moved through an earlier conference calendar. WCAB trial judges may have only minimal contact with typical litigation as there are, on the average, fewer than two hearings per closed case[251]

[251] "Hearings" in this regard include both conferences and trials. Division of Workers' Compensation, *Annual Report for 1998*, California Department of Industrial Relations, date of publication unknown, p. 21.

and the length of time spent at those hearings, especially at an MSC, is often a matter of a few minutes at most (the median judicial time expenditure was seven minutes). Additionally, there is not likely to be much in the way of carryover of issues and facts discussed at the MSC to trial. Judges are unlikely to remember key aspects about run-of-the-mill cases that they had fleeting contact with weeks or months earlier and as such, must be reeducated by the litigants regarding the details of the case (regardless of whether they reviewed the file previously).

More persuasive is the argument that judges take great pride in the way they manage cases assigned to them from start to finish and that breaking up their sole control would remove that "personal touch." Under a multijudge system, it is claimed, case management would evolve from a craft into an assembly line-like chore. This attitude is certainly laudable. Taking responsibility for moving cases through the system is exactly what is needed to combat excessive delay. Unfortunately, the overall aims of the workers' compensation system are not met if some portions of the caseload are handled expeditiously while others are not. In a high-volume court such as the WCAB, especially one with serious resource constraints, judges need to view case management responsibilities as both group and individual obligations. Pride in a job well done can, for example, be the result of a particularly successful MSC calendar where settlement was the most frequent outcome; this should be equally true whether or not a judge will see the few cases that are set for trial ever again.

Accountability

Is it possible to realistically assess the performance of a judge in the overall job of moving cases toward disposition if the link between pretrial and trial is broken? This is clearly an area where the single-judge concept has an advantage. At such courts, assessing how well a judge can process a single block of cases from MSC through settlement or trial is fairly straightforward. Gauging such performance at a multijudge office may require the development of more specialized analysis tools focusing in on individual components of that process.

There were also concerns that judges at multijudge offices would not be able to look at judicial statistics and easily see how they compared to other judges. We spoke to some single-judge location staff members who appeared to have a very good idea of how they stood in relation to other judges at both their office and throughout the DWC. They used the regular monthly reports issued by the Division to look at the number of trials they conducted, the number of conferences held, the number of findings issued, the number of settlements approved, and other summary information to give them an idea of how much business they handled recently. There is no question that dividing up management chores will make that comparison more difficult, but the DWC could craft alternative statistics to focus on particular aspects of litigation. For example, a judge could see how all the MSCs he or she handled over a period of time had turned out; the percentage of conferences ending in a trial setting, the percentage continued, the percentage taken off calendar, and the percentage settled could all help provide a view as to how effective the judge was at these important tasks. Helpful statistics would not go away in a multijudge settings; they would just have to evolve into something more relevant to the way cases are actually handled.[252]

It should also be kept in mind that the key statistics from the Legislature's perspective are not the types of orders issued or the number of hearings held but instead are time intervals from DOR filing to MSC, DOR filing to trial, and trial submission to decision. Success in meeting the first measure is in large part a function of nonjudicial staff performance and Presiding Judge policy, but the other two are directly influenced by how judges handle their personal caseloads and how they interact with the workload of the entire branch office.

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[252] In any event, the set of routine monthly statistics the DWC issues has long been in need of an overhaul. Based upon legacy analysis programs designed by long-departed staff, many of the measures that they produce reflect assumptions about WCAB practice that existed in the 1980s. Counts of Findings issued, for example, mix interim rulings on relatively minor issues with the far more important count of case-in-chief dispositive decisions.

The question of accountability in a single-judge location must also include a determination of whether one's trial calendar is being utilized in the most efficient manner. The opportunity for adequate supervision by the PJ of the calendaring practices of his or her judges at medium and large offices is extremely limited. In discussing the requirements of an effective individual calendaring system where the same judge controls all aspects of a case from start to finish, one court management authority felt that the "[r]ealization of the potential benefits of a system in which judges may be held accountable for their management of the caseload assumes the presence of someone who can and will hold them accountable."[253] In other words, accountability is a moot point if no one is watching. That might not be possible at a larger office where the Presiding Judge has only a limited ability to monitor in-court activity.

Indifference to Trial Needs

A number of judges reported to us that parties sometimes do only a minimal job of completing the Pre-Trial Conference Statement and so when they show up for trial, a not-insignificant amount of time is spent by the judge and counsel just to get the matter in shape for hearing. Essentially, the process of narrowing the issues has to begin from scratch. One concern regarding the use of different judges was that the lack of personal interest or investment on the part of the judge at the MSC might add to existing problems of attorneys failing to prepare properly for trial. Given the likelihood that the MSC judge would never see the parties again, it was claimed that Pre-Trial Conference Statements were being rubber-stamped without careful review. One judge we spoke to at a multijudge office did indeed complain that he wasted a lot of time at the start of many trials trying to work with the parties to essentially recraft the "Stips and Issues" because a few of his colleagues were routinely approving worthless PTC Statements.

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[253] Solomon, Maureen, and Douglas K. Somerlot, *Caseflow Management in the Trial Court: Now and for the Future*, American Bar Association, Chicago, IL, 2000, p. 37.

While this situation could certainly add to the amount of time consumed by trial as well as be quite frustrating for the trial judge, it is not clear whether spending a significant amount of additional effort in helping the parties narrow issues at the MSC is really a good investment of a conference judge's limited availability. Many cases that complete the MSC and submit the PTC Statement settle prior to or on the day of trial anyway. If it takes exactly the same length of time for a judge to meaningfully assist in issue narrowing regardless of whether it occurs at the MSC or at trial, then it could be argued that overall efficiency of a branch office is better served by reserving that effort for the fraction of cases that are actually ready to begin trial (rather than the larger number that simply reached the end of the MSC without a continuance, OTOC, or immediate settlement).

This may oversimplify the question of when a judge should assist in narrowing issues. Parties may be reaching settlement during the post-MSC/pretrial period more often as a direct result of the efforts of the MSC judge in helping to focus their attention on the truly significant differences in their positions. Such a process is thought of highly by experienced mediators who aid parties toward settlement through assisting them in a realistic evaluation of the case.[254] Nevertheless, the demands of typically crowded MSC calendars do not appear to foster a situation where the judge conducting the session actually has time to spare in reviewing the details of every case headed to trial with the parties. This is true no matter what type of judicial assignment arrangement is used; significant interaction between judges and attorneys at the MSC seems to be much more a function of the number of cases needing attention during the conference calendar than a reflection of whether the judge will ever see the litigants again.

MSC judges who have the time to do so should certainly spend whatever effort is required to assist the parties in moving toward settlement whether through direct mediation or indirectly through assistance with the PTC Statement. There is certainly no question that

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[254] See, e.g., Knight, H. Warren, Coleman F. Fannin, Richard Cherick, and Susan W. Haldeman, *California Practice Guide: Alternative Dispute Resolution*, The Rutter Group, Encino, CA, 1999, Chapter 3.

final responsibility for actually framing the stipulations and issues for trial lies solely with the MSC judge (even if first drafted by the parties).[255] Nevertheless, it is difficult to understand exactly if the blame for poorly developed PTC Statements lies with parties who arrive at the conference unfamiliar with the facts of the case and unprepared to meaningfully discuss either settlement or a trial (and so would be reluctant to stipulate to anything), with the demands of a heavy conference calendar that leave little time for judicial involvement, or because of the disincentives created by a multijudge system.

Ability to Meaningfully Shape the Pretrial Process

A more convincing argument for keeping the same judge for both MSC and trial is that case law suggests MSC judges should never rule on any objections to evidence as such decisions should be the sole province of the trial judge.[256] Because at single-judge locations the MSC judge invariably is the trial judge, some judges at such offices have told us that they feel quite comfortable ruling on any and all aspects of potential trial evidence that are raised during the MSC. When the case eventually does return to them for formal hearing, those sorts of questions have already been asked and answered and so the trial can move forward faster. If in fact it is, as we were told, more reasonable to let the parties at the earliest point in the litigation possible know what evidence will and will not be allowed in at trial, then all litigants should have that benefit regardless of what sort of judicial assignment system is used. Appeals Board guidance would be helpful in this area.

Regardless of the formal rules for deciding whether the trial judge has exclusive power over questions of evidence and other pretrial discovery issues, in practice it does appear that MSC and other conference judges do issue orders along those lines no matter which trial assignment system is used. The discussion immediately following looks at a slightly different question: whether such conference judge

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[255] LC §5502(d).

[256] See Zenith Ins. Co. v. Ramirez, 57 Cal. Comp. Cases 719 (1992) and the discussion on the role of the conference WCJ in St. Clair (1996), p. 1387.

rulings have any practical effect at all if they are not the trial judge.

Conflicts Between MSC and Trial Judges

The MSC is more than just a settlement conference or a final pretrial conference, though by design or practice it will usually fill one of those two roles. On other occasions, typically when the matter is continued or taken off calendar, it functions as a status conference where the parties are seeking clarification on particular topics or the permission to obtain additional discovery. The rulings of pretrial conference judges affect the *general* collection of evidence (such as allowing time to obtain another medical evaluation) for whatever trial eventually is held even if no decision is made as to whether *particular* types of evidence would be admitted for consideration.[257] If the MSC judge is not the trial judge, the argument goes, then there might be an enhanced chance that any decisions made prior to trial will be reversed or modified at the 11th hour. Judges differ in how they would rule on various pretrial requests and the ultimate arbitrator of what will be allowed in at trial (i.e., the trial judge) may well decide that the importance of building a complete record for the decision means that all previous decisions can be reconsidered de novo, even if to do so requires countermanding earlier rulings by his or her colleagues.

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[257] Under BR §10353, WCJs "may make orders and rulings regarding admission of evidence and discovery matters, including admission of offers of proof and stipulations of testimony where appropriate and necessary for resolution of the dispute(s) by the workers' compensation judge or settlement conference referee, and may submit and decide the dispute(s) on the record pursuant to the agreement of the parties." But see Zenith Ins. Co. v. Ramirez, 57 Cal. Comp. Cases 719 (1992), where the conference judge is only "to attempt to resolve the disputes and if that is not possible to frame the stipulations and issues to be submitted to the WCJ at the time of hearing ... If there is an objection to evidence or a motion to exclude evidence, the [judge] should, ordinarily, not admit such evidence. The WCJ who hears the case may rule on these objections or motions and either receive these exhibits into evidence or exclude them at the time of the regular hearing or make other appropriate disposition ... It is ordinarily not within the purview of the [judge] to rule on proposed evidence which is the subject of objection or a motion to exclude except where the case is submitted to the [judge] for decision."

Judges take the business of evidentiary rulings at trial very seriously. Indeed, some single-judge system staff told us that they would find it extremely frustrating to repeatedly conduct trials where some other MSC judge's decisions on key matters were inadequate or poorly reasoned. As one judge diplomatically put it, "We need to admit that some WCJ's are more adept at proper decisionmaking than others." Unless they postponed the trial, reissued the orders, and sent everybody home to fix whatever the problem was, they would be saddled with deciding a case whose record was clearly inadequate.

There is no doubt that judges can and do disagree as to the best way to manage litigation and decide matters before them. We would suggest that barring truly egregious decisions, WCJs should follow the lead of their colleagues in other court systems where great weight is regularly given to pretrial decisions issued by the various judges who might be called upon to deal with matters during a civil case's relatively long life. If a previous ruling is simply intolerable, it is probably a better idea to first bring it to the attention of the Presiding Judge for guidance on how to handle the matter than to silently reverse the ruling. The former approach also provides the PJ with an important data point for assessing the quality of MSC work performed by certain judges and also helps to ensure that the error is actually one of a magnitude that requires reversal (it may, of course, be the trial judge who is making the mistake). PJs would then be in a better position to identify sub-par judges and either provide increased assistance or training or in severe cases, contact DWC administration for further action. What is not an effective strategy is for each judge to work independently while at the same time allowing problematic judicial officers to operate day after day in the hearing room right next door to the detriment of litigants. While there is no question that legal acumen varies from judge to judge to some degree, moving cases through the system is a team effort.

One reason why two judges, or even the same judge at two different times, will issue orders that conflict or are duplicative is a failure of adequate documentation. A cryptic note in the case file such as "OTOC, defendant needs more time to get an evaluation" is of little help

to a subsequent judge who later must rule on another request by the defendant to remove the case from the trial track. In order to accurately determine whether additional time is needed, the second judge needs to know why the defendant originally wanted more time, the name of the doctor the applicant was to be sent to, what the estimated date of the evaluation was, and other critical information. Judges typically take counsel at their word and so without such documentation, it is possible that a story being recycled by this hypothetical defendant counsel again and again will result a stream of delays during which little is accomplished. A few words scribbled on the outside of a file jacket do not provide the necessary information for multiple judges to manage a case over a long period of time.

Creating such documentation unfortunately takes time. It is far easier to check off a couple of boxes on a “Pink Sheet” Minutes of Hearing form and move on to the next, more pressing matter. Our review of cases files confirmed that it was often very difficult to figure out why a judge had continued a case, taken it off calendar, or made some other particular order unless he or she clearly memorialized the event in the file. Our abstractors were not the only ones who had these difficulties; when we occasionally brought files to other judges to help us understand what had occurred, they were also in the dark. Regular auditing of case files by PJs would be impossible if conference and trial judges do not create a history that can be understood later.

But even with an adequate paper trail to follow, trial judges still will have the option to modify the prior pretrial decisions of both themselves and others. The system has to depend on these judicial officers doing the right thing rather than simply refusing to address changing circumstances as they develop no matter what. As we suggest above, however, it would be far better for a trial judge to take the time to bring the matter to the attention of the Presiding Judge for consultation if the proposed decision would reverse the pretrial ruling of another judge and as such, radically change the expectations of the parties who showed up for the hearing under the reasonable assumption that the previous order was still controlling.

Continuity in pretrial decisionmaking does not depend on the same judge handling both the MSC and trial. There is also no reason (absent an unbalanced conference calendar) why a case originally assigned to a particular judge for the purposes of the initial MSC cannot stay with that judge until the matter is actually set for trial. It should be kept in mind that the vast majority of cases have only appearances before conference judges, not trial judges. The conference judge has great power to wield over how the pretrial process is conducted. If continuity in decisions is desired, then assigning the same judge to handle all MSCs and other conferences is an attractive idea.

Impact at Smaller Offices

Those branch offices with relatively fewer WCJs may experience some problems with setting trial dates under a multijudge system. The number of potential judges who might preside over the trial of any particular matter is obviously reduced by one if the MSC judge is not allowed to be the trial judge. This problem is exacerbated if upon assignment, the parties then challenge the newly named judge. If calendars are fairly dense, then the next available opening for an acceptable judge's calendar may be further out than had the calendar clerk been able to use any of the judges currently hearing trials. One way to avoid that problem would be to simply set on a first available judge basis, even if it means assigning the trial back to the MSC judge. Whatever potential for gaming the trial calendaring process that reportedly exists in a single-judge setting would be minimized as long as trials are not an exclusive subset of the MSCs for each judge.

Impact on the Clerical Section

Another concern of multijudge offices we heard was that additional clerical effort is required to shuttle the board file from the MSC judge's office area back to the file room and then eventually out to the new trial judge. In contrast, the judges at some single-judge offices retain their files from MSC assignment through the point at which a disposition is made. Given scarce clerical resources, a decision to move to a multijudge rule would clearly have to take the increased support staff workload into account.

Fairness to the Judges

One of the most commonly voiced arguments against the multijudge system is that a judge who is extremely effective at promoting settlement at the MSC would wind up with the same trial load as another judge who merely signs off on the pretrial conference statement and dashes off the calendar memo in order to move on to the next case. In effect, a "lazy" or "ineffective" judge gets a free ride while those who put additional effort into their jobs receive no tangible reward. While this sort of situation does seem unfair to the more productive judicial officer, minimizing the length of the overall trial calendar should be the primary concern for administrators.

Settlement Assistance

Those advocating for a multijudge system assert that separating the MSC and trial judge roles would permit a franker exploration of settlement options by the conference judge because he or she will never be placed in the role of the trier of fact. Some judges we spoke to have indicated that they are reluctant to "go deep" into a case at the MSC for fear of tainting their decisionmaking process. But not all court systems believe that the trial judge is unable to fairly adjudicate a case once the parties have discussed their strengths and weaknesses in a conference setting; in the California Superior Court for Orange County, for example, the judge assigned to trial is the same one who conducts any judicial settlement conferences unless the parties object.[258] And the reality is that in both single-judge and multijudge settings, workers' compensation judges do not typically perform the sorts of intense, hands-on settlement efforts associated with classic mediation efforts. Given the fact that the conference might be just one of 30 to 50 the MSC judge would have held that day, it is difficult to see how he or she could be swayed many weeks or months later by a sensitive or prejudicial comment mentioned within this brief amount of time.

Indeed, the impact upon settlement negotiations arising from the use of the same judge did not seem to be a major concern to most single-

[258] See, e.g., Orange County Superior Court Rule 448(G).

judge practitioners with whom we discussed the issue. In contrast, a few multijudge attorneys, especially those who also appear in the state's Superior Courts, were clearly uncomfortable with the notion of frankly discussing sensitive aspects of the case during negotiations with the ultimate trier of fact. An administrator contemplating a change to a multijudge approach should take into account whether such a system might have some positive effect on settling cases at the MSC.[259]

Recommendation as to Judicial Assignment Strategy

The arguments for and against the use of one of these two assignment schemes reflect in some ways a core philosophical difference about who is ultimately responsible for ensuring that workers' compensation disputes get to trial in the shortest reasonable length of time. The foundation of what we heard from single-judge advocates seems to be based on the notion that a judicial officer should have the greatest possible discretion in managing a distinct segment of the caseload and that the overall benefits of such an approach outweigh any occasional delays or inequities. Those who are more comfortable with a multijudge assignment system seem to view the situation differently: In their eyes, each judge is just one component of a larger team (including other judges and support staff) needed to process the office's entire workload, the responsibility for case progress is therefore a shared one, and giving managers the discretion to assign aspects of such processing as needed is the best way to use available resources and meet mandated time lines.

As we indicated at the outset, we did not specifically address this question through a targeted data collection. The complexity of the issues involved, the fact that the type of assignment system is clearly a very personal belief for some, and the difficult-to-measure impact of

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[259] It may well be that the ability of an MSC judge to help move the parties along to settlement depends not on whether he or she will preside over the trial or as to any previous experience or training as a mediator but instead upon the average length of time available for discussion at an MSC (seven minutes for a three-and-a-half hour conference calendar when 30 MSCs are scheduled versus 21 minutes each when only 10 cases are scheduled). Unfortunately, our study design did not allow us to capture that sort of information.

changing any long-standing trial assignment scheme deserve a study dedicated solely to examining this single aspect of court management in the WCAB. To have done so here would have consumed our attention to the exclusion of other issues such as staffing, case management practices, and technology. Nevertheless, we spent considerable time listening to the concerns of advocates on both sides of the issue as well as visiting offices and reviewing the calendars at locations using both types of assignment systems. As a result, we believe that we can suggest a possible approach to be used until hard data from such a study is available.

First, no change is warranted if a single-judge office is currently offering litigants in the majority of its cases a trial date within the 45-day post-MSC target. We make a distinction here between "offering" and "setting" because we observed time and time again a calendar clerk proposing an initial date to attorneys that would have scheduled a trial well within 45 days only to have the offer declined because of the attorneys' competing commitments of other trials and conferences, vacations, and the like. The date finally agreed upon was sometimes as much as three weeks later and we feel that the office in such instances complied with the spirit of the legislative mandate even if in trying to be user-friendly, the setting slipped past the maximum allowable interval. In any event, we see no compelling reason to change—even in light of the laudable goal for systemwide uniformity—if an office is showing that it can generally do the job the legislature demands using its current trial assignment scheme.

Second, this general success in meeting time mandates should be shared by all the judges at a single-judge office. If there are judges whose trial calendars are set out much further than others and if the typical date offered at the MSC for his or her cases exceeds 45 days, then something is amiss. Allowing such an individual backlog to be maintained or even grow is not acceptable given that the parties in cases newly assigned to that judge for future MSCs are doomed at birth to experience delay if they require trial. The problem has to be immediately addressed in some manner. One common technique we were made aware of was to reduce the number of new MSCs being assigned to that

judge so that there would be fewer trials needing a date on his or her calendar each week. One problem in such an approach would be that the conference calendars of other judges would then become even more crowded; more importantly, the core cause of the trial backlog (too few cases being scheduled on the judge's trial days) would not change. A better fix would be for the Presiding Judge to work directly with the judges in question in revising their calendaring practices and to continue to closely monitor the situation for the foreseeable future. If this is successful, then no change is warranted. If not, then the burden of the delay must be shared with other judges by spreading the trial load around much more evenly. This might not be quite "fair" for the majority of judges at the office, but it is a lot more equitable for the litigants who are the sole reason why the courts of the WCAB exist in the first place.

Third, if such problems remain, then a Presiding Judge (in consultation with the Regional Manager) must seriously consider a shift to a strategy that allows greater centralized control over the scheduling of trials and who will hear them. One initial approach would be to reassess the trial-setting formula being used by judges and clerks and then ensure that the new standards are being followed to the letter by all of those who are responsible for calendaring. Coupled with this is a need to consult regularly and frankly with practitioners to see if problems that do not necessarily show up in the calendar statistics (such as a judge's reluctance to allow difficult cases to get to trial or the routine overestimation of trial length) are still taking place. If so, and if a more direct approach working one-on-one with problem judges has not been successful, then our recommendation would be that at least in the near term, the office should move to a multi-judge system where many of the incentives for these problems are essentially eliminated and where any imbalance in the workload can be quickly addressed.

Even with a shift to a multijudge system, a Presiding Judge's work is not over. He or she must still take personal responsibility for ensuring that the calendaring is performed fairly and that MSC judges

continue to professionally discharge their responsibilities to encourage settlement and if needed, adequately prepare a case for trial.

Other tasks also need to be undertaken if an office moves from a single-judge to a multijudge program because the change provides an excellent laboratory for understanding what other locations should do in similar circumstances. Given the level of interest in this issue, the DWC needs to view the imposition of new procedures at various offices as an opportunity for assessing the pluses and minuses of single-judge and multijudge systems. Production statistics before and after the switch should be carefully reviewed to see how the new system has affected throughput. Moreover, the impact of the changing roles of judges under the multijudge approach needs to be assessed from discussions with judicial officers who will have now worked under both settings. This information should be relayed to DWC administrators to guide them in determining whether to adopt the practice generally or to continue to allow each location to choose independently. It can also be used to get a better idea of whether the changeover has had the intended consequences and whether a return to the original system is warranted.

In the final analysis, the controversy over trial judge assignment systems may be missing the mark altogether. An approach will not succeed or fail solely because incentives for productivity are designed in or because disincentives causing delay are minimized. The degree to which judges and Presiding Judges discharge their respective duties in a professional manner is really what this debate is all about. In discussing these issues in regard to the civil and criminal courts, one court researcher concluded "...the apparent differences in performance between the two types of assignment systems may be due to the accountability and judicial control built into the particular court's plan and the skill and commitment of the judges rather than any inherent systemic difference."[260]

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[260] Solomon and Somerlot (2000), p. 34, discussing the findings of Barry Mahoney found in B. Mahoney, L. Sipes, and J. Ito, *Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings from Current Research*.

➢ ***If an office experiences routine difficulties in getting trials scheduled within 45 days of the MSC or if such difficulties appear to be limited to certain judges at that location, and if direct and ongoing attention by the Presiding Judge in modifying calendaring and conference practices either officewide or for individual judges does not appear to resolve these problems, then a judge other than the MSC judge should generally be assigned the trial following the MSC.***

➢ ***The DWC should evaluate the effects of any office's change in trial judge assignment policy both for assessing whether it should be adopted generally and for determining if the switch has indeed achieved its goals.***

"First Judge Available" Assignment

If an office is operating under multijudge assignment rules, we believe that the fairest method of balancing a branch office's available judicial resources against the demand for trial is to give the parties the opportunity to be heard at the earliest time possible. Even if different judges are always used for MSC and trial, randomly assigning trial judges without consulting the calendar may result in an inequitable disparity in time to disposition. Vacations, Industrial Disability Leave, assignment to handle special cases like asbestos-related claims, particularly complex trials requiring multiday sessions, and a host of other reasons might extend some judges' trial calendars out further than others. To avoid that problem, we believe that generally any case that needs a trial date should get the very next one available with a judge eligible to hear the case. Again, this discussion assumes that the office uses a multijudge assignment system and does not apply to single-judge locations.

➢ ***Where the assignment of the trial judge is not directly linked to the identity of the judge presiding over the MSC, it should be made solely on the basis of which judge has the next available trial slot.***

The Amount of Trials Scheduled Per Day

No matter what type of system an office uses for assigning trial judges, we believe that it is in the interests of efficient caseload processing to consider alternative methods for determining the number of trials scheduled for a judge on any one day. Given their importance to system throughput, long-cherished trial scheduling formulas should be reevaluated at every office.

Many branch offices (though certainly not all) use trial length estimates to help determine the number of cases to be assigned to a judge. One formula might be to set four total "hours" of cases for a morning or afternoon trial calendar. This might include four one-hour trials, a single half-day trial (usually thought to be one needing the entire morning or afternoon calendar of three-and-a-half hours each), two two-hour trials, or some other combination. Another might be to set six total hours of trials for a single trial day. Some approaches add a smattering of Expedited Hearings or lien trials to this mix. As can be seen in the complete list of office characteristics found in the ***Technical Appendices***, each of these branch offices seems to have adopted a slightly different trial-setting policy, though all depend on some sort of projection of the likely length of time a judge would need to conduct the trial. Most, though not all, schedule only the number of cases that could conceivably fit into the time available for trials and no more.

As we have attempted to make clear throughout this chapter, the amount of judicial time a trial consumes it not simply the time spent hearing testimony, though that appears to be the primary component of the estimates. The information that a WCJ needs to consider in making a decision is not only a function of what was heard from witnesses testifying under oath during the trial. Many trials only have one witness (typically the applicant), though the case file might be as much as a foot thick with medical reports and other evidence, all of which need to be considered carefully when drafting an opinion. Some trials have no witnesses at all and are decided solely on the basis of the documents already in the file, but even in these cases, there is considerable in-court work being done. Parties and their judge must

spend some amount of time prior to hearing any testimony narrowing the issues in dispute, refining the Minutes of Hearing, and taking care of other required business and it isn't clear that the time needed for these purposes is related to the number of witnesses to be put on the stand that day.

As such, the number of witnesses should not be the only determinant of how many trials a judge might reasonably be expected to handle in a day. A "one-hour" trial with a relatively thick pile of reports might well take up more total judicial time than a "half-day" affair when posttrial work is taken into account. As described more fully in ***CHAPTER 8***, the parties might go home after less than 60 minutes in court, but the tasks of the WCJ are just beginning.

What then is the "best" way to schedule a judge's trial day? One alternative to explore is that adopted by the Central Region and followed by a number of the Southern Region offices to varying degrees. The first component of this approach is that trials are not set by length but by number so that any particular judge will have about five or six trials assigned to him or her each trial day (the number fluctuates depending on the need to "compress" the calendar to address statutory time mandates). In the event that there would be insufficient time to hear all those cases that did not settle, any extra cases would be rolled over to other judges. The idea behind this approach is that over time, the total hours that a judge will actually spend in trial and working on decisions will average out, though some trial days will be very busy and others will be light. Trying to precisely calculate expected trial time is thought to be impossible because of both the inability to predict which cases will actually need trial and the fact that estimates of total trial length are notoriously inaccurate regardless of whether made by judge or counsel.

The second component of the Central Region approach is a single trial calendar (i.e., no separate morning and afternoon sessions) and the policy that all parties are required to appear at 8:30 a.m. on their scheduled trial day and should expect to remain at the court all day if necessary. Once the cases that are clearly ready for settlement have been disposed of, and after the cases that have been continued or taken

off calendar upon request of the parties have been sent away, the judge can then assess the amount of work remaining to be done. The remaining trials begin being heard that morning and if need be, some will not start until the afternoon.

The third component of the Central Region requires that there be a mechanism in place to roll some trials over to other judges when the total cases remaining after settlement or continuance appear to require more in-court testimony time than the scheduled judge has available. If it is likely that one or more trials cannot be started and completed by the end of the day, the parties in such cases are sent as soon as possible to the PJ, who attempts to find another available judge.

The Central Region approach has a number of drawbacks. First, parties who are likely to go to trial must expect to remain at the branch office for the entire day (though we are told that rarely happens) even if the number of witnesses is few and testimony is expected to be brief. This places an additional burden on litigants, witnesses, and counsel to block out a fairly large chunk of their valuable time. As it turns out, the number of cases in the Central Region where the parties wind up having to stay until 4:00 p.m. or so just to get started are reportedly quite few. We more fully discuss the question of using a single morning trial setting below (see ***Trial Calendar Start Times***).

A second potential problem is that the court must be ready, willing, and able to quickly roll over overbooked trials to judges with open slots on their trial calendar. Without a routine system to notify a central staff member of the need for a reassignment or of an unexpected opening in another judge’s trial day, there is a strong likelihood that an excessive number of trials will have to be postponed unnecessarily. From what we are told, that does not happen to any significant degree. Efficient reassignment policies are also needed simply to try to get cases waiting in the trial queue to some available judge as soon as possible rather than having to wait until 2 p.m. or 3 p.m. with the originally assigned judge. Reassignment then is a critical assumption of the Central Region’s scheme. We more fully

discuss the question of creating efficient procedures for reassignment below (see ***Improving Reassignment Procedures on Trial Day***).

The third potential problem revolves around the fact that should all scheduled parties appear and require trial, the reassignment process would be overwhelmed (there are, of course, only so many other judges at a single office available), but it would be the more complex trials that are deferred to another day. There seems to be a perception held by a number of judges across the state that their "Southern California" colleagues have the luxury each morning of deciding which of many cases to start trial and by choosing only easy ones, the more complex or difficult matters can be continued (ideally tried by someone else on another day) or forced to settle unfairly. We do not believe this to be the case. Four out of the six offices used for our abstraction of case file data operate on the single a.m. trial calendar approach and of these, two set five or six trials for each judge (regardless of length) and one will also set five or six trials if there are none felt to require a half day or a full day's worth of work. As seen in ***Table 9.29*** and ***Table 9.30***, only a tiny fraction of all trials in our abstraction data (which would therefore be skewed toward this type of system) were continued for "board reasons," which include inadequate time or insufficient personnel available to hear the case. If indeed Southern California judges were picking off the one or two sitting ducks out of a large pile of potentially difficult trials, the continuance frequency would be much higher.

The real question is not whether the Central Region has hit upon the ultimate "magic formula" but rather what will work best to give each judge a roughly equal amount of trial work (when testimony, trial management, and the decision process is factored in), what would keep the flow of cases moving along smartly by overbooking trials just enough to account for settlements and the like (but never to the point where trials have to be routinely postponed, giving litigants the expectation that their hearing will likely be continued to another day), and what would result in a trial workload reasonably sustainable by a judge who, it should be remembered, has other duties to perform as well.

Clearly, official scheduling policy should be made only by the Presiding Judge and not by individual judges who might decide for themselves what an acceptable level of trial-related work they should have each week. The underlying problem with efficient trial scheduling is a lack of data in this area. None of the formulas adopted by any of the branch offices were the result of quantitative research as far as we could determine. We suggest that the DWC conduct a statewide long-term empirical study of how estimates actually compare with trial length, how trial length compares with judicial work required following the hearing, how the number of trials scheduled compares with trials actually held (and why), and a number of other factors that should help the development of a workable formula grounded in reality. Such a study was not possible with our research approach as it would have (in part) required tracking actual trial length over a considerable period of time and then reviewing the original estimates contained in the Minutes of Hearing following the MSC; furthermore, we would have had to collect this sort of data in all branch offices, not just six selected sites.[261] But the recording of trial time on an ongoing basis could be accomplished with the help of the court reporter or as a part of the routine tasks that a judge performs to conduct the trial. Collected over six months or a year, such information could be used to develop a set of best practices for WCAB trial scheduling.

Until such a study is performed, a Presiding Judge should keep the notion of scheduling trials not by estimated length but by number in his or her “toolkit” to be used when it appears the office’s current practices are not resulting in enough actual trials for each judge. The same considerations that went into our discussion of judge trial assignment policy are applicable here as well. Given a lack of hard data as to what is the best way to go, offices should view trial-setting

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[261] This would have required a “time study” of far greater length than the single week allocated in our research design. Even if the recording of time expended were limited to the trials, it would impact three out of five workdays for the average judge. Our research goal was to record and observe DWC activity in a way that was as unobtrusive as possible and this would not have been the case with a long-term time study.

formulas as works in progress. If the office is able to schedule a sufficient amount of trials so that the 45-day mark is generally met for all the judges at an office, no change is indicated. If not, adjustment of the trial calendaring practices is needed. If the problem appears linked to inaccurate estimates of trial length, then a move to scheduling by number of trials should clearly be considered.

- ***If an office experiences routine difficulties in getting trials scheduled within 45 days of the MSC or if such difficulties appear to be limited to certain judges at that location, and if the problems are related to errors in estimating trial length, then a switch to scheduling by number of trials (rather than by total estimated time) should be considered.***

- ***In order to assist Presiding Judges in setting trial calendaring formulas, the DWC should perform a comprehensive and long-term analysis of this issue.***

Who Should Control the Trial Calendar?

One of the ways to minimize even the potential for idiosyncratic calendaring practices at single-judge locations would be to shift direct control over the calendar from individual judges to clerks.

At some offices, each judge (or his or her secretary) has a copy of his or her trial calendar available during the MSC in order to schedule future trials once it is clear that settlement is not possible. Because this process has the advantage of the actual presence of representatives from both sides, conflicts are minimized, and the parties walk away from the hearing room or judge's office with a date in hand. The problem with such an approach is that it gives judges great discretion in shaping the density and character of their own trial calendar. With little oversight from the Presiding Judge, they essentially have free rein over how many cases they will hear on any one day and the total estimated length of all such trials. Scheduling decisions would be made almost in complete ignorance of overall office needs and moreover the judicial officer would not necessarily know how the trial date they are

giving to the parties compares to those being issued by other judges at their own MSCs that day. Implementing standardized formulas for scheduling that, for example, allow some realistic level of "overbooking" to compensate for the likelihood of cases settling out on trial day is made more difficult because the rules must be both understood and followed by each of the various judges at the office.

We do not see any reason whatsoever for judges to continue to act as highly paid calendar clerks in addition to more pressing duties during the MSC session. Settling on a date acceptable to two attorneys who are likely to have fairly convoluted professional and personal calendars takes time. Attorneys often have to consult with staff back at their offices as well as review hardcopy or electronic scheduling products they might have carried with them to the MSC in order to find open dates and times. Having a judge offer potential dates and waiting until the attorneys either accept the choice after checking their own schedule or request an alternative does not seem to be a good use of judicial resources.

Direct judicial control over trial scheduling does not appear to have any obvious benefit in terms of reducing the demands on the clerical staff. Procedures for handling the process vary, but a typical approach consists of a clerk photocopying the future trial schedule for each judge and providing it to the judges' secretaries prior to the start of the MSC. When the day is over, the marked up version is returned to the clerks who then hand enter the information into the master calendar book. The only DWC time "saved" here is the shifting of the responsibility for offering candidate dates to the attorneys and receiving their response (or offering alternatives if unacceptable) from a clerk to a judge. In terms of data entry chores from the clerks' perspective, there is no difference.

Our greatest concern lies not in questions of calendaring resources but in control over the individual calendar. A higher level of scrutiny is required of Presiding Judges to ensure that rules regarding trial calendaring are being executed in a uniform, fair, and efficient manner if the oversight has to be extended to each judge rather than a single calendaring clerk. Allowing judges virtually total discretion as to how

many trials they will hear over the course of a week brings with it the possibility that those same judges will consciously or unconsciously take into account their overall workload when making scheduling decisions. Of course, individual trial calendars should be adjusted for unusual spikes in demand (or drops in availability) occasioned by particularly difficult litigation, educational conference attendance, illness, a need for an unforeseen number of expedited hearings, and the like. But making those adjustments should be the sole responsibility of the Presiding Judge, a situation only possible (without daily review of individual calendaring) if his or her wishes regarding scheduling rules and exceptions are funneled through the calendar clerk.

Obviously, this requires the attorneys to depart the MSC session and approach the calendar clerk's window to obtain a trial date. At some offices we visited, a clerk was only available for providing and confirming trial dates during limited hours of the day. That can be frustrating to an attorney who has completed the MSC and needs only a date in order to leave and attend to other business but finds that the window is closed. Having both attorneys actually present is the most efficient way to schedule future trials as both must be in agreement as to the proposed day if conflicts are to be minimized. Given the importance of getting a trial date issued as quickly as possible and the importance of having one that is acceptable to all concerned (the alternative of parties being granted a continuance on trial day for a problem that could have been foreseen weeks previously is extremely wasteful), there seems to be little reason to continue the practice of restricting the times in which attorneys can jointly obtain a trial date from a clerk. Even at offices where clerical shortages are most profound, at least one clerk should be available to be called to the counter for this task during <u>all</u> open business hours. If the calendar clerk is unable to find enough free time to interact with the court's users on demand plus also do the not-inconsiderable amount of "back office" work involved in entering the dates into the master calendar and into CAOLS, then some aspects of that job need to be divided among multiple personnel. Some of the most vociferous complaints we heard

about the lack of an office's "user friendliness" were over this very issue.

Our suggestion to remove responsibility for trial calendaring from the judge in favor of a clerk does not extend to matters other than trials. If possible, a judge should always have the power to set a certain date for the parties to return to his or her hearing room following any request for a continuance or order taking the matter off the trial calendar.

- ***If the MSC judge is to continue to be the judge assigned for the trial, then the job of actually setting a judge's trial calendar should be separately handled by a clerk under the supervision of the Presiding Judge.***

- ***Parties requiring a trial date following the conclusion of the MSC should be able to consult with a calendar clerk during all open business hours.***

Improving Reassignment Procedures on Trial Day

Some limited amount of overscheduling of trials "...is an acceptable practice when carefully planned as a compensatory mechanism for case fallout due to settlements, etc."[262] As long as the total number of trials that are likely to be held on any particular day does not exceed the officewide judicial resources available to conduct those trials, it is not unreasonable to assign any particular judge with more trials than he or she might be able to conduct (in the unlikely event that all were ready to begin that day). The near certainty that some, if not most, scheduled trials will be canceled at the last minute due to settlement means that simply booking each judge with no more trials than are possible to hear results in a lot of unused courtroom time. Again, seven hours of unbroken trial time on three days of the week is far more work than any judge can handle. We certainly do not advocate overloading judges to the point at which decisions take many months to complete or to the point where judges only have enough time to give the

[262] Solomon and Somerlot (2000), p. 46.

record a cursory examination during deliberations. We are also aware that scheduling multiple trials on the same day means judges have less time to review files prior to the start of the hearing. But the opposite extreme of day after day of only a single one-hour trial being heard (or no trials at all) means that with the current judge-to-requested trial ratio most offices experience, other hearings will have to wait an unacceptably long time for an open trial slot. If that wait begins to exceed the 45-day target following the MSC, then a serious problem has developed.

The primary risk of overbooking is that on occasion, a single judge will wind up being asked to conduct far more cases than he or she can handle and so will have to continue one or more trials to another day. That is a dangerous situation because if it happens too often, parties will no longer assume that WCAB's trial dates are credible ones, they will be less likely to prepare adequately for the trial, and they will postpone settlement discussions until just before the scheduled start, all with the knowledge that if needed, they can "volunteer for bumping" to another day. Judges will also be inclined to grant questionable requests for continuances or OTOCs in order to free up time for more pressing cases. It should be stressed that preventing unnecessary postponements of trials where the parties are ready to go is a more critical goal for the WCAB than simply ensuring that all judges at an office are actually conducting some minimal number of hearings on their scheduled trial days. Once litigants begin to believe that trial dates are no longer firm, a host of very undesirable behaviors develop.[263]

Obviously, the WCAB needs to constantly monitor how its trial scheduling policies compare to real-world demands and make adjustments as needed. Finding that perfect balance will probably take time. But the immediate key to maximizing the number of trials while minimizing the number of hearings that must be rescheduled is to set up a system for smoothly and quickly shifting overbooked trials to other judges whose calendars have opened up on trial day at the same office. This

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[263] See, e.g., Friesen, Ernest, "Cures for Court Congestion," *Judge's Journal*, Vol. 23, no. 1, American Bar Association, Chicago, IL, 1984, p. 52.

also has the benefit of helping to ensure that each judge has a relatively equal trial workload over time.

P&P Index #6.7.5 clearly provides for such reassignment by the PJ with a "rotational trial calendar" when the trial cannot proceed with the originally identified judge and (1) has not started, (2) there is the likelihood that if reassigned the trial could at least be partially completed, and (3) if the overall workload of the candidate judge permits.[264] Indeed, PJs we spoke to generally indicated that they would be willing to reassign trials if they are apprised of the need and if they could find a judge with free time. But in reality, the process for such reassignment often appears to be a haphazard one. PJs do not always know when a judge has an unexpectedly large number of ready-to-go trials in time to make the needed adjustments early enough in the day and if they do, the only way they can identity likely alternatives is to either patrol the corridors looking for darkened courtrooms, contact the judges by phone, wait for judges to volunteer on their own initiative, or check with the hearing reporters to get a sense of who is being used and who is sitting idle.

Another factor impeding the efficient and effective process of reassignment is the attitude of judges who might be asked to handle an overbooked case. We were surprised to hear again and again that reassignment at some branch offices was rarely used because judges there discouraged the practice at every opportunity. Their rationale (and they made no secret of their beliefs) was that a judge who did a good job of getting his or her cases to settle on trial day would find that the effort was for naught since any time freed up for working on decisions and other duties would be wiped out by the newly reassigned trial. This view assumes that the caseload of a branch office is not a shared responsibility but instead is divided up into neat piles and

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[264] If the number of available slots is limited, PJs generally give preference to expedited hearings, then to completing matters that have already had some previous testimony, and then to trials where out-of-town witnesses are present and able to testify. The same sorts of priorities were generally reported to us as the order in which trial judges decide which cases they might hear first (the expected length of time a trial would take also was factored in).

assigned to judges to handle as they see fit. It also assumes that moving a case toward settlement is something to be performed primarily out of self-interest rather than as part of an overall effort to move cases to completion. It will not be easy for a Presiding Judge to convince the judges who work under his or her supervision that the business of the branch office is a team effort, but it must be done. Part of that campaign should be to assure judges that any overflow will be spread around the office, the same people will not always be the recipients of the cases rolled over, and that the PJ will be the one to choose which of the competing trials will remain with the originally assigned judge and which are to be transferred (in order to avoid any misconceptions that the process can be used to dump difficult cases on others). The first step, however, is to move forward with reassignment when needed regardless of the personal preferences of the trial judges. Any time litigants, witnesses, and attorneys are sent home because their assigned trial judge was busy while at the same time another judge sat in his or her office doing paperwork and a hearing room sat empty should be a source of embarrassment for every judge, Presiding Judge, Regional Manager, and DWC administrator. While we certainly are mindful of the fact that a judge who is not in trial is likely to be working on tasks that are just as vital to the overall process as presiding over any hearing, the negative consequences of delay and cost resulting from such an unnecessary (and essentially preventable) postponement means that every conceivable effort should be made to find a free judge.

Attorneys often do not help this situation. There sometimes appears to be a shared belief that a vested right exists in the particular WCJ who was assigned to hear their case; indeed, we have been told on numerous occasions that when presented with an alternative judge on a day when their originally scheduled trial may be impossible to begin, counsel for both sides generally prefer a continuance over the unexpected change in the trier of fact.[265] The chance for delaying a trial until a later date may seem attractive to counsel as it might

[265] We did not observe attorneys declining an alternative assignment during our site visits, but in actuality, we were only aware of just a few trials needing reassignment.

provide additional time to settle the case and avoid the uncertainty of a final adjudication. If both parties (or more accurately, both attorneys) so agree, the trial may not be heard for many weeks or even months despite the immediate availability of a judicial officer, courtroom, and hearing reporter. The impact of such avoidable delay to witnesses (who have to appear on another date), to applicants (who have the resolution of their claims put on hold), and to defendants (who incur the cost of additional appearances by their counsel) is not insignificant.

The end result is that a successful reassignment under the current procedures depends on a combination of a significant expenditure of the Presiding Judge's time, the accommodating nature and self-initiative of judges, and the consent of the attorneys. We believe that streamlining the procedures for reassignment and limiting the ability of parties to decline an alternative judge simply for the purpose of delay are vital to a branch office's responsibility to adjudicate disputes as speedily as possible. Because routine continuances resulting from overbooked trials can promote a very dangerous attitude among the bar regarding trial preparation, the only practical policy would be to keep the trial schedules extremely light if reassignment is not possible. As long as the Legislature continues to demand that trials begin no later than 75 days after the filing of the DOR, and as long as the ratio of judges to new cases remains at current levels, then overly conservative trial calendars must be avoided. A reasonable reassignment process is the needed safety net.

Within the first hour of the trial calendar, a judge should have a fairly accurate sense of which cases are likely to settle and which are requesting continuances or OTOCs. The information need not be reported directly to the PJ; a clerk, for example, can keep track of trial demand and alert the PJ if it appears that a judge may have more trials that day than time would likely permit. Ideally, the judge could provide this information by a simple mouse click on a screen listing the day's scheduled trials, but phone calls or reporting to a clerk assigned to

visit the courtrooms on a regular basis would work just as well.[266] The early hours of the trial calendar are the best time to make any needed reassignments. It also gives the judge to whom the trial will go additional time to review the file prior to the start.

Part of the underlying rationale for case reassignment is to spread the work of the branch office across all the judges who work there. Ideally, all judges would be in trial for about the same number of hours per week with no one judge shouldering the lion's share of trials and no one judge winding up with a light schedule day in and day out. Shifting trials into open slots furthers this goal, but if the PJ is restricted in choosing which judge to use because of that person's underlying workload, then the opportunities to balance out trial demand are limited. One problem is that the "workload permitting" restriction can be interpreted to mean the extent to which the judge has a backlog of unresolved matters, including submitted trials for which no decision has been rendered. This approach rewards slower judges with a reduced trial calendar and punishes faster judges with additional hearings. While it would be foolish to fail to take workload into account when making reassignment decisions, it should not be the deciding factor or provide judges with a ready-made veto power.

As mentioned previously, attorneys play a large role in shaping the practice of reassignment. At the present time, if both parties wish to decline the offer of an alternative judge, the matter would have to be rescheduled with the original judicial officer. Given the fairly dense calendaring of trials, such rescheduling may mean a delay in having the case reach trial approximately equal to the amount of time that has already elapsed from the MSC. From the branch office's perspective, additional notices will have to be mailed (though this would not necessarily be true) and a valuable trial slot that was being offered by an available WCJ will be wasted. The workers' compensation bar is a

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[266] The current lack of personal computers for judges at a number of branch offices would likely make the "mouse click" idea difficult to implement; furthermore, no office we visited had any sort of DWC-issued computer in the hearing room itself and it is likely that most offices are without network connections to that area.

tight-knit one and an attorney who is consistently reluctant to accommodate the scheduling desires of counsel on the other side may be seen as difficult and uncooperative. Keeping in good standing with other members of the bar with whom one works day in and day out is a necessity in a litigation world where an attorney may have multiple matters before different judges and at different branch offices all in a single day. A failure to acquiesce to the other side's desire for a continuance, regardless of the reason, may mean that when that attorney also needs a favor, one will not be forthcoming. The result is that the requirement that both sides need to agree to decline the reassignment may sometimes translate into a veto power easily wielded by just one attorney.

At the moment, there does not appear to be a requirement that the exercise of that veto power be tied to any of the criteria that are normally used to challenge the assignment of a trial judge. Inconvenience, personal dislike, unexpectedly nice weather, conflicting appointments, seeking a better bargaining position, or even failure to properly prepare for trial are all potential reasons why an attorney may welcome the chance to decline the new judge and be successful in doing so. The need for a prompt resolution of workers' compensation disputes means the WCAB cannot afford this luxury. We believe that at the very minimum, a refusal to accept reassignment on a day the parties were already required to be ready for trial must be adequately based on specific criteria similar to those used for challenges of judicial officers.

One concern voiced to us regarded the effect of reassignment on a litigant's trial strategy and preparation effort. It was felt that if the identity of the trial judge is switched at the last minute, the relative bargaining positions of the parties could change as well. The new judge might be viewed as more (or less) sympathetic to the interests of employees (or employers) and so the expected case value would shift accordingly and perhaps make settlement more (or less) attractive. Also, evidence and argument carefully crafted to persuade the original judge might not be as effective with another. In such instances, the attorney would want to first inform the client of the issues involved

before deciding whether to assert some sort of challenge. While these are certainly legitimate concerns from the standpoint of a practitioner, the DWC must operate on the belief that case value is determined by the information in the file, not the suspected prejudices of a particular judge. By setting up a system where the reassignment process is started as soon as possible, there should be enough time for an attorney to contact his or her client for guidance. It should be kept in mind that BR §10563's requirements for physical presence or telephonic availability of persons with settlement authority apply to trials just as much as they do to settlement conferences. Knowing that reassignment is a possibility for any trial, attorneys would be well advised to keep open a line of communication with their clients. If a challenge were exercised, then the solution would be to simply reset the trial for another day before the original judge.

It should be noted that we are not advocating a "master calendar" approach where all parties scheduled for trial that day would first appear before a judge or administrator for assignment to available judges as needed. While similar processes have been used successfully in other court systems, there is a shared sense among judges and practitioners within the WCAB that the trier of fact and law should have done at least some pretrial preparation (in civil and criminal settings, the need for a judge to prepare is lessened because his or her role is generally limited to managing the trial rather than participating in the deliberations).[267] A classic master calendar for trial day may not allow enough time for file review and the like unless the trial start is delayed until late morning or afternoon. Nevertheless, it is possible that with the proper adjustments, a daily master trial calendar may be a reasonable option for allocating trial workload in the future, but we are not in a position to make such a recommendation. The improved reassignment procedures should therefore be instituted with an eye for

[267] In contrast to regular hearings, expedited hearings may actually present a situation where a daily master trial calendar might be useful. Little or no preparation is needed on the judge's part and the issues are usually straightforward. Such an approach is being used currently at one local office and we believe the DWC should assess its benefits and drawbacks for possible systemwide adoption.

addressing occasional overbookings for judges, not for routine shuffling around of scheduled cases. If judges regularly have to roll over their trials to others, then the Presiding Judge needs to seriously rethink the assumptions that went into the formula for trial scheduling. Offices should never shrink away from reassignment, but it should not become the rule for the majority of trials.

- ***Better procedures should be put in place to encourage and facilitate the shifting of overbooked cases to available judges on trial day.***

- ***Judges should be required to assess the likely demands on their daily trial calendars no later than one hour after the first scheduled trial time and to immediately provide a status report to the PJ or his or her designee. Judges should also regularly update the PJ or his or her designee with trial calendar information as trials are completed, cases settled, or other actions taken.***

- ***The PJ's decision as to which judge a case might be reassigned should depend on the amount of time available that day for new trials, not on the overall workload of the WCJ.***

- ***Parties should be required to accept reassignment unless they assert a peremptory challenge available under Board Rule §10453 or can show that the new judge should be disqualified for cause under LC §5311.***

The Peremptory Challenge

The ability of parties to have a limited amount of control over who will try their case can play havoc with the pace of litigation. Under BR §10453, a party can declare under penalty of perjury that it feels the currently assigned trial judge cannot provide it with a just, speedy, and inexpensive trial and by doing so, a new judge must be identified. While this would appear to be a serious allegation of judicial misconduct, the reality is that, as one noted workers' compensation scholar has indicated, "...[p]eremptory challenges are frequently filed based on little more than a perceived personality

conflict."[268] Indeed, the motion can be used not as a method of securing a fair trial but as a way to "...buy [a] period of additional time by simply filing a peremptory challenge upon the issuance of any written notice of a regular hearing."[269]

While the opportunities for delay aren't as noticeable when the motion is made orally following a conference setting (the calendar clerk simply selects another available judge), the end result is that attorneys' wishes can impact the identity of the trier of fact with little or no justification. In extreme instances, WCAB judges who are perceived by the local bar as overly concerned with following the nuances of statutes, regulations, or the Policy & Procedural Manual, or who are generally reluctant to grant continuances will find their trial calendars lighter than those of their colleagues. This has unquestionably been the experience at some branch offices in recent years and results in a waste of a very costly and very precious filled judge position. By voting with their challenges, attorneys can effectively blackball judges perceived to be uncooperative. Despite the seemingly universal desire for a "user-friendly" court, it should be remembered that judges by their very nature are called upon to routinely make unpopular decisions. Allowing the bar to routinely sidestep particular judges with relative ease sends the wrong message about judicial independence and, especially at smaller offices, means that all litigants must pay the price with a trial calendar that is extended out unnecessarily.

Of course, a challenge for cause (conflict of interest, clear bias, prejudging, lack of qualifications, etc.) under LC §5311 or BR §10452 should always be taken extremely seriously. But if indeed many peremptory challenges are the result of simple personality conflicts or tactical maneuvering rather than based upon substantial reasons, then the underlying rationale for allowing parties to decline the assignment of a trial judge with relative ease is perverted. And if a pattern of bias or inability to conduct trials is truly present, then it is

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[268] St. Clair (1996), p. 1410.
[269] St. Clair (1996), p. 1408.

something that really should be brought to the attention of the WCAB. At the moment, attorneys are required by BR §10453 to simply indicate whether a trial conducted by the assigned judge could not be "fair," "expeditious," "inexpensive," "unencumbered," or "impartial" without indicating the facts why the attorney believes this to be the case.

A judge who is routinely failing to conduct fair trials, for example, is insulting the very foundations of our system of jurisprudence. Presiding Judges, Regional Managers, DWC Administration, the Commissioners, and the public at large have a right and a need to identify unfair or incompetent judges at the earliest opportunity. But these serious charges are trivialized by the ease with which they can be made. A BR §10453 challenge is shrugged off as a simple matter of attorney preference or convenience despite the use of terms that echo the Constitution's mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character."[270] We believe that requiring the attorney to at least detail the underlying basis of such charges would limit the use of challenges to situations that actually merit the burden it places on the DWC and justify the delay in case resolution sometimes associated with its use. We also believe that the WCAB should routinely assess the frequency and seriousness of challenges of all varieties (both peremptory and for cause) to determine at the earliest opportunity whether fundamental problems in judicial behavior, ethics, or demeanor are present.

Notwithstanding the above, the peremptory challenge is a long-held and cherished right of both applicants' attorneys and defense attorneys. The ability to ask for a different workers' compensation judge from the one originally assigned for trial is paralleled by similar latitude long given litigants in civil cases. Moreover, it may serve as an important (though perhaps abused) safety valve for diffusing tension within the workers' compensation community when judges are perceived as being too rigid or too lax in their interpretation of the sometimes confusing mix of Labor Code statutes, AD Rules and Board Rules, and the Policy &

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[270] California Constitution, Article 14 ("Labor Relations"), Sec. 4.

Procedural Manual. While we believe that it is in the interests of system efficiency to limit challenges to those instances where there truly is a problem with due process, this change is one that must be the subject of an extremely open and public debate that would go beyond the scope of this study. It is a classic example of a difficult policy choice (due process versus delay) that needs to be made collectively. A committee of the bench and the bar, including representatives of the judges' collective bargaining unit, the major attorney organizations, and the State Bar, should meet and discuss this question with an eye toward reaching a consensus regarding any recommendations for BR §10453.

- ***The workers' compensation community needs to collectively assess whether the rules regarding peremptory challenges should be reviewed in light of their impact on case resolution times.***

CONDUCT OF THE MSC AND TRIAL CALENDARS

Calendar Calls

At the MSC...

From the perspective of the branch office, being able to move quickly and smoothly through a conference calendar is an efficient way to release judge time for other duties. Much of what passes for an MSC calendar is in the form of "dead time" caused when judges simply sit and wait for parties to come forward. Some judges attempt to make the wait worthwhile by reading advance sheets or if the periods of inactivity are long enough, working on decisions and the like, but based upon what we observed, getting any serious work done during these brief moments in between interruptions would be difficult.

Part of this waste (at least on its face) of resources is due to the traditional accommodation of the hectic schedules of workers' compensation practitioners. Appearances before multiple judges or even multiple branch offices during the same morning or afternoon calendar are not uncommon (though they sometimes require the understanding of opposing counsel). In other court systems, multiple sessions would be almost impossible to pull off because judges either call a roll at the

beginning of the calendar and look with disfavor upon those who are not present at the start or they take cases in turn according to a preset schedule and if parties are not available when their turn is up, their case may be continued to another day. Within the WCAB, however, the fact remains that at many branch offices the available space is simply inadequate for seating all the attorneys for all the cases on the entire conference calendar. Even requiring that just one of the attorneys on each case be present at the beginning or throughout the entire session would be difficult logistically when 25 MSCs might be scheduled in the morning or afternoon; only a few DWC hearing rooms we saw could accommodate 25 bodies, in addition to the judge.

The laissez faire attitude that most judges evidence toward organizing a conference calendar is surprising to those unfamiliar with longtime workers' compensation practices. Having the judges sit patiently at the disposal of the parties suggests that this is a system where attorneys, and not the court, control the pace of litigation. But the reality is that by and large, the court's underlying business is indeed being conducted even when the WCJ is sitting at the head of the table with little to do. Teams of attorneys are simultaneously negotiating settlements or drafting Stips & Issues—precisely the intended products of an MSC. They might be doing it over a cup of coffee in the cafeteria, but the necessary work is still being done. Moreover, it is not uncommon to see attorneys shuffling from table to table at that same cafeteria or from hearing room to hearing room to simultaneously work on multiple cases with different opposing counsel. A more orderly approach by the judge in queuing calendar cases might make such multitasking impossible. Having the judge make him or herself available upon demand is a poor use of the judge's time but appears to be a way that helps keep down the private costs of litigation.

There is no question that if all the actual time spent during an MSC calendar were compressed into the beginning of the session, judges would have larger blocks of time to conduct more important matters than leafing through advance sheets and bar periodicals. But we believe that this accommodation to the realities of workers' compensation practice is one that the branch office can afford to make if the judge has the

option of waiting in his or her office for the attorneys to approach when ready rather than solely in the courtroom and if conference calendars are generally able to finish in time. If nothing else, working in the office can give a judge a little better opportunity to review unfinished decisions, interact with the secretary, or prepare for upcoming trials.

The ideal approach of allowing judges to work in their office until required becomes problematic at branch offices where the hearing room (where the attorneys are usually queued up or negotiating) and the office are not contiguous. This appears to be the case at a number of locations where the judges' offices are across a hallway without public access or are even in a completely different part of the building. Because it is impossible to simply knock on the door of the judge's office when ready, some branch offices have adopted a policy to allow practitioners continuous access to the interior of the District Office. Such access raises serious security risks unless the branch office has an expensive keypad or card reader system installed (or tasks a clerk with the responsibility to confirm the attorney's identity and "buzz" him or her in). Others with the same layout have procedures in place that require an attorney to call the judge's secretary when ready. But if he or she is otherwise occupied, the result is that parties who want to conduct their business must wait until the call is forwarded around the office to the right person. Ideally, branch offices with such layouts would have an intercom to signal the judge when ready (alternatively, a phone in the hearing room would allow the attorney to call the judge directly). At some branch offices, no direct connection to the judge's office is available as accordingly we watched attorneys who were otherwise ready to go sit waiting for the judge to emerge from the inner sanctum. Because of these difficulties, we suggest that future branch office design take into consideration the need to have judge offices and hearing rooms directly connected either physically or electronically.

Routinely finishing conference calendars by the end of the session did not appear to be a problem at any of the branch offices we visited. As such, there seems to be little reason to change current practices in

order to address a problem that does not exist. The question then remains whether individual judges should exercise a higher or more formal degree of control over their calendar, including calling roll at the outset and continuing matters when no response is forthcoming, in order to maximize judicial time that could be spent on other chores. As indicated above, there does not seem to be a problem in getting through a conference calendar, even at locations where 30 cases are scheduled for a morning or afternoon. As such, judges who take such a hard-line approach toward calendar control when Board Rules and Administrative Director Rules are silent on the issue serve no purpose other than their own desires and run the risk of alienating the local bar. We believe this practice should be discouraged or prohibited except in circumstances of overall branch office needs. But disfavoring roll calls should be limited solely to the practice of calling off names at the start of the calendar and continuing any matter (or taking it off the trial track) when no one answers. A judge must have the ability to reasonably manage his or her conference calendar and some sort of roll call might be warranted toward the end of the three-and-a-half-hour period if scheduled parties have not yet made their presence known.

Our remaining concern involves wasting the precious time of an applicant who is forced to remain in the waiting room for hours while attorneys and judges perform their MSC dance. We suggest that judges assess as quickly as possible whether settlement is actually possible and if not, allow applicants to leave the premises <u>if they can be reached by phone later</u>. This simply extends the same courtesy now shown to the defendant community by BR §10563 to injured workers whose presence is no longer needed. We are mindful that in some instances, settlements are reached at the MSC after a point at which the parties have concluded that trial is the only possible solution and so have begun working on the Stipulations and Issues document. Ideally, the worker would have some method of being contacted by his or her attorney and either return to the DWC office for the last-minute settlement or simply agree to the terms over the phone and sign off on the proposal another day.

- ***Only branch offices and judges that have consistent trouble completing their MSC calendars in a morning or afternoon setting should explore formally calling the calendar at the start; when this is not a problem, calling roll leads to conflict with traditional bar practices and should be prohibited.***

- ***Applicants should be allowed to leave the MSC once a judge has determined that settlement is not a likely outcome of their case and that immediate telephonic contact should circumstances change is possible.***

At the Trial...

A different conclusion regarding roll calls is reached for a trial calendar. Strategies for conducting MSCs and other conferences essentially affect only the judge and the attorneys. Some delay and waste can be tolerated in light of the needs of the bar and the relatively short duration of each MSC contact. Shuffling the order of cases will not likely result in an inability to complete any scheduled conference that morning or afternoon. At trial, however, witnesses, hearing reporters, and litigants stand waiting to begin as soon as possible, so that they can leave as soon as possible. Moreover, it is vital to the efficient allocation of judicial resources for the PJ to know promptly whether trials must be shifted around. On trial day, parties should be required to be present at the very start of the calendar absent good cause (indeed, the 8:30 a.m. and 1:30 p.m. official times already have a 30-minute buffer built in because the offices are technically open and ready for business at 8:00 a.m. and 1:00 p.m.). It should not be a burdensome imposition on those asking for formal adjudication of their cases via an expensive WCAB trial to simply show up on time.

One thoughtful contributor pointed out the potential inequity of performing a roll call at the start of a trial calendar given the fact that attorneys sometimes have to juggle multiple trials during the same calendar (hopefully at the same district office). It was suggested that implementing trial roll calls be deferred until the DWC upgrades their

calendaring system to ensure that trial conflicts will not arise. We disagree. Attorneys always have the option of contacting the judge's secretary the day before and explaining that they may be delayed momentarily until a trial calendar at a nearby hearing room has been discussed and planned out for the morning or afternoon. They can and should contact opposing counsel to explain where they are likely to be and what should be said when the judge calls their case. We believe that this minor inconvenience should be shouldered in light of the fact that trial continuances due to wasted time at the start of the calendar affect not only the immediate litigants but also all other parties before the WCAB who desire a prompt trial date.

One thing we should emphasize is the requirement that no matter what the DWC decides to do in this regard, it should be uniform for at least the judges at a single office (though systemwide would be preferable). Either all judges at the same location should call a trial roll call at the start or none of them should. To do otherwise would be to drive a wedge between some judges of the WCAB and the bar that practice before them.

➢ ***Trial calendars should have a formal roll call at the start. The practice should be uniform across all the judges at each district office. Parties should expect that attendance at the very start of the trial calendar is mandatory absent extraordinary circumstances or prior notice to the judge and other litigants.***

Trial Calendar Start Times

As long as a branch office is generally able to *schedule*, *hold*, **and** *complete* trials within 45 days of the MSC, the Presiding Judge should have the discretion to design the calendar in a way that best fits the office's needs and the traditional practices of the local workers' compensation community. But if it appears that an unacceptable number of trials are being set too far out, or if the branch office is consistently unable to complete trials within the morning or afternoon calendar, it should shift to a uniform 8:30 a.m. setting.

Discontinuous trials are to be discouraged at every opportunity, but it is not unknown for all scheduled trials in a morning calendar to be disposed of in short order only to find that the branch office is unable to complete an afternoon trial. This is a horrendous waste of branch office resources and of the parties' time and money. While at some branch offices morning trials have the luxury of rolling over to the afternoon, judges who attempt to squeeze in an extra trial or two in the afternoon run the risk of adjourning prematurely. It makes far more sense to take advantage of all available time for trials being conducted that day. The only way to efficiently accomplish this is to begin each trial as soon as the last one has ended.

We believe that branch offices that need to do so should change to an 8:30 a.m. setting after giving the local bar adequate notice of the expectation of the WCAB that parties shall remain at the branch office until 5:00 p.m. unless excused by the judge. On the vast majority of trial days, few if any late afternoon trials would require attorneys and witnesses to cool their heels unnecessarily. The alternative of having to take off another day of work or to pay outside counsel a not inconsiderable fee to return to the branch office on a later date justifies the occasional inconvenience.[271] Again, if the current calendar is operating within the statutory framework and discontinuous trials because of inadequate time are rare, no change is required. While we also discussed this concept in relation to addressing problems with allowing judges to control their own trial calendar (see ***The Amount of Trials Scheduled Per Day***, above), the same sorts of policy considerations apply regardless of judicial assignment scheme.

It should be kept in mind that asking parties scheduled for a trial to make themselves available until 5 p.m. is not some sort of punishment. Some have indicated to us that it would be impossible to operate profitably at an office where an entire day might be taken up with a one- or two-hour trial. But a "5 p.m. rule" helps the branch office to get as many trials in as possible by making sure the judge has

[271] Even when defense counsel is paid only for time actually spent in a hearing, having to visit the branch office on two occasions rather than one results in increased lost opportunity costs for the attorneys.

cases ready to start a regular hearing even in the late afternoon and by providing the flexibility to shift cases to other judges whose in-courtroom trial work has been completed for the day. In the end, being able to move trials through more quickly will be beneficial to those whose practice requires a high-volume, rapid turnaround of cases. In actuality, parties will likely be released far earlier than 5 p.m. if they are not able to get started on a trial that day. Moreover, most of the business of the WCAB (measured by the number of Applications filed) is already conducted at offices where the rule is in place. Somehow, practitioners at such locations are able to get in and out in a timely manner and still attend to other business. At these locations, unavoidable conflicts in the late afternoon are handled on an as-needed basis.

If the DWC had a plethora of judges with wide-open trial calendars, then hearings could be scheduled exclusively at the convenience of litigants. Unfortunately, current conditions require squeezing in as many trials as practical in a single day and to do that, parties must be ready, willing, and able to start the hearing as soon as the last case is finished or a judge becomes available. Allowing the parties to unilaterally decide whether they wish to leave at noon or 1 p.m. or some other moment in the afternoon just at the moment when a judge (who has worked to make the time available by smartly moving along the initial set of trials that day) turns to their case runs counter to the Legislature's express desire that workers' compensation disputes be resolved as expeditiously as possible.

- ***At all branch offices experiencing problems with trial calendars, the start time for all hearings should be 8:30 a.m.; parties should have the expectation that they might have to be at the branch office until 5:00 p.m.***

Using Volunteer Attorneys for Conferences

Just two locations have any sort of regular "judge protem" (JPT) session despite language in LC §123.7 that appears to encourage the practice. In theory, local attorneys could volunteer to serve without

pay as temporary judges in order to help with some aspect of the conference calendar. A WCJ whose MSC calendar was occasionally being handled by a JPT could conceivably turn his or her attention to the more pressing task of drafting and issuing decisions following trial during the freed up time. Nevertheless, many judges do not believe that JPTs are appropriate except in extraordinary circumstances. One argument against their routine use is that as a member of the local bar, they may be overly accommodating to their colleagues when a questionable settlement is presented. Another is that as only a temporary judge, they are not in a position to make the sorts of evidentiary rulings a WCJ is asked to decide at many MSCs. Still another is that the DWC should not be using unpaid help to avoid the problem of fully staffing their branch offices. Because the use of JPTs is relatively rare, we were unable to get a sense whether the first two complaints are justified. As for the third, we believe that this is not a time to be worried about whether limited use of JPTs would reduce job security for WCJs.

One way to address the favorable settlement review problem (to the extent that it indeed exists) and the issue of judicial orders is to use a JPT in conjunction with all the judges at a branch office who are working the MSC calendar that day. After briefly meeting with attorneys and deciding that JPT use is warranted, a judge could send the parties to sit with a JPT in order to either help mediate a settlement by providing an experienced practitioner’s viewpoint or to help the parties to complete their pretrial conference statement in the hopes of narrowing their remaining issues for trial to a minimum. The judge’s attention could then be focused on actual rulings and settlement approvals. This practice would cost the DWC little except for a room for the JPT to hold a session, would give local attorneys valuable experience should they ever decide to seek employment as a WCJ, and would hopefully help complete the day’s conference calendar sooner. Using such a process as a starting point, the DWC should then seriously consider expansion if reports from PJs, WCJs, and local members of the bar suggest that the benefits of JPTs outweigh any disadvantages.

➢ ***The DWC should encourage the use of judges pro tem in limited situations that avoid potential problems of favoritism and lack of authority; such use should be evaluated and if appropriate, the practice should be expanded.***

MISCELLANEOUS OFFICE AND DWC PRACTICES

Archiving

Current DWC policy is to ship files to the State Records Center (SRC) in groups based upon the date the case was opened (essentially in file number order). The age of cases made ready for archiving depends on the availability of space at the branch office and the availability of staff to box up the files, but typically it can vary between three-and-a-half to five years of age.

One problem is that files of any age may be needed to do business by the branch office many years later. An Application will generally be filed within a year of the injury, but a Declaration of Readiness might not cross the counter until many years later. Another problem is that unlike traditional civil litigation, workers' compensation practice does not have a single identifiable event that is likely to mean the case has been "terminated." Cases are rarely dismissed in the classic sense and even with a case-in-chief resolution event (settlement, trial, etc.), activity can take place for many months (such as request for attorney's fees related to vocational rehabilitation proceedings) even after the time for filing a Petition for Reconsideration has passed. Additional events that might require the branch office to revisit a case include Petitions to Reopen filed within five years of the date of injury, when the WCAB has expressly reserved jurisdiction in cases involving certain sorts of injuries, or anytime an issue arises regarding the enforcement of an award.

While it is not common that a case three-and-a-half years old might require the attention of the branch office, it does happen. This is especially true if the decision or settlement that closed the case included a provision for future medical treatment. If that case has already been transferred to the SRC, the branch office "pays" a service

charge for its return, so it is to the DWC's benefit to limit the initial transfer of cases to only those that are likely not to be needed anytime soon. But the current policy of shipping by Application date alone means that even if there was recent (though not ongoing) activity, the file would still be boxed up and shipped to the SRC.

Shipping by Application date alone is easier for branch office staff to handle because it allows for methodically opening up entire shelves for new cases. It is also easier in terms of tracking the archiving status of files because branch office staff can assume that all cases with a file number smaller than the earliest case still on location are at the SRC. From the SRC's standpoint, storing continuous blocks of files in storage is easier because it does not have to track individual case numbers.

Nevertheless, the expense of having to return cases and the delay such retrieval causes in resolving the matter suggests that the DWC should explore the possibility of sending cases to the SRC based on alternative criteria. One option would be to send files only when the Application date is of a certain age and if there has not been any activity in the case for a number of years. Another option would be to include even more recent case openings if they have a case-in-chief disposition event entered into CAOLS and the last activity noted in the database is a year or more old.

Such a policy would require a branch office to be able to obtain lists of cases that meet whatever characteristics are felt to reduce the chance of needing a return and also require the DWC to be able to track archived files by some sort of box ID. Any change in current procedures should be done in coordination with State Records Center and only after DWC staff have determined what sorts of matters have the smallest chance for return.

We were unable to collect data about the total cost of the process for pulling files, boxing them up for the SRC, and bringing them back when needed. It is possible that the total expenditures in this area will justify the installation of a stand-alone document management system with a high-speed scanning capability so that obsolete files can be scanned and stored in an electronic format and the physical version

then destroyed. If cost effective, such a system could be used to avoid future costs of retrieval and in anticipation of the eventual day when all pleadings and documents filed with the WCAB will be either delivered electronically or scanned upon receipt. We do not recommend, however, installing such a system until the immediate and future costs and benefits are fully assessed. Boxing up files is a task that can be performed relatively quickly by new hires or even unpaid interns while scanning inevitably requires more time per file and the use of trained personnel. The high cost of appropriate equipment is also a concern, especially at a time when the technological infrastructure of the DWC is in such disrepair and limited funds should probably first be used for other more pressing needs.

- ***The DWC should review the possibility of archiving files to the State Records Center based upon case-in-chief resolution and inactivity rather than simply the date of case opening.***

- ***The DWC should carefully review the costs and benefits of scanning obsolete files and storing the information electronically.***

Open Venue

The filing patterns for current locations of branch offices in Los Angeles and Orange Counties have finally stabilized after years of flux and office closure. Over time, permissive venue in Los Angeles resulted in the development of a few “mega-boards” (and the closing of smaller branches) for a variety of reasons, reportedly including a widely shared belief that judges at some locations were generous with attorney fees or settlement approval. Unless venue rules are changed to require filing within particular zip codes, attorneys will inevitably gravitate to the branch office that best suits their needs and in a crowded metropolitan area, most of the business will concentrate in a small number of user-friendly or geographically isolated areas (in Los Angeles, traffic patterns and drive-time problems essentially divide up the county even if there are no physical barriers). We believe that opening additional satellite branch offices in these densely populated counties is unwise

even in response to increased demand under current venue rules. It is more practical to add additional resources to existing sites as needed.

➢ ***No new branch offices should be opened in densely populated counties where open venue is possible.***

Decision Days

Interestingly, we received a lot of comments and opinions as to whether the DWC should adopt a uniform decision day for its offices so that all locations would have the same day of the week devoted to work other than holding trials and conferences. Some attorneys liked the idea as it gave them a day to schedule depositions and the like without fear that they might be required to appear in court on a last-minute matter. Some Presiding Judges were less thrilled because it meant that trials would be bunched up during the remaining four days thus requiring far more careful assignment of hearing reporters and hearing rooms and because there would be fewer judges available for last-minute trial duties. Some judges and support staff thought the "dark day" was ideal for attending to doctor's appointments when the frenetic activity of juggling busy conference and trial calendars was absent. Additionally, a few judges told us that they enjoyed the fact that they could work on their opinions and decisions in a quiet environment with little chance that they would be asked to pinch-hit on a trial that was unable to be started by the assigned judge. On the other hand, a handful of attorneys we spoke to disliked the fact that at some offices, walk-throughs and other unscheduled contacts with judges were prohibited on dark days. A few Presiding Judges found it more difficult to maintain supervision over their judges because some chose the dark day to work at home as permitted under their collective bargaining agreement. The list of plusses and minuses extolled by many members of the workers' compensation community on this topic was surprisingly extensive.

We take no position on this question because other than in regard to the potential for reduced staff productivity and flexibility for holding trials, it does not appear to impact on the areas we were asked to investigate. It is possible that the question will be moot in any

event if it becomes a requirement of any collective bargaining agreement with judges and staff members. We mention it here only to bring it to the attention of policymakers as an issue close to the hearts of many.

CHAPTER 14. CASE MANAGEMENT

WCAB involvement in a workers' compensation claim is essentially triggered by the filing of a Declaration of Readiness or a settlement document submitted for approval. While the case officially can begin years earlier with the filing of an Application for Adjudication, it is not until a request is made to have the case placed on the trial track or a settlement reviewed that there is any significant need for judicial action.[272] At that point, if the WCAB...

> ...is to give prompt and adequate consideration to its cases, it is essential that the court itself exercise active supervision over its caseflow. The possible alternatives to management by the court [such as] leaving case scheduling to individual lawyers...are not only likely to result in delay in individual cases but also to produce inefficiency and disruption in the flow of all cases. Each lawyer's primary concern is with his own cases and his own scheduling problems, and lawyers as a matter of professional courtesy are inclined to accommodate each other's scheduling needs.... Only the court has an overview of all cases, and only the court is in a position to provide orderly and impartial direction to the movement.[273]

In one sense, WCAB procedures already embody a well-tested principle of good caseflow management practice for litigated cases: Once the DOR is unilaterally filed by one of the parties to assert that the case is ready for trial, the matter is set for an initial conference as soon as resources permit. While the MSC might not always take place within 30 days as required by Labor Code §5502, it still provides the

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[272] As we state elsewhere, Applications do require the expenditure of clerical resources to process the document, enter data into CAOLS, and create a new case file folder even if nothing happens again for many months. Also, there are a smattering of miscellaneous orders (attorneys fees and the like) that can be requested before a case file number is actually issued or a hearing is requested. Nevertheless, it is the filing of a DOR or a proposed settlement that marks the beginning of significant judicial activity.

[273] Mahoney, Barry, and Harvey E. Solomon, "Court Administration," contained in Klein, Fannie J. (Editor), *The Improvement of the Administration of Justice*, American Bar Association, Chicago, IL, 1981, p. 37.

opportunity for a judge to exercise control early in the life of the case.[274] Once the MSC is held and a trial continues to be needed, the formal hearing can be held within a few months (though not usually within the required 75 days from the DOR submission); the result of this process is an early trial date setting, a caseflow management technique empirically shown to reduce overall time to disposition without increasing litigant costs.[275]

Given that some of the basic foundations for effective case management are already present under current WCAB procedures, it still remains for WCJs to personally take advantage of these opportunities and prevent the case from stagnating. Letting the pace of litigation be "lawyer driven" is a good way to have the matter languish for years, much to the dissatisfaction of both applicants and defendants. In this section, we look at some of the ways judges can exercise better control over how the case moves along and how current procedures could be modified to reduce the frequency where parties request delays in case resolution.

CONFERENCE-RELATED CONTINUANCES AND OTOCS NOT RELATED TO SETTLEMENT

Settlement-Related Continuances and Cancellations at Conferences

Without the possibility of informally resolving a case prior to trial through the use of a settlement, "...the system would collapse."[276] Therefore, the WCAB needs to do all that it can to encourage the parties to craft adequate and appropriate settlements by giving them the opportunity to resolve the matter informally. Judges should not hesitate to continue a conference or take the case off calendar any time the parties indicate that a settlement is likely within the immediate future and that all that is needed is simply a

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[274] See, e.g., Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, *Defeating Delay: Developing and Implementing a Court Delay Reduction Program*, American Bar Association, Chicago, IL, 1986, pp. 44-45.

[275] Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and Vaiana, *An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (1996), Table 10.1, pp. 89.

[276] St. Clair (1996), p. 1032.

little more time to obtain proper authority or complete some other task. Based upon our observations, this is exactly what is taking place in most circumstances. We mention this here because the discussion below regarding suggested changes in continuance or OTOC policy for conferences is related solely to situations where settlement is ***not*** anticipated in the immediate future.

The problem for judges, of course, is how to decide whether the reason given for the requested continuance or OTOC is indeed designed to finalize a settlement agreement. Like those in most court systems, cases before the WCAB are far more likely to settle than reach the trial stage at some far off point in the future. This fact makes a request such as "an OTOC is needed because I think we can settle this if we have a few more months to talk about it" a very good bet to actually turn out to be true. On the other hand, granting such a request avoids the responsibility judges have in ensuring that workers' compensation disputes before them are resolved in the shortest amount of time possible. A settlement process that would take far longer than the time needed to hold a regular hearing and issue a decision is of little benefit to the applicant.

If the proposed continuance or OTOC is realistically related to a pending settlement, it should be granted despite any contrary policy reflected by LC §5502.5 ("A continuance of any conference or hearing required by Section 5502 shall not be favored, but may be granted by a workers' compensation judge upon any terms as are just upon a showing of good cause.") Again, we note that this appears to be the current practice of most of the judges we observed. As always, we also believe that LC §5502.5 and related regulations should be amended to specifically allow and encourage postponements of this type by doing a better job of defining what constitutes "good cause" for issuing an order that is supposed to be generally disfavored. Without such guidance, the scope of what might be thought of as adequate reasons for a continuance or OTOC will stray far beyond the intentions of policymakers.

➢ ***Continuances and OTOCs requested in regard to a conference setting that are clearly related to allowing a settlement to be finalized should be freely granted.***

➢ ***What constitutes "good cause" for continuances or OTOCs should be better defined in relevant statutes and regulations.***

Underlying Reasons for Conference Continuances and OTOCs

As discussed below, we believe that continuances at the MSC are a function of the inflexibility in the design of the MSC itself and the fact that the session is typically held simply as a result of the desire of a single party in the dispute; this situation is made worse by severe time lines that essentially prevent adequate DOR and Objection review prior to the holding of the conference.

The Inflexibility of the MSC

The paradigm trial track for the WCAB is the deceptively simple formula of "one conference, one trial." Rather than having the parties appear again and again before the WCAB formally hears the case, only a single conference is required. Stripping down the litigation process to the bare bones has obvious plusses and minuses for how the case moves toward resolution. One danger in attempting to limit pretrial contact with the court to a single instance is that it restricts the ability of judges to provide early and continuous control over the pace of litigation, a concept that has gained nearly universal approval among leading court management researchers.[277] But as a matter of practice, the fact that an MSC is typically scheduled for a date within two months of the filing of the action-triggering pleading in the WCAB (the Declaration of Readiness) does give a judge the necessary opportunity to move the case along expeditiously right from the start. And given the fact that the typical branch office in 2002 does indeed have the capability to provide a trial within the following two months, the need for additional meetings of the parties and the judge would seem

[277] Friesen (1984), p. 7.

superfluous. Though typically brief (meetings with judges are often ten minutes or less in length), each extra conference is costly to defendants who must pay their legal representatives for the appearance regardless of whether the matter is continued, costly to applicants' attorneys who only have a limited amount of time to devote to individual cases, and costly to workers who have to take time off from their jobs or vocational training programs in order to attend.

By design, the DOR is a serious confirmation, made under penalty of perjury, that the case is ready for trial: The worker's condition has stabilized (if permanent disability is an issue), settlement efforts have been made, the declarant has no further need for discovery, and all medical reports have been made a part of the public record. If all of this is indeed true, then conceivably the parties could begin trial immediately.

But WCAB procedures slow things down a touch, though not by much. Within 30 days of the filing of the DOR, the parties are to come to the court one last time—and indeed for the applicant, the appearance is mandatory—to see if with the help of a judicial officer they can settle this case. If not, then witnesses are named, proposed evidence to be considered at the hearing is listed, a trial date is chosen, and most importantly, all further discovery is cut off for both sides. In effect, the Mandatory Settlement Conference serves as the one and only judicially conducted settlement effort and as the one and only pretrial conference. The MSC therefore only has two possible outcomes in theory: The case is either settled at the MSC or set for trial at the MSC's conclusion.

Of course, things are not that simple. The other side may not be in agreement that the case is indeed ready for trial. It can claim that the condition of the worker has changed and so the condition needs to be reevaluated; it can claim that there have not been settlement discussions as was averred; it can claim that there has not been a reasonable opportunity to complete the type and scope of discovery allowed by law; or it can claim that medical reports have not been made available.

This places the WCJ in an awkward position. The DOR is not a jointly executed statement; it is simply the claim of *one* side that they are ready, willing, and able to go to trial. If the judge gives the side opposing trial the benefit of the doubt as to claims of being unfairly rushed to a final hearing, there is not much he or she can do and still conclude the conference "successfully." The design of the MSC does not allow for any alternative outcome; at its conclusion, the case must have settled or be set for trial. If settlement is not an option and if the WCJ believes it is in the interests of justice to give more time to the parties to make the case ready to the point at which a trial is fair and possible, then a "concluded" MSC is not a possibility. It has to be either continued to another day or the DOR trial request itself must be voided, the MSC canceled, and the case taken off the trial track.

But neither of these options (continuances and orders taking the case off the calendar) is favored by official WCAB policy. LC §5502.5 states:

> A continuance of any conference or hearing required by Section 5502 shall not be favored, but may be granted by a workers' compensation judge upon any terms as are just upon a showing of good cause. When determining a request for continuance, the workers' compensation judge shall take into consideration the complexity of the issues, the diligence of the parties, and the prejudice incurred on the part of any party by reasons of granting or denying a continuance.

And BR §10548 reemphasizes:

> Continuances are not favored. The parties are expected to submit for decision all matters in controversy at a single hearing and to produce at such hearing all necessary evidence, including witnesses, documents, medical reports, payroll statements and all other matters considered essential in the proof of a party's claim or defense.
> Requests for continuances are inconsistent with the requirement that workers' compensation proceedings be expeditious. Continuance will be granted only upon a clear showing of good cause.

Nevertheless, many judges will go ahead and stop the MSC before its completion, either continuing the matter until another day or more

likely, taking it off the trial track altogether.[278] At the very minimum, such continuances or OTOCs add weeks and more likely months to the life of a case. What sometimes occurs to the great frustration of many observers is that upon arrival at the subsequent MSC, some other problem has now arisen or the original one has not been fixed and the cycle of delay and increased costs begins anew.

In other court systems, pretrial conferences are periodically held and even encouraged in order to keep the court up-to-date on the status of the case, to provide an opportunity for judicial management, and to address any problems that arise regarding discovery and the like. With the primary focus on minimizing the length of time between filing and trial, there is little public outcry that such courts are holding *too many* pretrial conferences and as a result, delaying the case unnecessarily. Indeed, the ability of judges to routinely monitor and when required, control the way a case proceeds through the system is thought by leading court researchers to be a key tool for getting cases to resolve expeditiously and inexpensively.[279] Meeting with the parties on a routine basis and issuing appropriate orders is perhaps the most obvious way to perform such management.

In contrast, MSCs are not supposed to provide a case management opportunity outside of the influence a judge might have in encouraging settlement or beyond the task of getting the parties to draft a list of stipulated and disputed issues for trial and a list of potential witnesses. If the case is neither settled or set for trial by the end of the day, then the “one conference, one trial” ideal is no longer possible and from an extreme viewpoint, the Constitutional underpinnings of the dispute resolution process have been shaken in violation of BR §10548: ”Requests for continuances are inconsistent with the requirement

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[278] A number of judges told us that in years past when the typical time from DOR filing to MSC ran to the order of many months, their general policy when a postponement was warranted was to reschedule the MSC to another day. With much shorter conference calendars generally, the current attitude is that an OTOC order is better suited because a party simply can refile the DOR and get back before a judge in about 30 days or so.

[279] See, e.g., Ebersole, Joseph, *Discovery and Pretrial Procedures*, contained in Klein (1981), pp. 143-146.

that workers' compensation proceedings be expeditious." The bottom line is that unless judges choose to flaunt these repeated warnings against continuing the case, they are essentially boxed into setting the matter for an almost immediate trial solely based on the largely unverified assertions contained in a single party's DOR. In reality, WCAB judges do not turn a blind eye to the special needs of the case and under circumstances they think are appropriate, order the case off calendar or continued. As such, MSCs sometimes act as management conferences, though when they are used in that role, the assigned judge is vulnerable to criticism. The number of conferences needed to resolve an average dispute is one statistic that is closely tracked by upper-level administrators.[280]

The obvious solution for avoiding the sometimes uncomfortable decision required at some MSCs of choosing between sending a case to trial prematurely or granting a continuance disfavored by policymakers is to never hold the MSC in the first place when the case still requires developing. To do that requires that the DOR itself be reviewed along with any documentary evidence in the case file to first determine whether the matter is indeed ready to go to trial following an MSC. The limited purpose of the MSC is theoretically possible at all because existing procedures do require the court both to screen the DOR for proper execution and to allow the respondent the opportunity to object to the claims of the declarant ***prior*** to the parties actually showing up at the conference. In theory, only those matters that are actually ripe for trial would be set for an MSC after this review and so at the conference itself, judges can close off discovery (if the matter does not settle) without fear that the responding party's due process rights are being compromised or that there would be an inadequate level of evidence presented at the hearing for the judicial officer to use in reaching a fair and just decision. As we discuss below, however, trying to fairly judge the appropriateness of setting the matter for trial

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[280] "On average, there were 1.53 hearings per closing case in 1998, compared to 1.47 in 1997." Division of Workers' Compensation, *Annual Report for 1998* (date of publication unknown), p. 21. Note that "hearings" in this sense include both conferences and trials.

based solely on the statements contained in the DOR and documents in the case file is difficult to do conceptually, requires an allocation of staff resources that are already in short supply, and can extend out the time required between DOR filing and the MSC. The current result at DWC branch offices is that MSCs are generally being set automatically upon the filing of a DOR and the quality of the subsequent review process, if any, is quite variable.

In sum, the concept that an MSC should only result in either a settlement or a trial setting is unrealistic given that (a) it is set at the request of a single party, and (b) safeguards against premature setting of an MSC are not reliably or consistently applied. As such, continuances and OTOCs are a natural byproduct when the matter is not ready for trial.

Assumptions for DOR Screening and Objection Review

As suggested, there already is a process anticipated whereby DORs are scrutinized so that unnecessary or premature MSCs will be minimized. Under P&P Index #6.3.6, the PJ "or an 'experienced and qualified person' designated by the Presiding Workers' Compensation Judge shall be responsible for determining whether a Declaration of Readiness to Proceed has been executed adequately, properly and completely and shall determine what type of proceeding and the length of hearing time."

This is not the only hurdle a DOR must leap. BR §10416 allows a party opposing the placement of the case on the immediate trial track to file an Objection within six days (for most matters currently before the branch office, though objectors in cases with pre-1991 Applications are allowed ten days) to state, also under penalty of perjury, specific reasons why the case should not be set for hearing or why the requested proceedings are inappropriate. At that point,

> The presiding workers' compensation judge or any workers' compensation judge or settlement conference referee designated by the presiding workers' compensation judge shall rule on the objection and make an appropriate disposition.

Conceivably, this ruling would come at a point prior to the considerable effort expended by the DWC to set the MSC and notify the

parties of the conference setting. If the PJ or designee felt that the objections were valid, the need for the parties to appear in court and make the same successful argument would be eliminated. By giving the district office the ability to reject insufficient DORs, by allowing any remaining objections to be handled by a relatively simple exchange of pleadings, and by requiring judicial review, outcomes other than settlements or settings for trial at an MSC should be limited to extraordinary circumstances.

As the figures for continuance frequency show, this simply is not the case. Somehow, a large number of cases are reaching the MSC before they are ready for trial. We believe that the problem lies in part with the underlying foundations for MSC design and that some of the assumptions for the foundations are questionable.

Faulty Assumptions of the MSC

It is assumed that the branch office will be able to screen the original DOR to ensure that the Declarant has met the requirements of the law when in fact this is not always possible.

In clear and unambiguous terms, BR §10414 requires a judge to assess the merits of the DOR prior to setting the matter for the conference:

> Declarations of Readiness to Proceed shall be reviewed by the presiding workers' compensation judge, or any workers' compensation judge or settlement conference referee designated by the presiding workers' compensation judge, who will determine on the basis of the facts stated in the declaration, the case file and any submitted documents whether the parties are ready to proceed and efforts have been made to resolve the issues. If so, a hearing shall be calendared; if not, the declaration shall be rejected and the parties notified.

Other language in the Labor Code also suggests that the review of a Declaration of Readiness is something to be performed exclusively by a judge or referee. LC §139.6(c)(2) states (in part):

> (2) ...In performing this duty, information and assistance officers shall not be responsible for reviewing applications for adjudication or declarations of readiness to proceed. This function shall be performed by workers' compensation judges. This function may also be performed by settlement conference referees upon delegation by the appeals board.
> (Emphasis added)

Regardless of the law's good intentions, it is difficult to see how a branch office can do more than a cursory inspection prior to setting the MSC if it is to also comply with other mandates of the Legislature. LC §5502(d)(1) requires that "In all cases, a mandatory settlement conference shall be conducted not less than 10 days, and not more than 30 days, after the filing of a declaration of readiness to proceed." Under BR §10544, a "Notice of Hearing shall be given at least ten (10) days before the date of hearing...." That leaves 20 days to handle the DOR after it is date stamped, to pull the case file and present it to the person doing the review, for time needed for a judicial officer to make such a review, to return it to a calendar clerk for determining a date and entering the information into CAOLS, and to actually send out the notice from the DWC's central mailing system. At the branch offices we have visited, even the most speedy will take a couple of days for the initial (sometimes minimal) handling and calendaring process; moreover, the DWC mailing system batches its work on an overnight basis and therefore adds a day to the total. The result, if all goes according to plan, is that an open calendar slot must be found no later than 16 days from the time of the judicial review if the time mandates are to be met. Even though upwards of 30 relatively short MSCs can be packed into a morning or afternoon calendar (leaving no time for anything approaching a serious settlement discussion), judges are currently tasked with spending just one day on conference calendar. At present levels of judicial staffing, it simply is not possible to have large numbers of open slots available for MSC settings less than two weeks out.

The preceding discussion assumes that the judicial review process will not delay the already tight schedule for moving from the receipt of the DOR to the sending out of the notice of hearing. In reality, judges do not stand over the shoulders of counter staff, waiting to grab DORs as they are filed and then dash them off to the calendar clerk's desk. It is more efficient for a judge to wait until a sufficient number of DORs have accumulated and focus his or her attention on these issues alone. The entire batch of reviewed files and approved DORs is subsequently sent to the calendar clerk, who can then sort and set them in a way that minimizes attorney conflicts.[281] Thus, at least a few additional days are consumed by having a judge involved in the process from DOR receipt to MSC setting.

In order to get the cases to the calendar clerk as rapidly as possible, some branch offices effectively dispense with a full judicial review of the DOR's sufficiency. To be sure, the DOR is mostly a checkoff form and it is either a yes or no proposition as to whether the pleading has the right number of boxes marked, has an adequate amount of text entered regarding settlement attempts, and is signed. One does not have to be a member of the California State Bar to be able to assess whether, on its face, a DOR appears to be sufficient. At some branch offices, the task is given to the calendar clerk who gives the document some sort of review (of varying levels of scrutiny) to make sure that nothing of importance is missing. Arguably, this practice is in compliance with P&P Index #6.3.6 (screening can be done by the PJ or an "experienced and qualified person" designated by the PJ) but runs afoul of BR §10414 (review only by "presiding workers' compensation judge, or any workers' compensation judge or settlement conference referee designated by the presiding workers' compensation judge").

[281] Some attorneys who file large numbers of DORs frequently request that as many as possible be set for MSCs to be held on the same day in order to minimize trips to the branch office. Most District Offices we encountered will attempt to accommodate such requests.

While clerical review of pleading sufficiency is nothing alarming in and of itself (many court clerks in other systems have this responsibility for a wide variety of pleadings before accepting them for filing), it certainly is no substitute for a judicial officer determining "...on the basis of the facts stated in the declaration, the case file and any submitted documents whether the parties are ready to proceed and efforts have been made to resolve the issues." No matter how well intentioned or competent they may be, calendar clerks simply do not go through the entire case file and other documents to the degree necessary to determine independently whether the parties, and not just the declarant, are ready to go to trial. Even at the district offices where juridical officers are the exclusive DOR screeners, it does not appear that judges do either.

At some branch offices, the desire for getting their statistics in line with legislative time mandates is so great that they set the DOR for an MSC almost immediately upon filing. There is not even the pretence of a calendar clerk review (who in actual practice do not reject many DORs anyway). PJs at such branch offices explained to us that with their conference calendars as full as they are, they had no other way to get MSC settings that even approach the 30-day limit.

It is assumed that the branch office will be able to review the Objection to the DOR before holding the hearing when in practice this may be impossible.

The preceding discussion focused on the ability of an office to screen the DOR quickly enough to get the MSC set in a timely manner. But as mentioned previously, screening is not the only duty required; there must be some sort of ruling on any Objections filed in opposition to the trial setting. When this process is added into the mix, the already tight time lines become even more difficult to meet.

It is not clear whether the mandate of BR §10416 specifically requires a judge to "rule on the objection and make an appropriate disposition" before the MSC is held or at the conference itself.

Moreover, if it is to be done before the MSC, it is not clear whether the Objection review must happen prior to setting the time and date of the conference (which is when the screening is usually done) or at some later point. If the frequency of continuances or OTOCs granted at the MSC due to premature DORs is to be minimized, one might expect that performing both the initial screening and the Objection review prior to setting would be the optimal situation from the standpoint of efficiency. The screener would have the benefit of the arguments of the party opposing the MSC in front of him or her at the same time the sufficiency of the DOR itself was being evaluated. That means the DOR and the case file itself must be "matched up" with any Objection the office might receive before the combined initial screening and Objection review can take place. Even if evaluation itself takes only the briefest amount of time, getting all of that done soon enough to set the case for an MSC within 30 days may not be possible.

Parties in cases involving post-1993 injuries have six days to file any Objection with the branch office following service of the DOR. An additional five days is given to perform any act with respect to such service.[282] As most pleadings are served by mail, objectors have a total of 11 days in which to get their document[283] to the branch office. As such, combining DOR screening and Objection review cannot really occur until after that point. Some branch offices cement this reality into practice by taking newly filed DORs and placing them on a shelf for about 11 days to let them "age" prior to review in the hopes that when an Objection does come in, it can easily be matched with the file and the DOR. But when the minimal requirement of ten-day notice of the conference is taken into account, a tiny window of less than nine days (and the DWC office is closed on two of them) remains for taking care of all

[282] BR §10507, CCP §1013.

[283] The Objection itself is not really a formal pleading. There is no official WCAB/DWC form for making the objection and we encountered a number of instances in our file reviews where the opposition to having the case set for an MSC was no more than a brief, sometimes handwritten, note mailed to a judge.

other aspects of processing the DORs, including waiting for the reviewer to get to the file and then getting the calendar clerk to schedule the conference. Even if the tasks are accomplished in this short a time frame, judges would have to have relatively open conference calendars with new slots available within two weeks or less to meet the time mandates. This is not routinely possible at most branch offices we visited. The results are that either the MSCs are set far in excess of 30 days or the office eliminates any presetting Objection review in order to get the case to the calendar clerk as soon as possible.[284]

It is assumed that the parties will file Objections in a timely manner when in fact, they sometimes do not believe it is absolutely necessary.

Local attorneys are well aware of internal branch office practices. They have surprising insight into personnel levels, procedures, and problems. Some also know whether or not the review of any Objection will be part of the initial screening of a DOR (and whether the screening is done by a clerk, secretary, or judge), whether pre-MSC screening is done at all, or whether the review of all Objections are deferred until the conference itself. They know whether or not to bother with the idea of drafting and filing an Objection within just a few business days of receiving service of a DOR. In such situations, they may choose to take their time in responding (thus exacerbating the problem of matching Objections to DOR prior to judicial screening) or simply wait until the MSC itself to make known their position against placing the case on the trial track. As judges are equally familiar with the realities of practicing at DWC offices where the Objection review process bumps up against statutorily mandated time limits (as they were likely to have been placed in a similar position when they were workers' compensation attorneys), they may be reluctant to

[284] One alternative would to perform the DOR screening and then quickly set the case for an MSC; any Objections that are received subsequently would be reviewed and if found to be persuasive, the parties would be notified that the conference was canceled.

refuse to hear an oral objection to the trial track offered at the MSC simply because the written version came in the office door a few days late or never was sent in at all. This would be especially true at an office where by official policy there was never any chance that the Objections would have been reviewed prior to the day of the conference.

It is assumed parties will always file an Objection if warranted when in fact, there are few drawbacks in failing to so.

BR §10416 states that if "...a party has received a copy of the Declaration of Readiness to proceed and has not filed an objection under this section, that party may be deemed to have waived any and all objections to regular hearing on the issues specified in the declaration." The intent of this regulation appears to be to force the parties to argue over whether the case is indeed ready for trial through an exchange of pre-MSC pleadings rather than waste everyone's time with an expensive conference and continuance. In theory, should the party responding to the DOR fail to object as required, then the case is deemed ready to go to trial and the MSC can be held with great certainty that its disposition will either be a settlement or a trial setting.

The high rates of continuances and OTOCs at the MSC prove otherwise. At these sessions, we listened to judges at many MSCs considering a wide variety of objections to trial that, by the parties' own statements, had not been formally submitted previously. While judges will sometimes inquire as to why any Objections had not been filed, the failure did not seem to be fatal to the objectors' position. Continuances and OTOCs were granted nonetheless.

It is difficult to quantify how often this happens. An extremely informal review of selected case files at one office in our sample found only about 10% of the DORs had a written Objection in the file as well.[285] A perhaps better assessment would be the

[285] Thirty case files with DORs were reviewed and only three Objections were found. It should be noted that the cases were chosen haphazardly (they were a subset of all sample cases with DORs at that

frequency of Objection filing noted in the CAOLS dataset compared to the overall numbers of DORs filed: In calendar year 2000, 15,420 Objections were filed compared to 179,741 DORs (see ***Table 5.4***). Though we did not formally collect information about Objection filing during our research, these low figures should be contrasted with the fact that about half of the conferences in our judicial time study were continued or taken off calendar for reasons unrelated to a pending settlement. Not all of these conferences were the result of DOR filings, but if the frequency for initial MSCs is similar, then there is good evidence to suggest that WCAB judges are not routinely requiring written and timely Objections as a condition precedent for arguing for a continuance or OTOC at the MSC. If true, practitioners would be well aware of the minimal risks of failing to file Objections in time.

We asked a few judges about this issue and they told us that they implicitly waive the requirement for a pre-MSC statement of objections for a wide variety of reasons, including wanting to do "the right thing" for equitable reasons, the judge's own independent need to develop the record (which, arguably, overrides technical deficiencies), an awareness of the realities of workers' compensation defense practice where the attorney appearing at the MSC may not have been given the assignment or the defendant's internal files until a short time before the conference (and thus would not have personally been able to draft and file an Objection in time), and because it is commonly understood that it makes little difference whether or not an Objection was timely filed because it doesn't always get evaluated prior to the MSC.

One problem with the current permissive approach is that it allows the party responding to a DOR the luxury of never having to review the file until the day of the MSC. They can show up at the branch office, leaf through the file in the morning, and then perhaps "discover" that some vital report or deposition is missing or is needed. If they can settle the case that day, great. If

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location), reflect the experiences at a single office, and may not be representative of DWC offices generally.

not, then there exists a ready-made "good cause" for asking for more time.

Addressing the Problem of Conference Continuances and OTOCs

Pre-MSC Gatekeeping

For the reasons outlined below, we believe that the clear intent of BR §10414 that branch offices must perform some basic level of initial DOR screening at or near the time of its receipt should be carried out (though we are not convinced that the ultimate goals of BR §10414 always require judicial officer involvement). We also believe that despite any additional delay that might be caused by requiring a judicial officer—as soon as reasonably possible—to fulfill BR §10146 by reviewing any filed Objections to placing the case on the trial track, the positive impact on private litigation costs justifies any added days that may elapse prior to the typical MSC.

Screening Versus Objections Review

DOR screening and the review of Objections are two very different tasks, though they are often thought of as one indivisible process by many judges, court administrators, and practitioners. They need to be addressed separately to better understand and refine their respective roles in assuring that cases that reach the MSC stage are the ones most likely in need of in-court attention by WCAB judges. In that light, any focus on revising the DOR screening process (a review that by and large is only concerned with ensuring technical compliance with check boxes and fill-in spaces on the DOR's format) should be distinguished from the more important task of deciding what procedures to employ when the party responding to the DOR has indicated an objection to placing the case on the trial track.

The blurring of the lines between DOR screening and Objection review is understandable because they can happen at the same time and be performed by the same person. Some branch offices, for example, hold newly filed DORs on a special shelf to allow time for any Objections to be matched with the case file and the DOR. After expiration of the "aging" period, a judge will simultaneously screen the DORs for

sufficiency and deal with any Objections if one is attached to the case file.[286] Performing the two separate tasks simultaneously allows the judge to have the case file physically available before him or her if it is needed either for screening or for Objection review.[287]

There is no reason why screening and Objection review cannot be done at the same time (assuming that an Objection has been filed) and in actuality, it probably makes sense to do so if policymakers continue to insist that judicial officers should be the only ones to perform initial DOR screening. Moreover, waiting for the period for filing an Objection has expired and matching up the case with any Objections before screening appears to reflect the sort of comprehensive process for both anticipated by the drafters of BR §10414 and BR §10416.[288] Nevertheless, screening under BR §10414 primarily involves checking the format of a pleading while Objection review under BR §10416 requires a judicial decision involving opposing parties and competing claims. By treating them as distinct requirements, it will be easier to craft revisions to current practices that are more effective and realistic.

Streamlining the DOR Screen

Who actually does the initial DOR screening process is not the most important issue. Judges who perform a cursory review of the check boxes

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[286] Based on our discussions with WCJs, it appears that a very common "ruling" on an Objection during this pre-MSC period is none at all: Unless the Objection is clearly meritorious, the DOR is given to the calendar clerk for setting on the theory that it is better to let the parties argue the matter in person at the MSC. Not only does this avoid the problem of making the decision based solely on the terse information contained in the DOR and Objection, there is also the chance that the parties will wind up settling on the day of the conference.

[287] The counterargument against letting DORs age until the time for filing Objections has passed and only then performing the screening and review process is that at the moment, objections are certainly not the rule in most instances and so the MSC setting for the majority of unopposed DORs would be unnecessarily delayed.

[288] The very short time allowed for filing of an Objection (just six days after the filing of the DOR as per BR §10416) suggests the intent of policymakers was that the MSC date should not be scheduled until both screening and objection review take place. If that were not the case, then the Objection could conceivably be filed any time prior to or even at the conference because the ruling would likely occur at the MSC anyway.

on a newly filed DOR serve no more useful function than simply having an "experienced and qualified" clerk do the same task. Screening for compliance with formal requirements of formatting and checkoffs is simply not that intellectually challenging and so a number of offices have given the task over to one of their nonjudicial staff. If it is the intent of DWC and WCAB administrators to continue business as usual in regard to what typically takes place during the initial DOR screening at office after office (i.e., clerical rather than judicial screening if it is done at all), then we believe that BR §10414 should be amended to give Presiding Judges a legitimate option of giving this task to nonjudicial personnel as P&P Index #6.3.6 already provides. The restrictive language in LC §139.6(c)(2) would have to be amended as well. Continuing to allow the widespread practice of clerical review of the sufficiency of a DOR (or even worse, no review at all) when both Board Rules and the Labor Code appear to prohibit the practice sends a not very subtle signal to both judges and Presiding Judges that the rules that guide workers' compensation in California can be broken or bent without a second thought if they are believed to be cumbersome, unwieldy, or impracticable.

Even if policymakers continue to believe that only a WCAB judicial officer is experienced and knowledgeable enough to perform meaningful screening, there is no reason to waste the time of that judge to look at a plainly defective DOR. Any nonjudicial staff member of an office could be tasked with making sure that all the proper boxes are checked and that all the blank spaces are properly filled out at the time the mail is opened and new pleadings are sorted. DORs with obvious problems could be rejected with a form letter listing any technical deficiencies without having to involve a judge in any part of this process. Clerical staff at courts across the country do similar reviews of newly filed pleadings to make sure they are signed, proper fees are paid, case numbers are included, and required sections are filled out, and if they are not, reject them on their own initiative. DWC clerical staff could certainly do some sort of initial review of the DOR assuming that the appropriate authorities contained in the Labor Code, P&P Manual, Board Rules, and AD Rules are coordinated accordingly. Only those that

survived this preliminary screening need be given to a judge for further review.[289]

Perhaps a more compelling need is to have policymakers decide one way or another how deep they wish the screener (whether judge or clerk) to delve into the facts and issues of the case. As currently designed, the process anticipated under BR §10414 requires the screener to "determine on the basis of the facts stated in the declaration, the case file and any submitted documents whether the parties are ready to proceed and efforts have been made to resolve the issues." Should the physical case file be opened and every document reviewed whenever a DOR is filed so the screener can independently confirm the truthfulness of the assertions made on the pleading by the moving party? Should file review only take place if there appear to be any inconsistencies in the DOR or if there is any communication from an opposing party suggesting that placing the case on the trial calendar is premature? BR §10414 is unclear in this regard (though a literal reading suggests some sort of independent review in every instance) and in the vacuum created by this lack of authority, the screening process currently ranges from none at all, to simply ensuring that the right boxes have been checked, to a judge taking a considerable amount of time to leaf through the materials contained within the case jacket to see what the history of the dispute has been and what pleadings and medical reports have been filed. Again, the widely known interoffice variation in the execution of this aspect of BR §10414—quite reasonable given inadequate clerical and judicial resources at many locations and a understandable desire to meet important time mandates by whatever means necessary—fuels the attitude that some rules should be followed more closely than others.

In any event, exactly what is to be done during screening needs to be precisely defined. Our suggestion here is that the initial screening essentially be limited to ensuring that the DOR is properly filled out and signed in order to memorialize the assertions of the filing party

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[289] The amount of time required for this sort of preliminary review is minimal and if given to the clerk who is charged with reviewing newly filed pleadings that have come in the mail or over the counter, no additional steps are needed. A clerk already has to pick up and inspect the document as part of the current mail sorting process.

(i.e., the worker's condition has stabilized if permanent disability is at issue, settlement efforts have been made, the declarant has no further need for discovery, and all medical reports have been made a part of the public record). Such a review can be accomplished quickly by an adequately trained clerk. If there are inconsistencies or errors in the assertions of the filer or if some existing or even recently discovered fact argues against setting the matter for the MSC, we believe that it is the responsibility of the ***opposing party*** to bring these issues to the attention of the WCAB by filing a written Objection under BR §10416. The staff at branch offices of the DWC have enough on their plate without also tasking them with digging endlessly through the case file for an independent confirmation of the DOR's adequacy. Despite the historical mission of California workers' compensation to act as an automatic, self-functioning benefit delivery machine whenever possible, its dispute resolution process clearly contemplates aspects of a classic adversarial system; as such, it is does not run counter to that historical design to put the burden of pointing out the inappropriateness of a DOR upon the shoulders of the responding party.

- ***BR §10414, LC 139.6(c)(2), and related rules and official policies should be conformed in order to (1) specifically allow initial DOR screening to be performed by nonjudicial staff, and (2) precisely define what exactly the screener should look for and the criteria to be used for approval or rejection.***

Formalizing the Pre-MSC Objection Review

Despite our belief that the rules regarding the BR §10414 screen need refining, who does this initial examination and what sorts of criteria are involved probably do not mean much in the grand scheme of WCAB practice (though it does have great impact on the amount of clerical and judicial resources required to accomplish the task). Even if a greater degree of scrutiny is employed systemwide (perhaps as a result of requiring judicial screening at those offices where it is currently done only by clerks or simply by implementing screening of some type where it is now unknown), only a fraction of additional DORs

are likely to be rejected simply on the basis that the filing party failed to complete the form and insert the magic words regarding settlement attempts. Despite the differences in the screening process that currently exist from office to office (none at all, by clerks, or by judges), we received no indication from practitioners we spoke to that ***unchallenged*** DORs with clearly apparent technical defects were being routinely set for MSC. It is simply not that difficult to fill out a DOR correctly so that it will survive the screening process contemplated by BR §10414.

A far more important goal for the WCAB is to give serious and deliberate consideration to the allegations contained in any Objection filed by a responding party. While the ultimate decision of how the DWC is to perform the initial DOR screen is as much a question of available resources as it is one of procedure, there can be no substitute for a full and deliberate review of any Objections filed in accordance with BR §10416 done as soon as possible after the filing of the DOR.[290] Even under leisurely circumstances and a motivated staff member, DOR screening is at best a cursory review of a single pleading; only an Objection review has the benefit of focusing the judge's attention on the specific issues most likely to require continuing or canceling an MSC. As this review involves considering the facts and allegations made by both sides, a judicial officer should get involved; no clerk, secretary, or I&A Officer should be placed in a position to decide between the competing claims of parties in a workers' compensation dispute.

Ideally, the review of any Objection would happen prior to scheduling the MSC so that a conference slot is not wasted. If done only after the setting but prior to the start of the hearing itself, and if the Objection is sustained and the MSC canceled, there is a reduced chance that another case can be inserted into that day's conference calendar. As we discuss elsewhere though, branch offices are not having

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[290] We are not suggesting that a judge must always issue a formal ruling on the issues raised in the Objection immediately following the review; if needed, the final decision can be deferred to the MSC for oral arguments.

any overwhelming trouble in getting a conference date within a reasonable length of time following the actual entry into the CAOLS scheduling system (the problem in meeting the statutory time mandates seems to be the time needed from the receipt of the DOR to the point at which the calendar clerk completes the setting process). A few wasted MSC slots are not likely to cause any significant extension of the conference calendar.[291]

The most important reason for a branch office to make a concerted effort to review and rule on any Objections to the DOR as soon as possible after filing (and not wait until the MSC itself) is that litigants should be spared the expense of having to appear before the WCAB when—based on a review of the Objection, the DOR, the case file, and any supporting documentation—a judicial officer has decided that an MSC is premature. In those instances where the justification for an MSC setting is clearly lacking, then it does a disservice to all parties to the dispute to have to be dragged down to the office unnecessarily. Even if the case has already been calendared for an MSC prior to a review of the Objection that convinces a judge to cancel the upcoming conference, a notice can still be sent out to the parties in time to avoid the costs of appearance.[292] While the better practice from the standpoint of "customer service" might be to avoid sending out a notice that requires practitioners, applicants, and lien claimant representatives to adjust their schedules for an appearance only to send them another one that tells them they do not need to show up, tight time mandates may prevent that courtesy. Getting the DOR screened and set

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[291] The same cannot be said for cancellations of the few available trial slots.

[292] There should be no need to inform the parties that following review of an Objection, the judge either decided in favor of the party filing the DOR or decided to defer a decision until the MSC. Routine notification of this "nonevent" would require additional data entry duties on the part of the local office staff and would also require the DWC to incur the costs of mailed notice. To avoid this expense, the WCAB should make it clear that regardless of whether an Objection was filed, litigants should always assume that an MSC will take place as scheduled unless they are informed otherwise; furthermore, they should also assume that oral arguments against placing the case on the trial track will be entertained as well any time an Objection is filed.

for an MSC as quickly as resources permit is probably the best way to get a timely conference for the greatest number of cases if the average time from setting to session continues to take three weeks or more. The additional 11-day delay required for waiting for the Objection receipt period to end means that only a few branch offices would be capable of holding off the setting that long and still get an MSC within 30 days of DOR filing. Once an Objection is received, however, a review should be performed as quickly as possible and if the MSC is to be canceled, that information should be transmitted to litigants as quickly as possible as well.

Our expectation is that the frequency of such cancellations will be minimal because in most instances, judges will quite rightly decide to go ahead and calendar the conference in order to give both sides the opportunity for oral arguments on the merits of whether or not the case should be placed on track for a trial. As such, one might wonder why bother doing an Objection review at all prior to the conference itself given that only a few conferences might be canceled and given that there certainly would be an expenditure of DWC judicial (for the review) and clerical (for collecting the Objection, DOR, and case file for the judge's consideration and for the data entry required to send out any notice of cancellation) resources? We believe that to the extent practical, the DWC should make every effort to ensure that when litigants and their attorneys take the time to appear before its judges, it is only for matters that could not have been resolved without their presence. A DOR with ***obvious*** defects or one resulting in an Objection whose arguments against placing the case on the trial track are ***clearly*** meritorious should not trigger a costly court appearance.

A simple notice that the Objection was granted is not enough. If a DOR is indeed rejected prior to the holding of the MSC because of the assertions contained in any Objection, the judge should notify the parties not only of his or her decision but also the reasons why it was so ordered and most importantly of all, what would likely be needed to cure the problem. A special form could be developed to assist the judge in fully explaining to the litigants what the defect was and what the solution might be. A decision made prior to the holding of an MSC that

is in favor of the objections raised by the party responding to a DOR is no different than one made in open court at the MSC itself; in both instances the parties need a “road map” in order to understand how to get the case back on track and moving toward resolution (see ***The Need for Ongoing Case Management of Continued or Off-Calendar Cases***, below).

Mandating pre-MSC Objection review has a number of potential drawbacks. First, it requires the expenditure of judicial time, an already precious commodity at many district offices. In the current environment, a review of every timely filed Objection would not be a painless task for many DWC offices. Because of limited judicial resources, some offices today essentially defer all review until the parties show up for the MSC. The argument for this approach is that given their other considerable demands, judges would not be able to routinely devote an adequate amount of time to the review and thus a pile of unreviewed DORs might stack up for days or weeks; if the review were to be done prior to calendaring the MSC, the end result would be even worse preconference delay than is now the case.

One way to offset this to some extent would be to free the judges from the related chore of DOR screening as we suggest above. Concentrating judicial resources on the more important but far more infrequent task of Objection review might mitigate some of the additional costs of review in all required instances. Still, administrators should be prepared for the eventuality that implementing routine Objection review will impact judicial availability. Though at the present time only about 1% of the average judge’s week is devoted to preconference screening of DORs or reviews of their Objections (see ***Table 8.2***), that percentage would rise markedly once Objection review became a common practice.[293] This would be especially true at those offices that currently dispense with any pre-MSC review at all. We believe that despite the likely additional effort, avoiding obviously inappropriate appearances (and therefore minimizing unnecessary private litigation costs) is still a worthwhile goal.

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[293] It will also rise if judges become more adamant about refusing to entertain arguments against setting the case for a trial date if they were not made in a timely, written Objection.

A second concern is that the judges will become too aggressive in enhanced roles as litigation gatekeepers. We are certainly not suggesting that they go beyond what is already required by BR §10416; it is just a question of when they should do it. It should be kept in mind that we are trying to avoid an unnecessary continuance at that initial MSC in order to minimize the costs of litigation, not prevent someone with a legitimate dispute that is ripe for resolution from getting to the MSC stage in the trial process.

The third problem is that it would require the clerical or secretarial sections to match up the case file with the DOR and any Objections and to make the package of documents available to a judge. We think that this concern is somewhat misplaced. The case file matchup would take place anyway prior to the holding of the MSC, so though the process is accelerated, it does not involve additional work. Once the matter is set for an MSC, a common current practice is to retain the file on a set of shelves more convenient for the assigned judge in anticipation of the conference rather than returning it to the general stacks for conference setting. Thus, retrieving the file from the judge's personal shelves for the addition of the Objection and then placing it in an easily accessible location for review (such as the judge's in-box) should not be difficult. At these "set first, review later" offices, the judge who is supposed to preside over the conference would then be the one who is also tasked with initially reviewing any Objections in that same case, conceivably providing the opportunity for a level of continuity in pretrial rulings.[294] At "review first, then set" offices, of course, the judge assigned to hear the MSC would not be known at the time of review (in most instances).

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[294] We are not concerned here, as we are in ***Trial Calendaring and Judicial Assignment*** in ***CHAPTER 13***, with the possibility that judges would be subject to undesirable incentives to act as strict "gatekeepers" during the Objection review in order to reduce their conference workloads. Unlike the substantial workload triggered by each trial, the average conference only requires about ten minutes of a judge's time. Moreover, calendar clerks have a lot more flexibility in regard to filling up newly empty slots in the MSC schedule. A judge who rules in favor of most Objections will not likely see much impact on his or her conference calendar.

The fourth problem is a concern that the information contained in the DOR and the Objection will be insufficient for a judge to do the sort of complex review envisioned by BR §10416. The party filing the DOR is limited by the form's layout to a superficial ability to argue the need for an MSC and trial while the Objection is unlimited in its length or scope. Moreover, the party filing the DOR will have no opportunity to respond to the Objector's assertions prior to the judge's review. The end result, it could be claimed, will be that the responding party will have the upper hand in blocking legitimate requests for an MSC.

There is no doubt that this is a possibility, but there is a safety net: the continued ability of a party whose DOR was rejected to simply refile immediately upon notice of the rejection. We are not aware of any rule that limits the refiling of a DOR. The second DOR could have an explanatory section attached to fully address the likely objections that would be posed again. If the first review was carried out as promptly as possible as we suggest elsewhere, the additional delay in finally getting to the MSC (assuming the second DOR is more persuasive) should only be a matter of a few weeks (11 days for the Objection filing period following the DOR filing plus whatever time is needed to get the file in front of a judge plus the time needed to send out the notice of DOR rejection). In other situations where the judge is concerned that the right to fully respond to the Objection would be compromised by a decision based only on the pleadings and the case file, they always have the option of deferring their decision on the legitimacy of the Objection (or even the sufficiency of the DOR) until the MSC.

The fifth problem is the flip side of the fourth. There may be an attitude among many judges that the philosophical basis of the California workers' compensation system requires that injured workers (who are far and away the ones most likely to be filing a DOR in the first place; see ***CHAPTER 9***) be given the benefit of the doubt, and so the MSC should always be held absent extraordinary or extremely compelling circumstances. If true, the result will be the rejection of only the most obviously flawed or frivolous DOR while in other cases a responding parties' legitimate, timely, and well-argued and documented

protest that the DOR was premature will typically be ignored. The safety net here is that objectors will continue to be able to reassert their objections at the MSC despite the fact that the DOR survived the preconference review. Nothing in BR §10146 prohibits the reconsideration of timely Objections at the MSC.

In sum, we believe that performing a judicial review of all timely filed Objections as soon as possible after the time for filing has expired (or as far in advance of any already scheduled MSC as possible) is a worthwhile goal for branch offices. This is true despite the potential that any savings in private litigation costs may come at the expense of increased demands on judicial resources. On the other hand, DWC administrators may also reach a conclusion that while pre-MSC Objection review is a good idea in theory, offices cannot afford the additional effort and decide instead to establish a policy of immediate setting upon DOR filing with consideration of the Objection to be performed at the MSC. At any rate, the current variation from office to office regarding whether Objection review takes place prior to the conference is not healthy and adds to the prevailing attitude that officially adopted rules can be unilaterally adjusted or ignored depending on local needs or traditional practices. We believe that whatever policymakers decide about the pre-MSC Objection review, BR §10416 needs to be clarified to express when and under what circumstances it is to occur.

- ***Every timely filed Objection should be reviewed by a judicial officer at a point in time where, if such Objection is justified, it is possible to either refrain from scheduling the MSC or at least provide adequate notice of cancellation.***

- ***Branch offices should be prevented from idiosyncratic interpretations regarding if and when pre-MSC Objection review should take place by an express clarification of the actual meaning of BR §10416.***

Linking Objections with the Mandatory Settlement Conference

In a sense, the recommendations above simply lay out the necessary foundation for one of our most important proposals: A party who feels

that a DOR is premature must in every circumstance initially make those beliefs known to the WCAB through the submission of a timely filed written Objection ***or be barred from raising the issue again at the MSC***. There is nothing novel about this idea; BR §10416 currently suggests the same result:[295]

> ***Any objection to a Declaration of Readiness to Proceed shall be filed and served*** within ten (10) days if the application is filed before January 1, 1991, or six (6) days if filed on or after January 1, 1991, after service of such Declaration. The objection shall set forth, under penalty of perjury, specific reason(s) why the case should not be set for hearing or why the requested proceedings are inappropriate....
> ...***If a party has received a copy of the Declaration of Readiness to proceed and has not filed an objection under this section, that party may be deemed to have waived any and all objections to regular hearing on the issues specified in the declaration***.
> (Emphasis added)

Why should WCAB judges take a much harder line with this aspect of BR §10416 than is currently the case? We were told time and time again by applicants' attorneys, judges, and even defense attorneys that very often a claims adjuster will sometimes hand over their files for the case to a defense attorney no earlier than the very morning of the MSC. Under the current atmosphere prevalent in most hearing rooms we observed, judges appear to be reluctant to cut off a legitimate—though delayed—objection to closing discovery and setting the matter for trial that was presented to the court for the very first time by a defense attorney who, also for the very first time, reviewed the file that same day. In such situations, no timely objection under BR §10416 could have possibly been made by that attorney (the file being in the hands of the adjuster until the last minute). In one sense, the oversight is justifiable; even if an Objection had been filed within the allotted 11 days from DOR service, at many district offices no real judicial review of the Objections would have happened prior to the MSC anyway. As such, refusing to entertain oral arguments for a continuance or an order taking the case off calendar would be unfair to an attorney who, through

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[295] See, e.g., Vasek Polak v. WCAB, 66 Cal. Comp. Cases 450 (2001).

no fault of his or her own, never had the chance to respond to the DOR during that short window weeks ago and even if she or he had, nothing would have been done by the WCAB anyway.

But this perhaps understandable permissiveness can lead to a very serious problem. Without question, some parties routinely arrive at the start of the settlement conference calendar clearly unfamiliar with the facts of the case and so are in no position to knowledgeably discuss settlement value (the stated purpose of the conference in the first place) until they quickly scan the file's contents and then listen to what the other side has to say. Experienced practitioners can then come up with a good ballpark sum for negotiations, but that is not what was intended by the design of the MSC. In theory, the defendant's representative should either have arrived at the MSC with the authority to settle the case, had someone at the court along who has that authority, or be able to call someone who does (BR §10563). But having "adequate" authority ideally means that the value of the case should have been determined at a point early enough to get the necessary permissions lined up prior to arriving at the conference. In actuality, we observed numerous instances of attorneys at the MSC leafing through the case file clearly for the first time. The informal nature of the MSC allows this luxury; a judge might have as many as 30 cases calendared for a single conference setting and as the typical practice is for attorneys to approach the judge at the time of their own choosing, there is ample opportunity to squeeze in a first blush review of the reports and other documents in the file.

We were not able to measure the extent to which parties showed up at the MSC without the settlement authority contemplated by BR §10563 or were only tangentially familiar with the facts of the case, but such problems were some of the first complaints we heard during discussions with applicants' attorneys and judges that touched on MSC-related issues. Defense attorneys as well occasionally bemoaned the fact that they are sometimes handed an unfamiliar case file so close to the start of the conference. Even when an attorney has the necessary latitude to agree to any settlement that he or she thinks is prudent, the formalized nature of the MSC makes a less-than-thorough knowledge of the case file

potentially dangerous: Unless the parties reach settlement, all future discovery is cut off and the matter must be set for trial.

Not wanting to agree to a haphazardly negotiated settlement that on later reflection might appear unfavorable, an attorney might opt for requesting a continuance or an order to take the case off calendar to buy more time. This wastes the court's time as well as that of those litigants who are looking for a prompt resolution of the case. The alternative of an attorney passively allowing the case to be set for trial and then commencing more serious settlement discussions soon after the MSC also is not a good use of judicial resources (as well as using up a valuable trial slot) and increases private litigation costs because the attorneys will likely have to return another day to seek settlement approval. Setting the case for trial is not simply a matter of finding an acceptable date; in an ideal world, the parties meet with the judge during the MSC and together draft a comprehensive Summary of MSC Proceedings that sets forth the issues and stipulations for trial, lists all evidence and witnesses to be presented, and contains proposed disability ratings (see, e.g., LC §5502(d)(3) and BR §10353). Doing a thorough job on this important task is made far more difficult if the case file is a first-time read. At the extreme, the result can be simply checking off all the boxes and claiming everything conceivable is at issue, stipulating to nothing, and describing the evidence that would be presented at trial in unhelpful generalities. If the case does not settle, the burden for narrowing the issues following this pro forma MSC then falls to the trial judge during an already busy calendar.

Another problem arises from allowing the parties to defer communicating any objections to the trial track until the MSC. Some minor deficiencies can be cured with the service of a missing report or some other minor act once the party filing the original DOR learns of the oversight. An Objection filed and served within the ten days following the service of the DOR allows a small amount of time for the requesting party to take care of whatever is needed. Under current practice, an MSC judge will have little choice but to allow additional time for the missing item to be delivered once its absence is claimed

for the first time at the conference. Ideally, this should have been resolved before the parties arrived at the court that day.

Letting the parties slide until the day of the MSC does not promote settlement. If there is no file review prior to the conference itself, there can be no serious discussions aimed at reaching an agreement beforehand. Ideally, cases should be settled days before the MSC with the appearance at the conference (if it hasn't been "walked-through" already) being solely for the purpose of jointly seeking the approval of the judge.

The way the sometimes serious problem of a lack of preparation and communication was addressed in prior years was to require the parties to file statements ten days prior to the MSC that list the issues in dispute, proposed exhibits, and witnesses. This well-intentioned rule (former LC §5502) was "mercifully"[296] dropped in 1993, presumably because of concerns that parties were being prohibited from presenting relevant evidence at trial simply because they failed to get this preconference statement in on time.[297] Nevertheless, requiring parties to review their own files in advance and prepare a preconference statement or summary (and even require them to meet and confer with opposing parties as well), is a common and effective technique in other forums for moving cases along prior to initial judicial involvement.[298]

We do not propose a return to the former version of LC §5502. While we believe that a comprehensive preconference statement requirement might be a valuable tool to discourage showing up at the MSC unprepared, it would add a brand-new burden to litigants already handling a difficult caseload. Nor do we think that a watered down version of the preconference statement is a good idea. Eliminating the

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[296] St. Clair (1996), p. 1383.

[297] See, e.g., Zenith Ins. v. Ramirez, 57 Cal. Comp. Cases 719 (1992).

[298] See, e.g., Federal Rules of Civil Procedure Rule 26(f): "... the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan ...."

requirement to list exhibits in the former preconference statement (a requirement that sometimes precluded tardy litigants from offering them at trial) would remove the most persuasive inducement to a realistic file review. What would be left would be simply a requirement that the parties list issues in dispute, a task easily performed without ever opening the file by creating a prewritten form and checking off every conceivable issue.

Our suggestion is simple: Require parties to operate under ***current*** rules and regulations. BR §10416 already deems parties "to have waived any and all objections to regular hearing on the issues specified in the declaration" if they don't respond to the DOR within 11 days after service. By enforcing this rule strictly, parties who walk into an MSC without having done an in-depth review of the file previously will be at significant risk of having all future discovery cut off and the matter set for trial.

Is it too much to ask litigants to respond to a DOR, draft an Objection, and complete mail service upon the court and other parties within ten or so days? We do not believe so. The Labor Code contains multiple provisions requiring the WCAB itself to rapidly respond to the actions of litigants within a very tight time frame. If the court must process a considerable amount of paperwork and rearrange its own schedule in order to hold an MSC within 30 days, it is not unreasonable to require consumers of WCAB services to also act with dispatch to help get that job done. Getting cases resolved promptly is a joint responsibility of both the bench and the bar. Parties should not assume that they can ignore the time limits of BR §10416 when it would be more convenient to do so, show up at the MSC and argue that the DOR is premature, and then consistently complain that the WCAB is a source of unnecessary delay.

Unexpected situations can certainly arise between the end of the Objection filing period and the MSC itself. Preventing a party from arguing against a trial setting at the MSC based on circumstances that could not have been known in time to include in a formal Objection would be unfair. While we think that the incidence of something coming up (such as a new injury) within the three- or four-week window before the

MSC would be small, it would be better to amend BR §10416 to make an express exception for situations that make themselves known for the first time after the end of the Objection filing and service period. Lack of knowledge on the part of the attorney due to not having received the case file until the day of the MSC should not, of course, count toward this exception.

We want to make it clear, however, that a renewed emphasis on the "waiver of objection at MSC if no Objection filed previously" rule should be enforced only when the workers' compensation community is adequately informed that judges will be implementing all of the provisions of BR §10416. We suggest that Appeals Board and DWC administrators meet with representatives of key workers' compensation attorney organizations to discuss the new guidelines.

We would also like to allay concerns that this is a measure directed solely toward defendants. Over 30% of all DORs are filed by a party ***other*** than applicants (see ***Table 9.11***), so injured workers would also be under the same pressure to make timely and specific objections to placing the case on the trial calendar in such situations or else suffer the consequences.

Requiring written Objections does not mean that the question of whether a case should be set for trial will be decided solely on an exchange of pleadings. We suspect that the additional number of DORs dismissed as a result of more frequent or more detailed Objections will be small. Most judges are likely to want to have the parties argue in person over such an important issue and if given a choice, would prefer to have the MSC scheduled than decide the issue primarily on what the defendant is claiming in the written response to the DOR. The primary purposes of our recommendation would still be served even if every single DOR filed resulted in a scheduled MSC: Parties would still be required to review the case file weeks before the conference or run the risk of an undesirable trial setting. In terms of setting priorities for new policies, we believe that limiting requests for continuances and OTOCs to those arguments raised in a timely filed Objection is a more important goal for the DWC than reforming the way the DORs are initially screened or whether the Objection is reviewed before the MSC. Thus, our

recommendations contained in ***Streamlining the DOR Screen*** and ***Formalizing the Pre-MSC Objection Review*** above should take a back seat to focusing the attention of a judge deciding continuance or OTOC requests solely upon the specific issues contained in the Objection. If this policy were adopted, then procedures for setting all DORs for an MSC immediately upon filing and without any screening or any pre-MSC Objection would be acceptable.

If BR §10416 is to be an effective way to discourage last-minute file review, there must be a requirement that the Objection *specifically* detail the reasons why the matter should not be set for trial following the conference. Generic or unresponsive protests (e.g., "More discovery is needed," "The case is not ready for trial," "The applicant is not permanent and stationary," or "The defendant objects to each and every assertion made in the DOR") automatically filed for every DOR should be given little or no weight. There needs to be some detailed documentation of the specific reasons for the objection such as references to actual statements in medical reports or a listing of unreturned telephone calls. Unless a requirement of specificity is clearly announced in controlling regulations and strictly enforced by judges at the MSC, then there is little reason to change from current practices and the problem of continuances and OTOCs at the MSC will continue unabated.

Elevating the Objection from an informal afterthought to a truly responsive pleading also requires that the "form" itself be improved. Currently, DOR filers are explicitly asked on *Form WCAB 9* to state under penalty of perjury that they are ready to proceed to hearing, that particular efforts have been made to resolve the issues noted, and attest to other important facts. But there is currently no official form for an Objection and as such, we saw numerous instances where the document was no more than a simple letter addressed to the judge in the case arguing against having the matter set for trial. While there is an implicit threat of a perjury charge or contempt citation under LC §134 for false declarations, in reality there is nothing that might give a potential objector pause to consider the veracity and appropriateness of his or her claims. Creating an official form for Objections, especially

one designed to encourage specific allegations of why the matter should not be set for trial is an important first step in addressing the original intent of BR §10416. That being said, the WCAB and DWC should not adopt a form for this purpose that is full of check boxes, making the Objection no more informative than a DOR. The arguments in an Objection need to be fleshed out and supporting documentation attached just as if the filer instead chose to make his or her opposition to the DOR first known at the MSC through oral arguments. If the choice is between continuing with the current free form approach or creating a highly structured pleading that is simply a notice of intent to object, then the former is far more preferable than the latter.

- ***Only formal, written Objections made with adequate specificity and filed within the time limits of BR §10416 should be considered. Judges should refuse to entertain requests for continuances or OTOCs that were not previously made as an Objection unless the circumstances of the case changed after the end of the Objection filing and service period.***

- ***An official form for filing Objections under BR §10416 should be developed. The form should emphasize that any declarations made therein are under penalty of perjury and that the reasons against having the case set for trial must be detailed with adequate specificity or else they will be overruled.***

The Need for Continued Discretion

No matter how high the level of scrutiny given to DORs and any Objections, there will still be many instances when the only way to fairly determine whether the case is indeed ready for trial is to have the parties appear before the judge and argue their respective positions. In the interests of justice and in accordance with workers' compensation laws and statutes, judges should always have occasion to rule that trial is premature, despite policy guidelines that say otherwise.

We believe that there should not be any *complete* restrictions placed upon a judge's ability to decide when the MSC should be disposed

of by other than a settlement or a trial setting. The reality of workers' compensation practice is that other outcomes are both possible and desirable.

- ***Even with adequate DOR screening, early Objection review, and requirements that opposition to a trial setting be first made with specificity in a timely filed Objection, legitimate continuances and OTOCs will still be a part of many MSCs; mindful of the policy against unjustified delay, judges need the discretion to make such rulings when circumstances require.***

The Need for Ongoing Case Management of Continued or Off-Calendar Cases

Once a judge has found that continuation or removal from the trial calendar is appropriate, what happens next? We believe that present practices at branch offices seem to be to give the parties considerable freedom and discretion to fix whatever defects prevented the court from completing the conference or setting the case for trial. This can lead to an endless merry-go-round of delay and increased private and public costs of litigation. Granting a continuance without associating it with precise orders, with a time table for completing critical tasks, and a date certain for returning to the court to move on to the next phase of litigation is the root of much dissatisfaction with current branch office continuance practices.

It should be kept in mind that a case that reaches the MSC only to result in a continuance or OTOC not associated with a settlement is already suspect. This case has already proven it will not fit into the one conference-one trial paradigm and must be the subject of a higher level of judicial oversight than is needed in more ordinary litigation. Regardless of cause (e.g., the parties are not communicating with each other, are not negotiating in good faith, have not given the case the attention it deserves, have not obtained the needed medical evaluations, have not served reports and other discovery on the other side, or whatever), the court must look at this as an opportunity to focus its own attention on the dispute in order to give it the extra degree of judicial management it needs. The best way to accomplish this is to not

simply let the parties continue to flounder by themselves but to document the exact reasons for the order in the case file (so that no matter which judge receives the file in the future, he or she will be intimately familiar with the circumstances that caused this false start and will not be swayed if the same excuse is given again) and to require the parties to return in a reasonable amount of time to give the court an update.

It is the judge's responsibility to make sure the matter does not dissolve into an endless (and expensive) cycle of DOR filings and uncompleted conferences. When a continuation or OTOC is reasonable, an unequivocal order and the immediate scheduling of the next event are needed to prevent the case from going into "...judicial limbo. Cases which cannot proceed for good reasons are given a future review data to make sure the conditions haven't changed.... If parties and witness attend the hearing, they are given official written notice of the next hearing before the hearing is adjourned."[299]

One benefit from this approach would be in the area of enforcing discipline among the bar and in encouraging compliance with procedural requirements. An example of this might be instances when the defendant appears without adequate settlement authority at the MSC. If a continuance is granted on that basis, a date certain for the next appearance should set immediately and an order, adequately detailed in the minutes, issued to return only with someone who can realistically discuss settlement. Failure to have such authority on the second appearance would be highlighted by clear evidence that the lapse was already excused once and so can be addressed severely without reservation. Absent such documentation, it is possible that a judge would be inclined to merely admonish counsel for what was described to us as a routinely ignored violation of the rules.

Another example of the need to set forth a road map for the case when a continuance or OTOC is warranted is where the parties have decided to seek the evaluation of an Agreed Medical Examiner. Ideally, this decision should have come about prior to the filing of a DOR and

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[299] Friesen (1984), p. 7.

not have waited for an MSC to be scheduled, the court's time taken up unnecessarily, and an applicant required to attend a session that could have been avoided by a short telephone call between counsel. Nevertheless, when the decision to seek out an AME is reached at an MSC, it is up to the judge to make sure that a reasonable and specific time frame is allowed for scheduling and completing the evaluation before granting the request. AME appointments for popular doctors are scarce commodities and waits of six months to a year are certainly possible. As such, it is not unknown for the parties to jointly request the continuance, have it granted, and then only later find out (without the court's knowledge or approval) that the case will lie dormant for the foreseeable future. A better practice would be to require the requesting parties to obtain an examination date ***first*** and ***then*** discuss the continuance or OTOC with the judge. Given the equally important roles of judicial officers as case managers and as case adjudicators, a decision could then be made as to whether the rights of the applicant to a speedy resolution of the case are being displaced by the hope of a marginally better evaluation of the injury in the far distant future. If the request is granted, then the parties should be required to return to the court on a date certain following the appointment (with adequate time for generating the report and serving it on all parties) and complete the MSC. A judge might also reasonably refuse to allow the extensive delay due to the adverse impact on the injured worker and instead set forth a far shorter time for obtaining an AME. Requiring adequate documentation in the case file and requiring a concrete plan for completing the remaining tasks in the case is the best way to ensure that judges take the time and give the question of delay the careful consideration it deserves.

The example above shows why ongoing case management is not simply a punitive tool for keeping a vexatious or procrastinating attorney in check. As suggested in ***CHAPTER 9***, perhaps half of all requests for continuances are joint ones, not just the result of one side cleverly trying to avoid prompt resolution of the case. A judge needs to look beyond the arguments of the attorneys before him or her and decide whether the interests of nonpresent individuals and entities

(applicants, lien claimants, and defendants) are also being served by a continuance or OTOC.

One question that arises is whether a judge should even consider requiring the parties to reappear at some future date if the order was to take the case off the trial calendar (as opposed to a continuance). The argument is that if the case is not ready for trial, then there is no reason or justification for hauling the litigants back to the hearing room for a case that is still being developed. That might be true if no DOR had ever been filed, but by definition, one party swore under penalty of perjury that the matter was indeed ready for final disposition. Even if an OTOC is granted, it is not unreasonable for a judge to oversee some aspects of a case that has already run into roadblocks. The next session need not be an MSC and it need not be scheduled to be held anytime soon. A generic “pretrial conference” could be set before the parties walk out the door with the OTOC order in hand and the date for such a conference might be, under appropriate circumstances, three months down the line. Hopefully the case will have been resolved by that time, but if not, then it surely is in the interests of meeting the Constitutional mandate for expeditious handling to have the parties back in to see what is taking so long. The applicant’s needs in such drawn out cases deserve heavier than normal oversight on the part of the judge; even if the parties show up for this subsequent appearance merely to inform the judge that the condition requiring the first postponement continues, then at least the attention of these attorneys would have been refocused on a problem case even if just for a brief moment. Ideally, the opportunity to meet and confer at this session would also provide the opportunity for settlement.

As mentioned at the outset of this section, the discussion applies primarily to continuance and OTOC requests in a conference setting that are not related to a pending settlement. However, the same tools we suggest here would be of great utility when applied to settlement-related requests. When granted, the judge should detail the assertions of the moving party that a settlement is imminent into the case file and set the matter for a follow-up conference date 30 days or more in the future (notice should be waived in order to minimize DWC expenses). If

the case indeed settles as predicted, the conference date can be canceled and the empty slot filled with a replacement with little trouble. If the promised agreement never takes place, the parties will have to come back and explain to the judge exactly why their assertions made in support of the initial request for time were incorrect. Avoiding "judicial limbo" should be a high priority for all continuances and OTOCs, including settlement-related ones.[300]

Notwithstanding the above, there may be a few instances where a return date is not possible, especially in regard to orders taking the case off the trial calendar. An example might be when the worker's health has worsened to the point where all parties agree that trial would now be premature and that a course of treatment is required before the applicant will again reach a permanent and stationary condition. Ordering the parties to return in such a case might not be warranted; nevertheless, the responsibilities of the judge to document the situation in the file would be no less important. Less clear would be a similar request for an OTOC where the actual degree of degradation of the worker's condition is hotly disputed. Scheduling the parties to return after some reasonable length of time has passed for what might be considered a "status conference" is not unreasonable given that the WCAB has a duty to ensure that the case remains on both counsels' radar screen when the worker's condition is a point of contention. If a DOR is refiled prior to that date, then the future status conference can, of course, be canceled in favor of a regular MSC. If a new P&S report has been generated in the interim but no negotiations or DOR filings have been initiated, then getting the parties to appear before the judge and explain why is clearly in the best interest of the applicant.

As indicated in the previous paragraph, we do not believe that the granting of an OTOC always suggests that a reasonable return date is not possible to determine. Even though the DWC is not always able to provide litigants with an MSC within 30 days of DOR filing, the

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[300] In a sense, judges do this already. The common notation of "30 days for OTOC" is supposed to give the parties an additional month to complete an in-progress settlement process. In reality, a number of judges have no real intention of following up with the parties if the settlement does not take place within that time frame.

situation is far better than that experienced a few years ago. As such, judges in recent times will issue an OTOC in instances where they might have once continued the conference because a party need only refile a DOR to get back to the MSC in a very short span of time. It was also suggested to us during the course of this research that judges might be issuing OTOCs more freely because the rules discouraging postponements without good cause contained in LC §5502.5 and BR §10548 speak primarily about *continuances*, not orders taking the case off the trial calendar. Instituting a blanket exception to our continuing case management policy for OTOCs is dangerous because of this tendency to prefer OTOCs to continuances in order to simplify the scheduling work of judges and secretaries. Unless circumstances are such that giving the parties a return date makes absolutely no sense at all, an OTOC should only mean that the matter is off the immediate trial track but not that the WCAB has washed its hands of a case that does not seem to fit the one conference-one trial paradigm.

One question that might arise is how this policy of aggressive case management can be enforced. We believe that regular audits of sampled case files by the Presiding Judge should give an early indication of whether a judge is conducting business as usual with undocumented reasons for continuances and OTOCs and routinely allowing the case to drift into judicial limbo. A pattern and practice of such a laissez faire attitude would be quickly apparent because so many cases involve postponements. Also, we would hope that judges who wind up getting files previously worked on by others would identify those instances where an earlier order seems to have been issued without a judge's full and ongoing attention. Once most judges begin to view case management as a routine and shared responsibility, those who continue with inefficient habits will be easier to identify.

- ***Every legitimate continuance or OTOC should be seen as an opportunity for continuing case management by the judge; whenever practical, no continuance or OTOC should be granted without setting a new date for the next conference and without clearly indicating what tasks are to be performed, who are to perform them, and when they should be accomplished.***

Settlement Authority at the MSC

Board Rule §10563 is clear that attendance at the MSC is mandatory not only for the applicant personally but also for the defendant to have some representative "available" with "settlement authority":

> Unless the notice otherwise provides, the applicant shall be present at a conference hearing including a mandatory settlement conference as provided in Labor Code section 5502, subdivision (d) and the defendant shall have a person available with settlement authority. The person designated by the defendant to be available with settlement authority need not be present if the attorney or representative who is present can obtain immediate authority by telephone. Government entities shall have a person available with settlement authority to the fullest extent allowed by law. At the time of Regular Hearing, all parties shall be present and the defendant shall have a person available with settlement authority in the same manner as set forth above.

The rule is flexible in that the person representing the defendant need only have the ability to contact someone with settlement authority by telephone if needed, thus saving the defense from the expense of an actual appearance. But we heard repeatedly of war stories where a defense counsel showed up at the MSC without adequate personal authority to independently settle a case and further had no realistic way to contact anyone in actual charge of the file that day.

This reported state of affairs would on the surface seem unlikely given the tools available to judges to address noncompliance with BR §10563. Board Rule §10561 clearly allows sanctions for failing to comply with the WCAB's Rules of Practice and Procedure when the action (or inaction) constitutes "a bad faith action or tactic which is frivolous or solely intended to cause unnecessary delay unless such failure results from mistake, inadvertence, surprise, or excusable neglect." Sanctions are also available for the "[f]ailure to appear or appearing late at a conference or hearing" when characterized as "a bad faith action or tactic solely intended to cause unnecessary delay where a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct." LC §5813(a) also allows a judge to order parties "to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-

faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Conceivably these rules would cover an instance (or more likely, a routine pattern and practice) where a party violates the clear requirement that they shall have a person available with settlement authority.

As mentioned elsewhere, we were not able to measure the extent to which parties showed up at the MSC without the settlement authority contemplated by BR §10563. To do so would have required a far more intrusive presence at the MSC through the use of "exit interviews" or some other survey techniques that would have run the risk of alerting the local community that RAND researchers were running spot checks on compliance with applicable rules and regulations. Nevertheless, we heard similar complaints voiced by both applicants' attorneys and some judges at all six site visit courts. Additionally, a lack of adequate settlement authority in any instance, no matter how common or rare, runs counter to the idea that the MSC is the WCAB's last, best hope for encouraging settlement before a costly trial setting is required. It is difficult to see how a case can settle completely at that conference without the defendant's representative having either the direct or indirect ability to agree to a proposed resolution to the case.[301] In the interests of an evenhanded application of the rules, moreover, it does not seem fair to require an applicant to be physically present at the MSC while applying (or ignoring) a much more liberal standard for the defense. While we do not have hard evidence of the percentage of MSCs where settlement authority is not available, we believe that if it happens in even a tiny number of cases the best interests of the WCAB and DWC have not been served. Making sure that litigants are present or at least available by telephone has been empirically shown as a

[301] Conceivably, the defense attorney can reach tentative agreement with the applicant and then contact a claims adjuster or case manager on a subsequent day for final approval. It does seem though that the process is better served by concluding the settlement at the MSC where all parties are physically present, a judge is available whose time has already been allocated for the case, and the opportunity exists to quickly answer and address any questions or problems.

significant predictor of reduced time to disposition in a civil court setting.[302]

But if the frequency of settlement authority problems at the MSC occurs anywhere near as often as claimed, judges are either not seeing fit to issue sanctions for these violations or they are unaware of the problem in individual cases.[303] While there are no doubt countless instances where the parties show up for an MSC lacking proper authority but the session is completed to everyone's satisfaction (and the subject of settlement authority never comes up), it may well be that judges are reluctant to punish a defense attorney in light of the vague generalities used in the rule. What constitutes having settlement authority is not defined by BR §10563: Should the defendant's representative be able to settle for an amount up to the price of the applicant's last demand? Can it be based solely on the defendant's own evaluation of the claim's worth (an evaluation that is likely to be far more conservative than the applicant's)? Does some fixed amount of authority no matter how small satisfy this requirement? What constitutes "immediate authority by telephone" is not defined either: Does having the main phone number for the insurer in the pocket of the defense attorney count? Must there be a specific person sitting by the phone and waiting for a call? What happens when the insurer or claims adjuster is in a different time zone and their offices are closed? Does an attorney's claim that he or she spoke to someone with full authority at the start of the conference calendar constitute compliance even though follow-up contact is not possible at the time the judge is actually meeting with the parties? Issues related to due process and equity also loom large: What are the limits to a judge's inquiry when

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[302] Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and Vaiana, *An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (1996), p. 78.

[303] Our CAOLS data reflected only 54 contempt orders in all of calendar year 2000. "Sanctions" are not the same thing as "Contempt" and so there may well be any number of instances where a dismissal or some other penalty is exacted without actually issuing a contempt order. But based on our conversations with those who were most adamant about the need for heightened enforcement of BR §10563, sanctions are not the case in all but the most flagrant violations.

the defense attorney matter of factly asserts that he or she already has adequate authority but does not indicate how much? Are sanctions appropriate if the defense attorney just received the file from the adjuster a few minutes before the MSC and through no fault of his or her own, settlement authority was not given? None of these situations are specifically addressed by the regulations.

This makes sanctioning for noncompliance difficult, if not impossible, in all but the most notorious situations. It is our hope that our recommendations intended to put the case file into the hands of defense counsel at the earliest opportunity prior to the MSC will serve to address this problem.[304] Having had sufficient time to review the medical reports and ratings, an experienced workers' compensation attorney should be able to make a ballpark estimate of the case's value from both the optimistic perspective of the applicant and a conservative defense appraisal. That same extra cushion of time would also provide ample opportunity for contacting claims adjusters or case managers for independent authority to negotiate and approve a settlement at the MSC (or at least getting good contact information and comparing schedules).[305] There would then be no understandable excuse for showing up at an MSC and "discovering" that the likely case value is far in excess of any nominal authority the attorney might ordinarily have to settle nuisance cases. That takes care of some aspects of the problem but not all. Getting judges to give the regulation the sort of attention the drafters no doubt intended will not be possible until the applicable Board Rule is reviewed and made more explicit about what is

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[304] See ***Addressing the Problem of Conference Continuances and OTOCs*** in this chapter.

[305] One added incentive for claims adjusters and case managers to get intimately involved with the MSC process may be realized if proposed BR §10607 is adopted. That rule would require defendants to have a "current computer printout of benefits paid available for inspection at every mandatory settlement conference." Not only would the defendant have to include this printout in the file being handed off to their counsel prior to the start of the hearing, it would clearly be in their best interest to discuss at the earliest opportunity any and all gaps or delays in payments the document might reflect. One commentator believes that the rule will go far in ensuring that meaningful settlement negotiations will take place at the MSC as a result and that required authority will likely be available.

allowed, what is not, what is excusable, and what deserves serious sanctions.[306]

We also believe that this is an area that deserves special attention to determine the extent to which noncompliance is an issue impeding the prompt settlement of routine disputes. Some applicants' attorneys have told us that like the issue of penalties, technical authority violations are often ignored in the spirit of cooperation and in moving the case to settlement. It makes little difference, we were told, whether certain defense attorneys required a few additional days to get hold of an adjuster because invariably the adjuster went along with defense counsel's recommendations. The sting of insufficient authority might also be blunted by the willingness of judges to freely grant continuances when a settlement is in the air and all that was blocking a submission of the documents for approval was the go-ahead from someone who was temporarily winning a game of phone tag with defense counsel. In order to gauge whether conditions are ripe for a more aggressive enforcement of BR §10563, we suggest that the DWC perform some limited data collection to see how often and why the regulation is being ignored and what the effect was on in-court settlement negotiations. If, as has been suggested, that the worst repeat offenders turn out to be governmental entities such as school districts and municipalities where a formal vote of board or council members are required before settlement can be reached, then the rules should be adjusted accordingly in order to target the root of the problem. The same would be true if the problem was primarily the result of perennially "empty desks" at particular insurers and TPAs where phone calls to obtain approval inevitably go unanswered; enforcement efforts could conceivably be focused on repeat offenders. However, refinement of the current rules for settlement authority should not be deferred

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[306] The discussion in this section for clarifying the rules is equally applicable to trials as BR §10563 makes no distinction between conferences and regular hearings. The exception, of course, is that getting the file into the hands of counsel in advance of the MSC will not change the likelihood that someone with authority to settle will or will not be present at trial. We believe that lack of authority to settle is primarily a problem at MSCs because no contributor indicated their concerns over inadequate authority at trial.

until the data collection is complete; with the current budget woes affecting the DWC, it may well be that such a study is not possible until a more favorable fiscal climate has arrived.

Having someone available with settlement authority at the MSC is a condition precedent to realistic negotiations if the desire of policymakers is to provide a one-stop experience for litigants to appear, settle, and receive judicial scrutiny all on the same day. While delays from having to contact a temporarily elusive claims adjuster for authority probably only add a few days or weeks to final resolution when the attorneys have otherwise reached agreement during the MSC, the additional steps required can impact public and private litigation costs. A settlement reached and concluded at the MSC avoids unnecessary paper shuffling on the part of DWC staff, the judge already has time made available for review during that conference calendar, the parties are present and available if the judge wishes to ask questions, and there is no need for one of the attorneys to return to the office on a subsequent day for a walk-through review. Perhaps most importantly, the additional time required to achieve final closure means that the applicant must wait even longer to get on with his or her life.

Requiring parties to have someone present at pretrial conferences who can settle the case is a core component of effective case management in other court systems.[307] Having such a person at or able to be contacted during a conference whose primary stated purpose is settlement makes even more sense. Nevertheless, we do not believe that there needs to be <u>additional</u> sanctions available to the judge for enforcement. BR §10561 and LC §5813(a) already provide serious tools for a judge to punish those who show up without having obtained the required authority or contact information. Until judges are comfortable knowing what exactly constitutes a violation of §10563, however, more effective use of sanctions is not realistic.

➢ ***<u>The criteria for what constitutes availability of a representative with settlement authority at conferences and hearings should be more</u>***

[307] See, e.g., Federal Rules of Civil Procedure 16(c).

precisely defined. Judges should be given better guidance as to when to aggressively enforce BR §10563.

The Use of Specially Designated Status Conferences

The conflict between explicit branch office policy disfavoring continuances (including OTOCs) and the actual practice of granting them when it would be inequitable to close off discovery and force a party to proceed to trial has led some to suggest that an initial conference (triggered by the DOR) should be held prior to the MSC in order to ascertain whether in fact the case is ready to move toward trial. This "status conference" would not have to have the limiting defect of having to be terminated if one of two precise outcomes (settlement or set for trial) cannot be realized. It would also allow a judge to issue clear and precise orders about what is required and more importantly, when it is required so that the parties would be tasked with actually moving the case along rather than simply hoping a settlement will save the day. At that very same conference, the judge would set a firm date for the MSC to be held and perhaps one for a trial as well.

The problem is that most cases do not need a status conference per se. Parties on both sides can and do come to the MSC with the expectation of either settling or preparing for trial; no matter how much of a problem continuances and OTOCs have become, about half of all MSCs still result in desirable outcomes.[308] Mandating the use of a status conference in every case seems to be guaranteeing that the cases that now fit the paradigm of "one conference, one trial" will evolve unnecessarily into "two conferences, one trial." Even if the MSC were then set for the next available date, current calendars would require at least another 30 days to add to the length of the average time to disposition.[309] With a median time from action request to final disposition in this system of only about five months for trial track

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[308] "Desirable outcomes" would include a trial setting, an immediate settlement, or a continuance or OTOC for the purpose of completing an impending settlement. See ***Continuances and OTOCs*** in ***CHAPTER 8***.

[309] This, of course, assumes that an adequate number of new judges are added in order to handle the extra number of conferences.

cases (see ***Table 5.7***), routine setting of a status conference would be a serious cause of overall delay.

In effect, a status conference within the workers' compensation system would really act in the role of a "discovery conference" used by other court systems to manage the timing and extent to which additional evidence can be obtained from the other side. In this system, however, the idea that discovery in the traditional sense is ever required is quite abhorrent to some. The 1965 Workmen's Compensation Study Commission cautioned that "discovery procedures should be discouraged in proceedings before the (WCAB) and that, therefore, the need to conduct such discovery should, only in exceptional cases, be regarded as cause for removal of a case from the active calendar."[310] Here, discovery is supposed to be completed before the parties even request to put the case on the trial track, not afterward.

If the time from the DOR to the MSC, essentially the "last pretrial conference" to use the analogy from the traditional civil courts, were much longer on the average, then designing an initial event that focuses the attention of the parties at the earliest stage in a case's life makes much sense. But in this system, the MSC already performs this role. We believe that the current approach of moving toward trial in the most expeditious manner possible through the "one conference, one trial" ideal can work if (1) the frequencies of requests for continuances and OTOCs at the MSC are reduced by getting the parties to review the case file prior to showing up at the MSC (via a more rigorous Objection review and refusing to entertain oral arguments that have not first been made in a timely Objection filing), and (2) judges do not adjourn a continued or canceled MSC without setting a firm date in the future to review the case status and documenting the reason for the order. If these steps are taken, any need to establish a routine status conference procedure should be reduced.

We also considered the use of status conferences in a limited number of matters that, based upon information contained in the DOR or Application, are more likely to need an extra level of judicial

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[310] California Workmen's Compensation Study Commission (1965), p. 88.

management. As seen in ***CHAPTER 6***, however, we were unable to find case characteristics that were more strongly associated with time to resolution than the office in which the case was being handled. Some of the nonoffice factors that did seem to be related to some degree are already addressed by some courts; as indicated elsewhere it is common practice to initially schedule a pro per applicant for a Conference Pre-Trial instead of an MSC no matter what the DOR requested. In many respects, this acts as a status conference for pro per cases as judges use the opportunity to "fix whatever is wrong" with the case prior to an MSC and its sometimes harsh close of discovery. Use of this special sort of initial conference seems justified, but the routine requirement of a status conference in every case would not be.

It should be noted that we are not arguing against the use of a "status conference" in cases that clearly warrant additional judicial oversight. Our concern lies primarily in attempting to create procedures where a status conference would be used prior to the MSC either in every case or when the party responding to the DOR so demands. In contrast, litigants should always be free to ask a judge to review the case when matters are bogged down or to decide various procedural questions if needed. One could envision a special status conference request form (separate and distinct from a Declaration of Readiness) in which a party would not have to claim that the case is ready for trial, that all reports have been served, that settlement efforts have been made, and all the other trappings of a DOR. Instead, it can be a simple request that would state that the case is in need of some sort of nondispositive question to be resolved or even general guidance by a judge. Such a conference should not have settlement or trial setting as the only possible goals (though potentially a status conference request could be made for the purpose of having a judge help guide the parties to settlement) as is currently the case with the MSC. We do caution that unless some sort of controls are implemented over the status conference request, a party either unfamiliar with its proper use or who intends to be vexatious might file an endless stream of demands for the conference. One approach would be to subject the request to a detailed screening before conference setting or to only allow them under very

specific circumstances (such as more than 90 days from the last conference or trial, only after an MSC has been held, or when a specific motion is to be made). Special status conferences should be used only in cases where an extra appearance is truly warranted; despite its flaws, the one conference-one trial paradigm does help to keep private and public costs of litigation down.

➢ ***Though initial status conferences might seem an attractive alternative to avoid some MSC continuances and OTOCs, their general use in all cases is unnecessary and would be a cause for additional system delay and costs. As such, general status conferences prior to the MSC are not warranted.***

TRIAL-RELATED CONTINUANCES AND OTOCS NOT RELATED TO SETTLEMENT

Settlement-Related Continuances and Cancellations at Trials

As with conferences, a case scheduled for trial that is on the threshold of a pending settlement should have any legitimate requests for a continuance or OTOC freely granted. Obviously, judges should be careful not to confuse the unfounded hopes of the parties to work something out in order to avoid the demands of trial with the more realistic expectation that a settlement will be concluded in a day or two with a simple telephone call. Again, we simply wish to be clear that the discussion below applies to non-settlement-related continuance and OTOC requests at the trial.

➢ ***Continuances and OTOCs requested in regard to a trial setting that are clearly related to allowing a settlement to be finalized should be freely granted.***

The Distinction Between Conferences and Trials

The language in LC §5502.5, BR §10548, and P&P Index 6.7.4 is equally applicable to both conferences and trials: calendar changes are to be discouraged, they are not in the best interests of the workers' compensation community, they are not favored, should only be granted on a clear showing of good cause, etc. But the impact on the WCAB from

continuances and OTOCs at the time of a previously scheduled trial is very different from that experienced if the request is made at an MSC. Each continuance or OTOC at trial means that one of perhaps just 15 trial slots available to a judge each week is wasted. There is no way to schedule a different case into the now-vacant slot because of understandable problems related to the proper service of notice. For each continuance or OTOC at a conference, the session affected is only one of perhaps 50 conferences scheduled for a single judge that week. Moreover, the time wasted is small; judges spend a mean average of 11 minutes for each MSC event if the matter is concluded, ten minutes if it is continued, and eight minutes if an OTOC is issued and a settlement is not involved. An appearance at the MSC solely for the purpose of asking for a postponement means little in terms of the work to be performed by a judge that day; a cancellation at trial means that a hearing room will go empty, a reporter wasted, and a judge has to turn his or her attention to other and sometimes less important matters.

The impact on the parties of such last-minute schedule changes is also greater for trials than for conferences. The applicant will usually attend both sessions as will the attorneys, but under the rules of many branch offices, all plus any witnesses are expected to remain on site through the entire day in order to get their trial in. Hopefully, no one comes to a branch office with the expectation that their request for a trial-related continuance or OTOC will undoubtedly be granted so all affected should have little else on their schedules that day. If the trial does not take place, their valuable time has been wasted as well. The same is not as true for conferences. At worst, only a half-day is wasted because conference calendars either only take place during the morning hours or in the afternoon.

As we discussed previously, many of the postponements granted at an MSC are the result of the fact that the conference is the first time the parties have appeared and are able to discuss the merits of proceeding to trial. That is not true of trial delays. It should be kept in mind that trials only take place after an opportunity to argue against setting the matter for a hearing was provided during a recent MSC where a ruling on any Objections was made one way or another. A non-

settlement-related request for a continuance or OTOC made at trial so soon after the MSC should then be due only to circumstances that have changed radically since the conference or some sort of unavoidable scheduling problem (such as the nonappearance of a witness). As the short length of time between conference and trial is unlikely to provide much in the way of opportunity for new injuries and the like, then the high frequency of trial postponements suggests that parties are being given the opportunity for a "second bite at the apple" by revisiting issues already decided at an MSC. That should never be allowed to happen. Short of some sort of recent upheaval in the circumstances of the litigants, judges should refuse to even entertain a request for trial postponement if it includes arguments already dismissed at the MSC. Proper documentation of the MSC judge's decision to overrule the Objection at the initial conference will help trial judges avoid giving parties an unfair second chance. If this is followed closely, then judges should be more comfortable in restricting trial postponements to a much smaller number of cases.

Despite their generic classification in the WCAB as "hearings," trials and conferences are clearly different creatures. An adequate reason for postponement at a conference may be insufficient at a trial, especially when the overall interests of other litigants to get an expeditious adjudication are factored in. Having a single set of statutory and regulatory rules regarding continuances and OTOCs that apply equally to both conferences and trials fails to allow judges and court administrators the ability to tailor their decisions to the distinctive policy considerations that arise in each type of session. A uniform mandate will either be too harsh when applied to conferences or too liberal when used in a trial setting.

Notwithstanding the above, there will undoubtedly be instances where a non-settlement-related continuance or OTOC is warranted. If so, then the same sorts of suggestions made previously regarding conference postponements apply here as well: No requests for delay should be granted without setting a firm date for the parties to return, without the judge precisely documenting the reasons for the request in the file,

and without specific orders that require parties to perform the actions needed to get the case back on the road to resolution.

- ***The rules that reflect continuance and OTOC policy should make a distinction about their use in different types of WCAB conferences and trials.***

- ***Trial continuances and orders taking off-calendar on trial day when not associated with a settlement should rarely be granted except in emergencies.***

Notification of the Represented Parties

Other court systems require that parties first sign off on any requests for continuances made by their counsel. We do not think that such a mandate will work in routine WCAB practice because relatively rapid time lines mean that there is little opportunity available for an attorney to review the file, decide that a postponement is warranted, and then get a signature from a person in authority.[311] But we do believe that it is important to keep the public informed of when and why the final disposition of a workers' compensation claim by formal hearing that has moved through the system for months or years now has to be postponed on the very day of trial. It is not enough that the attorney tells his or her client that the trial was continued; without further information, the client will likely assume the cause was either the other side's machinations or the branch office's inability to provide services. If not true, then there is no opportunity for the type of feedback needed for client control of a hired representative. It will also mean that dissatisfaction among litigants over the issue of delay will be directed to the wrong source.

We believe that it would be a minor inconvenience to counsel to require that he or she provide his or her client with a copy of the order continuing or canceling trial when it is not associated with an

[311] This might not be true for applicant attorneys as the worker is very often sitting in the office's waiting room. Defendants, however, are not likely to be present and so contact would have to have been made prior to the conference or trial.

actual or pending settlement. This will also, we believe, provide an added incentive for the judge to be very precise about why the order was issued and who requested it, a procedure that will assist in long-term management of the case. The order can include preprinted language that specifically commands each counsel to transmit a copy to an appropriate nonattorney recipient if he or she represents an organization or to the named party if an individual. Obviously, ensuring compliance in each and every instance would be extremely difficult, but the twin goals of giving routine litigants a better sense of what is going on at the local offices and of encouraging better case control by the judges would be achieved even if a few attorneys unprofessionally fail to comply with the order.

One question that arises is whether the information will do anyone any good because the majority of requests for trial postponements are "joint" ones rather than being at the sole behest of the applicant or defendant (see ***CHAPTER 9***). In reality, there might have been just one moving party at the start, but when the judge inquires as to the position of the other party, the response may well be neutral simply because of the pressure on all attorneys who work closely together to get along and not appear to be obstinate or uncollegial. Certainly, the order should specifically indicate whom was the party originally requesting the postponement and what the response of the other side might have been. The characterization of a motion for continuance or OTOC as a joint one should be reserved for those instances where the two sides were clearly in agreement at the outset.

Some commenters have assumed that we are suggesting that all continuances and OTOCs be reported in detail to litigants. We make no such recommendation. The conference calendar will always be characterized by postponements of the session itself and of removal of the case from the trial track and while we would hope that the DWC takes steps to minimize these delays, they are inevitable and in many instances, quite justified by the circumstances of the case. Trials are a different matter and unless the continuance or OTOC is related to a pending settlement, the waste of a valuable trial slot calls for special measures. Making sure that all concerned—judges, attorneys, and

litigants—are all on the same page as to why something as important and as highly anticipated as a scheduled trial was called off at the last minute is worth any inconvenience to counsel to make a copy of the judge's detailed order and hand or mail it to their clients.

It may be surprising to some to learn that according to P&P Manual Index #6.7.4 (effective date 12/18/95), there already exists an informal requirement that copies of orders for continuance or to take off calendar are to be "...served by the moving party...on all parties of record including but not limited to the applicant, applicant's attorney, defense attorney, insured, self-insured, third party administrator, employer, and lien claimants." It appears that in actual practice this seven-year-old requirement has, when not ignored completely, been interpreted to mean that service on the *counsel* for the parties of record satisfies the intent of the rule. But there seems little point for a rule requiring explicitly informing counsel of the order because in all likelihood, he or she was standing right in front of the WCJ when the request was decided. The only way that there can be any client control over their representatives regarding the issue of unnecessary postponements is to directly inform workers, insurers, employers, TPAs, and the businesses and professionals that make up the lien claimant population of exactly why the trial is being put off for another day at great expense to all concerned.

- ***Counsel should be required to serve a copy of the order upon their client whenever trial continuances and orders taking off-calendar on trial day when not associated with a settlement are granted.***

Board-Related Trial Continuances

Board-caused trial delays (typically caused by a lack of an available hearing room, judge, court reporter, or insufficient time) are what the public and the bar associate with the worst aspects of inefficient or ineffective court administration. They also are a symptom of significant problems in resources and/or calendaring approaches. Nonetheless, the statistics for Board-caused trial continuances continually get mixed up in the numbers for all such

continuances and there is a possibility that new policies created to address continuances will either ignore the special needs of trial schedules or will impose stricter standards on pretrial procedures than is necessary.

Note that we consider started trials unable to be completed that day as a subclass of Board-caused continuances. A judge who begins a trial at 4:45 p.m. simply to get the appearances on the record and avoid the negative appearance of a complete continuance may be doing more harm than good.

We believe that each PJ should prepare a report once a week detailing the frequency of *Board-caused* trial continuances and their causes and submit same to the Regional Manager and to the Administrative Director. The workers' compensation community needs to be assured that top-level management at the DWC is acutely aware of when these sorts of events are permitted to take place. For trials that were unable to be completed, the total time the matter was actually heard should be reported as well as the estimated additional time needed to complete the case. This will allow the supervisors to distinguish between those cases that simply ran too long and those that were started solely for the purpose of avoiding a continuance. Making sure that notice of these undesirable events is passed up the chain of command to at least the Regional Manager level will also avoid the possibility that a Presiding Judge might ignore chronic problems.

- ***Trial continuances on trial day that are due to "Board" reasons should be immediately reported to the Presiding Judge, the Regional Managers, and the Administrative Director.***

LIEN PROCEDURES

Generally

Ideally, liens are resolved at the time of the close of the case-in-chief (via settlement or trial) so that either the defendant agrees to pay the ones presented (or agrees to pay a mutually negotiated amount), the lien claimant withdraws the lien, or a judge reviews the matter and orders payment at an appropriate level. It is usually once

the case-in-chief has been resolved without addressing the question of what should be paid for any services rendered that a lien holder will file a DOR to request official adjudication. From a clerical standpoint (data entry, file movement, paper processing, calendaring, notice, and the like), the process for adjudicating a disputed lien is not that much different than adjudicating the case-in-chief; a DOR is filed and must be reviewed and calendared, an initial conference is held,[312] and a trial will take place if the matter is not settled before then. From a judicial standpoint, deciding liens can be less time consuming and as there is no need to review extensive medical reports, trials are brief and a decision can often be reached and delivered almost immediately. That being said, adding one or two appearances for some or all of the parties to a dispute that has, by and large, already been decided is source of much frustration. Moreover, clerical shortages at some locations have resulted in prioritizing new DORs and giving first access to new calendar slots to matters other than liens. The end result, if not checked, will be a return to days when boxes of unprocessed lien DORs were gathering dust in office hallways.[313]

The limitations of CAOLS do not allow us to determine how often liens are unresolved following settlement approval or the issuance of a Findings and Award or Findings and Order. However, in 1990, DWC judges issued 3,119 lien decisions which more than doubled to 7,542 in 1992 and grew to 33,641 in 1995.[314] Thankfully, lien decisions dropped to 17,585 by 1999.

Explanations for the explosion of lien decisions in the early and mid-1990s and its subsequent reduction in recent years vary. One commonly held belief is that so-called “lien mills” became a feature of

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[312] This is not true in all offices; at some, the use of a lien conference before a lien trial is expressly discouraged on the theory that liens are routinely settled on the day of the trial anyway and so an interim conference would simply extend the time to resolution.

[313] As recently as five years ago, backlogs of thousands of lien DORs at some of the larger offices were not unknown. See, e.g., Commission on Health and Safety and Workers’ Compensation, *CHSWC Profile of DWC District Offices* (1997), p. 4.

[314] Commission on Health and Safety and Workers’ Compensation, *1999-2000 Annual Report* (2000), p. 116.

workers' compensation practice in the early part of the last decade; the reported goal was the churning of medical treatment bills in cases involving relatively minor injuries (or in some notorious instances, no injury at all) in order to maximize payments from insurers. This was said to be a widespread practice in Southern California that led to a spike in the number of new cases and in the number of liens being filed per case.

Another possible explanation is that judges at the time were ignoring or unaware of the status of lien holders and approving settlements that were sometimes silent as to what liens were outstanding, who was responsible for paying those liens and what they agreed to pay, and which liens were in dispute. Technically, the rights of the lien holders to demand and recover the costs of services they provided were not affected even if the settlement did not address their claims, but in reality, much of the momentum toward resolution would be lost. Defendants no longer would have to worry about the potential threat of a disgruntled lien holder delaying settlement approval and applicants would have little interest in becoming involved in a messy lien resolution process after the settlement check has been cut and attorneys fees awarded. In sum, attracting the attention of defendants and others to take care of the liens would have been difficult. The alternative for judges to demand that each and every outstanding lien be paid, denied, or adjusted prior to signing off on a settlement agreement was not an attractive one either; such a policy would mean additional delay in case-in-chief settlement and compensation delivery to applicants.

A related explanation is that the rise in unresolved liens took place prior to 1990 but never showed up in the annual statistics due to competing demands on judicial and clerical resources. Operating under the theory that resolving the case-in-chief and getting benefits to the injured worker was the highest priority for the WCAB, lien DORs were given a reduced level of attention. At some offices, according to legend, boxes of unprocessed lien DORs sat dormant in hallways and storage rooms while more pressing matters were attended to. In response to this situation, special "lien units" were set up at the offices in

Santa Ana (in 1993) and Van Nuys (in 1995) and staffed by judges who did little else but concentrate on lien DORs, lien conferences, and lien trials for cases from all over Southern California. Quick decisions following a speedy trial were the norm and on occasion, there were cries of protest that due process rights were being trampled upon as the price for dealing with the backlog. Given the special focus upon liens by these judges, it should not be surprising that lien decisions went up dramatically during the period of time the units were operating. Nevertheless, the situation appeared under control well enough that by 1998, the lien units were disbanded and liens were now handled in the usual manner.

In 1995, the DWC issued a "Uniform Lien Policy" that some observers credit for doing a better job of handling liens. Except for good cause demonstrated by extraordinary circumstances, lien issues were now to be resolved at the same time as any other issues raised by the case-in-chief. While a judge might provide that the actual amount to be paid would be subject to later adjustment, a decision had to be made as to whether the lien should be allowed at all.[315]

The issue of liens was to be taken into account during conferences even if the case-in-chief was not resolved. At the MSC, the judge was tasked with reviewing the case file and the EDEX electronic public access system to see what liens had been filed and whether notice had been served on all claimants.[316] If the case-in-chief could not be settled and the matter set for trial, outstanding issues were to be documented in the pretrial conference statement, the parties were to be requested to contact the lien claimants by phone to resolve the dispute, and notice of the upcoming trial was to be served on all known lien claimants.

P&P Index #6.11.1 also requires that at least by the close of the MSC, a "good faith effort" has been made to resolve any outstanding lien

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[315] A decision to allow or disallow a medical lien usually turns on whether the treatment provided was reasonably required to cure and/or relieve the effects of the injury; for medical-legal liens, the question is one of reasonableness and necessity.

[316] This is necessary because liens filed via EDEX may not show up in the case file and vice versa.

issues. It is only after such an effort has taken place that a judge might set a bona fide lien dispute for trial.[317] Similarly, a C&R or Stips might be approved without resolving the lien issues only after the judge determines that a good faith effort has taken place. Obviously, determining what constituted an effort with the requisite level of good faith would be easy if the lien claimant was present and not so easy in his or her absence. One problem we heard about repeatedly from some lien holders was a claim that various defendants do a very poor job of executing this good faith effort (or worse, make no attempt at all to contact the provider) despite assertions made at the time of settlement review in the lien holder's absence. When this actually occurs, the lien claimant may have little knowledge that a settlement is being negotiated and will find out only after the fact that the case has been already resolved.

Though the absolute numbers of separate lien decisions have dropped, older liens can still present special problems. Lien DORs can be filed over payments made many years previously, sometimes on cases that had their case-in-chief adjudicated long ago and that are stale enough to have been shipped back to the State Records Center or that involved defendants that have long since been dissolved or have been absorbed by other insurers.

The Priority Placed on Lien Resolution

The ability of the workers' compensation system to operate efficiently, to give workers a choice in their medical care, and to defer any personal expenditure until liability is clear depends on satisfying the needs of the lien community. Moreover, making sure liens are taken seriously during the pretrial and trial stages reduces the chances that unresolved liens will reappear and disrupt the orderly business of the WCAB months or years later. Lien holders should be given an equal footing with other parties to the litigation, but from discussions with a number of lawyers and judges, one gets the impression that the days of the "lien mills" are still with us or just a heartbeat

[317] A lien trial might also be ordered if the parties have settled all other issues at the MSC.

away from exploding again. Though the system needs to be on guard to prevent that sort of lamentable situation from occurring again, lien holders should be treated as if their claims are valid ones until proven otherwise.

➢ ***Resolving liens at the time of case disposition should continue to be given a high priority by WCAB judges.***

Improving Current Procedures

Assuming no unanticipated spike in the number of filed liens, current procedures where settlements are not approved until the defendant contacts the lien claimant and at the very least agrees to settle or try any remaining liens appear to have been working. At the branch offices we visited, postresolution lien activity is reportedly under control and not felt to be a problem by the judges and PJs we spoke to. Nevertheless, more can be done to ensure that lien disputes do not continue to loom on the horizon for otherwise resolved injuries.

Availability of the Lien Claimant at the MSC

While BR §10563 requires the applicant be physically present at conferences such as MSCs and that the defendant have a person available with settlement authority who can at least be contacted by phone, no similar requirement is made of lien holders, though in theory they should have notice of the hearing. They are only "encouraged" to be available by phone. In actual practice, larger lien holders such as EDD do routinely attend in person and are able to assist in achieving a global settlement, but for other claimants, appearing at a session where resolution is not a sure thing is an expensive proposition if done to excess. Asking a doctor or other medical care provider to personally appear at an MSC in order to guarantee payment for minor treatment is not a good way to encourage a beneficial long-term relationship with the California workers' compensation system.

But if MSCs are to live up to their promise as a way to promote settlement, then lien claimants must have input. We believe that a procedure should be put in place where a lien claimant has the option of appearing at an MSC or other conference or alternatively, informing the

branch office of a daytime contact number that can be confidently used by the parties as part of the "good faith" attempt requirement. If the lien claimant cannot be reached at that phone number, at least the Court can be satisfied that the defendant has done all that is reasonable under P&P Index #6.11.1. At the moment, the judge must rely on the claims of the defendant that realistic attempts at contact were actually made; reportedly, a simple statement that a single message to call back was left on the lien claimant's voice mail often suffices for a good faith attempt. Giving better guidance to judges as to what the good faith requirement actually means seems like an obvious need for WCAB and DWC administrators to address.[318]

When this contact information has been provided to the Court, then the routine necessity of a WCJ issuing a Notice of Intention to either allow or disallow the lien claim would be avoided. By mandating that lien claimants with notice of an MSC either physically appear or inform the parties and the judge of a phone number at which they could be reached during that three-and-a-half-hour period, then the awkward problem of resolving the rights of a legitimate litigant without their input could be avoided. Conceivably, if the matter did not settle at the MSC, the lien claim could be scheduled for hearing at the same time as the case-in-chief.

The question then remains as to whether the goal that the lien claimant is to either personally appear or provide alternative contact information is to be a formal requirement (conceivably with some sort of sanction) or simply an expression of desired WCAB policy (as it is now). We believe that the lien claimant community should be consulted as to the best way to achieve this ideal. The Employment Development Department appears to have found that attendance at most MSCs where settlement is imminent is worth the personnel expense, though other lien claimants, especially those with only tangential contact with the workers' compensation system, may reach a dissimilar conclusion. It cannot be overemphasized that lien claimants are litigants with rights

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[318] To assist judges in this determination, some have suggested a requirement that defendants document each contact (or attempt to contact) in an affidavit accompanying the proposed settlement agreement.

no less important than those of applicants or defendants. Reaching a balanced consensus as to the best way they can be a part of settlement negotiations without adversely impacting their ability to operate a successful business is vital to the health of the entire workers' compensation system.

One question that arises from this approach is whether the additional effort required to maintain contact with lien claimants during the MSC is worthwhile. Our judicial time study (see ***Table 8.7***) found that only one in five settlement reviews is conducted at the MSC while over half are reviewed at events where the lien claimant is not likely to be present anyway (walk-through presentations or reviews in the judge's office). Why not have the lien claimant available for all reviews if it is so important to have them at the MSC? The point is not to have the lien claimant available in order to help convince the judge of the adequacy of an already drafted settlement; rather, it is to ensure that when settlement discussions are begun and concluded during the short time available at an MSC, the interests of lien claimants are protected. When applicant and defendant attorneys meet and confer in person for the first time during the MSC and reach agreement (and immediately submit the document to the judge for review), there is little opportunity to track down a lien holder for personal approval. When a settlement is reached outside of the MSC, there is no similar need for haste. Applicants and defendants have as much time as they think prudent for the purposes of contacting lien claimants by simply deferring submission of the agreement.

- ***If unable to be physically present, requiring lien claimants to be available by phone or by other method of contact during MSCs would facilitate the required good faith attempt for resolution at the time of settlement; the lien holder community should be consulted for the best way to achieve this goal.***

Limitations on Enforcing Stale Liens

The promise made by many defendants to "pay or adjust" liens at the time of settlement do much to remove any roadblocks to approval. At that point, it becomes the duty of the defendant to deal with the lien

holder who for some reason or another was not present at the time of settlement. In most cases, it can be assumed that the lien holder and the defendant will eventually resolve this remaining issue and the matter can be put to rest. But even a lien holder with notice of the settlement may choose to let the claim lie dormant, perhaps because the amount is too small to bother. Unfortunately for the efficient running of the WCAB, the case then remains in a state of limbo awaiting the day in the possibly distant future when the lien claimant changes its mind.

It seems unfair that applicants have but a one year statute of limitations in which to file an Application for Adjudication or be barred from seeking the jurisdiction of the WCAB and that applicants can have their case dismissed for inaction while lien claimants can return to the court years later to recover their expenses from the defendants who have already settled. While there clearly are equitable considerations here, it is equally clear that mining the records of health care providers years after all the parties have forgotten about the matter disrupts the flow of the DWC offices. Moreover, some of the "lien claimants" that request a hearing on a long-dormant matter appear to be intermediaries who have discovered an outstanding balance, purchased the "paper" from the original lien claimants at a discount, and then present multiple claims to a defendant in the hopes of settling the matter at a profit. While there should be no restrictions on the ability of lien claimants to sell their interest in relatively worthless claims, the process can be abused if done long after the Board Files have been returned to the State Records Center and long after the insurer has sent their own records to deep storage. It then becomes more cost effective for the defendant to pay some nuisance value than to retrieve the files from the salt mines.

If the lien claimant has received notice that a case-in-chief decision has been rendered (whether through settlement or trial), and if the claimant is dissatisfied with the defendants' subsequent actions in resolving the lien, then some reasonable length of time should be given to file a DOR. If the notice is somehow defective, or if the defendant's actions have made it impossible for the lien claimant to meet the cutoff date, then the judge should have the discretion to waive

the cutoff date and allow the filing of a DOR or other pleading upon the showing of good cause.

It should be kept in mind that we are not proposing a mechanism to cut off legitimate lien claims that for whatever reason simply fail to be prosecuted immediately.[319] Without medical care providers who are willing to defer payment until some unknown future date, workers would be unable to obtain health care services except at the discretion of the insurer. But we do not believe that a one-year "statute of limitations" (no more onerous than that placed upon the injured worker) on the prosecution of an unresolved lien where the balance of the case has been resolved would result in irreparable harm to this important segment of the benefit delivery system (as long as adequate notice of the resolution is given to the lien claimant); rather, it would serve to discourage the long-forgotten claims that are resurrected years later at great cost to the WCAB.

One understandable concern voiced by the lien holder community is that this rule might serve to cut off their right to file DORs when the defendant made an unsubstantiated claim that notice of resolution had been served. Regardless of whether the notice failed to reach the lien claimant because of an intentional act, an error in addressing, or problems with the postal service, the end result would be that a judge would have to decide between two conflicting stories. One way to avoid this problem would be only to invoke the lien DOR time limit rule when the defendant can show reasonable evidence that the notice of resolution was served (by using, for example, a certified letter with a return receipt requested). Another possibility is to parallel the extensive procedures contained in BR §10582 for notifying an applicant of the intent to seek dismissal of a case (a letter of notification must be sent and then a petition must be filed with a copy of the letter). Something similar could be done to warn lien claimants that the time for seeking the payment of unresolved liens was drawing near. Other methods

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[319] We make no recommendation regarding whether there should be any specific time limit for the initial filing of lien claims. Our concern is limited to prosecuting valid liens that were not resolved at the time of settlement or trial.

surely exist and we believe that this is another issue that must be discussed with both the defense and lien holder community.

- ***Restrict the ability of lien claimants to file DORs to a limited period of time beyond the date that the case-in-chief has been resolved if the lien claimant has clearly received proper notice.***

Automatic Setting for Lien Trial

We believe that the approach outlined previously is more cost effective from the branch office's perspective than an alternative proposal where all unresolved liens following settlement are immediately set for trial. The end result is the same—unresolved liens will not lie dormant for years—and there at least remains the strong possibility that both the lien claimant and the defendant will resolve their differences without the branch office having to send notices and schedule valuable hearing room time.

The problem is that some defendants will declare in their affidavit of good faith settlement attempts that they agree to "pay, adjust, or litigate" though discussions are ongoing. Obviously, this tells the judge nothing about the defendant's true willingness to reach an informal agreement with the lien holder. Placing the matter on a track for a trial on lien issues would call the bluff of foot-dragging defendants and ultimately speed up final closure of the case (conceivably, the parties would reach settlement by the start of the lien trial). Nevertheless, we believe that the lien holder must bear some responsibility for triggering judicial intervention when it believes the differences between the defendant and itself are too great to settle amicably. The costs of filing a DOR that seeks a lien trial are not overly burdensome and by scheduling such hearings only when there is a true dispute, precious judicial and staff resources can be conserved.

Our disinclination to recommend automatic setting for lien trial should be distinguished from the separate issue of whether a lien DOR should first trigger a lien conference (with a trial to take place at a later point if settlement is not possible) or to set the matter directly for a lien trial. Though we did not collect office-by-office

information on this subject in our Presiding Judge survey, it does appear that some offices make it a routine practice of first holding a lien conference while others always schedule a lien trial first. One argument for the former approach is that a lien conference can be held relatively quickly as part of an existing conference calendar (perhaps within 30 days versus a much longer period of time to find an open trial slot) and that settlement is a likely result anyway. Advocates for eliminating the intervening conference step suggest that adding an extra appearance in order to finally reach trial wastes the time of litigants who are clearly unable to resolve their differences informally. We do not take a stand on this debate except to suggest that continuing the variation in procedures from office to office appears to run counter to the notion that local distinctions affecting significant procedural steps to resolution should be eliminated or at least minimized.[320]

- ***Automatically setting all unresolved liens for trial following settlement is unnecessary if alternatives to the current practice of unrestricted lien DOR filings are explored.***

- ***The rules and regulations regarding the effect of a lien DOR filing should be refined so that all offices across the state either first set the case for a lien conference or for a lien trial.***

EARLY INTERVENTION

A number of members of the workers' compensation community have the well-reasoned argument that the most effective time for the DWC to get involved in an injury claim is prior to the point that a formal dispute exists. By intervening at an early stage, the factors that lead to the need for expensive and lengthy adjudication can be addressed more informally and reduce the time elapsing from injury to the point at

[320] We do believe, however, that there is little point in holding a "lien conference" as an intermediate step toward trial if all the parties (including the lien holder) have appeared at the MSC, settlement was not possible, and the judge thereafter ordered the matter set for lien trial. Given the fact that an opportunity for face-to-face settlement already existed at the MSC, having another conference seems unnecessary.

which the worker is satisfied that the condition has been adequately addressed. Much of this concern is related to claims handling procedures (of which the WCAB has little control), but it also touches on questions of whether the WCAB should continue to do nothing until a Declaration of Readiness has been filed.

The problem is whether this should be a function of the adjudication process or of some other aspect of the workers' compensation system. At the present time, the WCAB typically only gets involved at the point at which the parties have filed an action request in the form of a Declaration of Readiness, a Request for Expedited Hearing, or a settlement needing review.[321] Prior to that moment, the case file is a relatively thin folder (assuming one was created following the filing of the Application) with little activity required except by the clerical unit. A concern is that if the time from case initiation to action request extends too great a time, the court's laissez faire attitude may impact the ultimate resolution of the case. As researchers have observed in regard to traditional court systems:

> Not only must the court take control of the pace of litigation, but that control must begin from the event that tolls the running of the statute of limitations. The commencement of judicial control must not indefinitely await the filing of a certificate of readiness. A case processing system that leaves the counsel in complete control prior to the filing of the certificate of readiness abdicates responsibility for a significant delay-producing portion of the system.[322]

Under the assumption that the WCAB already takes an immediate interest in the case following the filing of an action request, there are then two periods of time for early intervention to occur: (1) between the filing of the Application and the filing of the action

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[321] There are other instances where petitions are filed or other requests made of the WCAB prior to a party filing one of the documents listed. However, none trigger the sort of case-in-chief dispute resolution process that is generally thought of as embodying workers' compensation adjudication.

[322] Lawyers Conference Task Force on Reduction of Litigation Cost and Delay (1986), p. 36.

request, or (2) between the filing of a claim form and the filing of the Application.

The post-Application intervention period is one where the WCAB clearly "knows" that the dispute exists (indeed, a case number has been created). One possible option would be to have the WCAB convene a conference in any case where an Application had been filed and no activity had been noted in the file for a particular length of time. This is certainly within the intent of BR §1082, which gives the court the ability to dismiss a matter for lack of prosecution if the case has not been activated for hearing within a year of filing and if the parties have been given notice and an opportunity to be heard. The number of cases that would be affected would be few and arguably, the positions of the parties have already been hardened so that the intervention would be anything but productive. Another option would be to convene a conference very soon after the Application is filed to learn of and address any problems, note the benefits being provided, and take care of other potential stumbling blocks. Regardless of the potential benefit of such a process, it is not realistic to assume that under current or even the most optimistic future budget conditions, the judges of the WCAB would be able to handle another 180,000 to 200,000 conferences per year.

A threshold question is whether any sort of early intervention following the Application filing is even worthwhile. The concerns noted above about those traditional civil courts that let cases languish until the filing of a "certificate of readiness" may not be applicable here. In those forums, a complaint (their equivalent of the Application) is often filed just prior to the time limit imposed by the applicable statute of limitations. A typical practice of plaintiffs' attorneys is to wait until the medical condition of the plaintiff has stabilized and long-term residuals can be assessed before filing. With case initiation, both sides can then commence meaningful discovery and as such, there may be a lot of out-of-court activity that can be judicially managed in order to speed the time to resolution and minimize litigation costs. But as noted elsewhere, Applications are often filed soon after injury but long before the condition has become permanent and

stationary. During that period, medical treatment is ongoing and unless there is a question about delay or denial of particular types of benefits, there is little the WCAB can do. There would be questionable payoff, for example, for a WCJ to send the case file to a DEU rater early in the life of a case because that evaluation cannot really take place until a P&S report is issued. In a traditional civil court, it makes sense for a judge to order foot-dragging parties to complete discovery and get the case set for trial and so there is little drawback for judges to inquire about the status of the litigation right from the start. As such, court efficiency experts have claimed that the naked use of a readiness document in a traditional court "does not improve caseflow and does not reduce delay. More importantly, readiness documents create a system contradictory to the philosophy of court responsibility for cases."[323] But in the WCAB, a WCJ cannot very well demand that the applicant's medical condition be stabilized by a date certain. Given these distinctions, we believe that the use of a Declaration of Readiness is a reasonable way to inform the court that the case is likely to be ripe for judicial intervention.

The above discussion is even truer regarding possible WCAB intervention in the Claim Form-to-Application period. Some estimates place the number of injuries covered by the California workers' compensation system at about one million per year. Early intervention in each and every case is obviously not an option. In order to focus limited resources on cases in most need of early attention, there would have to be some way to identify potential areas of dispute. Until recently, information from each Claim Form and benefit notices were only available from the hardcopy documents themselves. With the recent implementation of the earliest stages of WCIS, it may indeed be possible to search the database of all claimants at little expense to locate potential trouble spots.

But is this a function that should be performed by the judges of the WCAB or by another unit associated with the DWC? The Claims Adjudication Unit is made up of professionals who, though quite

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[323] Solomon and Somerlot (2000), p. 45.

knowledgeable about workers' compensation in general, are primarily trained to resolve disputes through a formal process. There is no need to use these staff members for the sorts of early intervention programs being advanced. Some sort of combined effort of the Audit Unit and Information & Assistance Unit might be indicated, but using judges and their specialized support staff would be overkill.

If such early intervention programs are effective at reducing formal litigation, the entire workers' compensation system would no doubt benefit. But it would be a mistake, as has happened with WCIS, to predict the reduction in the number of disputes or the degree to which judicial attention is required and then make changes in staffing or resource levels for the Claims Adjudication Unit. If the filing levels do drop off in subsequent years (for whatever reasons), resources can and should be adjusted accordingly.

- ***Programs designed to identify problems with claims handling practices or potential disputes in workers' compensation injury claims prior to the time at which judicial intervention is formally sought and to address those problems or disputes should not come at the expense of resources allocated to meet the needs of existing cases.***

CHAPTER 15. REVIEW OF ATTORNEY'S FEE REQUESTS AND PROPOSED SETTLEMENTS

ATTORNEY'S FEES

Standards for Fee Awards

No other area of contention in workers' compensation practice so embodies the core root of many of the WCAB's problems with uniformity as does a judge's award of a "reasonable" attorney's fee under Labor Code §4903(a). LC §4906(d) tells a WCJ that when "establishing a reasonable attorney's fee, consideration shall be given to the responsibility assumed by the attorney, the care exercised in representing the applicant, the time involved, and the results obtained." BR §10775 says that in establishing a reasonable attorney's fee, a judge shall consider the...

> "...(a) responsibility assumed by the attorney,
> (b) care exercised in representing the applicant,
> (c) time involved, [and the]
> (d) results obtained."

The same Board Rule refers judges "to guidelines contained in the Policy & Procedural Manual." The judges then turn to P&P Index #6.8.4:

> The Labor Code imposes an obligation on the workers' compensation judges to determine what is a reasonable attorney's fee in cases submitted to them for decision. The Board recognizes the valuable service rendered to applicants by competent attorneys. The Board recognizes, too, that reasonable fees must be sufficient to encourage such competent attorneys to participate in this field of practice. The Board has seen instances where fees appear to be unreasonably low or high. The Board has seen, too, instances where attorneys accept sizeable fees for services which are largely unnecessary because there is little in dispute and little time, effort or skill involved.
> The Board also recognizes that...in many cases a fee based solely on a percentage of permanent [disability] indemnity may be inadequate to compensate an attorney for his services. To encourage attorneys to render a more balanced service and to increase opportunity for attorneys to be more adequately compensated (particularly in view of increased statutory

> temporary disability) the following is promulgated as a guideline for the use of the workers' compensation judges.
> 1. In cases of average complexity, the Board believes that a reasonable fee will be in the range of 9 percent to 12 percent of the permanent disability indemnity, death benefit or compromise and release awarded. In addition thereto, a fee equivalent to 9 percent to 12 percent of the temporary disability indemnity and out-of-pocket medical benefits to the extent that they are obtained or awarded as a result of applicant's attorney's services may be allowed.
> 2. In cases of above average complexity, a fee in excess of the normal upper limit of 12 percent applicable to all benefits described in paragraph 1 hereof is warranted. Such cases may include, but are not limited to:
> (a) cases establishing a new or obscure theory of injury or law;
> (b) cases involving highly disputed factual issues, where detailed investigation, interrogation of prospective witnesses, and participation in lengthy hearings are involved;
> (c) cases involving highly disputed medical issues;
> (d) cases involving multiple defendants....
> 4. ...It should be realized that the time involvement of a recognized specialist, who has demonstrated his skill in the field, is to be valued much more highly on an hourly basis than the time involvement of a person less knowledgeable and skilled in the field of workers' compensation law.[324]

Moreover, ADR §10134 requires that new clients sign a "Fee Disclosure Statement" upon hiring an attorney that tells the potential applicant that "Attorney's fees normally range from 9% to 12% of the benefits awarded."

So, when the case is of "average complexity," are judges who routinely award 9% acting in accordance with the rules of the WCAB or are they practicing nonuniformity as compared to their peers who routinely award 12%? What constitutes an "above-average complexity" case when it does not fit into the examples listed above? How many defendants does a case need to justify 13% or 18%? Do cantankerous clients score points on the complexity meter? Do "recognized specialists" always get 12% for average cases? Always get more than 12%? What procedures need to be followed to justify a fee of 13% or higher in light of the fact that the client was put on notice that 12% was the high end of the normal range of awards? Do award requests

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[324] Drasin & Assoc. v. WCAB, 5 Cal.Rptr.2d 215 (Cal. App., 1992)

higher than 12% require a detailed petition or affidavits? The point is that despite the explicit directives in the Labor Code, Board Rules, AD Rules, and P&P Manual, *it is possible to defend a wide variety of approaches to the question of what are reasonable attorney's fee awards and what is required to support them*.

The issue becomes more complex when the routine practices of an entire branch office or urban area are taken into account. By definition, not every matter before the WCAB can be of above-average complexity, but we have observed branch offices where 15% awards were the rule rather than the exception. A settlement agreement that is presented to one of the judges at those branch offices will almost undoubtedly contain a 15% fee and almost undoubtedly, that fee will be approved. Within that branch office, the judges are acting in almost lockstep uniformity on this one issue, despite such practices appearing not to be justified by the regulations. The matter of interoffice variation is a different story. We visited branch offices where 12% was standard and heard repeated tales of practitioners arriving from other branch offices with a 15% fee request in hand only to be astounded when the smaller amount was awarded.

When we asked why a judge might choose to make 15% his or her default percentage, we were typically answered with one or more of three explanations. First, the urban area in which their branch office was located was thought to be more expensive than the average cost of living required in other locations across the state. Fifteen percent was then necessary for an attorney to continue a profitable practice and serve workers in that area. But as far as we are aware, no DWC study has been conducted to ascertain what areas of the state have economic conditions where 15% is always necessary. Second, we were told that other judges at that same branch office generally made it their practice to award 15% and so there would be no reason to swim against the tide if they were to continue to hear cases. Third, we were told that nearby branch offices were offering 15% and if their branch office was to stay "competitive" and not get shut down in the next DWC cost-cutting move due to a drop-off in new Applications, a 15% average would be needed as well.

These last two reasons were interesting ones because they suggest judges and branch offices think of themselves as offering a product to a consumer class of attorneys. A 3% difference may not seem like all that much, but to those with high-volume practices and razor-thin profit margins, it can indeed make a huge impact on the bottom line. With judge shopping a fact of life at some branch offices and with liberal venue rules that give applicant attorneys considerable latitude in where to file cases, a judge or a branch office that is consistently felt to be too conservative with fee approvals will eventually find itself with little demand for its services.

The 15% figure seems to be the new standard in some urban areas of California. The question is whether the Commissioners and the Administrative Director should update the P&P guidelines to reflect reality, refine them to explain when 15% is justified by regional differences or economics, or crack down on the scores of judges who are flagrantly ignoring the rules (if indeed that is what they are doing).[325]

We do not have an opinion as to which of these courses is the right one to follow. But we do know that the current situation is leading to extreme levels of attorney dissatisfaction, to giving off the impression that under certain circumstances it is okay for a judge to make policy on his or her own initiative, to imbalances in branch office filing figures, and to the distasteful practice of judge shopping.

➢ ***The current set of standards for the awarding of attorney's fees for indemnity awards are out-of-date and provide little guidance for judges; as a result, conflicts with the applicants' bar are inevitable. A panel of judges, Commissioners, and DWC administrators should jointly draft and coordinate explicit policy guidelines in this area and conform existing Board Rules, Administrative Director Rules, and Policy & Procedural Manual directives.***

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[325] We also were informed that there exists a difference among WCJs as to whether fees for penalties recovered by the applicant's attorneys are to be calculated using the normal range of about 9% to 15% or to be set at a much higher amount because difficult issues of liability may be involved.

Standards for Deposition Fees

The defense community has by and large abstained from involvement in the question of what constitutes a reasonable attorney's percentage of the PD award. The money comes out of the applicant's pockets anyway and there is little mileage to be gained by interfering with the relationship between attorney and client. Not so with the provisions contained in LC §5710(b)(4) for "reasonable" attorney fees for the applicant's attorney when the defendant takes the deposition of an injured worker. These fees are paid by the defendant though set by a WCJ. There is almost no guidance for WCJs to determining what sort of hourly rates are reasonable; moreover, the statute is silent as to whether the time spent preparing for and/or traveling to the deposition is to be included.

As with fees based on percentages of the PD, we saw a wide variety of deposition rates. At one branch office, the local bar has come up with guidelines on its own that explicitly index the hourly rate to the number of years the attorney has been practicing and whether he or she is a certified specialist. While such guidelines give a much needed sense of certainty to attorneys who are presenting requests for reimbursement, they could be seen by some as a "local rule" that flies in the face of the DWC policy that each branch office operate without formalized differences.

While the controversy over hourly deposition fees is not as great as it is with PD fees, many of the same policy problems arise as long as judges have no way to independently determine whether they are abiding by or ignoring the rules. We believe that this area should be clarified as well, perhaps with guidelines similar to those mentioned above formally incorporated into the CCRs.

- ***Deposition fee standards need to be better defined as well to eliminate discontent among the bar and litigants. A panel of judges, Commissioners, and DWC administrators should jointly draft and coordinate explicit policy guidelines in this area and conform existing Board Rules, Administrative Director Rules, and Policy & Procedural Manual directives.***

SETTLEMENTS

Generally

The requirement that all settlements of workers' compensation benefits must be approved by a judge is a distinguishing feature of the WCAB and a source of frustration for some stakeholders. In other civil court systems, judicial approval is usually only required when the plaintiff is incompetent, a minor, or when the matter involves mass litigation such as in a class action. Outside of these special situations, parties are free to resolve their dispute without judicial or public scrutiny even if the matter involves millions of dollars. In contrast, the California workers' compensation system has historically taken a different view: The ability of injured workers to trade away potential rights to long-term indemnity payments and unlimited medical care in exchange for the certainty of a favorable outcome and immediate compensation is extremely restricted. Judges here are required to "inquire into the adequacy"[326] of any compromise that releases the defendant from some or all of its future obligations. Essentially, settlements will not be approved unless they provide the full amount of compensation due to the worker, are used in cases where reasonable doubt exists as to some or all of the rights of the parties, or when approval is in the best interests of the parties.[327] Deciding when a proposed settlement meets at least one of these requirements makes up a significant portion of a WCJ's time. Indeed, based upon our best estimates, some 13% of a judge's workweek is directly or indirectly involved with dealing with matters related to settlement approval.[328]

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[326] BR §10882.

[327] BR §10870.

[328] This figure includes all events recorded in our time study where a judge indicated that settlement approval was an issue plus includes all adequacy conferences. As such, it is likely to overstate the amount of time actually spent reading a proposed agreement and evaluating it in relation to the information contained in the case file. For example, a judge might begin an MSC working with the parties to draft a Stips & Issue Statement, but by the end of the session, counsel reached agreement and asked for approval. Both the time for handling the Pre-Trial Conference Statement and the settlement agreement would be included here.

The question of whether to allow a worker to permanently give up some of his or her future rights in exchange for immediate or certain payment is one that has always been a concern to workers' compensation policymakers. One clear example of this is the fact that the Commissioners of the Industrial Accident Commission had the exclusive power to approve compromise and release settlements until 1953, some eight years after referees were given the ability to decide most other workers' compensation matters including at trial.[329] The 1965 *Report of the Workmen's Compensation Study Commission* called for a general policy stating "in absence of good cause shown compromise and release settlements will not be approved."[330]

Clearly, the WCAB cannot function without the overwhelming majority of matters before it being resolved by agreement of the parties. Even the Workmen's Compensation Study Commission acknowledged the fact that compromise and release "settlements are here to stay and have a legitimate and useful place in the administration of the compensation law."[331] The very idea that every case filed at a branch office would always result in formal trial is unthinkable and would send the workers' compensation system into a black hole from which even the most minor task would be impossible. Other large, modern court systems are in a similar situation, but from the perspectives of their judges and administrators, settlements are for the most part nonevents (though very desirable ones). Typically, civil courts are even unaware that a settlement has taken place, sometimes only noticing years later that the level of activity in the case at some point had dropped to nothing.

For the WCAB, settlements are not without cost to the court. Resources are consumed at every corner of the DWC: Clerks must spend time logging in the proposed settlement agreement and if needed, open new cases, files must be pulled and brought to the judge's attention, Information and Assistance Officers are sometimes asked to review the

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[329] California Workmen's Compensation Study Commission (1965), p. 69.

[330] California Workmen's Compensation Study Commission (1965), p. 85.

[331] California Workmen's Compensation Study Commission (1965), p. 77.

matter initially when unrepresented applicants are involved, notices of an approved settlement need to be served on interested parties, and informal ratings are sometimes requested by judges to provide an independent assessment of potential case value. Of course, time spent by its judges in the review process is time unavailable for trials and other matters while settlement adequacy conferences take up valuable hearing room space. Given that so many cases require formal settlement approval, branch offices have obvious incentives to minimize the resource expenditures for the average C&R or Stips.

Indications do suggest that settlements presented to WCJs are by and large being approved as is. During the week in which we conducted our time study, 78% of all settlements were given approval without modification, 8% were approved after some significant aspect of the agreement was changed, and 14% were rejected, deferred for later review, or set for an adequacy hearing. In that same week, judges indicated that about 13.4% of their total work time was spent in tasks that included evaluating settlements (whether or not approved).

From the perspective of the parties, a streamlined approval process is also desirable. Workers view the amounts immediately available under the proposed agreement as their rightful due and any delay in obtaining them unnecessarily drags out a process that may have begun years earlier. Indeed, it may be the immediate need for a large enough single sum of money to offset gaps between their former income level and the relatively smaller amount of disability payments that drove them to settle in the first place. Applicant attorneys who jointly present these agreements to the WCAB hopefully believe that the compromise is in the best interests of their clients and that the matter is ripe for resolution, thus releasing their attention for other cases on their desk. Defendants see these agreements as a way to buy peace and give some certainty to workers' compensation expenditures while doing so at some level of a discount. When the process for approval is drawn out unnecessarily, the chances rise that their counsel will need to spend additional time on the case which in turn results in increased litigation costs; at some point, the calculus that suggested settlement

was a good deal begins to tilt back toward the direction of taking their chances at trial.

This general sense among many stakeholders that any unnecessary delay in getting an otherwise acceptable settlement approved is to be minimized has been translated again and again into DWC policy, the most obvious of which is the one partially embodied in P&P Index #6.6.2: Every district office is to institute procedures that allow for a single visit approval of a proposed settlement and when required, take appropriate action within 15 days. In practice, cases that have settlements to offer are taken first in line at the start of a conference or trial calendar. Perhaps most importantly, it has been long held in California that the "law favors the settlement of controversies, including disputed workers' compensation claims" and that by postponing a settlement, "many employees would be deprived of an early and advantageous" resolution of their cases.[332]

Key Issues in the Settlement Review Process

Given its demands on DWC resources and the potential for costly delays, there are two interrelated questions involving the settlement approval process.

Should Formal Settlement Approval Continue?

We heard again and again of suggestions that the WCAB should drop judicial review for all applicants or that the process be reserved only for workers without representation. By doing so, it is argued, a waste of DWC resources would be eliminated and settlements would take place without the delay of a judge's interference with what is essentially a private business decision.

Some stakeholders believe settlements should no longer be subjected to judicial scrutiny as such review is unnecessary and patronizing.

Proponents of changing the current policy generally fall into two camps. First, there is a belief among a relatively few

[332] Permanente Medical Group v. WCAB, 140 Cal.Rptr. 612 (Cal. App., 1977).

stakeholders that the approval process is a paternalistic holdover from the early 20th century and in light of various modern safety nets, unnecessary for all applicants, irrespective of whether they are represented or their level of sophistication. The ready availability of Information and Assistance Officers gives both represented and unrepresented workers alike the opportunity to discuss a proposed settlement with a knowledgeable, unbiased person. Given that there are no similar restrictions against an individual settling much larger claims in Superior Court, some believe it seems patronizing for the WCAB to continue to suggest that ordinary workers are unable to handle their own affairs.

Some stakeholders believe that only pro per settlements should continue to be subjected to judicial scrutiny; attorneys have an educated and intimate view of case value and workers are ultimately protected by malpractice insurance coverage.

A second, much larger group suggests that while there may be a need for the WCAB to protect the interests of those who would otherwise be overwhelmed by the complications and potential pitfalls of the workers' compensation system, those workers who have retained competent counsel have available to them multiple safeguards against an ill-advised or misadvised compromise. By contracting with a member of the State Bar in good standing, workers who feel that their interests were not professionally protected can turn to an attorney's malpractice insurer to recover any benefits lost through counsel's incompetence, ignorance, neglect, or fraud. Moreover, the likelihood of such an event is minimized by the fact that the attorney will likely be quite savvy in regard to workers' compensation practice and would likely advise against settlement if it did not appear to be a good deal from the client's standpoint. Finally, attorneys are in the unique position to intimately know whether their client's position is vulnerable to a successful defense; permitting represented workers to settle without exposing such weaknesses to a judge or the other side is exactly was is meant by their best interests. Earlier RAND-ICJ

research also recommended eliminating judicial review of C&Rs for represented applicants.[333]

Some stakeholders believe that settlement review should be continued; not all workers' compensation practitioners have the same level of competence and judicial scrutiny protects both the worker and lien claimants.

Opposed to these sorts of changes is yet a third camp of stakeholders. It is felt that while proffered settlements generally do meet the interests of workers, on many occasions they do not, even when the applicant is represented by an experienced workers' compensation practitioner. Moreover, there is a concern that BR §10870's mandate that settlements serve the "best interests of the parties" (absent other criteria) do not only mean the best interests of the worker; they suggest that the most likely casualty of a hasty or insufficient settlement would be a lien claimant who will be left holding a large unpaid bill while the other parties go their separate ways.

What Uniform Standards Should Be Used?

Another area of suggested reform is to make sure that when judges do perform a thorough review, they will do so in a uniform way that allows practitioners who are attempting to craft an agreement to be able to predict what will pass muster no matter which judge it is assigned to or which branch office the agreement was filed in.

Many stakeholders are concerned that judges are scrutinizing some settlements more closely only because of relationships (or lack thereof) with certain counsel.

The common practice of providing different levels of scrutiny depending on the attorneys involved (see discussion below) is on the one hand a reasonable response to the overall demands of the position and the need to move the settlement review process through as quickly and expeditiously as possible. On the other hand, it has the potential for personality conflicts, allegations of

[333] Peterson, Reville, Kaganoff-Stern, and Barth (1998), p. 185.

"hometowning," and inappropriate deference based on relationships outside of the scope of the hearing room. Moreover, to the extent that other judges are more evenhanded with their reviews, the level of scrutiny then depends more on the luck of assignment (or judge shopping) than on approved statutory and regulatory criteria. This latter concern spills over to the branch office level as well. There is a perception that it is unfair for settlements at one location to be given great deference by its judges while at another, each agreement is scrutinized to the extreme letter or spirit of the law.

Many stakeholders are concerned that some judges routinely apply far more rigorous standards or more narrowly interpret the controlling law for settlements before them than do others at the same branch office.

Of all the concerns we heard about the settlement process, it is the dissatisfaction with how far a judge will go to ensure adequacy that was voiced the loudest. What was remarkable to us is that oftentimes the complaint was not that the judges were ignoring the law but that they were following it too closely.

A case in point involves a so-called *Thomas* finding.[334] The ability to settle vocational rehabilitation is independent of the agreement to resolve any claims for medical case or disability benefits. Moreover, any settlement of rehabilitation benefits can only be included in the main agreement if there was a substantial question of liability that would result in a "take nothing" award (i.e., a defense verdict) at trial if resolved against the applicant. In order to accomplish this, parties will typically insert language into a settlement agreement that refers to medical reports showing no injury or that suggests witnesses would testify that the injury never occurred. Incorporating a release of future rehabilitation benefits is an additional incentive for defendants to settle a matter and a negligible loss for applicants who have

[334] See, e.g., Thomas v. Sports Chalet, Inc., 42 Cal. Comp Cases 625 (1977).

little or no interest in vocational training. The problem for many judges is whether to allow a *Thomas* finding to remain in a settlement agreement when it is clear the injury did indeed occur and that the only reason for inserting the questionable assertion that a witness could be produced is to get around the perhaps unrealistic restrictions limiting the ability to settle all aspects of the work injury. Some judges will pay little attention to any *Thomas* language, preferring to focus on issues of medical treatment and ratings. Others will balk at putting their signature on something that everyone associated with the case knows is a legal fiction. In the interests of a uniform approach to settlement review, which set of judges is to be emulated?

A similar problem exists in regard to social security disability benefits. Under federal law, ongoing SSDI benefits are reduced when the total of such benefits plus workers' compensation disability benefits—including nonmedical lump sum payments—exceed 80% of the employee's predisability earnings. By characterizing the better part of a workers' compensation settlement as intended for medical treatment, the settling worker would be in a better position to receive the 80% maximum from SSDI. But some judges are reluctant to sign off on attributing so much money as medically related, especially when they and everyone else is aware that the sole intent is to dance around federal regulations. By doing so, such judges run the risk of appearing not as user-friendly as some of their more accommodating peers.

Another area involves the satisfaction of any associated lien claims at the time of settlement. P&P Index #6.11.1 states "Except for good cause demonstrated by extra-ordinary circumstances, lien issues shall be resolved at the same time as other issues raised in the case in chief." Despite this emphatic language, actual resolution is not always needed to approve a settlement if the WCJ determines that there has been a good faith effort to contact the lien claimants. This is usually not a problem if the lien claimants have appeared at the time of review, but more likely, they are not present. What constitutes a "good faith" effort is

not exactly clear. Is a single phone call enough? Some judges will allow a settlement under such circumstances to proceed with only a minimal showing that contact was attempted; others will hold up approval until something more substantial is accomplished (thus frustrating the desires of both applicants and defendants but perhaps protecting the interests of the lien claimant). Arguably, those judges taking a harder line are closer to the spirit of P&P Index #6.11.1 while other judges are assisting in the goal of encouraging settlement whenever possible.

Balancing the Need for and Impact of Settlement Review

Generally

Judges already apply different levels of scrutiny to proposed settlements; as such, judicial resource expenditures for the typical settlement review are small (though associated clerical time may not be). In actual practice, judges routinely told us that they perform what amounts to a type of “triage” for settlement agreements that come to their attention. The most perfunctory review is given when the judge is both familiar and comfortable with the abilities of the applicant’s attorney. It is felt that the attorney’s proven skills at negotiation and case valuation justify giving great deference to settlements presented on the behalf of his or her client. The fact that the attorney has and will continue to be a common fixture at the branch office also reduces the chance that he or she will try to sneak past anything questionable.

These same judges told us that a higher level of review is done when the practitioners are known to be able and competent though there is less familiarity with the attorney personally. Higher still would be the scrutiny of settlements presented by out-of-the-area counsel or those whose experience with the workers’ compensation system is limited.

Though settlement agreements involving pro per applicants would receive the closest attention, the judges told us that there were usually a core of attorneys with whom they were extremely uncomfortable with any offered settlement until they have had a chance to go through the file with a fine-tooth comb and perhaps have the opportunity to ask

questions of the applicant's attorney, defense counsel, and the worker. This has usually resulted, it was claimed, from some sort of past experience where facts were misrepresented or when the value of a proposed settlement was so much lower than might be expected that it could only be explained by a worrisome lack of experience and skill or even by placing the attorney's needs over that of his or her client.

This approach was confirmed by our observations of settlement reviews at MSCs and other times. The same judge who reviewed a proposal from attorneys he or she obviously was familiar with for no more than a minute or two would spend far more time with pro per applicants and for certain counsel where it was clear there was a lack of trust.

The practice of providing different levels of scrutiny depending on the attorneys involved is on the one hand a reasonable response to the overall demands of the position and the need to move the settlement review process through as quickly and expeditiously as possible. On the other hand, it has the potential for personality conflicts, allegations of hometowning, and inappropriate deference based on relationships outside of the scope of the hearing room. Moreover, to the extent that other judges are more evenhanded with their reviews, the level of scrutiny then depends more on the luck of assignment than on approved statutory and regulatory criteria.

Even if the apparently common decision of how much of a review to give a proposed agreement is made with the best of intentions (and our belief is that it is probably an efficient way to conserve resources for the settlements that are most likely in need of serious review), it does not end the question of whether the review should be done at all. Even though the judge might only spend a minute or two, there is still the associated expenditure of staff time to handle the paperwork and update the computer records. But it is likely that even with an end to the review requirement for some or all cases, clerks would still wind up as the custodian of the agreement as a protection against the possibility that it might not be honored in the future. Unless the review requirement abolition is coupled with an admonition that the settlement need not be filed until a related dispute arises and that a WCAB file does not need to be created simply for the purpose of allowing the

parties to settle (even without actual review), then the only time to be saved by ending the review process will be that of the judge. Given that I&A Officers and DEU raters may still be involved in claims (including both actual and potential WCAB cases) that are headed straight to settlement, and given that the frequency of their use may well increase if there is no judicial officer as a final authority to be consulted, then the judge time saved by dispensing with formal review may not make as large an impact upon DWC budgets as might be expected.

The focus on the public costs of reviewing settlements is an important one, but it should be kept in mind that less than 14% of a judge's time is currently spent on events that include the review of a settlement. The actual effort needed to review and approve may even be less as this figure includes all time spent at an MSC or trial where at least some of the judge's time may have been spent on getting the parties to agree in the first place.

Pro Per Settlements

Patronizing as it may sound, the full impact of swapping the right to unlimited medical care for some immediate fixed amount of money is not likely to sink in with an applicant focused only on immediate need. While the practice is by no means universal, we occasionally observed adjusters chatting with applicants in the waiting room and dismissing or minimizing the need to be able to pay for future treatment up front by pointing out that the pro per applicant might eventually be able to obtain medical coverage either through future employment or from benefits provided by his or her spouse. While we also observed pro per applicants clearly ignoring the strenuous admonitions of a judge during an adequacy review over the same sorts of issues, we believe that the requirement that the settlement be subject to scrutiny is called for by the highly complex nature of the workers' compensation process.

Ideally, no C&R involving a pro per litigant should be approved without the judge being able to personally ask the applicant whether they understand what is being bargained away, to confirm whether the rating is realistic, and see if the amount allocated for future medical treatment matches the applicant's expectations. We did not, however, collect any specific data in this area and do not know how often pro per

C&Rs are approved primarily on the assertions of a claims adjuster or defense attorney.

Represented Applicant Settlements

Our major concern here is with lien holders. This system is just coming out of a period where the needs of lien holders were given less than top priority in the scheme of things. The backlog in addressing the claims of lien holders who were not taken into account by the applicants and the defendants at the time of case disposition was a source of shame for the WCAB. Much of the improvement in the systemwide numbers of unresolved lien claims has come through a combination of intensive (and costly) processing of the backlog by specially assigned judge teams and by a heightened awareness on the part of all WCAB judges that a disposition without satisfying the rights of lien claimants is no disposition at all. Lien claimants should not be given second-class citizenship at a branch office because without the cooperation of medical providers, examining physicians, and others who defer demands for payment until the case is completed, the workers' compensation system would not exist as we know it.

Conceivably, other protections could be provided to lien holders without judicial review of settlement. They could be given some short, definite period of time in which to object to its terms. But such objections would be frequent if they have not yet had ample time to adjust the matter with the defendant. Far fewer settlements would have liens resolved so that the parties would not have to come back into court. Until other safeguards are in place, we believe that WCJs should continue to review settlements for both adequacy and to ensure that the best interests of all parties to the case, not just applicants, are taken into account.

As a side note, many applicants' attorneys told us that they welcomed the practice of judicial approval of settlements because in their view, it shielded them from the unpleasant potential of a malpractice claim. Whether this is realistic or not (it isn't clear whether their duties to their clients are discharged by a judge's cursory review) is beside the point.

Conclusion

Judicial review of pro per settlements is clearly indicated by the need to have an unbiased, deliberate authority figure as a bulwark against an all too hasty release of some or all of their future benefits. For different reasons, represented applicants should also have their settlements reviewed as well, despite the associated drain upon DWC resources, primarily in order to protect the interests of lien holders.[335]

We believe that workers are entitled to essentially the same level of benefits for a covered work injury regardless of whether the employer/insurer paid the original claim without complaint, whether a dispute wound up in the hands of the WCAB and the case went to trial, or whether the parties decided to settle the matter amicably. It should be kept in mind that unlike traditional civil practice, liability (other than questions of AOE and COE) in workers' compensation cases is not usually an issue so the sorts of "discounts" found in tort settlements for questions of relative fault are not applicable here. Making sure that injured employees get what they deserve in every instance, regardless of the procedural vehicle for final resolution of their case, is part of a 90-year-old "social bargain" where the right to seek unlimited damages has been exchanged for benefits that are sure and swift. Having a WCAB judge involved in the settlement process is a good way to ensure this goal is met.

➢ ***Despite legitimate stakeholder concerns, WCAB judges should continue to assess the adequacy of all workers' compensation settlements regardless of representation for the foreseeable future.***

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[335] Though previous RAND research (Peterson, Reville, Kaganoff-Stern, and Barth (1998)) recommended eliminating the review of C&Rs as a way to reduce the burden on the WCAB, that study did not have the benefit of our detailed judicial workload assessment. We found that at most, just 14% of a judge's workweek is settlement review related. Moreover, some unknown amount of that time would be devoted to reviewing Stipulations with Requests for Award, a task that would continue to require judicial intervention even if C&R review is eliminated because it involves the issuance of an official order of a WCAB judge. We believe that given our improved knowledge of WCAB judicial behavior, the justifications for dropping C&R review are not as compelling as was once believed.

Settlement Standards

Much of what we have seen regarding issues of nonuniformity in settlement approval practice relates to standards of when to include particular clauses, characterize the settlement in particular ways, or handle the issue of lien claimant consent. We believe these disputes arise out of a lack of guidance for judges and could be minimized if they had a clear set of policies to follow rather than trying to guess at case law or assent to what they believe are questionable practices. We believe that guidelines can and should be established, in conformity with case law, to eliminate some of the more vexing questions. We also believe that judges could be given additional tools to help them decide an approximate value of some difficult-to-measure future costs (e.g., if a medical report indicated that a knee replacement would be needed, reference to a schedule of likely future expenses for that type of procedure would be helpful). But we also believe that no new guidelines are indicated for the issue of determining whether the overall value or the terms of settlement are in the best interests of the applicant or are appropriate; while attorneys may grumble about judges placing a different value on the case than agreed, that is exactly what a judge is for and exactly why they are required to review settlements. In actual practice, however, only a small percentage of proposed settlements have their "net to the applicant" dollars increased (see ***Table 9.41***, ***Table 9.42***, and ***Table 9.43***).

➢ ***In order to minimize concern over unclear settlement review criteria, a joint panel of judges and Commissioners should draft explicit policy guidelines to cover the most common areas of dispute that do not involve settlement valuation. In regard to valuation, the DWC should consider the development of nonbinding evaluation tools to help judges estimate future medical treatment costs.***

The Use of Mediation to Promote Settlement

One attractive concept from the standpoint of conserving judicial resources while promoting much-needed settlements would be to use an alternative dispute resolution technique such as mediation to help

parties reach agreement in especially difficult cases.[336] The Mandatory Settlement Conference, which is conceivably the point at which judicial assistance for settlement would most likely be available, provides only a questionable opportunity for facilitation. At district offices where 30 MSCs are scheduled during a three-and-a-half-hour calendar, only seven minutes on the average could be spent discussing complex facts and issues with a judge. If the judicial officer is to knowledgably discuss the facts of the case with the parties and point out the strengths and weaknesses of their respective positions, he or she must have the time to read through the file, a difficult task to accomplish in that seven-minute window. One judge indicated his belief that the loss of time to meaningfully prepare for the MSC and conduct effective settlement negotiations has been the "largest casualty of inadequate resources."

Some offices have attempted to direct precious judicial time for mediation efforts to just those cases that would benefit the most by regularly holding an extra conference when the parties have indicated that a trial might take a half day or longer (see ***Special Conferences*** in ***CHAPTER 7***). Another alternative might be to allow the MSC judge the discretion to send the parties to a mediation session conducted by volunteer attorneys with the appropriate experience and training (continuing education credit could be given to reward the volunteer mediator).

While such ideas certainly are worth exploring, it is beyond the scope of this research to determine whether, on the whole, the use of mediation and other ADR approaches actually works to promote early resolution while saving private litigation costs. At first blush, the answer may seem obvious, but empirical research in this area has yielded mixed results.[337] Before making any sort of commitment to a systemwide

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[336] We make a distinction here between the ADR techniques of mediation and arbitration. Arbitration is already possible under LC §§5270-5277 either on a mandatory or voluntary basis and is used to help speed up final disposition of some or all issues in the case by using a private adjudicator rather than an overscheduled WCJ. Mediation, on the other hand, is intended to help the parties reach a mutually acceptable resolution of the case through settlement.

[337] See, e.g., Hensler, Deborah R., *Does ADR Really Save Money? The Jury's Still Out*, RAND, Santa Monica, CA, RP-327, 1994; Kakalik, J.

mediation program (regardless of whether conducted by judges or attorneys), we suggest that further research in this area would be worthwhile. As such, we do not make any recommendation as to whether the routine use of mediation will serve to address ongoing problems with delay and excess costs.

THE "WALK-THROUGH" PROCESS

Generally

Policy & Procedural Manual Index #6.6.2 (effective December 18, 1995) required each district office to establish an approved "walk-through" program to provide for "one-visit approval of a settlement by Compromise and Release or Stipulations With Request for Award which has a case file number or a maximum of two-visit approval for a [settlement] which does not have a case number assigned." Essentially, parties can arrive at the branch office without a scheduled conference or informal appointment and find a judge who will look at an agreement, review the file, and make an immediate decision. Suggested arrangements contained in Index #6.6.2 include having all judges accept proposed settlements for review each day, designating one or two judges each day as the assigned walk-through settlement judge, or designating a specific calendar session once a week for this purpose. As long as the settlement has not been already calendared for an adequacy hearing, P&P Index #6.6.2 gives parties the ability to present a proposed settlement to judges other than the assigned judge.

It should be kept in mind that Index #6.6.2 does not require that settlements always be approved during the walk-through session (the decision the judge makes might be to decline approval or to set the matter for an adequacy hearing) nor does it require that the parties be given an unfettered right to choose which particular judge will do the review.

S., T. Dunworth, L. A. Hill, D. McCaffrey, M. Oshiro, N. M. Pace, and M. E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act,* RAND, Santa Monica, CA, MR-803-ICJ, 1996.

Potential Drawbacks to the Walk-Through

Despite its ability to move relatively brief matters through a branch office without delay, walking-through settlements for immediate judicial review as envisioned by P&P Index #6.6.2 is not without potential drawbacks:

Liberal Walk-Through Rules Allow Litigants to Choose Which Judge Will Hear the Matter

Judge shopping and forum shopping are a fact of life; indeed, an attorney who fails to take advantage of a favorable selection of venue or a judge may be failing to take the best interests of his or her client to heart. This reality does not mean a court system should permit the practice at every opportunity. Generally, parties are required to use the same judge if testimony has already been heard or if the matter has already been set for hearing on the issue of adequacy. But outside of these situations, parties can by and large choose whatever judge they want for a walk-through review subject to the rules of the branch office in this regard. While PJs are required under P&P Index #6.6.2 to divide such settlements among the WCJs at the branch office, the process is clearly used more often with some judges than others.[338] A judge who is prone to question adequacy or who will not allow questionable or overreaching releases is unlikely to find a long line of attorneys outside his or her office door waiting their turn. Conversely, judges that are viewed as receptive to just any sort of agreement will find themselves with little time available for other chores due to the added volume of work.

The potential for judge shopping is an issue that evokes strong reaction. Some judges and DWC administrators we spoke to find the liberal ability of litigants to choose the judge to review a settlement to be the most distasteful and unseemly aspect of the

[338] A common approach is to assign each judge at a branch office a different day of the week to entertain walked-through settlements. This complies with the policy statement that the process is intended to divide the work among all judges equally. In actual practice, of course, attorneys can simply choose to refrain from bringing the settlement to the office until the desired judge's day has arrived.

entire walk-through process. But other judges and administrators take the opposite view and suggest that by allowing unfettered choice, the problem of "obstructionist" judges (i.e., ones who are claimed to endlessly defer settlement approval) will be avoided.

If the goal of the walk-through program is really only to allow attorneys to move settlement approvals to the head of the adjudicatory line, then it seems that instituting procedures to ensure that such reviews are truly distributed equally among all the judges of the branch office is well within the spirit of the policy that established the program. Allowing litigants to crowd around reputably agreeable judges while other judicial officers sit idle does not seem like a good use of resources regardless of how one views the ethical questions involved.

The Walk-Through Process Requires Immediate Clerical Attention to Pull Files or Create New Cases

In the long run, the work expended by a clerk to handle walk-through requests would likely have been required anyway if the settlement had been sent in by mail or used as a case opening document. But such work can normally be performed during relatively slower times of the week. In order for walk-throughs to achieve the intended goal of a single visit review at the attorney's convenience, someone is going to need to go to the file room and retrieve the file jacket within a short time. Offices that are already short staffed may not be able to afford the disruption to an already busy day.

The Walk-Through Process Requires Immediate Judicial Attention That May Interfere with Other Work

Dealing with a steady stream of visitors clutching settlements and Board Files makes concentrating on drafting opinions and making decisions more difficult. Within the context of trial and MSC calendars, the disruption is minimal (though we have observed attorneys presenting matters to a judge in the middle of a trial during a short recess), but on a day specifically set aside for

deliberation, walk-throughs may have a negative effect on productivity.

The Walk-Through Process May Encourage Judges to Give Less Than Their Full Attention to the Settlement

The directive that each branch office establish a walk-through process suggests that the procedures be adopted in a way that provides for one- or two-visit approval of settlement. The choice of words is illuminating; the intent is to move settlements through as quickly as possible, not to have the walk-through routinely act as a scheduling conference for a future adequacy hearing. There is a real risk that judges will see the walk-through procedures as reflecting a desire on the part of the DWC to approve settlements in all but the most flagrant displays of inadequacy.

In actual practice, an attorney who is approaching a judge for a settlement review often does so in the middle of a noisy and chaotic conference calendar or even in the hallways of the branch office. There appears to be a shared expectation that the review will be done quickly and with few questions and little discussion so that everyone can get back to work. The extent to which the pressure to handle a matter right there and then (as opposed to reviewing the file in a quiet office) is affecting the approval process is unknown, though some judges did confess that they felt pressure from the circumstances of the presentation. Our analysis of judicial time expenditures does suggest that judges spend slightly less time on a walk-through settlement approval than they do during MSC settlement approval (see ***Table 8.8***). While the first-time approval rate for walk-through settlements is actually about the same as for agreements reached during an MSC (see ***Settlements*** in ***CHAPTER 8***), it is not clear whether the agreements being offered at both types of settings are similar in all important respects. On the other hand, judges are unlikely to have prepared for each and every matter on the MSC calendar and as such, they are as familiar (or as unfamiliar) with the walked-through file as they are with the cases scheduled for an MSC.

The Walk-Through Process Can Move Beyond Settlement Approvals

The language of the P&P provisions for walk-throughs clearly refers to the process as being one for review settlements. But at many branch offices, judges routinely handle walk-through requests that involve attorney fee orders and the like. While expediting these sorts of routine matters seems to be harmless (and likely saves or simply advances in time the expenditure of clerical resources that would be used to provide the request and the file to the judge), it is not clear whether they are formally allowed by official DWC policy.

Presiding Judges and WCJs we spoke to were mixed as to whether relatively trivial nonsettlement matters were better handled by a walk-through if time permitted or by turning to them during the quiet part of a decision day. The policy considerations that created the walk-through process, ostensibly to provide a possibly at-risk applicant with compensation at the earliest possible time, do not apply when the matter concerns the award of vocational rehabilitation attorney's fees. Is there as compelling a need to get these fees into the hands of the attorneys a week or two quicker than if the request had simply been mailed in? Moreover, as walk-through time is limited, should attorney fee requests get equal priority with settlements in terms of who gets the attention of a judge first?

Nonsettlement walk-throughs become an issue if the process is overused for trivial events (given that there is only a limited amount of time available during a conference calendar for seeing nonscheduled cases), but significant policy issues also arise when the subject matter is contested. Discovery questions are an excellent example. It is unlikely that parties would jointly present a request to compel discovery, so the only way a judge can review and decide on an ex parte request is through the use of a self-destruct order (i.e., the order is in effect unless a party formally objects) or a Notice of Intention (i.e., an order will be issued on a date certain unless a party objects). Many judges are reluctant to use these tools when it is likely that a party might

object and a conference to decide the issue will have to be held anyway. In their view, matters involving such contentious issues as discovery may simply be inappropriate for ex parte presentation of such motions because of serious due process issues (even with a self-destruct order or a Notice of Intention). Other judges have no similar concerns.

There are certainly compelling arguments on both sides for extending the process to nonsettlement matters and for restricting it to the review of informal case resolution documents; we make no recommendations on this question whatsoever. But though the enabling provisions of Policy & Procedural Manual Index #6.6.2 speak only to settlement, DWC administration is surely aware that more than just C&Rs and Stips are being decided at many locations. This "constructively tacit" approval (characterized to us as a "don't ask, don't tell" policy) is a source of concern. Either nonsettlement walk-throughs should be ***clearly permitted*** (and if so, under what circumstances) or ***clearly prohibited***.

The Walk-Through Process Varies from Office to Office for Both Staffing Reasons and Due to Presiding Judge Preference

Few branch offices have adopted exactly the same sorts of procedures for walk-throughs. At some, clerks pull the files immediately and judges will review them every day of the week; at others the settlement must be submitted to the judge's secretary a couple of days before a conference calendar (thus making the walk-through more of a method to orderly schedule a full conference calendar in advance); at others only a single day of the week is designated for walk-throughs (sometimes the judge's decision day); and at others, only the Presiding Judge will do the review. As mentioned elsewhere, it is sometimes difficult to determine when such nonuniformity is simply a reasonable response to local conditions and available resources and when it poses a problem for litigants to receive a just, speedy, and inexpensive resolution of their case.

The Walk-Through Process Can Primarily Benefit Represented Litigants

Our time study found 75% of all settlements presented to the judges for approval involved represented applicants, but if the settlement was submitted as part of a walk-through, the number climbed to 91%. Clearly, pro per applicants do not take equal advantage of the walk-through process. Unless the defendant's representative takes the initiative, pro per settlements are likely to be mailed in or filed over the counter as usual. This raises the question of whether applicants with an attorney ought to be able to jump to the head of the settlement review line at the expense of pro pers.

A related question is whether pro per settlements should ever be walked-through (assuming that a claims adjuster or a defense attorney is the sole person presenting the agreement to the judge). Like pro per settlements that are mailed in and reviewed by the judge while alone, a pro per walk-through means that the judge will not have an opportunity to ask the applicant about what he or she believes the settlement actually means, especially in relation to future medical expenses. We take no position on this issue because we did not collect data on the frequency with which applicants actually accompanied the defendant to the walk-through review.

Potential Benefits of the Walk-Through

Walk-Through Settlements Appear to Be an Efficient Use of Judicial Downtime During Conference Calendars

As mentioned elsewhere, judges can find themselves during a conference calendar with blocks of time in which little paperwork or decision drafting can be accomplished. Conference calendars do not appear to have problems in being completed and so to the extent that the business of the branch office can be discharged more efficiently by filling in dead time with settlement reviews, they appear to have a positive benefit on overall time and resource use.

Walk-Through Settlements Appear to Reduce the Need for Formally Scheduled Conferences

Compared to reviews of mailed in settlements done in a judge's office, having at least one of the attorneys standing there during a walk-through review gives the judicial officer the opportunity to get an immediate response to any questions of how the case was valued. In a non-walk-through review, the judge might have to spend the time to correspond with the parties or even set an adequacy hearing just to get a simple answer. Even if the adequacy hearing results in an approval, the parties would have had to wait additional time for case resolution.

The Walk-Through Settlement Process Can Reduce Demands on Clerical Staff

Walk-throughs appear to shift some of the tasks required for settlement review from the DWC to private counsel. A settlement that arrives in the mail or is filed over the counter must be reviewed by a clerk to determine what the document is and what steps are needed, the file needs to be pulled and transported to the judge, and if there are questions during the review, someone (often a secretary) has to contact the parties via telephone or letter to ask questions or request an appearance. A walk-through also requires that the case file be retrieved, but it is the attorneys who transport it to the judge and as they are present to answer questions, there is no need for additional contact. Mail opening and sorting, a task that can be a source of trouble at branch offices where clerical staff levels are low, is eliminated. The DWC also saves some money from the elimination of the requirements for serving the approval order on the parties. Given that walk-throughs in actual practice may get funds into the hands of settling applicants only marginally quicker than had the agreement been sent in via the mail or filed over the counter, the clerical resources saved by the walk-through process could well be its most important overall benefit.

Conclusion

We believe that the benefits of moving settlements through as expeditiously and efficiently as possible appear to outweigh the possible risks outlined above as long as the ability of parties to engage in unfettered judge shopping are limited. We believe that at the minimum, the walk-through process should be made available for attorneys to present settlements to judges as part of an existing conference calendar or to the Presiding Judge (without the need to link to a conference calendar). Branch offices that are currently unable to provide a minimal level of walk-through services due to a lack of clerical staff should be given adequate resources to do so.

We do not believe that in order to realize the benefits of the walk-through settlement approval process, each office must have the exact duplicate procedures. A walk-through process is not a fundamental right of workers' compensation practice nor does it displace the traditional procedures contemplated in the Labor Code and associated regulations. The likelihood that particular variations in procedures might increase litigant costs or delay resolution beyond that for non-walked-through settlements or result in an unjust outcome is small. There is no penalty for foregoing its use in favor of sending the settlement agreement to the branch office via the mail or filing it in person. It is merely an optional way to speed up the time needed to get the document in front of a judicial officer, a way that requires some additional effort on the part of the presenting party (in that an in-person appearance is needed). As such, specific procedures for allowing settlement walk-throughs can vary from office to office as long as they have been approved by a Regional Manager or upper-level DWC administrator, as long as they are "open and notorious" with prominent notices detailing the rules posted at the office to avoid misunderstandings, and as long as they give a party the ability to get an in-person review of the proposed agreement ***at least*** one day each week with the conference calendar being an obvious (though certainly not the only) choice for the period available for presentation. If demand by local attorneys and litigants for walk-through settlement approval reviews exceed the judicial resources (one day, for example, not being

long enough to accommodate a week's worth of requests), then the office should make every effort to expand the period available for presentation and the number of judicial officers participating.

One continuing concern that we have involves attorneys shopping for a particularly agreeable judge to do the walk-through or avoiding a particularly difficult one as well. In reality, there is little an office can do to completely guard against attorney influence on the choice of the reviewing judge beyond P&P Index #6.6.2's prohibition against switching if the matter has already been calendared for an adequacy hearing. Practitioners are certainly intelligent enough to figure out the best ways to game the process even if random assignment is used. The experience of one office is illuminating. A party requesting a walk-through must go to the clerk's office to ask that the case file be pulled. When the file is handed over, the clerks simultaneously perform a random assignment of one of four judges available that day for walk-through reviews. The names of these four judges change from day to day in order to spread the workload around all of the office's judicial officers. Once assigned and the case file is handed over, there is no option for the party to request another judge be drawn. But should the assigned judge be unsatisfactory, some attorneys are smart enough to quietly return the case file to the "To Be Refiled" bin and then return another day when the altered composition of the four judges (not specifically identified to the public but certainly known to the attorney community within a short time each morning) increases the odds that a desirable judge will be selected from the list. From a purely administrative standpoint, the primary problem here is not the moral or ethical ramifications of litigants selecting their own adjudicator but the additional burden placed upon the clerical section as they wind up pulling and refiling the same case file again and again until the attorneys get who they want. Should such a policy continue, there seems little reason to continue allowing walk-throughs at all as their most important benefit to the workers' compensation process—reduced clerical resource expenditures versus traditional settlement review—is negated.

The primary goal of walk-through procedure design in regard to judge selection should be to spread the work for these in-person reviews evenly among all the judges at an office; accomplishing that goal will minimize the problem of judge shopping even if it might not be completely curable. Savvy attorneys will always be able to either have complete control over selection or avoidance (or at least be able to shift the odds in their favor) so short of banning the practice altogether, each office must find a way to ensure that over the course of a year every judge generally sees about the same number of walk-throughs. Though judge shopping as a legal tactic is usually held in low esteem, some of the concerns legal commentators might have over one side having disproportional influence compared to the other over the selection of the specific judicial officer who would preside over a trial or render a decision (judge shopping in the classic sense) are reduced in this situation because with walk-through settlements, both sides are now acting as one in order to obtain settlement approval.[339] While the potential for judge shopping should not be ignored, the DWC should focus on balancing out the workload involved in walk-throughs so that the problem is minimized in the aggregate (even if some individual assignments reflect the intention of the parties). For example, one possible approach might be to randomly assign a permanent walk-through judge to a case at an early point in the litigation (such as when the DOR is filed) so only that judge could be used for unscheduled in-person reviews. Judge shopping would still be possible (the parties could simply wait until the MSC judge assignment to decide whether to use the walk-through judge as an alternative), but over time, there should be a rough balancing out of the workload.

It should be clearly understood that our recommendations regarding the walk-through process assume that the matters in question are limited to settlement-related concerns. Again, until the DWC and WCAB precisely

[339] Judges still have a requirement to ensure that the applicant's best interests are being taken into account and that the rights of lien holders are being protected even if both the applicant's attorney and the defendant's attorney are asking for approval. This overriding mission may suggest that judge shopping for settlements is still to be discouraged despite any joint action of counsel.

define what exactly is permitted to be walked-through under Policy & Procedural Manual Index #6.6.2, we are unable to address the question of whether the process's benefits continue to exceed the drawbacks when discovery requests, attorney fee requests, and the like are involved. Our preference would be to have branch offices first concentrate on providing reasonable opportunity for settlement walk-throughs; only after that point should the DWC and WCAB assess whether other matters could be handled as well without further impacting the orderly workflow of the branch offices.

- ***Despite potential problems, at the very minimum a walk-through settlement process should be allowed at least one day a week at all branch offices. The conference calendar period appears to be a good place to allow such in-person settlement presentations, but other times should be considered if demand exceeds available judicial resources.***

- ***Refinements to the walk-through settlement approval process that are specifically designed to spread the workload for on-demand reviews among all judges at an office should minimize the potential for "judge shopping."***

- ***A clear and concise statement of DWC and WCAB intentions as to the permitted scope of the walk-through process is needed if the technique is to be expanded to non-settlement-related matters.***

CHAPTER 16. TRIAL AND POSTTRIAL PROCEDURES

SUMMARIES OF EVIDENCE

The Costs and Benefits of Summaries of Evidence

LC §5313 and BR §10566 require the WCJ who presides over a formal hearing to prepare a summary of all oral and video-graphic evidence presented at the trial. The Summaries are included with the Opinion and Decision (though as a convenience to the parties they sometimes are served along with the Minutes of Hearing as soon as completed) and serve as documentation of both what was said at trial and of the way the judge viewed the evidence in the context of the issues in the case.

To prepare these Summaries, the trial judge typically takes extensive handwritten notes during testimony (though at least one judge we observed used a laptop for this purpose) as the witnesses are questioned and cross-examined. After the hearing has concluded for the day, many judges will immediately dictate the notes (or more precisely, a narrative based upon the notes) directly to a hearing reporter who later produces a draft for the judge’s review and eventually a final, official version. Depending on the need to review the exhibits, have the reporter read back passages from the trial’s steno notes, or decipher his or her own handwriting, this may take a considerable length of time. Other judges conduct this live dictation at a more convenient time or will record their notes on tape for later transcription by the reporter.

The Summaries are an essential tool for judges, attorneys, and the Appeals Board. In discontinuous trials, Summaries are helpful to both the judge and to the parties as a quick way to review previous testimony. Judges told us that they rely on the Summaries to help them in their decisionmaking process, especially if they do not have a chance to work on the case until some considerable amount of time has transpired since the trial. In a number of instances, decisions are not drafted until the expiration of the “90-day rule” implied by LC §123.5(a) draws near; when the time between the close of testimony and

the formal submission of the case is added to the mix (possibly yielding a half-year delay from the date of the trial), a detailed record of the proceedings is desperately needed. Attorneys also reported that they use the Summaries to determine whether reconsideration should be sought on the grounds that the judge misinterpreted key testimony or that the Decision was not supported by the evidence as described in the judge's own words. When requesting reconsideration, the level of detail contained in most Summaries often means that the parties need not incur the expense of purchasing an official transcript. The Commissioners also rely on the Summary as an unbiased, focused way to review the evidence in a case without having to read an entire transcript or having to rely on the self-serving passages from an official transcript selected for reproduction in a Petition for Reconsideration or in the Answer to Petition.

All of these benefits come at a price. Judges we spoke to reported that for an "average" two-hour trial, they might spend anywhere from 15 minutes to as much as two hours for dictating the narrative and reviewing the reporter's draft version (with 15 minutes to 30 minutes being a typical reply). Our own time study data suggests that for every one hour spent in hearing testimony, an average of 20 minutes were spent afterward dealing with matters associated with the Summary of Evidence. We were also told that trials were sometimes stopped at 11:30 a.m. or 4:30 p.m. in order to dictate the narrative when the testimony is most fresh in the mind of the judge and to ensure the availability of the reporter who would be able to read back specific portions of the testimony if needed. Obviously, the hearing reporter would spend additional time to produce the draft and the final version beyond what the judge might need.

We were also told that a number of WCJs have made disability claims in the past for repetitive motion injuries to their upper extremities primarily as a result of taking such detailed notes. While we were unable to ascertain exactly how often such claims are actually made, a number of judges we spoke to complained about the physical demands of the summary process.

Another reported cost is more difficult to quantify. Some judges reported that by concentrating on recording what the witness was saying, they were unable to observe nonverbal clues as to the witness's demeanor and truthfulness. At many of the trials we saw, the judge's eyes were indeed focused on their notes and not on the witnesses throughout much of the testimony time. It should also be kept in mind that much of what is recorded for inclusion into the Summary of Evidence is irrelevant to actually reaching a decision in the case.

In sum, the costs of producing summaries of evidence are not insignificant, either in judge and reporter time, work injury claims for judges, and the reduced attention for witness demeanor. However, such production does seem to be an integral part of the workers' compensation process, acts to keep the private costs of litigation down, and provides an additional yardstick to measure whether trial decisions are appropriate and justified. Consumers of WCAB services should realize that continuing to produce these documents is a drain on the limited time judges have for managing and deciding cases. At a minimum, additional judge positions must be filled in order to save litigants the costs of purchasing transcripts following trial. Summaries are a classic example of the tensions that exist between balancing the private versus the public costs of litigation. If policymakers provide the extra support needed, then we believe Summaries should continue to be produced until acceptable alternatives are available.

- ***Because of its quality assurance role in the trial decisionmaking process and because of its positive impact on private litigation costs, a product similar to a Summary of Evidence should continue to be produced for every trial. The workers' compensation community should be made aware, however, that there are significant public costs associated with producing these documents.***

Alternatives to Current Practices

Generally

It should be noted that some judges we spoke to did not find the process overly burdensome and that by dictating their notes to a hearing

reporter immediately following trial, they avoided the problem of trying to decipher their own handwriting and the meaning of sometimes cryptic notations days or weeks after the trial has concluded. As mentioned elsewhere, the production of a Summary of Evidence is one of many features of current workers' compensation practice and procedure that facilitate uniformity in trial decisionmaking. Despite these benefits, it may be felt by some stakeholders that the value added by the Summary of Evidence to the trial decision and reconsideration process does not justify the costs in time incurred by judges and hearing reporters. Other court systems rely on the parties to obtain a transcript of the proceedings at their own expense, usually in conjunction with an appeal, and given the state of financial distress the WCAB finds itself in, it is difficult to justify continuing to provide Summaries of Evidence to parties solely on the basis that it helps keep the private costs of litigation down.

Having the judge produce a Summary for every trial, regardless of whether the decision is the subject of a Petition for Reconsideration, also seems to be an inefficient use of precious judicial resources. In 1999, there were about 13,500 "decisions on the merits" issued by WCJs while only about 4,000 Petitions for Reconsideration were filed that year. In that light, it is not surprising that some judges strongly felt ending their responsibilities of producing a formal Summary of Evidence from their handwritten notes should be part of any delay and cost reduction program.[340]

The question then becomes how to minimize the negative impacts of eliminating the Summary of Evidence requirement. The three groups that would be most affected by ending the practice are judges (as an aid for recalling pertinent trial testimony), the Commissioners (as an efficient and streamlined way to review testimony), and litigants (as a trial aid, as an aid in making the decision whether to seek reconsideration, and as a no-cost substitute for ordering transcripts). Lower-cost alternatives to Summaries of Evidence should be explored if the functions of these

[340] These judges generally indicated that if the requirement were ended, they would nevertheless continue to take notes to assist them in their deliberations.

time-honored documents can be realized without a significant impact in the way the WCAB and the Commissioners dispense justice and the way litigants assert their rights.

Formal Transcripts

Assuming that the charge for transcript production accurately reflected the costs to the DWC (see ***Transcripts*** in ***CHAPTER 11***), it might be possible (from the WCAB's standpoint) to dispense entirely with the need for a Summary of Evidence ***if*** judges generally can draft their decisions without resorting to transcribed testimony.

It has been postulated to us that ending the practice of creating Summaries of Evidence would work to speed up the posttrial decisionmaking process because judges would no longer have the luxury of reviewing testimony at their leisure. Decisions would have to be rendered soon after the close of trial or the WCJ would likely forget what went on at trial despite whatever notes were taken.[341] We believe that such an expectation appears to be in line with a philosophy that by starving the workers' compensation adjudicatory system, it can be made to run "better" (faster, cheaper for the parties, rendering more reasonable decisions, acting in a more uniform way, etc.). In fact, we believe that the opposite is true.

What is likely is that for many litigants who reached the trial stage, the costs of litigation would rise as transcripts were ordered more frequently. This would not only be the case when reconsideration was sought (perhaps in nearly every instance) but also as a general practice following trial to determine whether grounds for filing a Petition exist. At current rates, transcripts cost $3.00 a page. It is difficult to say what that rate would be if it truly reflected the DWC's costs in providing the hearing reporter. Assuming that it doubled, then a 50-page transcript would cost the requesting party approximately $300. Unless the amount in controversy (either in terms of permanent disability or the potential for future medical care) is sufficiently high, it would be hard to justify that much of an expense, especially on

[341] A number of judges mentioned to us that they would eventually be unable to read their own handwriting if they did not get to a hearing reporter in time to dictate their notes.

a routine basis. But clearly more transcripts would be ordered, even with the higher per page costs. At the present time, practitioners are used to having a detailed road map to oral testimony provided to them expeditiously and at no cost. It may be difficult to wean them from relying on the judge's summary to help them remember what took place at trial and to help them decide whether to appeal. At least in the short run, obtaining transcripts might be a matter of routine for all but the most trivial matters. As a result, the average costs to both applicants and defendants to bring cases to trial would almost certainly rise.

An adequate number of new hearing reporters would have to be hired to meet this increased demand. This is perhaps unlikely in the short run given the DWC budget problems (though conceivably justified by an increase in the transcription price to something that reflects their true cost). Until the number of reporters rises to meet the need for a jump in transcription requests, there would likely be a backlog created in the execution of their routine duties. Even if litigant-requested trial transcriptions were given a lower priority, the production of Minutes of Hearing and other matters vital to the posttrial decisionmaking process would be impacted. Many judges told us that they wait for the Minutes to be completed by the reporter before beginning their deliberation process (though part of that delay may be due to waiting for the accompanying Summary of Evidence as well).

Any backlog may also spill over to affect the reconsideration process. At the present time, litigants have just 20 days (plus five for mailing) to file a Petition for Reconsideration following a trial judge's decision. That relatively short time period is possible because the parties have been served with a copy of the judge's Summary of Evidence as soon as a few days after the hearing and certainly no later than the day the decision was issued. Because of the costs of ordering transcripts, parties might wait until the decision is actually rendered before making the request (rather than having made one during the sometimes three-month-long period between the hearing and decision). Conceivably, reporters would not be able to meet the increased demand and newly ordered transcripts might take longer than the time now allowed for filing the Petition. Current practice denies additional

time for filing the Petition based upon a need to obtain a transcript without identifying specific material defects in the Summary of Evidence. Obviously, there would be no Summary to point to, but in the interests of justice, the Commissioners might have to routinely waive that requirement when faced with a flood of parties claiming that they are being denied their right to appeal. The upshot of all of this is that for many cases, the average overall time to disposition (from initial DOR to final decision following any reconsideration) may be increased.

Ordering transcripts is a routine fact of life in general civil litigation as the sort of no-cost, accurate, WCAB judge-produced Summaries of Evidence are unknown in those court systems. The important point to remember here is that at the present time, parties to workers' compensation litigation are getting the benefits of a product that is produced at a not-inconsiderable expense to the WCAB. But we believe that dispensing with the requirement altogether without a suitable replacement would have a negative impact on costs and delay without an adequate offset in time saved by judges and hearing reporters.

➢ ***At the present time, replacing judicially produced Summaries of Evidence with formal transcripts upon demand would likely increase the private costs of litigation and the average time to final disposition.***

"Rough Draft" Transcripts

The keystrokes on a hearing reporter's electronic stenographic writer are recorded on a tape or diskette but are essentially illegible to anyone except the reporter in that form.[342] The electronic file is then loaded into a computer and through the aid of ***c***omputer-***a***ssisted ***t***ranscription or "CAT" software and a customized "dictionary" that the reporter has developed over time and tailored to his or her own writing style, the stenographic codes are translated into English. In order to produce an official transcript, the reporter must then edit or "scope" the draft to eliminate any remaining raw stenographic markings or

[342] Reporters can also use a manual shorthand machine whose output goes only to a stream of paper, but the end result is that the symbols are eventually typed into a computer for translation.

unintelligible word combinations through a combination of CAT software tools and eyes-on review of the text.

One option that has been suggested is to have the reporter provide the prescoped version of the hearing transcript with little or no editing. The judge and the parties would receive this rough draft soon after the trial is concluded. This approach has an additional benefit in that the parties could have access to the draft essentially at the same time the judge would. While the draft transcript would not be as well organized or concise as the Summary of Evidence, it would generally serve some of the same purposes for the litigant as an aid for trial review, for knowing when to order formal transcripts, and as a way to determine whether there is any potential in a Petition for Reconsideration. If parties wanted to call the attention of the Commissioners to any particular aspect of a witness's testimony, they would incorporate passages from a formal transcript (and if it is felt that the passages were being quoted out of context, the responding party could indicate as much just as litigants do in other civil trial systems). Judges would also be able to review the testimony in draft form and if clarification is needed, they could request that the reporter refine the draft for only a portion of the witness's time under oath.

The problem is that this approach assumes that the reporter's draft is "readable." In fact, such drafts are often unintelligible as they are a product of the peculiarities of the stenographic process and of the reporter's own individual conventions. The answer is not simply a matter of using computers to fix the problems. For example, we saw a first draft where the witness's actual statement of "the window rose" appeared as "the heroin dose" even after being processed by CAT software. The reporter easily fixes these errors during the sometimes laborious scoping process, but to someone reading the initial rough cut, the result is at best difficult to work with and at worst, misleading. We do not believe that "raw" transcripts would be an acceptable substitute.[343]

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[343] Another potential problem lies in how CCP §273(b) is interpreted: "The production of a rough draft transcript shall not be

➢ ***At the present time, it is not possible to use the initial draft of the reporter's transcription as a substitute for Summaries of Evidence.***

Real-Time Court Reporting

Generally

An intriguing alternative would be to use so-called "real time" court reporting. Rather than doing the first step of CAT translation on a computer in the hearing reporters' area after the hearing is over, a laptop is directly connected to the stenographic machine that allows for concurrent translation of the keystrokes into English. More sophisticated setups have links to computer displays for judges and attorneys that allow them to see the words almost immediately after being spoken and to allow them to mark or highlight passages for later review. It should be understood that this process involves more than simply bringing a computer into the hearing room; in order to minimize the frequency of untranslated codes and errors, the stenographer has to have had special training in this technique (less than half of the hearing reporters we spoke to indicated that they were real-time capable) and the CAT software has to be capable of outputting text with a very low frequency of errors. Much is made of the fact that real-time court reporting creates a nearly simultaneous translation of the steno strokes, but whether the output is instantly displayed or printed out later, it is the ability to produce readable text without the need for scoping that is the distinguishing feature of real-time court reporting.

Real-time transcripts still contain untranslated stenographic symbols, misspelled names, and nonsensical word combinations though not to the degree of first-draft transcripts. These are very good drafts of a final official transcript and no more. But though the level of accuracy from this stenography method is not high enough to dispose of the need for scoping and proofing before an official transcript is produced, the text is quite readable.

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required." It is not exactly clear, however, if this means that the hearing reporter can decline any and all requests for a rough draft even if desired by a judge or whether it only covers instances where the draft might be demanded by a litigant.

As an evolutionary ideal, the use of real-time draft transcripts should be on the DWC agenda. Even if Summaries of Evidence are still required, trial judges could use real-time produced transcripts to supplement their own notes[344] during the posttrial decisionmaking period. Judges could be provided with a way to mark the statements made during testimony so that passages that may be of particular importance will be highlighted and easily located in a hardcopy document. We believe that many (perhaps all) of the benefits to a trial judge's decisionmaking process that currently result from creating Summaries of Evidence would similarly be realized from the use of a real-time transcript.

The Move Toward Real Time

Given that real-time reporting would address the trial judges' needs, avoid the costs and delays we believe would arise out of a transcript-only-upon-demand approach, and is far more useful and accurate than a rough draft transcript, should it be adopted as a replacement for Summaries of Evidence? The answer is yes only if other benefits of Summaries of Evidence could be realized and if implementation would be possible given current or anticipated DWC resources and capabilities.

Summaries of Evidence in their present form seem to be an integral part of DWC practice. For litigants, the loss of a concise summary of the testimony would mean more effort would be needed to identify pertinent statements made by witnesses. Conceivably, they could be given the same passage highlighting ability that a judge would have as long as they brought in their own laptops. Again, we feel that the convenience to the parties of obtaining a highly organized trial summary for free does not, in and of itself, justify the associated drain on DWC resources. A more important concern would be that a transcript alone (whether draft, real-time, or official) will never provide the same insight that Summaries of Evidence do into how the judge interpreted the

[344] The practice of note taking would not end without a Summary of Evidence requirement, though there would be little reason to produce an exhaustive recitation of what was asked and answered at trial.

evidence in the case. As we indicated in ***Uniformity in Trial Decisionmaking*** in ***CHAPTER 12***, we believe that a Summary of Evidence is an important component of the process that serves to enhance trial decision uniformity by revealing the evidentiary basis the judge used to reach a conclusion.

Would the Commissioners be hampered by the lack of a complete summary? The answer is not clear, especially when the costs of production are taken into account. The liberal rules for appeal of a WCJ's decision allow review when the WCJ was felt to have reached a decision not supported by the evidence. The Summary of Evidence, while admittedly secondhand information, is an excellent review of the oral record (which saves the Commissioners from having to pore over a thick transcript) and is "evidence" of a sort as it documents the WCJ's perceptions of the witnesses. But the current practice of creating—without exception—a formal Summary for every single trial that is designed to assist an appellate body in its review, when in fact only a fraction of cases reach that stage, seems to be overkill. Conceivably, if the issues to be reconsidered indeed involve error in determining facts, the parties have the option to call the Commissioners' attention to passages in a formal transcript just as they do in other civil court systems with a matter on appeal.

A recommendation of whether to replace Summaries of Evidence with real-time transcription is difficult because their use impacts more than just the trial judges who create them. The interests of litigants and the Commissioners clearly must be considered before deciding whether to cease their production altogether. It is also difficult to determine whether the cost to produce a Summary is outweighed by their benefit in helping to ensure that trial decisions are justified by the oral and video-graphic evidence offered at the hearing. A question as difficult as this needs the guidance of the workers' compensation community to resolve. We believe that the WCAB should convene a panel of Commissioners, WCJs, hearing reporters, and practitioners to assess the benefits and drawbacks of using a real-time transcript in place of a Summary of Evidence. Such an assessment should only come after its use has been tested on a pilot basis.

One immediate problem is that a Summary in its current form is explicitly required by LC §5313 and BR §10566. We believe that these requirements should be initially amended to allow the use of real-time transcriptions as an acceptable substitute for the Summary of Evidence in both trial and reconsideration purposes in order to explore its widespread adoption in the future. If expedient, such a substitution could initially be made dependent upon the consent of all parties appearing at the trial. BR §10578 already allows the parties to waive the Summary requirement. Also, a policy should be adopted by the Commissioners to allow parties to quote from a real-time transcript in their Petition and Answer; if a party believes that the quote being used by an opposing side is inaccurate, they can always request the reporter produce an official version of the testimony in question.

Even if real-time transcription is a useful substitute, can it be implemented in the near future? Currently, DWC hearing reporters are not generally skilled in real-time procedures. While this can and should be a goal of the DWC, it appears that an ***immediate*** upgrade of reporter skills and technology would have cost implications that may dwarf any savings in judge time. But some DWC hearing reporters already have real-time training (though they might not employ it in their duties at the branch office) and so an opportunity exists to explore the implications of its use. We believe that these hearing reporters should be provided with appropriate real-time equipment and software and whenever possible, parties should be given the option of jointly agreeing to waive the Summary requirement in exchange for being given a copy of the real-time transcript file immediately following trial.

- ***At the present time, it is not possible to substitute real-time court reporting for the current process of judicially produced Summaries of Evidence; however, the process should be tested on an experimental basis and jointly evaluated by key stakeholders. Controlling statutes and regulations should be amended to allow for the use of real-time transcription as a substitute for a Summary of Evidence.***

DECISIONS AND OPINIONS FOLLOWING TRIAL

We met a number of judges who had no problem issuing most decisions following trial within a couple of weeks and some judges were widely known for their ability to routinely turn a decision out over a weekend. Others with equally sized caseloads at the same branch office consistently ran up against the 90-day paycheck cutoff. Three months to render a decision in a case is inexcusable, in light of the relatively quick process throughout other aspects of workers' compensation litigation and when compared to much more productive judges.

Not all cases are created equal. Some cases certainly defy a quick decision due to the size of the Board File and the complexity of the issues, and others are difficult to bring to a resolution because the most obvious decision is distasteful to a judge's sensibilities. But for average cases, judges should be able to perform this critical task within a far more reasonable amount of time than a quarter of a year.

Why are some judges able to meet the statutory mandate of 30 days while others have such a hard time? The answer is not always lack of luck in case assignment, it is not always a lack of resources made available to that judge or that branch office, and it is not always the size of the workload. Over time, the conditions that both "fast" and "slow" judges at the same office face are essentially the same. The problem is therefore most likely to be something in the way they individually approach the tasks of summarizing evidence, reviewing the applicable case law, reviewing the medical reports, and drafting the decision.[345]

In order to better understand what was happening, we spoke to the secretaries and hearing reporters who work closely with judges who were

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[345] One question we explored was whether certain judges are less able to get out decisions on time due to difficulties in obtaining adequate secretarial support for editing their documents. Secretaries are generally assigned to work exclusively with a single judge and so if there were long-term problems with their workflow, the judge's personal statistics would suffer. While no doubt there are secretaries who are slower than others in turning around edits or doing data entry, the differences would not explain lag times of multiple months from the end of trial to finally issuing the decision. A judge whose personal secretary is a constant source of delay would always have the option of approaching the LSS-I and requesting that others help with the backlog.

notorious for lengthy delays. Almost invariably, they told us that in their experience the judges who were consistently in danger of having their paycheck halted were often disorganized in *every* aspect of trial practice from the moment the attorneys arrived for the hearing, including reviewing and assembling the Board File, narrowing stipulations and issues, conducting the trial, and summarizing the testimony.

Based on the records we reviewed and the discussions we had with support staff, these problem judges were generally limited to a select few at the office and the multimonth delays in their caseload were the rule year after year. For these reasons, we believe that the problem of getting decisions out is primarily related to individual judge differences and not the overall workload demands or particular calendaring practices of the office. Certainly judicial resource availability plays a role here; if WCJs only had to hold two trials a month, then even one reluctant to make difficult decisions or who takes hours to complete tasks that others perform in minutes would be able to meet the time mandates. But a system that must make many difficult choices in allocating precious funds cannot afford to overstaff the number of judges in order to compensate for those who appear to lack the skills and techniques employed by their speedier colleagues.

We suggest that judges who are having routine problems getting decisions out within a maximum of 60 days following submission should be the subject of an intense training program, perhaps developed by the National Judicial College or internally produced by the DWC, using the input and advice of “fast” turnaround judges, in improving their organizational and writing skills. One suggestion that has been made that merits serious consideration is specific training for judges, based on input from DWC hearing reporters, on how to effectively dictate in order to create a complete record.

One concern we have is in the attitude of a number of judges we spoke to who view the outside limit on turning out a decision as 90 days. While uncompleted decisions remaining after three months require the DWC to temporarily withhold a judge’s paycheck, the real time mandate is 30 days. Anything beyond that point is a cause for concern

and deserves a concentrated effort to cut the turnaround time by whatever means necessary, even if failing to do so has no immediate effect on income. One way to help focus that effort is for Presiding Judges to consider any unissued decisions remaining 30 days after submission as evidence that a judge has uncompleted work to finish. We mention this because some PJs told us that certain judges at their locations feel free to leave the office early whenever they have completed all conferences or trials assigned to them that day. We have no idea how widespread a practice this might be, but no judge should be excused on that basis prior to the end of the business day whenever a litigant in one of the cases he or she has heard is still waiting for a decision in a trial completed a month or more earlier.

Ideally, the clock for the 30-day limit (and all other measures of posttrial decisional performance) would begin to tick the moment the actual in-court aspects of the trial were concluded. Allowing the judge great discretion in determining when the case will have been officially submitted provides an opportunity for inappropriate control over the pace of litigation. As a backlog in decisions for previous trials develops, judges can give themselves additional breathing room for new hearings by waiting a while to make a request to the DEU for a formal rating, by ordering the parties to submit trial briefs, by holding off on completing the Summary of Evidence, or by making a questionable order for a follow-up medical report. Making the close of oral testimony the starting point might well move judges to wrap up these ancillary tasks sooner (or reduce the instances when additional evidence is not needed but is requested nonetheless). Nevertheless, we understand that it might be unfair to gauge a judge's performance on decision turnaround from the moment the last witness is excused when some of the time expended is clearly outside of the judicial officer's direct control. As such, we do not currently call for the time line criteria to be modified until such time as the process has been improved to the point of achieving better success with the current (and arguably more liberal) standards.

- ***With adequate resources and training, judges should always meet the 30-day time limit absent extraordinary circumstances. A trial that has***

been waiting for a decision for 30 days or longer following submission should be considered presumptive evidence that the judge who heard the case has not completed all daily tasks under his or her responsibility.

- ***Judges who consistently fail to get decisions out within 60 days after submission where the average at the same office is much less need immediate training in basic organizational and writing skills. The DWC should make assistance and education in the area of efficient decisionmaking a top priority for future judicial training efforts.***

One source of difficulty in trying to monitor judicial performance in regard to trial decisionmaking is that CAOLS does not provide adequate detail as to the current status of the process. There is no way for a PJ or administrator to quickly get a sense of why the decision is taking as long as it is and whether the problem lies within the control of the judge. The lag time between the end of oral testimony and the day the case is formally submitted can be due to a request for a DEU rating that has not been acted upon, problems in getting the Summary of Evidence completed, difficulties in scheduling a follow-up medical exam, the (hopefully temporary) loss of the Board File, the failure of the judge to promptly issue rating instructions or make other orders, or a variety of other reasons. For the DWC to be able to remedy routine sources of delay in this regard, it must know not only the fact that the trial has not yet been submitted but why.

Presiding Judges do have a “60-day report” currently available to them based on information in the CAOLS database that indicates which cases had hearings conducted or proposed settlements filed more than 60 days previously. The problem is that separating the ones that are legitimately in limbo (such as those waiting for a formal rating or a second hearing date in a discontinuous trial) from those that are gathering dust on the judge’s shelf is not possible. Also, the report provides no basis for identifying problem areas that may be slowing down the work of the entire office. One interesting idea would be to require every judge to inform a central staff person at an office (perhaps the lead secretary) of the date the hearing was completed, the reasons why

the judge did not order the case submitted within a week following the end of the trial, the date of any request or order made (such as to the DEU or the parties) that has triggered the delay, the date the rating or other evidence or argument was received, the date of formal submission, and finally the date the decision was rendered.

In actuality, much of this data collection would not be expressly required by LC §5313 or LC §123.5 because under those time mandates, the period between the end of the hearing and formal submission is not a source of concern. But to injured workers who expect a decision rendered as soon as possible, the technical reasons why the clock has not started ticking have no importance. If, for example, decisions routinely take months to deliver following trials (ignoring the submission distinction) and most of that delay is due to DEU turnaround issues, then the DWC's energies should be focused on helping the raters do their jobs rather than giving relatively quick judges additional instruction in writing and organizational techniques. Without such comprehensive information, there would be no way to discover why the posttrial process consistently gets bogged down.

This type of data collection would also allow PJs and administrators to identify those decisions that are taking much longer than most to complete even if they are not technically "late." It should be stressed that the time for addressing the needs of particularly difficult cases is as early as possible in the process, not just when a red flag has been raised at the end of 90 days. Occasionally we visited judges who seemed to have multiple volumes of files representing a single complex or difficult-to-decide case sitting on a shelf in their office. They frankly admitted that going into those volumes and finishing up the trial was not a task they relished, perhaps deferring consideration until taking care of other, more straightforward matters. We do not have a recommendation in this regard, but we do suggest that the DWC investigate whether a better policy might be to always work on trials in order of the date of the hearing rather than letting some particularly unattractive ones gather dust and important memories fade.

➢ ***The DWC should consider instituting a separate data collection for the posttrial deliberation process with the goal of determining the extent to which periods between the end of trial and final decision are due to submission delays and the reasons behind such problems.***

RESPONDING TO PETITIONS FOR RECONSIDERATION

Time and time again, many judges were frank enough with us to admit that once they reviewed the Petition for Reconsideration and determined that there was no reason why they should modify or rescind their original order, they often addressed the need for a Report on Reconsideration by essentially taking the original Opinion and Decision, shifting the paragraphs around, and changing the tenses of the words. They generally were very insistent that this took place only after they were able to honestly assess whether the grounds in the Petition were without substantial merit, that the first explanation of their decisions already addressed the claims in the Petition, and that they were satisfied with both the reasoning and outcome of the original order.

We believe that it is a waste of judicial time to perform cosmetic surgery on an Opinion and Decision that they have absolutely no intention of changing in order to meet the requirements of BR §10860. The rule should be changed to allow WCJs the option to formally state under oath that the Petition has been thoroughly reviewed, no good cause was found to modify or rescind the Decision, and as such the original Opinion has been incorporated in its entirety to satisfy the requirement for a Report.

One concern noted to us would be that when a judge has reviewed the file and chosen to reaffirm the discussion in the original order, the parties would be denied the opportunity for additional insight into the reasoning behind the decision. It should be kept in mind, however, that in many instances under current practice, nothing of importance is added when the existing paragraphs in the Opinion are shifted around simply for the sake of appearances. We believe, however, that judges in highly disputed, complex, or novel cases would likely continue to create responsive Reports from scratch rather than simply adopt the initial Opinion. Also, judges should draft a responsive reply whenever the

Petition raises questions not addressed in the original Decision and Opinion.

The time savings from this recommendation will not be as great as the 165 minutes per week we estimate is currently spent on Reports on Reconsideration. We still wish to see judges thoroughly review their original decision to determine whether an error had been made. Judges would also be free to draft a full and detailed Report if they so desire and we suspect that many of them will despite the newly available option. Others may adopt the original opinion but also choose to provide additional clarification or support for specific aspects of the decision that are the critical concerns of the Petition. All that will be eliminated is some unknown fraction of the 2 hours and 45 minutes that is now needlessly spent doctoring up an existing document.

One question that arises from such a policy is whether it will make the job of the Appeals Board more difficult. Under LC §5908.5, actions of the Appeals Board are supposed to "state the evidence relied upon and specify in detail the reasons for the decision." The increase, if any, in the workload of the Appeals Board is difficult to predict. It should be kept in mind that of the thousands of Petitions filed, only a few hundred actually result in a decision after reconsideration is granted (see ***Table 19.1***). Will the Appeals Board be forced to grant additional numbers of Petitions (rather than simply allowing them to be denied as a matter of law after 60 days) because they will not be adequately convinced of the appropriateness of the trial judge's reasoning? Possibly. Will the Appeals Board's staff wind up having to pore over the record and research case law more often in the process of reconsideration because the trial judge did not provide additional authority in a thorough Report? That might be possible as well. Our sense though is that if the practice of superficially re-editing the Opinion and Decision is already as common as claimed, then the suggested policy should have little effect on the overall burden placed on the Appeals Board. If indeed a spike in Petitions granted or delays in reconsideration turnaround are seen, then the suggested policy can be reconsidered in the light of actual evidence. It should be kept in mind that even the Appeals Board shares in the responsibility to ensure that

its own trial judges are turning out decisions following trial as rapidly as possible. Working with those judges to develop methods for reducing the extensive posthearing burden they must bear is a good way to achieve that goal.

- ***Judges should be allowed the option to adopt their original Opinion and Decision as their Report on Reconsideration as long as they have certified that they have reviewed the Decision in light of the Petition's allegations and fully considered possible modification or rescission.***

CHAPTER 17. COURT TECHNOLOGY

> No real knowledge of the operation of Workmen's Compensation Acts can be acquired until complete statistics have been gathered...injustices that may exist through the law cannot be remedied until the facts are known, and the facts cannot be known until complete statistics have been compiled.
>
> *Commission on Workmen's Compensation Laws*, 1914[346]

DWC CLAIMS ADJUDICATION UNIT ON-LINE CASE MANAGEMENT INFORMATION SYSTEM

Evaluation of CAOLS Performance

At the present time, the Claims Adjudication On-Line System (CAOLS) is the DWC's sole electronic means of managing litigation in its courts. We have repeatedly alluded to problems we encountered in trying to use the data it collects, but criticizing CAOLS seems almost unfair. This system was first implemented in the mid-1980s and though it has been updated in a number of ways, it simply can never be as efficient and flexible as the current approaches to case management information systems (CMIS) being used in other courts.[347] The following discusses some obvious areas where the system as currently designed and implemented evidence serious need for improvement.

Examples of Ongoing Problems with CAOLS

CAOLS does not "talk" to other DWC computer systems.

Though they share a number of features and were developed during the same era, there are three separate computer systems being used at branch offices throughout the state. Besides the one that is the Claims Adjudication Unit's primary management tool, the Disability Evaluation Unit and the Rehabilitation Unit each have their own distinct file systems and interfaces. Most clerks can

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[346] Quoted in Iowa Division of Workers' Compensation, *Electronic Data Interchange (EDI) Development Guide*, Iowa Workers' Compensation Advisory Committee, Des Moines, IA, January 2000, p. 12.

[347] Given the computer resources available at the time and the fact that they were essentially breaking new ground, developers of the CAOLS in the early 1980s cannot be faulted for failing to consider the needs of the WCAB in the 21st century.

access all three systems from a single terminal or PC, but information on one is not carried over to another. Thus, names, addresses, dates of birth, dates of injury, injury type, and other information must be repeatedly entered for the same work injury. Thankfully, not every work injury involves a rating from the DEU or services from the RU, but when they do, valuable clerical time is wasted. Eliminating this quirk of history would be a big step toward making CAOLS more efficient. Moreover, there is no "single screen" way to display the entire breadth of services (adjudicatory, evaluative, and vocational) that have been offered by the DWC.

CAOLS does not provide an easy-to-understand case history.

The system was primarily designed for DWC personnel to assist in the distribution of notice of hearings, to keep track of file locations, and to provide rudimentary information about claims. It does not appear to have been intended to be a user-friendly source of information to litigants or judicial personnel. Transactions such as case openings, judge assignment, hearing settings, pleading filings, and notice mailings are jumbled in a way that might have made sense to a programmer in 1985 but is essentially unreadable to a layperson in 2002.

The best indicator of how cumbersome it is for even staff members to decipher the codes is that many clerks, secretaries, and judges we spoke to rely on handwritten notations on the outside of the case file jacket in order to get a sense of what hearings have been scheduled in the past, what their outcomes were, and what events are planned for the future rather than calling up the case on a CAOLS-connected monitor. The inability to discern meaningful case history information from CAOLS by those who do not have the physical case file directly in front of them calls into question the current policy of referring outside inquiries from applicants and others for case status to a centralized phone bank.

CAOLS event file codes use terminology prone to misinterpretation.

An order by a judge to set a trial date following an MSC can be entered as a "continued" hearing even though the conference began and ended on a single date and resulted in the parties completing a "Stips & Issues."

CAOLS writes over important types of events in the interests of file space savings.

Though all the data currently contained in CAOLS could fit on a single hard drive of one of today's top-level home PCs, data storage in the 1980s was far more expensive. Thus, it made sense to consolidate multiple history records that essentially involved the same event into one all-encompassing entry. The result is that when a hearing is set, the first entry gives the date the setting was made as well as the scheduled date of the hearing. This is vitally important to identifying potential problems in calendar management because it shows how far out cases are being set. When the hearing is actually held, continued, or canceled, new information is added that overrides the original entry; the result is that CAOLS would now show essentially only the date (actual or originally scheduled) of the hearing and the date the staff member entered the update. Any information regarding whether the branch office is setting hearings 30 days, 45 days, or even longer from the time the request reaches the attention of the calendar clerk is lost forever.[348]

CAOLS requires data entry personnel to hunt down matching addresses in order to assign unique codes to parties and their

[348] It is possible to determine compliance with statutes mandating that an MSC be conducted within 30 days of the filing of the DOR and a trial within 75 days of the filing of the DOR because the event entry regarding the DOR acceptance is not overwritten. But as discussed elsewhere, we believe that the time from DOR filing to the date an MSC is set by a calendar clerk reflects the ability of the clerks' section to meet caseload demand while the time from the calendar clerk setting to the scheduled date of the hearing reflects the ability of judicial resources (judges, reporters, hearing rooms) to meet similar demands. Unless the two periods can be parsed out of the entire time from DOR to first hearing, then identifying the particular area at a branch office most in need of assistance will be made far more difficult.

representatives' law firm and if an exact match is not found, create new ones.[349]

Clerks and secretaries tasked with associating existing system ID codes with parties and law firms sometimes do so through a combination of detective work and sheer luck, sometimes taking a surprising amount of time to find the best match. It is not always apparent to a clerk whether the "XYZ Corporation" located at "123 Main Street" mentioned in the Application should be given one of the codes that have already been assigned to "XYZ Inc." or "XYZ Enterprises" or if an early entry for XYZ at "1233 Main Street" is the correct one and the current Application is wrong. In many instances, the clerk will create a brand new ID for the name and address combination he or she sees on the pleading in order to avoid having to make a potentially incorrect decision. The end result is that the same XYZ Corporation will wind up over the years with dozens and dozens of "unique" ID codes, all with slight variations in name and address. Analysts who wish to track the frequency to which specific entities are involved with formalized workers' compensation disputes thus have a far more difficult time of identification.

CAOLS uses attorney codes that identify law firms rather than specific practitioners.

Many workers' compensation law firms, especially on the defense side, are large entities with dozens of attorneys employed at any one location. But when a party's legal representative needs to be identified in CAOLS, the clerk or secretary is limited to using codes that are associated with the entire law firm. This can make getting important notices to the correct attorney problematic for law firm staff and it limits the ability of the DWC to incorporate computerized calendaring technology that makes

[349] This is not as much of an issue for applicants as their social security numbers already provide a ready-made unique ID. There are problems associated with the fraudulent use of the same SSN by those who are working in this country illegally but that would be true regardless of CMIS design.

allowances for the vacation and other needs of individual practitioners.

Conceivably, a practitioners' State Bar number could be used instead of a DWC-generated ID. A requirement that the Bar ID be included in every pleading signed by a California attorney would eliminate a lot of the work currently expended by clerks and secretaries to match the representative with an existing address.

CAOLS event codes have not been adjusted to keep pace with changes in workers' compensation law.

Many event codes refer to post-1989 injuries, though there were significant impacts in procedure from the 1993 reforms. To the uninitiated, it is difficult to determine whether such codes refer only to Window period injuries or to both Window and Post-Window matters.

CAOLS is not well suited to protecting the identity of applicants with HIV-positive status.

Complex and sometimes conflicting regulations surround the issue of what the DWC's responsibilities are to applicants who are HIV positive, even if the infection itself was not caused by anything that was related to employment. Current policy is to keep the physical case files of these applicants in a secure location (typically, but not always, in a locked cabinet in the PJ's office) and to enter false names and social security numbers into CAOLS in an effort to prevent access by authorized individuals and organizations. The need to seal the record in certain case situations does not seem to have been considered during CAOLS' system design. The case cannot be left off CAOLS entirely because there exists no alternative way for the WCAB to provide notice or exercise its other duties. The problem is that CAOLS depends on being able to associate multiple open cases with a single individual using a valid social security number. Also, blotting out important information from CAOLS seems to be a cumbersome way to handle the statutory requirements of privacy, especially in light of the fact that it not difficult for outsiders to identify

cases likely to involve HIV-positive applicants by looking for certain commonly known patterns in names and social security numbers.

We believe that a better approach, subject to the requirements of controlling legislation, would be to track HIV status in parallel with CAOLS without disclosing the fact, either explicitly or implicitly, when accessed by the general public.

As a statewide legacy system with central administration and central file maintenance, CAOLS is occasionally subject to slowed response rates.

We have been told that it is not unusual to wait 30 seconds for each keystroke to be reflected on a CAOLS screen. For all intents and purposes during such periods, much of the workload of the WCAB is not possible to process.

CAOLS does not have the capability for printing out address labels from the Official Address Record.

A surprising number of clerks, secretaries, and hearing reporters all voiced this complaint about the current version of the DWC's online system. It appears that years ago it was possible to automatically produce labels, but at the present time, one must use a typewriter or address correspondence by hand. The failure to include this seemingly basic capability results in wasted staff time.

CAOLS does not keep track of important types of pleadings and events.

The list of possible documents and litigation events that data entry personnel can enter in CAOLS is limited. For example, there is no way to record that a Request for Expedited Hearing has been filed.[350]

[350] It is possible to determine whether an Expedited Hearing was scheduled or held, but there is no way to identify those cases where a DOR has fallen through the cracks and was never acted upon by a calendar clerk.

CAOLS does not allow for the routine entry of information contained in pleadings, orders, memos, or other documents; only the fact of the filing of the document itself is recorded.

While not absolutely required for scheduling and notice purposes, it would be of great use to policymakers to have available information on more detailed aspects of a case. For example, there is no electronic record of who requested a continuance of a conference or trial or an order taking the matter off calendar and there is no record of why the request was made. At the moment, the only way to assess changes in continuance practices is to hand tally orders copied for the benefit of the Presiding Judge or DWC administration.

Data entry errors are difficult to correct at the branch office level.

We have been told that once a mistake has been made, individual data entry personnel are powerless to remedy an error without contacting staff at the DWC's central processing facilities. Such steps take time that would be far better suited for other tasks.

Key judicial personnel at branch offices are generally ignorant of how CAOLS operates and how their decisions and orders are translated into event histories.

Much of what is being entered into CAOLS depends on a clerk or secretary interpreting the underlying desires of WCJs as indicated in Minutes of Hearings or Orders. But data entry personnel often have a difficult time deciding what the WCJ actually wanted to have happen or placed into CAOLS. For the most part, what the clerk or secretary enters is of lesser importance because CAOLS is primarily for the benefit of the DWC while the parties' attorneys essentially know what the judge intended because they were there at the conference or trial when the decision was made. As a result, some data entry staff who consistently encounter cryptic or undecipherable notations by a judge have confided in us that due to the pressing demands of their positions, they will simply choose a

“catch-all” default option on CAOLS in order to capture that something happened that day without any further details in order to move on to other cases. At the individual case level such shortcuts mean very little because CAOLS is not currently used as a case management tool to any degree, but the practice makes gathering accurate aggregate numbers a serious problem for administrators.

We believe that the frequency of this situation could be reduced if judges knew what the actual procedures were in CAOLS for opening cases, entering in orders, and other aspects of the business of the WCAB. They would be more likely to issue memos and orders that could be interpreted more precisely by clerks and secretaries. But only a tiny handful of judges we were in contact with have ever closely watched the process of keying events into CAOLS, let alone actually becoming intimately familiar with the details of its operation.

The days when a judge could remain blissfully ignorant of the data processing and management information systems side of court operations are over. Even hampered with a computer system that is nearly two decades old in design, the WCAB of 2002 no longer functions within the Dickensian model of clerks with green eyeshades laboriously poring over large ledgers in one part of a courthouse while judges concern themselves solely with august matters of legal reasoning in another. Like it or not, judges of the WCAB increasingly have to possess sophisticated computer skills to enable them to manage their own caseload more efficiently and to allow the DWC to take advantage of potential technological improvements. If they do not, then the burden falls on other staff members to make up for the judicial officer’s failure to keep up with the times.

Thanks to the seemingly universal impact of home computing and the Internet, as well as the increased use of computerized legal research at law schools, most WCAB judges generally appear to be receptive to employing computer resources whenever possible. Even though the DWC fails to provide modern personal computing resources

for many of its judges, some have voluntarily brought their own PCs and Macs from home and at their own expense because they feel the ability to have access to a computer is critical to their duties. While commendable, such computer literacy does not immediately translate into familiarity with the features and requirements of an antique computer system that is most critical to the business of the WCAB.

We believe that judges should receive some nominal training in the use of CAOLS, not just to access information already entered, but to better understand the demands upon their fellow staff members at the District Offices.

The discussion above points out just a sampling of the problems preventing CAOLS from acting as an easy-to-use, versatile case management system. Given its age and the development of more modern approaches to electronic case management, CAOLS is in need of replacing, not just a cosmetic upgrade. The only question is when and in what form.

The Next Generation of DWC CMIS

Replacing CAOLS

Given an electronic transactional database system that is about two decades old, it is not surprising that other observers have also pointed out CAOLS' numerous deficiencies.[351] But despite the significant problems with CAOLS, there is no point in replacing the current online system until the situation with conflicting and multiple forms are resolved and until the AD Rules, the Board Rules, and the Policy & Procedural Manual are in agreement. The result would be simply cementing the status quo into an expensive computer overlay. Furthermore, the reality is that such a replacement is unlikely in the short run given current DWC budgets. But work could begin now on ensuring that all DWC clerks, secretaries, judges, and other staff member stations are network-ready for Internet (or DWC intranet) access.

[351] See, e.g., KPMG Peat Marwick LLP (1996), pp. 4-18.

Such a capability would allow whatever system is to be eventually adopted to be installed with a minimum of on-site technical work because an essentially free browser on the end-user's PC could act as the interface to the DWC's new CMIS.

Another reason to wait a bit longer is to make sure that the replacement can take advantage of advances in the exchange of information between the DWC and potential defendants. A recent initiative in record-keeping was precipitated by LC §138.6 as part of the 1993 reforms. The statute requires the Administrative Director to develop an information system to assist the department in managing the workers' compensation system, facilitating ongoing evaluation of the process, measuring adequacy of indemnification, and providing statistical data for various research. To do so efficiently, the system would be based on the Electronic Data Interchange (EDI) protocols of the International Association of Industrial Accident Boards and Commissions. By mandating a single "language" for the transmission of claim data and other information related to workers' compensation benefit delivery, private entities would then be able to communicate with the DWC electronically in a uniform, regular, and rapid manner. The current embodiment of such a comprehensive resource for management and planning is the Workers' Compensation Information System (WCIS), a depository of claim data that initially accepted the electronic submission of First Reports of Injury in September of 1999. Additional types of information that go beyond the First Report are eventually planned to be collected as well; however, not all insurers and self-insureds are currently participating.

As ambitious as WCIS is, it is certainly not a replacement for CAOLS. WCIS appears to be primarily aimed at the *administrative* side of the DWC's operations rather than the *adjudication* component. WCIS really is a tool for handling workers' compensation claims generally and at the moment, does not purport to capture the sorts of information needed to manage a court's caseload. Improving the DWC's litigation management system would then have to come from a brand-new data system built from the ground up. But whatever system is eventually developed should definitely be tightly integrated with the Workers' Compensation

Information System. Linking the two systems would provide judges and court administrators with critical information that would be both clear and unambiguous about benefit levels and claims handling history (especially important in regard to penalty petitions). It would also save much of the data entry required in opening up new cases because comprehensive information about the injured worker and the insurers would already be available almost from the moment of injury. Unfortunately, WCIS is still in its earliest stages and behind schedule as well. It would be most prudent to wait until WCIS is well tested and an integral part of routine workers' compensation claims handling before trying to build a new case management system around it.

At the moment, CAOLS "works" well enough for its primary use: the delivery of notice of upcoming conferences and trials. As labor intensive and error prone as the system might be, the significant costs of immediate replacement are not easily borne by a court that is unable to fully staff its own offices. There is no question that CAOLS needs to be upgraded (replacement is probably a better description of the level of overhaul needed) and we certainly are not advocating that the DWC continue to use this cumbersome and antiquated system indefinitely. The Division should begin at once to obtain a thorough understanding of the strengths and weaknesses of the various products already on the market for court case management systems even if actual purchase is not on the immediate horizon. Moreover, the process for obtaining targeted funding from the state for technological upgrades is a slow one, reportedly taking a number of years. With the assumption that the potential impediments to successful implementation we describe above will have been overcome by that time, we do believe that the DWC would also be wise to begin at once the steps needed to seek specific funding for the changeover. What cannot be supported is any effort for immediate replacement, an effort that would undoubtedly divert a substantial portion of current funds vitally needed for filling vacant positions.

- ***The current Claims Adjudication On-Line System (CAOLS) does not meet the standards of a modern case management information system, requires significant levels of labor to operate, and is a major source of waste***

and error within the DWC. Immediately begin the process of investigating the best alternatives to CAOLS and immediately initiate the process of securing future funding for replacement, but no new system should be implemented until the confusing and nonuniform state of rules, policies, and procedures has been corrected; the Workers' Compensation Information System is functioning at a mature level; and the diversion of DWC funds for such a project will not result in additional staff reductions.

Future Development

While we do not believe that the resources are currently available for replacing CAOLS, it must happen at some point. Who should do the basic development? The DWC has some very competent and dedicated MIS staff members, but it is unrealistic to assume that they would be in the best position to design a full-featured CMIS system that can be easily integrated with a document management system (DMS),[352] an electronic filing interface for receiving pleadings via the Internet or other medium, an attorney accessible calendaring system, and a public access network so that litigants and others can view the Board File remotely and track case progress. Without these features, any improvement to CAOLS would not be taking full advantage of modern technological developments and the current thinking among leading court administrators. When CAOLS was originally designed, it made sense to make the development primarily an in-house project given the relative advantage that government MIS staff had with handling centralized data systems over their counterparts in private industries. Commercial case management information systems were almost unknown or were so tied to legacy data processing systems at particular installations that their applicability to other courts would have been marginal.

In 2002, the situation is quite different. Dozens of well-established commercial information technology companies already specialize in the design and installation of sophisticated CMIS systems for courts across the country. It no longer makes much sense to spend

[352] A DMS is a system intended to seamlessly receive, store, search, display, and archive electronic versions of documents.

considerable resources with in-house staff, much of which would be expended simply in order to get up-to-date with recent developments and designs, when there exists a wide variety of vendors with the requisite expertise and a track record of success.

Another, perhaps more compelling reason is that a system developed almost entirely within the confines of the DWC runs the risk of not incorporating the necessities for open integration with outside networks and data systems. Any new CMIS project for the WCAB must carry with it at least the *potential* for interfacing with separate systems maintained by insurers, employers, other court systems, and other government agencies. This goes beyond the obvious need to connect to and integrate with the systems used by the DWC's own disability evaluation and vocational rehabilitation units. At a minimum, any new CMIS should be able to take advantage of information on the computers of the Employment Development Department and the Department of Industrial Relations' Division of Labor Standards Enforcement and Division of Occupational Safety and Health (and in return supply information as needed to assist those entities in the performance of their own missions). As for private organizations, most of this can be realized by integration with WCIS that should serve as the primary nexus for the exchange of information between regulators and the regulated. The use of universally recognized "tags" for data elements such as found in Legal XML[353] and other conventions such as those being developed by the International Association of Industrial Accident Boards and Commissions are a basic necessity for ease in communicating and exchanging data with outside systems. The use of outside vendors who are experienced with creating installations that work well with a myriad of other entities is vital to minimize the chance that whatever is chosen to replace CAOLS will not quickly become an expensive dinosaur. It should be understood that we do not believe that 100% integration with outside systems is a condition precedent to the installation of an upgraded CMIS by the DWC, only that it be possible and relatively easy to implement.

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[353] See, e.g., LegalXML, *Home Page*, http://www.legalxml.org, accessed July 18, 2002.

No matter how experienced the selected vendor might be, adequate time will be needed to consult with judges, clerks, secretaries, DWC administrators, insurers, worker advocacy groups, and other stakeholders in order for the vendor to understand and incorporate the specific needs of the California workers' compensation system. The current CMIS has lasted almost 20 years and for better or worse, can last a few more in the name of getting this important task right.

- ***Any replacement system for CAOLS should include integration with a document management system as well as an attorney-accessible calendaring system and an electronic filing manager; the capability to interface with systems maintained by other government entities; and provisions for the remote viewing of dockets and pleadings by the public (subject to privacy protections).***

- ***Any replacement system for CAOLS should be done through the services of outside vendors with extensive experience in court case management information systems.***

- ***Any replacement system for CAOLS should be done with input about required features from all segments of the workers' compensation community.***

Funding

One concern stems in part from the experience with the WCIS implementation. The justification given for funding this worthy project was that staff levels could be reduced as a result of anticipated improvements in claims handling (which in turn would impact the number of disputes). While optimistic projections regarding new information systems are certainly not unique to the DWC, the price for WCIS that may ultimately be paid in reduced authorization levels in the near future may result in crippling the ability of some district offices to do their statutorily required job (see ***Anticipated Future Reductions*** in ***CHAPTER 10***).

We caution DWC administrators against allowing a similar bargain to be struck regarding CAOLS. While we firmly believe that its replacement

will ultimately save the DWC a considerable amount of now-wasted clerical and secretarial effort, allow for more efficient management of cases, and give administrators a tool for identifying sources of cost and delay, there is absolutely no way to quantify how much more efficient the DWC will operate once the new system is up and running. Trading away future staff authorizations in order to obtain funding is a very risky business.

- ***Funding for the replacement of CAOLS should not come at the expense of current or near-term staff levels.***

ELECTRONIC FILING OF PLEADINGS

Generally

In many respects, workers' compensation practice in California lends itself to implementing an electronic filing program (often abbreviated as "e-filing") far better than some other areas of the law: This is a form-driven system whose pleadings are of limited number, are fairly uniform, and contain valuable information needed to manage the case found in a consistent and easily identifiable location; the scope of such an implementation would be on a statewide basis available to all practitioners rather than individually by county; and there appears to be a golden opportunity to integrate filings made electronically with the WCAB with data systems maintained by the DWC's Rehabilitation Unit, the DWC's Disability Evaluation Unit, insurers, and employers. Also, shifting the record-keeping responsibilities of the DWC from a paper-based world to one that can fit on disc drives is very attractive as an alternative to high-priced real estate in some urban areas. Workers' compensation losses from staff repeatedly moving heavy physical files would be avoided as well.

In many ways, workers' compensation practice is similar to the world of bankruptcy law in that much of the importance of individual pleadings is derived from the information contained in them. "Notice-based" civil court pleadings typically contain little data within the text that is of use to court administrators; in terms of case processing and management, for example, it is rarely useful for a clerk or a judge

to know that the auto accident which is the substance of the complaint involved a particular type of automobile or that the plaintiff is alleging particular types of physical or mental injuries. As such, clerks in civil courts do not usually read through the text of a pleading as part of the data entry process and usually only the pleading type, date filed, and identity of the filer is recorded. In contrast, the dual role of the DWC in both administering the California workers' compensation system (i.e., rate-setting, auditing and enforcement, information delivery to injured workers, etc.) and in adjudicating any disputes requires the collection of information regarding the type of pleading and the extraction of information within the pleading (e.g., injury type, body part, date of injury, social security number, etc.). Bankruptcy practice requires a similar level of data collection and labor intensive data entry from attorney-filed documents and as such it is not surprising to note that the United States Bankruptcy Courts were one of the first institutions to inaugurate large-scale, full-featured electronic filing systems.

The movement toward the use of workers' compensation data in a primarily electronic form has already taken hold in the insurance industry. A number of insurers, including State Compensation Insurance Fund, are in the process of turning their facilities into "paperless offices" in order to control administrative costs and to better track claims experiences. Information about a particular claim is easily accessible via computer terminals to those who are working on the case and perhaps most importantly of all, integration of these systems among various internal departments and divisions of the insurer minimizes the need for costly duplication of data entry. Paper is not irrelevant to this process, but generally, the electronic version is the one used by internal staff members for claims handling and record-keeping.

Actually, "electronic filing" has already arrived for some litigants who appear before the WCAB. Through the EDEX access system, subscribers have the ability to query the DWC database of all workers' compensation cases and receive all case information electronically. What makes EDEX a judicial e-filing system to some degree (rather than simply a process to provide public access to DWC data) is that the so-

called “Green Lien” (AKA “Notice and Request for Allowance of Lien”) can be filed by subscribers as well. This saves branch offices from inputting lien holder address information into CAOLS and it also serves as a way to cut off misinformed lien holders from continuing to flood the branch office with supplemental Green Liens as the amounts in question increase despite the fact that only the initial document is required.

Evaluating the Use of Electronic Filing in the WCAB

Despite the potential advantages in speed and labor costs compared to current DWC practices, we do not believe that spending a *significant* amount of effort to move toward electronic filing of pleadings generally *at this time* without simultaneously seeking a replacement for CAOLS would be a wise one for the following reasons:

The current and historical experience with electronic filing of court documents is a mixed one.

In 2002, there are no technical reasons why “e-filing” cannot work (the secure transmission, receipt, and storage of important documents is fairly easy these days) and given the great degree to which Internet access can be found in the offices of most modern practitioners, it would seem that such systems would be simple to design, implement, and administer.

Apparently, they are not. Despite significant positive publicity at the outset of their implementation, there are only a handful of successful electronic filing programs in state civil trial courts and only a tiny fraction of the nation’s legal pleadings are currently transmitted to a court of law electronically.[354] While the number of sites are growing all the time, many courts have found that the deceptively simple concept of

[354] “Fax filing,” while undoubtedly electronic in nature, generally results in the shifting of the responsibility to print out a hardcopy version of the pleading from the attorney to the court. While there are some proposals for integrating faxed images directly into the document management and case management components of e-filing systems, it is clear that fax transmission will always be a sidelight to direct filing of word processing or imaged files.

e-filing translates into a major investment in technology, in the time to create a system attractive and accessible to all members of the community both at the outset and on an ongoing basis, and in revising statutes and court rules covering long-standing concepts of “signatures” and “service” in a way that does not impact due process. Even when there exists a full-featured, thoughtfully integrated system with seemingly unlimited technical and resource support such as that found at the U. S. Bankruptcy Court for the Southern District of California, attorneys have sometimes been slow to embrace the concept and a significant proportion of practitioners continue to file in the traditional manner. A number of “successful” e-filing systems have never progressed beyond a handful of regular filers (where participation is voluntary) and there often is extensive ongoing tinkering to fix newly discovered problems or address issues thought to be minor ones at the outset (but that now loom large with actual, live filings).

This is a very expensive process, consuming both resources and personnel, and given its current state of affairs, the WCAB/DWC cannot afford to be on the “bleeding edge” of new technology unless the costs of development are in addition to, and not at the expense of, funding for current operations. Other courts have chosen to implement e-filing now, even if their system does not immediately work up to expectations, because they have the additional resources needed for the long haul to work out the technical and workflow kinks plus get the community on board. Eventually, their efforts will pay off, but a similar long-term commitment may not be possible here.

A court system that has neither a modern case management information system nor even a rudimentary document management system is not in a position to implement e-filing.

It must be kept in mind that e-filing is more than simply pushing a button on an attorney’s keyboard and instantaneously sending an electronic file to a court’s computer. What the court

then does with that electronic document is the heart and soul of any e-fling system.[355]

If the court is unable to use the e-filed pleading without creating a hardcopy, then it simply becomes a very expensive off-site network printer for law firms. If there is no way to access the electronic files in a user-friendly manner and view them from workstations throughout the court (e.g., in the clerks' unit, from judges' offices, from public access terminals, areas where attorneys are conducting face-to-face negotiations, and from both sides of the bench in the hearing rooms), then some of the most significant benefits of e-filing will be lost. A full-featured, modern document management system and adequate electronic resources (such as monitors in networked courtrooms) are absolutely necessary to allow such access. Moreover, a court needs to be able to fulfill its obligation as a custodian of important records and without a way to store files in an orderly and accessible manner, the end result is that the court's servers would become a dumping ground for duplicative electronic versions of files they were forced to create in hardcopy format in order to conduct the business of the WCAB. While this would not be undesirable from an archival standpoint (an electronic version of the case file would save the cost of transmitting physical files to the State Records Center), it probably would not be worth the new hardware. The bottom line is that courts, as well as the litigants and practitioners who visit their facilities, must be able to use an electronic version of the case file just as easily and expeditiously as they do now with traditional hardcopy. Unfortunately, that requires a significant investment in monitors, storage devices, and the like.

Even with adequate document management and display, a court must have a modern case management information system in order to realize the most commonly touted benefits of e-filing. There is

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[355] See, e.g., McMillan, James E., J. Douglas Walker, and Lawrence P. Webster, *A Guidebook for Electronic Court Filing*, West Group, Inc., 1998, pp. 3-4.

little point to sending new case-opening documents over the Internet if clerks are still required to rekey the most important data they see on such documents. There is also little point to creating an e-filing system where a significant amount of the information found on other form-based pleadings never gets placed into an electronic format. At the moment, much information that would be potentially important to DWC administrators (such as the reasons for an expedited hearing request) is not captured electronically. An e-filing system implemented without first extensively upgrading the WCAB's current electronic case management information system would simply require valuable data to be keyed in by hand or ignored for the sake of expediency. The marriage of CAOLS with a sophisticated process for electronic document transmission and storage could be compared to installing a GPS navigation system into a Model T; the maps on the display will be pretty, but the car won't move any faster, be any more reliable, or use less gas.

Keep in mind that this is a system where many of the judges currently do not even have the benefit of a personal computer for editing opinions and the like. It strains the imagination to believe that the jump from a method of conducting judicial business essentially unchanged from the early 1980s to one that is at the forefront of modern court technology can happen without significant investment and disruption.

Most vendors offering CMIS systems are already designing them to incorporate future e-filing needs (indeed, many offer e-filing modules as an add-on option or openly publish the specifications needed for other vendors to integrate their e-filing interfaces) so little would be lost by first concentrating on getting the basics of case management and document management before the next step of e-filing is taken.

Some of the most touted benefits of e-filing may not be as pronounced in the current context of the WCAB.

A major selling point of electronic filing for attorneys in other jurisdictions has been the elimination of filing service fees

charged by special couriers (or the costs of having office staff prepare and present pleadings to court counter staff). This savings has allowed some vendors to essentially underwrite the costs of equipment and installation by charging a small amount per page for the service. But unlike traditional civil litigators, workers' compensation attorneys are often at the District Office each and every day and so the effort to personally deliver pleadings for filing is already minimal at best. E-filing is solely for the benefit of the DWC and so unless the costs to the filers are kept to nearly zero or the use is made mandatory, little will change.

Another potential (though easier to remedy) problem lies in the fact that a significant proportion of the size of the case files retained by the WCAB is made up of medical reports and evaluations, not party-prepared pleadings. Until medical providers get integrated into the new system, either the attorney or the WCAB would have to go through the expense of scanning the original in order to get it into an electronic version. High-speed scanners are not the norm in most small law offices (though many new photocopiers have such a capability available) and so the DWC would be required to do the scanning on its own or more likely, decide that the costs of doing so are far greater than the costs of making up a hardcopy file in the traditional manner. While there is little doubt that eventually medical care providers will jump at the chance to send their reports electronically to the parties (rather than incurring the cost of printing and mailing) who could in turn forward them to the WCAB, at least for the short run there would be a mix of electronic and hardcopy documents for nearly every case and the savings in shelf space would be negligible.

Summary

It is important to emphasize that we do believe that the DWC would be well served by attempting to move toward the paperless office (or more realistically, the "less paper office") whenever circumstances permit. Many of the chores currently performed by clerks would be

eliminated or greatly reduced if documents came over the Internet rather than by the mail and if the information contained in them could automatically be entered into whatever electronic case management system the DWC is using. The routine movement of data between the various units of the DWC (Claims Adjudication, Auditing, Vocational Rehabilitation, etc.) begs for a fully integrated system that minimizes data entry by hand to those occasions where it is absolutely unavoidable. Ideally, such a system would also easily "talk" to other Department of Industrial Relations groups such as the Division of Labor Statistics and Research as well as the Division of Occupational Safety and Health in order to both share information not currently available to each other and to end duplicate data entry for the same information they independently collect at the present time.

Such a system could also take maximum advantage of the next level of automated data exchange: that between the DWC and attorneys, insurers, employers, lien claimants, and others. As mentioned previously, this goal is being made possible by the development of industry-wide standards for the electronic exchange of information routinely collected by those involved in workers' compensation with one major effort being led by the International Association of Industrial Accident Boards and Commissions (IAIABC) with the promulgation of its Electronic Data Interchange (EDI) protocols.[356] In the context of workers' compensation litigation, EDI standards appear to be a critical requirement for achieving the full benefits of electronic filing. Simply transmitting an electronic "picture" of the limited amount of information on the Application, Declaration of Readiness, or other pleading is not enough to justify the equipment and personnel costs of

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[356] See International Association of Industrial Accident Boards and Commissions, *Electronic Data Interchange (EDI)*, http://www.iaiabc.org/EDI/edi.htm, accessed July 18, 2002. Other groups and governmental agencies related to workplace safety, healthcare delivery, and insurance such as the U.S. Department of Health and Human Services, the National Association of Insurance Commissioners (NAIC), the National Council on Compensation Insurance (NCCI), and others are also developing EDI standards that may impact upon California workers' compensation practice. Hopefully, there will be some coordinated effort to standardize the formats for common data elements.

implementing an electronic filing capability. It is the information within those documents that is of greatest interest to the DWC, not the simple "picture" of the document itself. By incorporating EDI elements into new versions of electronic pleadings, administrators could easily obtain a richer picture of the facts and issues in each case with no additional effort to move the data from law office to the DWC server. Unless the electronic filing system can automatically extract data elements from submissions, DWC clerks would still be required to read through the text and perform much of the same data entry chores that they do now.[357]

EDI standards would also provide a better foundation on which to design a full-featured electronic filing program, especially if such standards were available to software designers who develop for the legal services industry. Integrated software packages for workers' compensation practitioners that help manage their case files, produce

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[357] Electronic filing systems in civil courts generally use one of three strategies for transferring information from the filer to the courts. One alternative is to simply send the document in various formats such as an Adobe PDF file, as an image file (similar to scanning a hardcopy version), or in the original word processing format such as Corel WordPerfect or Microsoft Word along with a small set of identifying information about the pleading's title, the sender, and the like. The document file is the official "pleading" which is stored as part of the document management system while the accompanying data are delivered to the case management information system for use in docketing and other tasks. A more radical alternative dispenses with much of the traditional notions of a single, identifiable document and focuses on sending discrete packages of information (such as the identify of the filer, the amount in controversy, venue information, key allegations, etc.) that when taken together constitute a legal filing. All of this information is received into the case management information system and reassembled as required for the purposes of display. A middle road approach is to retain the concept of a single document but imbed invisible "tags" (similar to hidden HTML tags in web page documents that tell how the text is to be displayed) within the pleading that identify important fields. These extensible markup language (XML) tags are inserted automatically by the filer's word processing software by using specially supplied applications designed to work with the specific processor. Data for the case management information system are then extracted from the tagged text in the document. Any potential e-filing system for the DWC would need to incorporate some sort of version of these approaches in order to reduce the need for clerical extraction of important information.

pleadings, and transmit both the pleading and the information contained within it to the DWC are more likely to be made available if the "language" for organizing and delivering that data is a common and open standard.

With the advent of cheaper personal and small business computers and easier access to the Internet, electronic filing of pleadings at courts generally is posed to finally live up to the overly optimistic expectations that arose from early demonstration and pilot projects. One of the factors that should spark its growth is the recent work of the Electronic Filing Standards Subcommittee of the National Consortium for State Court Automation Standards, a joint effort of the Conference of State Courts Administrators and the National Association for Court Management.[358] Instead of each jurisdiction taking the plunge into e-filing blindly, the "Standards for Electronic Filing Processes" the Subcommittee has drafted should finally give both administrators and information technology developers a clear road map of what is needed for successful implementation and operation. Standardization of system design and features should eventually bring the cost down to a point where even courts with modest means can afford to go electronic. It should be noted, however, that this threshold event in electronic filing is a very recent one and with few exceptions, most judicial e-filing programs are still in their infancy.

E-filing is clearly the way modern courts will receive the bulk of their filings in the decades to come and the DWC would be remiss if it failed to plan for its eventual arrival. The benefits of e-filing are many and every stakeholder would be well served by moving toward a workers' compensation system where the vast bulk of pleadings and reports are exchanged, stored, and displayed electronically. Earlier RAND-ICJ research on the workers' compensation system also came to the conclusion that unnecessary staff functions "...could be alleviated by mandating the electronic filing of papers with the WCAB."[359] But while

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[358] See Consortium for National Case Management Automation Functional Standards Project, *E-Filing Functional Standards*, http://www.ncsc.dni.us/ncsc/ctp/htdocs/standards.htm, accessed July 18, 2002.

[359] Peterson, Reville, Kaganoff-Stern, and Barth (1998), p. 185.

electronic filing is an extremely attractive goal for the DWC's future plans, we believe that until the agency's case management information system and document management capabilities are significantly upgraded, the ***immediate*** benefits of e-filing would be few compared to the anticipated costs of implementation. Given the current state of DWC finances, it is likely that the initial costs of implementing an electronic filing system would have to be offset by either immediate staff reductions or the diversion of any additional monies provided to fill existing vacancies. Moreover, the state of WCAB/DWC official forms is still in flux and should be the subject of an intense, across-the-board review as suggested elsewhere in this document. Implementing an electronic filing system at great expense in order to extract questionable information from some of these outmoded documents seems like wasted effort.

There is no question that the ability to incorporate e-filing should be an integral consideration in the purchase of any new CMIS system, but focusing energies and resources to provide this option to filers at the present time without first realizing other technological, procedural, and staff-level improvements for the system would be inadvisable. That being said, there is no reason not to include the capability of receiving and managing electronic documents as a mandatory requirement for any new case management system the DWC may purchase or develop in the future.

- ***While a logical and absolutely necessary future step, direct "e-filing" of pleadings should only be instituted once the DWC has implemented a modern case management system and sophisticated document display technology at each of its district offices. Furthermore, maximum effort first needs to be focused on revising and updating WCAB/DWC forms and procedures before their permanent integration into a system for the electronic exchange of information between litigants and the courts.***

DOCUMENT MANAGEMENT

As mentioned previously, implementing electronic filing requires both a sophisticated CMIS component and a document management system component to work properly. That day may be a number of years away and even then, voluntary e-filing may be slow to catch on with the workers' compensation community. But some of the benefits associated with the movement of documents from paper-based to electronic might be realized before widespread acceptance of e-filing by first scanning case files that are being sent to the State Records Center in order to be able to use an electronic version as a first choice before ordering their return if the case reopens. Accordingly, we have suggested that the DWC evaluate the use of installing high-speed scanners for both saving the cost of retrieval and for preparing for the day when all active Board Files will undoubtedly be in an electronic form (see ***Archiving*** in ***CHAPTER 13***).

Would it make sense to start the movement toward an electronic court by scanning all new filings now? Conceivably, a sophisticated DMS could be initiated prior to the eventual replacement of CAOLS (and the implementation of an electronic filing manager) as a stand-alone system for imaging all incoming documents. Other courts across the country perform this task even without an electronic filing capability. Besides reducing the need for internal file movement, scanning could be coupled with a fairly simple system for remote access of pleadings that would allow workers, defendants, and other parties the opportunity to review case files 24 hours a day without requiring a clerk to pull the case jacket. The Workers' Compensation Board in New York is well along its way toward a goal of a "state-of-the-art claims processing system which uses scanning, imaging, and optical disk technology to eliminate paper-based case folders and corresponding paper movement,"[360] though at the

[360] New York State Workers' Compensation Board, *Electronic Case Folder Mission Statement*, http://www.wcb.state.ny.us/content/main/ecf/index.htm, accessed November 4, 2002.

present time the direct electronic filing of pleadings by litigants is not possible.[361]

While these are attractive benefits, without the value added of integrating these imaged documents with a sophisticated CMIS, they do not appear to be enough to offset the drain on staff time to run each and every pleading (including medical reports) through a scanner soon after filing. One concern is that the imaging would have to take place almost immediately after the receipt of the document in order to minimize the delay in getting it into the proper file jacket (or on the desk of the assigned judge). This would make scanning one of the highest daily priorities for clerical staff with little offsetting reduction in other duties. Clearly, a document management system with a high-volume scanning capability for older files and for documents that will continue to be filed in a hardcopy form should be a component of any new case management information system installation. Routine scanning should, nonetheless, wait for the day when the DWC branch offices are truly ready to work exclusively with an electronic version of the Board File (a situation that will require a top-to-bottom overhaul of local office technology and workflow) and when the countless hours wasted keying duplicate or unreliable information into CAOLS can finally be ended.

The New York example is a good one. Actual implementation of the electronic case file process was relatively rapid; reportedly, it only took about a year to move the adjudication side of the Workers' Compensation Board from a paper-based system to one where electronic files are used almost exclusively during hearings. But New York rolled out an extremely sophisticated case management system at the same time the electronic document component was added, thereby jettisoning a legacy CMIS that would not have worked with electronic documents. Now, judges routinely enter orders directly into their own terminals, are able to query the system at will to identify cases needing attention,

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[361] New York does allow carriers and employers to transmit data electronically regarding underlying claims and the like, but at present, documents requiring signatures must continue to be filed in the traditional manner.

and essentially process most aspects of their workflow through the CMIS in addition to being able to read a medical report and the like on a screen. Integrating a new document management system against the backdrop of a modern, full-featured electronic case management system was a natural step. For the DWC and WCAB, moving to a similar electronic case file process while continuing to be severely hobbled by CAOLS' 20-year-old problems and requirements would not pay off nearly as well. Unless CAOLS is completely replaced either prior to or simultaneously with the implementation of a sophisticated document management system, the money spent for scanners, servers, and monitors would be poorly spent.

- ***Routine scanning of incoming documents should be deferred until the implementation of a new case management information system and the installation of an adequate number of monitors for the use of judges, attorneys, and litigants throughout each branch office.***

CALENDARING AUTOMATION

Though ideally a system for automating the currently labor intensive process of calendaring conferences and trials would be developed and integrated simultaneously with the eventual replacement for CAOLS, there is no reason not to move forward with this particular innovation as soon as possible.

At the present time, calendar clerks typically thumb through the pages of an oversized ledger (very similar to those that have been used by court clerks since the 19th century) to find the first open date. The open date is determined by the branch office's specific formula for conference and trials and so the clerk must confirm that the candidate judge does not already have the maximum permissible number of hearings that day. The next step is to check a slew of handwritten notes and law firm letters (typically taped to monitors or nearby walls) that detail the preferences of local lawyers and law firms to see if the date has an announced conflict. Some of these notes and letters ask that no hearings be set during blocks of dates due to vacations and the like while others request that hearings for certain attorneys only be

scheduled on particular days of the week. If satisfied that there are no obvious scheduling problems, the calendar clerk then handwrites the case number and the parties' names into the calendar book. Despite the check for announced vacations, conflicts where an attorney might have to appear in two different hearing rooms at the same branch office or even two different offices on the same day would not be known to the clerk unless the calendaring is done in the presence of the affected counsel (that is usually only the case when a trial is set immediately following the end of an MSC; MSCs themselves are usually set without direct attorney input). Finally, the clerk turns to his or her computer screen and keys in much of the same information they just wrote into the calendar ledger into the CAOLS database. The notices of the hearing then go out the next day or so unless notice was waived by the parties.

A somewhat different scenario takes place where judges rather than clerks are setting their own trial calendars. Because the scheduling is done in the hearing room or judge's office rather than at the master calendar ledger, typically a tentative "mini-calendar" for each individual judge (often just a photocopy of the most recent version of the master calendar ledger) is provided before the start of MSCs so that the judge can easily consult the attorneys and find a date acceptable to all. The tentative list is periodically collected from the judges and the information is likewise entered into the ledger and into CAOLS if the calendar clerk determines there are no problems with overbooking or conflicts.

Despite the precautions taken to minimize attorney conflicts, they are not uncommon. One major source is the simultaneous scheduling of the same attorney or law firm to matters before two different branch offices that are a considerable distance away from each other. Calendar clerks setting MSCs at the two branch offices only know that the attorney has no specific requests before them, not whether they are going to have to appear at two places at the same time. Short of an extraordinary effort[362] and an accommodating opposing counsel, one of

[362] We were quite impressed by stories told to us of workers' compensation practitioners who racked up hundreds of miles of driving in a single day, hitting the first branch office for a brief Expedited

those two sessions will have to be continued. Even when attorneys are courteous enough to contact the other side and the branch office a few days prior to the MSC to let them know that he or she would be unable to attend, because of the requirement of 10 days notice the slot that would have been used for the conference cannot usually be reassigned to another case. This would be even truer for conflicted trial settings.

The obvious answer to the wasted time a calendar clerk expends in finding an appropriate date and to the wasted resources calendar conflicts create is an automated calendaring system where the first available date for the branch office or an individual judge is determined almost instantaneously in a way that guarantees that both specific attorney needs are accommodated and that an attorney would not have to appear before more than one branch office per day. Conceivably, the number of conferences or hearings at a single branch office on a single day by a single attorney could be controlled as well. Ultimately, the software's logic could be tailored in such a way to create a calendar schedule that reflects each branch office's policies toward the settings of conferences or trials (e.g., all in the morning, in the afternoon and morning, trials scheduled by total estimated hours, trials scheduled by count, etc.). As the system would likely be administered centrally, it could also be used on an ongoing basis to monitor calendar density and delay.

Such as system is well within current technological capabilities. Computerized scheduling software is a not particularly novel idea in 2002 and a number of vendors already offer such products.[363] For the same reasons advanced elsewhere in regard to the eventual replacement of CAOLS, we believe that the development of an automated calendaring system should be done through an outside vendor rather than through in-house DIR or DWC MIS staff; there is no reason for this state agency to

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Hearing, racing to another for a late morning MSC, then heading across a number of counties for an afternoon trial.

[363] For example, more than 15 different companies claim to offer calendaring and scheduling products to courts on the National Center for State Court's website. See National Center for State Courts, *Calendar and Scheduling Vendor Profiles*, http://www.ncsc.dni.us/NCSC/vendor/Excerpts/CALENVND.HTM, accessed July 22, 2002.

reinvent the wheel when the considerable experience of private developers could be easily exploited.

Two keys to making this work most effectively for the WCAB are to ensure that it can be interfaced with the current CAOLS and that attorneys can directly input their specific requirements of days they are not available through an easy-to-use Web interface. The latter requirement is not technically difficult if attorneys are required to include their State Bar ID numbers anytime they sign a pleading intended for filing with the WCAB[364] and use that Bar number when logging onto the calendaring website.[365] The attorney should also be able to indicate whether he or she is with a law firm that will provide alternative counsel in the event that the only available slots for trials or conferences within the legal maximum periods would cause a personal scheduling conflict.[366] The former requirement is more problematic as CAOLS is a legacy system that was not designed for such add-on modules.[367] Even if an interface between the two systems at the present time is not possible (and as such someone would have to be tasked with keying the date of the event into CAOLS in order to trigger the automatic noticing capabilities of the Teal Data Center), the time saved in laboriously locating the best calendar spot, in minimizing continued conferences and trials, and in providing access to the calendar ledger for any clerk would be worth the investment. At the moment, calendaring is done only by a select few staff members due to

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[364] Similar requirements are routine in some other court systems. See, e.g., California Rules of Court 201(f)(1).

[365] Conceivably, steps might have to be taken to ensure that persons other than the actual attorney or his or her staff do not fraudulently submit vacation or other dates of unavailability for the purposes of mischief or delay. A WCAB-issued “PIN” number would be the obvious solution.

[366] It is likely that law firms themselves would also have to be issued some sort of identifying code.

[367] While it may not be possible to have information from the automatic calendaring system seamlessly flow into CAOLS due to the difficulties of linking up with a legacy computer system, the reverse does not seem to be true. The information sent to a printer at the Teal Data Center when a conference or hearing has been scheduled and notice is required is exactly what is needed to provide the automatic calendaring system with a picture of a branch office’s future schedule.

the complexity of the rules for finding an acceptable date and this situation has become a serious bottleneck at some locations. Routine data entry of selected dates, however, could be performed by just about any staff member in the office even if duplicate entry into CAOLS continues to be required. Even if integration with CAOLS is not possible at the present time, an important requirement for such a system is that it be designed in such a way to easily integrate with future replacements or upgrades of CAOLS, regardless of which vendor assumes that responsibility.

To ensure its effectiveness, the system should also be one where information about the case, type of conference or trial, the litigants, the judge, and the selected date is not known solely to the district office but instead is a part of a centralized, networked system. In order to minimize interoffice attorney conflicts, there must be some way to determine whether the same practitioner is being asked to appear in two different places at the same time.[368] Continuing to allow calendaring to be an office-specific function will only perpetuate this situation. Moreover, while the rules for calendar assignment can be tailored to meet the individual needs of any branch office, we believe that there needs to be greater centralized oversight over systemwide scheduling practices.[369]

Perhaps the most important feature of such a system would be to move away from the current practice of using a paper-based calendar ledger at a single desk at each office. This traditional system, as discussed elsewhere, is responsible for some of the delay seen between the point at which a DOR is accepted for filing and the moment a judge and a date are selected for the MSC. At the medium-sized offices we visited, there was usually only one person tasked with the

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[368] Some set of rules would have to be worked out to optionally allow an attorney filing a DOR to allow the calendaring of a trial that might conflict with an existing event. This would be the case, for example, when the filer is a staff member of a large applicants' attorney firm and if a conflict occurs, another member of the same office could appear.

[369] This is not a new recommendation. Others have also noted the apparent need for a centralized, automatic calendaring system. See, e.g., KPMG Peat Marwick LLP (1996), pp. 5-20.

responsibility for processing DORs ready for calendaring. No matter how large the stack of DORs might become, only a single clerk could work to identify a date and enter it into the master ledger. Even at an office where the original filing date of some DORs ready for calendaring was 30 days old, the only solution seemed to be to make sure that either the calendar clerk or the clerical supervisor was working on the pile at all times the office was open for business. Unfortunately, that effort was still insufficient for the task. Given the critical importance of calendaring in meeting legislatively mandated time limits, a more obvious approach would have been to assign two or more clerks to process the backlog simultaneously, but with only a single ledger book, this is not practical.

Moving toward a networked system would eliminate the bottleneck. Each PC on the desk of any clerk should be able to perform the task of calendaring, assuming that all clerks have been given training in this area. The logic involved in calendaring is not that difficult and with the use of simple software tools, the computer itself could handle problems in spreading the work evenly around the available judges. Restricting the task of calendaring to only one or two clerks is a guarantee that any absence of those individuals or drop-off in performance will result in unacceptable backlogs. Restricting the task of calendaring to a single desk guarantees that when such backlogs develop, they will be difficult to eliminate. While the preference would be to have a networked system across all offices to allow DWC administrators to remotely monitor calendaring practices, the top priority would be to install a multiuser product at each office.

Because we believe that the impact on delay (from reducing the backlog at the calendar clerk desk), litigation costs (from reducing the likelihood of continuances granted because of conflicts), and user-satisfaction (from better coordination of attorney schedules) from an electronic calendaring system are so great, this should be the DWC’s top priority for technological upgrades. As always, the administration should seek special funding for this project because any further erosion of staff levels at this time—even for such an important advance—would

not be in the best short- or long-term interests of systemwide performance.

- ***A unified off-the-shelf networked calendaring system that uses California Bar ID numbers to identify the attorneys involved in the case and that allows Internet submission of attorney availability information should be instituted as soon as practical. Every clerk should be trained in the use of the system and be able to calendar requests for conferences and trials from any of the office's computer terminals. This innovation should be the DWC's top technological priority once adequate resources for staff levels have been resolved.***

INDIVIDUAL COMPUTING

Minimum Standards

Uniformity in branch office procedures and level of productivity will always be an elusive goal if judges do not have the same level of technological support. We were very surprised to find that at five branch offices, judges do not have a DWC-supplied desktop computer in their offices at all[370] and at some other locations, the ones supplied are woefully outdated and lack such basic features as CD-ROM drives. Judges at these branch offices cannot edit or draft their own Opinions and Decisions, they cannot receive e-mail from administrators or other judges, and they cannot do any online legal research unless they supply their own computers or pull relatively better ones destined for destruction out of the trash bins of other branch offices.

It seems incredible that in 2002, inexpensive PCs capable of performing simple word processing and online legal research are not found in every judge's office. Not only does the current situation place additional strain on secretarial resources, it impedes the expeditious delivery of Opinions and Decisions. We believe the disparity in personal computing should be ended immediately.

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[370] Four locations reported that their judges were without any computers at all in their offices. An additional location has computers, but these were obtained by a couple of judges who voluntarily salvaged them from another office before they were to be trashed.

➢ ***All WCAB trial judges should have access to a personal computer with Internet and e-mail capability.***

Legal Research Capabilities

The costs of access to electronic legal research is getting smaller each year, especially as appellate bodies post their opinions on free public sites. Younger judges are certainly familiar with such tools. It makes more sense to pay for electronic access than to equip and update law libraries at each branch office. But this can only happen with computers available to judges that are connected to the Internet and that have drives capable of reading a simple CD-ROM. We believe that the DWC should explore electronic options for replacing their hardcopy law libraries.

➢ ***All WCAB trial judges should have access to electronic legal research resources.***

JUSTIFYING IMPLEMENTATION OF NEW SYSTEMS AND UPGRADES OF LEGACY SYSTEMS

The DWC cannot expect that increased use of modern technology will create an environment where immediate workforce reductions would be painless. In fact, the opposite is true for at least the short run. Changes in technology bring with it disruptions in the normal workflow caused in part by personnel being diverted to training, equipment installation woes, and the considerable time spent by management in design and implementation. That being said, such short-term impacts on productivity may well be accompanied by the eventual freeing up of resources currently spent on activities best performed by the new procedures or equipment. But that is an assessment that would have to be made once the dust settles and the true cost savings are apparent in light of possible unforeseen cost increases. Reducing staff authorizations at the very same time new information systems and procedures are put in place is a risky bet on projections that might have been overly optimistic when made and perhaps colored by the natural desire to modernize or centralize outmoded services or processes.

Even in the best of circumstances, personnel reductions at the very moment new technology or procedures have been put into place can have a negative impact on performance measures. But in a system already stressed by resource constraints and increasing demand, such moves—without the time needed to assess their justification—can be devastating. Moreover, the negative impact on the system from the immediate personnel reductions makes any assessment of the innovations' benefits even more difficult. In the worst-case scenario, the reduced workflow will be blamed upon the technology or process itself, not on the reduced number of critical staff members.

Two examples come to mind. There is little question that the Workers' Compensation Information System currently being developed by the DWC will someday prove to be an invaluable tool for identifying ongoing problems in claims handling that routinely evolve into formal disputes which in turn consume Claims Adjudication Unit resources. At the moment, however, it is still a system in its early formative stages and the information obtained thus far has simply not matured to the point where any impact on filing rates can be seen. Unfortunately, the DWC is being held to answer to the Department of Finances' 1997 expectation that by 2001, data from WCIS will have resulted in a drop in filings so significant that 34 positions could be painlessly eliminated (see ***Anticipated Future Reductions*** in ***CHAPTER 10***). The system has not yet paid off as hoped, yet as of this writing, the positions are still scheduled for cutting.

Another example is in the initial impact of the Regional Call Centers. Centralizing the distribution of routine information makes sense and so the DWC was wise to experiment with the idea of dedicating some staff members to handle phone calls no matter where a litigant's case had been filed. But to reduce the impact on the overall department budget, employees were immediately transferred from branch offices to staff the Centers (rather than new staff being hired to fill the positions). Few DWC offices can lose a clerk, rater, or I&A Officer without significantly impacting the workflow and so for a number of Presiding Judges we spoke to, the creation of the Regional Centers had

only negative consequences even if their remaining staff might spend less time on the phone at some future point in time.

It needs to be remembered that the primary purpose of technological or procedural innovation is to make workflow more efficient and to suit the needs of the customer base more effectively. But crippling the system at the outset or before any benefits have been realized potentially creates an environment where after all is said and done, the net result is that things are no better than before the effort and expense of implementation was made.

- ***The assumption that advances in electronic management information systems or centralized information systems will immediately result in personnel cost savings large enough to justify the expense of such implementation is flawed. Future technological implementations should not be realized at the expense of immediate staff reductions.***

CHAPTER 18. "CUSTOMER SATISFACTION" AND THE WCAB EXPERIENCE

GENERALLY

It is not always clear whether workers realize that the level of permanent disability payments is a function of a rigid schedule mandated by the Legislature and developed by the Administrative Director, and their preinjury wage levels. Some workers we spoke to during informal discussions at the offices we visited, though certainly not all (and especially not the ones who had previous experience with the workers' compensation system), appeared to believe that the outcome of the trial they had just experienced (or expected to at some future point) was a single dollar amount fixed by the judge to compensate them for their injuries and other losses. While such a result might be true had the injury occurred outside of the work relationship and they were successful at a personal injury tort trial, this isn't the case in workers' compensation disputes; the judge in this system essentially decides the factors of disability which then yield a predetermined amount that has no relationship whatsoever to the income needs of the worker's family. If indeed benefit levels have not kept up with the pace of inflation in recent years as has been suggested[371] and that permanently disabled workers sustain significant uncompensated wage loss,[372] then it is possible workers will focus any frustration for economic difficulties subsequent to the Findings and Award or the approval of any settlement upon the judge's indifference to their plight or inability to see how the injury has impacted their lives. Such frustration was clearly evident in many e-mails and letters we received from applicants over the course of this research.

Clearly, it would be in the WCAB's best interest to ensure that workers whose cases are before its judges are very clear about what the stakes are and are not and the sometimes limited role in the overall

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[371] Commission on Health and Safety and Workers' Compensation, *1999-2000 Annual Report* (2000), p. 102.

[372] See, e.g., Peterson, Reville, Kaganoff-Stern, and Barth (1998).

compensation process these judges play. Possible methods of accomplishing this goal would include information about workers' compensation protections and limitations provided to all workers ***before*** injury (perhaps as part of vocational education classes given in California high schools) and more detailed and coherent instructions about the process to those who have filed claim forms or visited Information & Assistance offices.[373]

Ultimately, the task of describing how the system works falls upon the shoulders of WCJs, if such information has not been provided beforehand. We observed some judges patiently explaining some of the complexities of the process to those workers who appeared before them at trial and especially to those who were making in-court appearances as part of a settlement review. But the point in the litigation at which this discussion takes place is usually at the final stages (trial or settlement) and not early enough to dispel any misunderstandings that might continue to color the relationship between the worker and the WCAB. Compared to the entire length of time a claim might be active (regardless of whether it is measured from the point the injury is sustained, from the filing of the Application for Adjudication, from the filing of a Declaration of Readiness, or from the filing of a proposed settlement agreement), trials and settlement reviews are relatively brief events occurring only in the very last days before resolution.

Even if a worker understands the mechanics of what drives the amount and length of disability payments (and many are very savvy in this regard), it isn't always the case that they also understand why it takes so long to dispose of what they believe to be a relatively straightforward claim. We regularly received communications from workers who believed that it was the judge who demanded a new medical evaluation from an AME (thus triggering a many-month delay), though in reality it was likely to be the result of a joint request made by their own attorney and that for the defense. Similarly, we received complaints that "the court" failed to settle the case at the Mandatory

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[373] See, e.g., Commission on Health and Safety and Workers' Compensation, *Recommendations: Information for Injured Workers*, California Department of Industrial Relations, 2000.

Settlement Conference. While some confusion is understandable (the name of the conference suggests that settlement is required), it is not likely that the judge was the one blocking settlement. Indeed, it appears that nonapproval of a proposed agreement at the MSC takes place only about 2% of the time settlements are presented at that conference (see ***Table 8.8***). Somehow, these applicants are confusing the other possible outcomes of an MSC (setting for trial, continuance, or an OTOC) with a judicial decision that is affecting their chances for a quick and informal resolution of the case.

We are not suggesting that applicants be brought into the hearing room each and every time their case is discussed with a judge. While this would be the ideal situation (they certainly have a right to observe how their claim is being handled and it would do much to allay any concerns that the case is subject to mysterious, back-room machinations), the small size of typical hearing rooms and the confusion that would be generated by packing in dozens of extra bodies during the three-and-a-half-hour session would impact the ability of the WCAB to hold up to 30 MSCs in such a short time. Exactly how the WCAB could better communicate the reasons behind judicial decisions to applicants is beyond the scope of this study, but there is clearly a need to address this problem.

It needs to be remembered that workers often perceive the WCAB as the focal point for how work-related injuries are taken care of in this state despite the fact that only about a fifth of all claims develop into a formal case and of those, nearly 20% start out as an already resolved settlement with little WCAB involvement required.[374] They do not realize that for the most part, how their claim will progress is often a function of the actions of their employer, the workers' compensation insurer or claims administrator, their doctors and other health care providers, and their attorneys. Nevertheless, the WCAB and the DWC have a responsibility to provide a "face" to the governmental

[374] In 2000, a total of 195,369 new cases were filed with the WCAB. Of these, 159,467 were initiated by the filing of a new Application for Adjudication. The rest were original settlements (C&Rs or Stips). Commission on Health and Safety and Workers' Compensation, *2000-2001 Annual Report* (2001), p. 100.

side of the equation and to treat those who seek redress in its courts with respect and honesty. Concerns about how the WCAB treats injured workers and other parties and the type and extent of information provided to help them wind their way through this very complex system is nothing new[375] and the longer the problem is failed to be addressed, the longer the WCAB will be viewed by some as uncaring and biased.

In that light, this chapter touches on a few miscellaneous "customer service" issues voiced to us by litigants (and to a lesser extent, by their representatives) via in-person discussions, e-mail, and postal correspondence.

THE USE OF ROBES

The judges of the WCAB are not "referees," they are not "umpires," they are not "hearing officers," they are not "mediators," and they are not "counselors." No matter what they are called, WCJs are *judges* in every sense of the word and the hearing rooms of the WCAB are *courtrooms*.

Again and again, we heard WCJs tell us that they were very conscious of the danger that by taking themselves and the work they do too seriously, they might act overly judgelike or exhibit the worst symptoms of "blackrobeitis." While these expressions of humility are laudable, the fact remains that this indeed is a very serious business and acting like a judicial officer is exactly what is needed to bring a higher sense of responsibility to the WCAB.

At some branch offices, robes are normally reserved for special functions only such as swearing in new judges; many judges we spoke to do not even own one. This may not be surprising as the costs of robes are borne solely by the WCJs and it was reported to us that they range in price from $130 to $250. At some branch offices it is up to the individual judge to determine when robes are to be used, though by and

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[375] For an excellent and comprehensive compilation of comments reflecting the point of view of applicants, see Sum, Juliann, *Navigating the California Workers' Compensation System: The Injured Workers' Experience*, Labor Occupational Health Program, University of California at Berkeley, July 1996.

large, all the judges at a single District Office tend to wear them or not wear them under the same circumstances.

While MSCs are fairly casual affairs where the only people present are usually the judge and the regular collection of local attorneys interacting with each other with a high degree of informality and familiarity, trials (including regular hearings and expedited hearings) are another matter. They tend to be little different in terms of decorum and seriousness than what one might observe at civil courthouses across the country. Witnesses are sworn in, hearing reporters make a permanent record of all proceedings, and the amounts in controversy are far in excess of what might be found in other limited jurisdiction courts. At least for applicants, what takes place in that room can have a profound effect on their lives.

We believe that it is critical to send a signal to witnesses and litigants that what they have to say is important enough for the State of California to assign someone to listen to their words who is ethical, just, and deliberate. We also believe that a signal needs to be sent to the judicial professional to behave in "judgelike" manner, to follow both the letter and the spirit of the law that is embodied in the trappings of the office, and to realize that parties are anxiously awaiting their decision. Counsel need to be reminded as well that the orders being issued by the judge carry the full weight of any judicial officer in the state. Wearing a robe at trial will also be helpful in making up for (though will not completely offset) the sometimes disorganized or shabby state of many branch office hearing rooms. If such a rule is adopted, the DWC should provide suitable robes to the WCJs without cost.

One argument we heard repeatedly for not wearing a robe is that litigants and witnesses will feel more comfortable if the WCJ is dressed plainly.[376] It seems unduly patronizing to us to assume that workers

[376] Judges who are not wearing robes, with few exceptions, are usually dressed in formal business wear; thus they look remarkably like the other attorneys in the room and may not always resemble litigants who often come directly from their place of employment.

are incapable of providing testimony except under the most nonthreatening of circumstances.

Another, perhaps more persuasive argument is that it seems ludicrous to require the wearing of a robe in light of the fact that the resources and facilities provided to judges (including clerical staff levels, computers, and modest state of some offices) are in some instances woefully inadequate. Related to this is a perception that the entire adjudicatory process is thought of as the "illegitimate stepchild" of the workers' compensation system as reflected by repeated legislative slights and administration indifference. Wearing a robe, it is asserted, would be an empty gesture designed to cover up the lack of respect shown for the role of the Claims Adjudication Unit. Obviously, a black piece of cloth will not cure the problems that mark some aspects of the WCAB, but we believe that underscoring the importance of the proceedings and showing respect to the injured worker who has come to tell his or her tale is a good place to start.

We do not express an opinion as to whether the use of a robe during conferences would be beneficial. Given the extensive amount of shuttling back and forth that takes place between the judge's office and the hearing room, and the fact that the parties themselves are rarely present, it does seem like overkill (especially with the tight spaces and limited air conditioning facilities at some inland offices). This might not be true, however, in instances where an applicant is being brought in during an adequacy hearing or for some other purpose.

- ***Robes should be worn during trial.***

CONTACT WITH APPLICANTS

Pamphlets

At almost every branch office we visited, the DWC's extensive collection of informational pamphlets were not readily available in the one place at the District Office that injured workers are likely to congregate (the clerk's counter) but instead are in a rack somewhere near the Information and Assistance Unit's area. That area might be down the corridor, on another floor, or even in a detached building.

Applicants sometimes spend hours in the waiting room biding their time until their attorney returns from an MSC calendar while in fact as a group, they typically spend very little time in any reception area for an I&A Officer. Those members of the public who have experienced a workplace injury and are unsure of how to proceed with their workers' compensation claim prior to formal litigation are more likely to first come to a branch office's waiting room in order to figure out their initial steps. We believe that pamphlets should be placed in as many areas of a branch office as might be accessed by the public in order to disseminate this vital information as widely as possible.

- ***Informational pamphlets should be made prominently available near the clerk's counter in the branch office's waiting room, not just in the I&A section.***

Non-English and Non-Spanish Information

English and Spanish are just two of the languages spoken in households across the state in 2002. Many California workers understand only Armenian, Cantonese, Farsi, Hmong, Khmer, Korean, Mandarin, Punjabi, Russian, Tagalog, Vietnamese, or some other language not covered by the two used by DWC information pamphlets. While it may not be cost effective to reproduce the entire set in the over 200 languages spoken in this state, we believe that a single large sign could cover the most common ones and should indicate where an injured worker could go or call for additional information. Such assistance is available currently in the DWC through the use of telephone translators employed by the "AT&T Language Line," but it is not always clear whether workers know that they have this option.

- ***A highly visible sign in the most common languages spoken in California should be placed in the branch office's waiting room and near the front counter with instructions as to where and how assistance can be obtained in languages other than English and Spanish.***

Hearing Notices

Some applicants we had contact with indicated that they would appear at DWC offices for some sort of hearing with the expectation that their case would be resolved that day, but in reality, “nothing” happened. Part of this confusion, we believe, is related to the paucity of information on DWC hearing notices. For example, a notice might read “MANDATORY SETTLEMENT C” with the word “conference” being shorted due to space limitations. An applicant reading this notice might assume, as we were told on a number of occasions, that a settlement would be taking place that day, a settlement that the notice indicated to be “mandatory.” In reality, anything could happen at such a conference with settlement being only one of the options. If settlement does not occur, then the applicant’s frustration will be directed toward the WCAB itself rather than toward his or her own counsel or that for the defendant. It should not be too difficult to provide a couple of simple paragraphs on the notice that explain what might happen at the MSC, or trial, or whatever hearing is scheduled.

- ***WCAB hearing notices to litigants should include a simple explanation of what is intended to take place at the conference or trial.***

Initial Appearances

We regularly observed workers arrive at a branch office early in the morning who were clearly without a clue as to what to do. At some locations, a small, sometimes less than obvious sign explains that they should sign their names on an “appearance sheet” and wait for their attorney. At other branch offices, the applicant has to get the attention of a clerk who explains some sort of similar procedure. At others, there does not seem to be any sort of uniform way to provide instructions on what to do and where to wait.

There is no reason for these people to feel any more uncomfortable or awkward than necessary. We believe that branch offices should reassess the way they handle the crowds in the waiting room in order to make the experience, if not a pleasant one, at least free of uncertainty

of what to do. Any sign detailing check-in procedures should be prominent and written in both English and Spanish.

- ***A more organized way should be developed for workers who are appearing at the branch office for the first time to meet with their representatives or seek the services of an Information & Assistance Officer.***

FACILITIES

Standards

The newer branch office hearing rooms and public waiting rooms are clean, modern, and adequately sized. Branch offices occupying older facilities, however, sometimes appear to resemble a failing business on the edge of bankruptcy. At one place we visited, the public "waiting room" was actually 18 chairs placed against the wall of a darkened corridor until the regular visits by the fire department order their removal (and until they mysteriously return the following day). At another, large shoe-sized holes intended for utility access were scattered over the hearing room floors posing a serious safety hazard. At others, hearing rooms sometimes double as resting places for dusty piles of obsolete computers, copiers waiting for repair, and boxes of little-used forms. Hearing rooms are occasionally outfitted with a jumble of mismatched tables of varying height and stability. Cracked and yellow linoleum, peeling paint, inadequate ventilation, poor lighting, ancient furniture, and dirty windows seem to be the standard design features for some of the branch offices we have seen.

Building lavish palaces to house the adjudication component of a system designed to save costs at every opportunity sends the wrong message to the California taxpayer. But so does using marginal facilities year after year that are shabby and prone to stuck elevators, malfunctioning air conditioners, cramped passageways that do not provide adequate clearance for wheelchairs, and the appearance of neglect and decay. We believe that some reasonable amount of effort should be expended to provide at a minimum waiting areas and hearing rooms with an

outward appearance that evidences respect for the public the WCAB is intending to serve.

- ***Décor and design at some branch offices should be upgraded to minimally acceptable, uniform standards.***

Meeting Areas

A surprising amount of the business of workers' compensation practice takes place at the branch office each day. A District Office sometimes resembles a noisy bazaar where claims are bought and sold. Some attorneys clearly use the facilities as an auxiliary office for meeting clients and other counsel. A common sight at a branch office is that of two attorneys with files spread across whatever flat space can be found, trying to reach a negotiated settlement. Because there are only minimal restrictions on conversation even during a conference calendar, hearing rooms are abuzz with frank discussions of medical examinations, ratings, and case value. Because the full Board File is necessary to a complete file review, working out the final details of a settlement appears to be only possible when the attorneys are physically present at the branch office.

Areas open to the public—other than hearing rooms or the main waiting area—at District Offices are limited. At those branch offices located in a relatively pleasant climate the year round, outside patios function as meeting areas. Some branch offices, but not all, have a conveniently located cafeteria where attorneys can meet. At other branch offices, there is no place to engage in serious discussions with other counsel when the weather is rainy or blazing hot.

We believe that increasing the amount of space available for potential settlement discussions should be a priority for selecting or designing new branch office locations. We also believe that existing branch offices where space is already at a premium or unavailable for other uses should make it a policy that the doors to hearing rooms are to be left unlocked during regular business hours even when there is no conference or trial taking place. The potential for theft or mischief is far outweighed by the benefits of encouraging attorney-to-attorney

interaction, especially when it is related to matters not currently before the branch office that day. We regularly observed locked hearing rooms that stood empty while at the same time attorneys were attempting to conduct meaningful negotiations in dark hallways and with the branch office's own files spread out on the floor.

A related matter concerns the need for a private place where an attorney can meet with an applicant to discuss sensitive matters without the possibility of eavesdropping. There should be at least some space where the door can be shut and a moment of total privacy achieved. Moreover, other attorneys should be discouraged from taking over such space to turn it into their own private office.

- ***Branch offices should maximize space available for attorney-attorney and attorney-client interaction, including leaving hearing rooms unlocked when not in use.***

CHAPTER 19. WORKERS' COMPENSATION ADJUDICATION MANAGEMENT AND POLICY

COMMISSIONERS OF THE APPEALS BOARD

Impact of Reconsideration on Time to Resolution

In theory, any decision or award of a workers' compensation judge or some other action at the branch office level can eventually be appealed to the state Courts of Appeal and the California Supreme Court, and ultimately the Supreme Court of the United States. But parties are first required to petition the Appeals Board to review their case in the hope that the Commissioners will grant such a petition and subsequently decide to amend or rescind the complained of act. Given that few writs for review are ever granted by the Courts of Appeal, in a very real sense the Appeals Board functions as the "court of last resort" for workers' compensation claims in this state.

At the moment a Petition for Reconsideration is filed, a branch office springs into action in a way not typical of handling most pleadings. Signs exist at many branch offices to directly hand the Petition to a designated clerk for filing rather than dropping it into the filing basket, the Board File is pulled and given with the Petition to the WCJ almost immediately, a "due dates" memorandum is drafted by the judge's secretary and sent to the Commissioners, and work begins by the judge on reviewing the case and issuing a Report on Reconsideration within 15 days. At the district office level at least, the reconsideration process moves along briskly.

But one concern we heard during our research is that the Appeals Board has evolved into a major source of delay for the workers' compensation system. While this study does not examine the internal practices of the Appeals Board, we were clearly interested in determining the impact of the appeals process on the time needed to resolve a typical workers' compensation case.

In traditional civil courts, appealing trial court-level decisions is somewhat problematic because typically only the decisions of law made by the lower court judge are appealable. Absent extraordinary

circumstances, questions of fact in a civil court decision (whether made by jury or judge) cannot be the subject of an appeal.[377] This limits most civil appeals to technical issues such as the interpretation of a statute or whether the judge should have allowed in a particular piece of evidence; more fundamental questions such as whether the jury should have found for the plaintiff or defendant at the end of the trial are considered beyond the proper scope for an appeal. The situation in California workers' compensation practice is very different. Under LC §5903, a party's Petition for Reconsideration may be grounded in the claim that the evidence introduced at trial "does not justify the findings of fact" or that the "findings of fact do not support the order, decision, or award." These powerful tools therefore provide the means to appeal the outcome of just about every workers' compensation trial even if the judge's handling of the pretrial process, the admission of evidence, and the conduct of the trial was impeccable. In a very real sense, California workers' compensation procedures allow the parties to get a "second bite at the apple" following trial.

Given the relatively liberal grounds for filing a Petition, one might assume that such appeals would be the hallmark of just about every workers' compensation case that does not end in some sort of mutually acceptable conclusion. The lack of any significant negative consequences for such filing (for example, there are no appellate filing fees) suggests that prudent practitioners might be wise to petition the Appeals Board as a matter of course. Surprisingly, only a third of WCAB decisions on the merit are ever appealed by the parties beyond the judges of the branch offices and a much, much smaller number have the decision reviewed by the Appeals Board. Though any sort of final order such as the dismissal of the case with prejudice can be the subject of the Petition for Reconsideration presented to the Commissioners of the Appeals Board in San Francisco, one would assume that trial decisions

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[377] A backdoor method used in the civil courts is to ask the trial judge to overturn the decision of the trier of fact and then appeal the judge's denial of the motion as an error of law. Still, the basis for the motion to overturn or adjust the award is typically related to some sort of alleged abuse of discretion by the jury rather than simply failing to decide factual disputes correctly.

would be the most likely candidate for a Petition. Not counting settlements, there were about 36,700 closing decisions issued by the WCAB in 1999 and of these, about 13,500 were "decisions on the merits," presumably the type of final order that would be the subject of a Petition for Reconsideration. This should be compared to the 4,000 Petitions filed that year (***Table 19.1***).

Table 19.1

Appeals Board Filings

Calendar Year	*Petitions for Reconsideration Filed*	*Orders Granting Reconsideration (Without Decision After Reconsideration)*	*Decisions After Reconsideration*
1998	4,675	390	429
1999	4,055	459	265
2000	3,716	347	303
2001	3,001 (11 months; 3,273 projected annual)	224 (11 months; 244 projected annual)	287 (11 months; 313 projected annual)

While these numbers suggest that only a fraction of workers' compensation trials ever involve the Appeals Board process (and even a much smaller fraction of all workers' compensation disputes in total), the impact on the overall time to final resolution for these three to four thousand cases may be significant. Generally, the filing of the Petition results in one of the following events:

1) The Petition is denied as a matter of law because the Appeals Board took no action within 60 days after filing,[378]
2) The Appeals Board formally denies the Petition within the 60-day limit,
3) The Appeals Board grants the Petition within the 60-day limit and simultaneously issues a decision of some type (e.g., affirming, rescinding, altering, or amending the original judicial action), or

[378] LC §5909. This assumes that the Appeals Board indeed received the petition and the file from the local office in a timely manner.

4) The Appeals Board grants the Petition within the 60-day limit but then withholds judgment until further proceedings have taken place or evidence gathered (such as another disability evaluation, further testimony, an additional medical report, or other request).

Given the above, what sort of effect on time to resolution do these actions of the Appeals Board have on cases where the parties have petitioned for reconsideration? It should be kept in mind that we are talking only about the period in which the matter is before the Appeals Board; the parties had 20 days (plus five for mailing) from the judge's order to file the Petition, but that period of time was out of the direct control of the Commissioners. If the Petition is denied (outcome number 1 or 2 above), then at most the case's life is extended an additional 60 days beyond the time already allowed for Petition filing. Ideally, if the Appeals Board is going to deny the Petition, the decision would come at the earliest possible point in order to allow the parties to put the matter to rest and move on. But 60 days, compared to the median time from Application filing to the issuance of a Findings and Award or Findings and Order following trial, is not that large of an increase. It should also be kept in mind that of this 60-day period, the first 15 days were conceivably in the hands of the original WCJ who has the option of modifying or rescinding the decision prior to drafting the Report on Reconsideration. In effect, the Appeals Board is only "responsible" for 45 days of the life of a case with a denied Petition for Reconsideration.

Outcome number 3 (the Petition is granted along with a simultaneous issuance of the Appeals Board's decision) may well be associated with longer case disposition times because while the decision would have occurred within 60 days of Petition filing, the case itself might be ordered back into the trial queue or even reopen discovery. But is this a source of "unreasonable delay" on the part of the Appeals Board? One would certainly hope that the Commissioners of the Appeals Board base their decisions on the need to make sure justice has been served, not

whether their actions slice a few weeks or even a few months off the overall time the dispute has been before the WCAB.

Option number 4 is far more problematic. While the granting of the Petition will have taken place within the initial 60 days following its filing, no decision is actually rendered at that time. This type of "grant for further study" essentially places the case into the control of the Appeals Board until whatever further proceedings they require have taken place. At this point, there are no limits whatsoever on the time the Appeals Board can take to issue its final decision save the Constitution's mandate of a workers' compensation system that is expeditious as well as inexpensive and fair.

For those Petitions that are not granted, perhaps a maximum of 85 days (a maximum of 20 days to file the Petition plus five for mailing following the order or decision in question plus an additional 60 days for the Appeals Board to rule on the Petition) is added to the overall time to disposition if the Appeals Board denial is considered a part of the case's overall life. For those that are granted for further study, the additional time is far greater. The Appeals Board can take whatever time it wishes and the ultimate outcome might be to return the matter back to the District Office for retrial or other proceedings (and conceivably, the new decision of the trial judge could be petitioned again). Nevertheless, the total number of Petitions granted for reconsideration has numbered only a few hundred in recent years. Even if the Appeals Board is less than prompt at issuing a decision following the grant, the direct impact on the overall time to final resolution for tried workers' compensation cases in the *aggregate* is small (though on an *individual* basis, it may be significant and a source of much frustration). The Appeals Board does not appear to be a direct cause of systemwide delay.

Impact on Rulemaking and the Development of Substantive and Procedural Law

A different result is reached when looking at how the Appeals Board influences the overall operation of the system. First and foremost, the Commissioners are a key source of rules for practice and procedure. Additionally, any published *Decisions after Reconsideration* carry great

weight in how the WCAB's judges decide matters at the District Office level. This is especially true when the Appeals Board votes on the reconsideration *en banc* "in order to achieve uniformity of decision, or in cases presenting novel issues."[379]

The problem is that there must be at least four Commissioners sitting on the Appeals Board to constitute a majority (of the seven seats) to refer a case to the entire panel for an en banc decision. Commissioners are appointed by the Governor to six-year terms, but in some years, unfilled vacancies on the Appeals Board have resulted in periods where no en banc decisions were possible. Additionally, the rulemaking process is impacted by Appeals Board vacancies. Indeed, there has not been an across-the-board revision of Board Rules in decades, despite the passage of two major reform legislation packages. While this glaring oversight is not only due to vacancies (a fully staffed Appeals Board is not a condition precedent to rulemaking), it is understandable that the Commissioners would prioritize their duties during shortages to handling the more pressing needs of newly appealed cases.

➢ ***Immediately fill all existing Appeals Board vacancies to facilitate prompt disposition of reconsiderations, to facilitate en banc decisions, and to facilitate the rulemaking process.***

THE NEED FOR A SYSTEMWIDE COURT ADMINISTRATOR

Introduction

Part of the reason for the reorganization of the former Industrial Accident Commission into two separate entities was the belief that the delivery of workers' compensation benefits should be separated from the adjudication of any contested claims. The bifurcation of such functions had been recommended by workers' compensation experts in the past. With the reorganization, judicial functions were to be vested with the Commissioners, with the Administrative Director having powers over all other matters. In theory, the Commissioners would act as the "Supreme

[379] LC §115.

Court" for the entire adjudicatory system and would craft all-important rules of practice and procedure. Trial judges, though nominal employees of the DWC, would look to the Commissioners for professional guidance and policy. The Division would simply provide resources to the trial judges much in the same way that in some states, a separate county clerk's office provides assistance to independent courts. For a more complete description of the creation of the Administrative Director's position, see ***CHAPTER 1***.

The April 1965 *Report of the Workmen's Compensation Study Commission* that precipitated the organizational split was clear as to the respective roles to be played by the heads of the administrative and adjudicatory entities. The Division of Industrial Accidents (the predecessor of the DWC) would be required to furnish the Appeals Board with "quarters, equipment and supplies," but the judicial officers (as embodied by the Appeals Board) would execute their adjudicatory duties independently and would alone decide the level of resources needed to handle their caseload.

Regardless of the original intent of the Workmen's Compensation Study Commission or the drafters of the enabling legislation, the role of the Administrative Director could never remain limited to sending out paychecks to judges, organizing the offices, and handling the case files. The Appeals Board's preoccupation with their vital role in handling their own caseload on reconsideration meant that more than just the day-to-day details of operating the workers' compensation trial courts would have to be left to the administrative side of the equation. Pressure to make the workers' compensation courts a more integral component of the entire benefit delivery system and to do so in a way that minimized the burden on the defendants who paid a part of its operating costs also meant that the opportunities and incentives for DWC influence over the procedures and rules to be followed would be increased.

Such details are often what define the type of justice parties will receive from the judges of a court. Rules regarding filing procedures, calendaring practices, workload standards, personnel discipline, and the like often drive judicial behavior. Moreover, the Appeals Board wound

up having little control over the question of resources being provided to the trial judges; decisions made by the administrators of the Division and the Department of Industrial Relations as well as state budgetary practices have determined judicial and support staff levels. Because the workers' compensation courts were not part of the judicial branch, they would have no independent powers to demand what they believed to be adequate funding.

LC §111(a)[380] codified the de facto status of the AD who would supervise and be responsible for all personnel under his or her control, including trial judges, and coordinate all the work of the Division, including the adjudication of disputes. LC 5307.3 allows the Administrative Director to "adopt, amend, or repeal any rules and regulations that are reasonably necessary" to carry out his or her duties. Essentially, the Administrative Director—who initially would have been in a support role only—would now supervise the trial judges and promulgate the rules under which they operate.

This relationship is different from that found in traditional court systems. Typically, support services for a court are managed by professional administrators. While the administrator, especially if elected, might have authority equal to that of the judges of the court, the judicial officers answer either only to themselves or to other judicial supervisors. At the extreme, Federal District Court judges have the power to hire and fire their district's Chief Clerk at will. Judges, not court administrators, are likely to be the ones who develop their own procedural rules even if it is a legislative body that gives

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[380] Labor Code §111(a) provides "The Workers' Compensation Appeals Board, consisting of seven members, shall exercise all judicial powers vested in it under this code. In all other respects, the Division of Workers' Compensation is under the control of the administrative director and, except as to those duties, powers, jurisdiction, responsibilities, and purposes as are specifically vested in the appeals board, the administrative director shall exercise the powers of the head of a department within the meaning of Article 1 (commencing with Section 11150) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code with respect to the Division of Workers' Compensation which shall include supervision of, and responsibility for, personnel, and the coordination of the work of the division, except personnel of the appeals board."

them the final stamp of approval. Even in courts where the administrators have some independent authority, the Clerk will generally refrain from trying to set policy on how a judge would handle the matters before him or her. While in the California workers' compensation system the Appeals Board does have the ability under LC 5307(a) to adopt "reasonable and proper rules of practice and procedure," this is only in addition to the parallel rulemaking authority of the Administrative Director.

For better or for worse, the dispute resolution process became tightly integrated with other aspects of the workers' compensation system. Claims adjudication would be just one function performed at branch offices of the Division along with rating, rehabilitation services, and providing information to the community. From one standpoint, this approach had the potential benefit of keeping transactional costs for workers' compensation to a minimum by establishing a single central authority for administering both benefit delivery and adjudication services. From another standpoint, the complex relationship between the DWC and the trial judges of the WCAB places the Administrative Director in the position of the primary provider of administrative support, a "Supreme Court" for rulemaking, and as direct supervisor of the judges' actions. At the same time, the AD must carry out other duties of the Division, some that have nothing directly to do with adjudication and others that indirectly affect the progress of disputes through the system such as disability evaluation.

The concern of many stakeholders is that the AD's attention is spread too thin and that the needs and demands of the Claims Adjudication Unit have been given a lower priority than other duties. With the AD unable to effectively supervise what is happening at the district office level, some feel that the trial judges have been allowed to operate as independent entities; at the extreme, time mandates are ignored, the quality of judging has suffered, continuances are liberally granted (which drives up the cost of litigation), and decisions are being made in a haphazard fashion. Moreover, the fixed nature of the resources allocated to the entire Division suggests that the AD would be tempted to shift personnel and facilities away from the Claims

Adjudication Unit to other workers' compensation tasks. Another concern is that the policymaking qualities that might make for an effective agency head such as the Administrative Director do not translate into the more business-oriented management skills required to run the workers' compensation courts.

Over the past few years, workers' compensation packages that have successfully received the legislative stamp of approval (though have been subsequently vetoed by the Governor for a variety of reasons) have contained language that would establish a new position of "Court Administrator." The hope of these bills was to focus responsibility for managing the workers' compensation courts through a Court Administrator who "would further the interests of uniformity and expedition of proceedings before workers' compensation administrative law judges, assure that all judges are qualified and adhere to deadlines mandated by law or regulations, and manage procedural matters at the trial level."[381]

The approach taken by Senate Bill 71 (2001-2002 Reg. Sess.), which passed in September of 2001, but was subsequently vetoed in October, is typical of legislative proposals calling for a strong and independent Court Administrator. Assembly Bill 749 (2001-2002 Reg. Sess.), which passed in February of 2002 and was subsequently signed by the Governor, also contained language establishing a Court Administrator, but that legislation created a position whose authority and independence is far more limited than found in SB 71. In order to better gauge whether a Court Administrator would indeed address the problems of delay, excess costs, and nonuniformity as the proponents over the years have hoped, we used the SB 71 version as the model for our analysis.

The Court Administrator Proposal

In SB 71, the Court Administrator would be carved out of the existing authority of the Administrative Director and would be charged with administering the "workers' compensation adjudicatory process at

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[381] Senate Committee on Labor and Industrial Relations, *Analysis of SB 71*, State of California, May 9, 2001.

the trial level."[382] Both positions would be appointed by the Governor with the advice and consent of the Senate. The AD would serve at the pleasure of the Governor while the Court Administrator would serve at the pleasure of the "director" (presumably the AD, though this is not clear) and would report to the Administrative Director as well. Trial judges would still be employed by the Administrative Director but would instead be supervised by the Court Administrator. The role of the Court Administrator in reducing delay and nonuniformity is clearly expressed by the legislature:

> In the exercise of his or her functions, the court administrator shall further the interests of uniformity and expedition of proceedings before workers' compensation administrative law judges, assure that all workers' compensation administrative law judges are qualified and adhere to deadlines mandated by law or regulations, and manage procedural matters at the trial level.[383]

Uniformity is again the theme in another part of SB 71:

> (a) The court administrator shall establish uniform court procedures, uniform forms, and uniform time of court settings for all district offices of the appeals board. No district office of the appeals board or [workers' compensation administrative law judge] shall require forms or procedures other than as established by the court administrator. The court administrator shall take reasonable steps to ensure enforcement of this section. A workers' compensation administrative law judge who violates this section may be subject to disciplinary proceedings.[384]

The relationship between the Court Administrator and the Administrative Director would sometimes be a complex one under SB 71. Ethical regulations would be recommended by the Court Administrator but adopted by the Administrative Director. Workers' compensation judges would be recommended by the Court Administrator but actually appointed by the Administrative Director. In some instances, such as regarding rating medical evaluators, the Administrative Director would act in consultation with the Court Administrator. Both, presumably

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[382] SB 71, Section 28.
[383] SB 71, Section 35.
[384] SB 71, Section 80.

independently, would be able to charge and collect fees, report to the Governor, create office manuals, and require judges to undergo training.

The new position would also carve out some authority from the Appeals Board. Current LC §5307 reads (in part):

> The appeals board may by an order signed by four members:
> (a) Adopt reasonable and proper rules of practice and procedure....
> (c) Regulate and prescribe the kind and character of notices, where not specifically prescribed by this division, and the service thereof.
> (d) Regulate and prescribe the nature and extent of the proofs and evidence.

Section 74 of SB 71 would amend LC §5307 to read:

> 5307. (a) Except for those rules and regulations within the authority of the court administrator regarding trial level proceedings as defined in subdivision (c), the appeals board may by an order signed by four members:
> (1) Adopt reasonable and proper rules of practice and procedure....
> (3) Regulate and prescribe the kind and character of notices, where not specifically prescribed by this division, and the service thereof.
> (4) Regulate and prescribe the nature and extent of the proofs and evidence....
> (c) The court administrator shall adopt reasonable, proper, and uniform rules of practice and procedure governing trial level proceedings of the Workers' Compensation appeals board, which rules shall include, but not be limited to:
> (1) Rules regarding conferences, hearings, continuances, and other matters deemed reasonable and necessary to expeditiously resolve disputes.
> (2) The kind and character of forms to be used at all trial level proceedings.

Conceivably, the Appeals Board would no longer be involved in the development of rules regarding practice and procedure but would still be responsible for establishing rules of evidence, giving guidance to judges on how to decide cases before them, and other nonprocedural matters.

The extent to which the Court Administrator would have oversight over nonjudicial personnel at the district offices is not clear. Numerous references underscore the point that the judges are to be supervised by the Court Administrator. However, the hearing reporters

are the only nonjudicial staff members specifically mentioned as under the command of the Court Administrator (and even then only when not otherwise engaged in other required duties). In contrast, the AD still is responsible for appointing I&A Officers at the district offices and with providing them with clerical support as well. As such, a district office of the DWC, if retained in its present form, would have the judges reporting to the Court Administrator while the clerks, secretaries, I&A Officers, Rehabilitation Consultants, DEU Raters, and hearing reporters (with the one exception noted above) reporting to the Administrative Director. This suggests that control over the actual operations of the district office would still be the prerogative of the Administrative Director. The Court Administrator would have no independent authority to shift resources from or to any office or even any section within an office.

Presumably, details about how judges would interact with other district office operations would be worked out over time. A more important question is the relationship of all three sources of authority to issues that transcend a simple definition of procedural versus substantive law. Under SB 71, the Court Administrator, the Administrative Director, and the Appeals Board would have wide latitude to address areas they perceive to be required by the Labor Code:

> The Division of Workers' Compensation, including the administrative director, the court administrator, and the appeals board, shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code.[385]

Without question, there would be instances where more than one of these parties would have a legitimate interest in the same matter. It is not clear, for example, which entity would be responsible for how attorney fees would be calculated. Are the standards currently enunciated in BR §10755 and P&P Manual #6.8.4 simply a matter of procedure? If so, they would conceivably fall under the Court Administrator's jurisdiction. But if they relate to the legal rights of

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[385] SB 71, Section 38.

a participant in workers' compensation dispute resolution, they would still be more properly defined by the Appeals Board. And if they affect some aspect of the overall workers' compensation benefit delivery system (a conceivable interpretation given that the size of the attorney's fee impacts the amount of money going to the applicant), they would still be subject to the rulemaking powers of the Administrative Director.

The Need for a Separate Court Administrator

As stated elsewhere, unifying the various sources of authority for the adjudicatory process is an important goal. The questions raised by SB 71 are whether the establishment of a strong and independent Court Administrator position is the most effective way to achieve such a result and what would be the related benefits and liabilities.

One concern would be that despite the attempt to neatly carve out a part of the authority of both the Administrative Director and the Appeals Board, the result, at least for the foreseeable future, would be the development of yet another line of authority to be followed by judges and considered by practitioners. Without question, it will take a considerable amount of time for existing sections of the AD Rules, Board Rules, and P&P Manual that would now be addressed by any new "Court Administrator Rules" to be either conformed or deleted.

Another concern is that nothing in the proposed arrangement addresses the core problem that is leading to nonuniformity among judicial decisions: the lack of a clear and coherent approach to the existing standards judges are already using in making decisions. Again, it is not clear whether the Court Administrator would have any influence over the way judges rule upon substantive matters such as the standards for settlement agreement review or when a *Thomas* finding would be approved. Conceivably, the Court Administrator could tell the judge when an agreement would be reviewed (such as through uniform walk-through rules) but not how.

The only way such issues could be addressed effectively is through a joint effort of the Appeals Board, the Administrative Director, and the new Court Administrator working together (with the advice of judges and practitioners who are the ones who actually know what will work and

what will not) to revise all the existing rules no matter where they are found and to coordinate the future adoption of new ones. A Court Administrator who simply adopts a rule parroting current guidelines without actively seeking out the advice of the workers' compensation community or who proceeds to operate independently of the two other controlling sources of authority will accomplish little.

While the underlying sentiments expressed in SB 71 are laudable, it is not clear whether the net result, other than a new set of procedural rules, will be any different. Under the existing arrangement, the Administrative Director already possesses all the supervisory powers that would be delegated to the new Court Administrator. Indeed, the Court Administrator is a carved-out position rather than a new entity with independent authority. A Court Administrator would be affected by the exact same limitations on management options that the AD operates under currently despite the stirring charge to make judges "adhere to deadlines mandated by law or regulations." Civil service rules would still bar swift disciplinary procedures and collective bargaining practices would restrict the ability of a Court Administrator to freely shift personnel and duties around as he or she saw fit.

Many of the issues being addressed by the Court Administrator proposal could be accomplished by other means. As indicated elsewhere, a standing committee for coordination (modeled after the Rules Committees of the Federal Judiciary) made up of representatives of the Appeals Board, WCJs, and DWC administration (along with input from the workers' compensation community) should jointly review all four current lines of authority (ADR, BR, P&P Manual, and official forms) with an eye to proposing changes that will satisfy the Labor Code. There is no reason why the current Assistant Chief for Claims Adjudication couldn't take a lead role to perform some of the tasks proposed for the Court Administrator.

Most relevant to the issue of office performance would be the question of resources. Though SB 71 does authorize eight new "judge teams" (each consisting of a judge, a secretary, and a hearing reporter), there is no requirement that these new positions be *adequately funded and filled*. Neither would the Court Administrator be

given additional funds to address existing vacancies. As such, the Court Administrator will be placed in exactly the same position of an Administrative Director in the current regime and the branch offices will continue to operate at an average of 20% less than full staffing. No matter how much additional judicial supervision there might be, none of the extra oversight is going to move a Declaration of Readiness from the mail basket to the calendar clerk for MSC setting any faster than is the current experience. Creating a new top-level position with all the trappings of the office and with all necessary support staff also seems a bit ironic in light of the fact that many district offices are experiencing crippling shortages of the lowest paid position in the Division. As such, we believe that creating a Court Administrator position at the present time would divert needed attention from the more pressing needs of the district offices.

- ***While the idea of creating a strong and independent "Court Administrator" with a separate line of authority over procedures and the responsibility for judicial supervision has some merit, such a plan would not be the best or most immediate way to address current DWC budget constraints, procedural problems, or litigant discontent.***

CHAPTER 20. IMPROVING "THE PEOPLE'S COURT"

The Commission holds that it is not a court and that hearings before it are not trials, but are what the term implies, "hearings," or inquires in which the dispatch of business is best facilitated by permitting the...referee...to do most of the inquiring.... In short, it is the purpose of the Commission to afford an object lesson as to how to determine issues of minor consequence with reasonable certainty and without delay or burdensome expenditure.

Industrial Accident Commission, 1914.[386]

The Commission initially wanted to be more of an administrative body than a court. The Appellate Courts have held this to the contrary. Since the courts took this attitude it is only natural that the litigating parties...should also take the same attitude. Contrary to the original intention of the Commission, to limit litigation to a minimum, the trend throughout the years has been to increase litigation, especially since the emphasis a few years ago on the issue of 'due process'.

Letter from R. E. Haggard, Supervisor of the Permanent Disability Rating Bureau, to H. E. McClellan, Executive Secretary, Senate Interim Committee on Workmen's Compensation Benefits, June 16, 1950.[387]

DWC's mission is to minimize the adverse impact of work-related injuries on California employees and employers.

Division of Workers' Compensation website, 2002.[388]

[The Commission,] in matters within its jurisdiction acts as a judicial body and exercises judicial functions and in legal effect is a court.

Supreme Court of California, 1935.[389]

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[386] California Industrial Accident Commission (1914), pp. 8-9.

[387] Cited in California Workmen's Compensation Study Commission (1965), p. 168.

[388] Division of Workers' Compensation, DWC Home Page, California Department of Industrial Relations, http://www.dir.ca.gov/DWC/dwc_home_page.htm, accessed July 18, 2002.

[389] Bankers Indemnity Insurance Company v. Industrial Accident Commission, 4 Cal. 2d 89, 97; 47 P.2d 719 (CA 1935).

> *One of the clear pictures that emerges from a review of the work who have examined the process of implementing change in courts is that success is difficult to achieve.... [J]udges' reliance on legal precedent; the decentralization of court systems; the discretion residing in each judge, lawyer, litigant and staff person; the lack of a unified, institutional perspective; and the allocation of power and resources all combine as obstacles to change.*
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> Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, American Bar Association, 1986.[390]

THE DIFFICULTIES OF STUDYING AND IMPROVING WCAB AND DWC OPERATIONS

An "Administrative Body"? A "Court"?

The combined entity made up of the trial-level judges of the Workers' Compensation Appeals Board and the administrative support and supervision provided by the Division of Workers' Compensation is a unique creature. Part social service agency, part regulatory body, and part traditional trial court, it must perform a delicate balancing act to ensure the adequate delivery of benefits to injured workers, reasonable cost savings for employers, and the due process rights of every player in this complicated system. If the Workers' Compensation Appeals Board were a completely independent component of the judicial branch of government, the tasks of judges and administrators would conceivably be much easier. Cases could be decided at whatever pace the Appeals Board found prudent and, if additional resources were needed to staff and equip its various local courts, its requests to the legislative and executive branches would carry greater weight than they do now. It could also decide cases, as well as design rules and procedures for their handling, in a way that pays far less attention to private litigation costs and instead focuses on getting the fairest result possible.[391] But the duties of WCAB trial judges are

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[390] Lawyers Conference Task Force on Reduction of Litigation Cost and Delay (1986), pp. 1-2.

[391] This is not to suggest, of course, that traditional civil courts are totally unconcerned with the need to resolve their cases in an expeditious manner or that they are oblivious to complaints voiced by litigants over unnecessary private costs. Nevertheless, workers' compensation courts must pay relatively greater attention to these

intrinsically linked with both the mission of the DWC to address all conceivable aspects of work-related injuries and the budgetary decisions made by the Governor and the Legislature, over which the judges and their staffs have no input or control. In order to continue to operate, it must show that it furthers the global goals of the workers' compensation social insurance system and does so in a way that keeps both private and public costs to a minimum.

The WCAB is nevertheless a judicial body at its core. The hallways of DWC branch offices are filled not with bureaucrats, but with judges and attorneys and litigants who all expect and demand that justice should be served in every case and that the rule of law should take precedence over all other considerations. Because of that expectation, implementing change is as difficult here as it is in any other court in the nation. Moreover, there are definite limits to what policymakers can do to streamline the process for dispute resolution. As one stakeholder told us, "Assembly-line justice is an oxymoron." While during the earliest days of the California workers' compensation system the goal strived for was simply one of "average justice," modern notions of due process and fundamental fairness require that the rights of every litigant be protected at every step along the adjudicatory process.[392]

Because of these conflicting realities, it would be a mistake to assume that any study of the WCAB will yield a painless, cost-effective formula that will turn the adjudicatory arm of the California workers' compensation system into a well-oiled, lightning-fast judicial machine that can operate at peak efficiency with only a handful of personnel and equipment. It is simply not possible. Court systems, even within the specialized environment of the workers' compensation social insurance program, can seem inefficient and plodding compared with other types of organizations. Diametrically opposed parties have very different

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aspects of court and case management because of the historic integration of these forums into the overall benefit delivery system.

[392] "It is better for the state and for the people of the state that what may be termed 'average justice' shall be speedily and inexpensively administered than that exact justice shall be striven for at a cost that, in many cases, would consume the entire amount involved and leave the applicant indebted for costs and expenses besides." California Industrial Accident Commission (1914), p. 8.

expectations of what the ultimate results of any interaction with a judge ought to be, and when those expectations meet head-to-head, the results are costly and time consuming to all concerned. Moreover, parties have an acute sense of entitlement to certain due process rights not found within the context of normal business or social transactions; these same parties are not shy about aggressively asserting those rights when they perceive that the court is attempting to move cases through the system in an unfair or reckless manner. Added to this mix is the parallel responsibility of the WCAB to ensure, without fail, that injured workers are compensated to the full extent the law allows, even if they do not have the benefit of professional counsel to guide them through a procedural minefield. Within this reality, any future reform might be measured in inches, not miles.

Finding the Right Focus

A number of our recommendations—especially those related to ensuring that the branch offices of the DWC have a full complement of clerical staff and supervisors, and those related to long-overdue technological improvements—would require a significant increase in future budget allocations to the agency. We are not oblivious to the fact that as of this writing, the State of California is facing a stunning fiscal crisis that makes an infusion of additional personnel and equipment highly unlikely for the near future. Some members of the workers' compensation community have suggested that given this pessimistic financial situation, RAND should concentrate solely on recommendations that can be implemented within existing resource constraints.

While this approach certainly has merit, it should be kept in mind that the staff and infrastructure shortages DWC offices exhibit are by no means a recent phenomenon. Year after year, resources made available for claims adjudication and ancillary services seemed to be a step behind what was needed to handle the workload. While there have been a few shots in the arm over the past 15 years or so, they primarily seem to have been intended to address the upheavals caused by the 1989 and 1993 reforms. Once the last spasms of the 1993 reforms had subsided and

the filing peaks of the mid-1990s were only a memory, it would have been a prudent moment for policymakers to carefully assess exactly how actual (not authorized) staff levels were processing the caseload of the past few years (a caseload that, for the first time, was operating under a fairly stable set of rules and procedures) and fine-tune the budget accordingly. Instead, the DWC's budget for adjudication services continued to fail to provide enough funds to simply hire all the staff that had been authorized. Had adequate funding been provided at the time, the projected cuts that will likely affect all state agencies in the near future would have had a far less serious impact on DWC operations.

Ignoring the impact of ongoing staff and equipment shortages and discussing only "low-dollar" changes in the rules of practice and procedure might have given a reader unfamiliar with the lamentable situation at branch offices the impression that the status quo was adequate to process workers' compensation disputes and that a few new regulations would move cases along even quicker. The reality is that policymakers must be made fully aware of how inadequate resources have historically affected the DWC's ability to meet legislatively mandated time goals and other workers' compensation-related duties; any potential near-term cuts in DWC funding must therefore be considered in light of the fact that the agency has already been operating with a reduced workforce. Policymakers also need to understand that changes in procedures or management philosophy are simply not going to make up for years of missing clerks and woefully outdated information technology. Ideally, these shortfalls would be addressed immediately, but at the very least, the problems must be rectified the moment the state's financial picture takes a turn for the better. We believe that exploring budget- and staffing-related issues now will increase the chances that they will remain on the radar screen of policymakers in a hopefully more rosy future.

Another suggested approach was that we should closely examine the question of how to fund the claims adjudication process. The present arrangement of 20% direct funding from employer assessments and 80% funding from the state's General Fund was claimed to result in a

situation where the task of allocating resources for this vital component of the overall workers' compensation system annually turns into a political football. By recommending a shift to 100% user-funding, as is the case in most other states,[393] it is hoped that a more stable source of operating funds would be guaranteed and recommendations we have made that require additional expenditures over and above recent budgets would have a far better chance of being implemented. Another interesting idea involves a one-time surcharge in employer assessments to provide the resources needed for upgrading the woeful technological infrastructure of the DWC; with a new case management system and electronic filing of pleadings, both delay and costs (public and private) would hopefully be reduced in subsequent years. While we believe that the issues involved certainly merit careful consideration by the entire workers' compensation community, the subject was far beyond the scope of our research agenda.

We are also aware that some of our recommendations might, for example, restrict judicial autonomy as has been traditionally practiced, cause disruption in the already busy work schedules of applicant and defense attorneys, require some staff members to perform new and perhaps unfamiliar duties, move cases along faster than is traditional or even desired by the local legal culture, reduce certain kinds of income streams for some attorneys, and result in other changes that might not always be appreciated. We are also aware of the potential for well-intended court reform efforts to decrease the time to key events in the name of delay reductions at the cost of some increase in public and private litigation expenses. But no modification to the current way the WCAB operates can be implemented without someone feeling that the entire

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[393] Precisely categorizing the scheme used in each state for funding its workers' compensation program is made difficult because the responsibilities of these administrative agencies are far from uniform. Nevertheless, it appears that 40 states obtain funding for the governmental component of the workers' compensation process entirely through assessments and direct taxes on employers and insurers, six states use general revenues exclusively, and California and three other states use a mix of general fund and private contributions. Office of Workers' Compensation Programs, *State Workers' Compensation Administration Profiles*, Employment Standards Administration, U.S. Department of Labor, October 2001.

brunt of the changes has been placed squarely and solely upon their shoulders. Our approach of sharing the *Candidate Recommendations* with the workers' compensation community at an early stage of the research with the intent of listening to and learning from their concerns hopefully would have minimized impacts that are patently unfair, but certainly change is never easy. The significant challenges demanded from the adjudicatory process by the two sweeping sets of reform packages passed in 1989 and 1993 are testimony to that fact; only in recent years has the WCAB and DWC fully recovered from the strain of completely revamping forms and procedures almost overnight.

Some have told us that we did not go far enough, that what was needed was not fine-tuning an existing judicial system but rather a complete rethinking of how workers are compensated for employment-related injuries. One school of thought was that California should seek to emulate those states where workers' compensation litigation with all the trappings of judges, attorneys, and procedural complexity is rarely seen. Another idea was that an unprecedented effort should be concentrated on the audit and enforcement aspects of insurer regulation with the hope of eliminating repeat offenders that might be causing a disproportional number of workers to seek legal redress. Still another was to revamp the rating schedule from top to bottom so that there would be little room for argument over what the future extent of disability might be. Another suggestion was to "nationalize" the entire workers' compensation industry and make SCIF the sole provider of policies to California employers. In a similar vein, some suggested that the answer could be found in a return to the days when workers' compensation premium rates were the subject of strict state regulation. Anything short of these and other similarly sweeping changes will likely be unsatisfactory to some whose frustration level with the current process has reached their personal limit. But our charge from the Commission on Health and Safety and Workers' Compensation was clear: This was to be a study of the adjudicatory process for deciding existing disputes, not a reexamination of the basic principles of the California workers' compensation benefit delivery system.

In sum, no single, inexpensive, low-impact, fast-acting “magic bullet” is available to completely address the needs of the WCAB and DWC in a way that will meet the expectation of all stakeholders. Moving the workers’ compensation courts toward the goals of speedier and less expensive dispute resolution while at the same time preserving long-held notions of what constitutes just and fair outcomes will cost money, require considerable effort and input from all segments of the workers’ compensation community, and ultimately result in only incremental improvements. Nevertheless, we believe that the end result will clearly justify the considerable effort and patience required.

Obstacles to Change

Many previous reports have suggested changes that make sense to us, based on what we have seen and been told and on other empirical evidence we have collected. Yet a number of years after the release of those reports, we encountered many of the same problems of delay, excess costs, and nonuniformity their authors noted and made many of the same recommendations during the course of our own research. As such, it seems wasteful to have reputable organizations and longtime observers of the workers’ compensation system repeatedly spend the effort and the resources to review the trial-level workings of the WCAB with the end result of minimal change. Why have these prior recommendations for judicial reform had so little impact?

The reality is that unlike more traditional civil trial courts, the WCAB is not an independent entity with a separate constitutional mandate. It is simply a part, albeit a highly visible part, of a larger administrative system of delivering workers’ compensation benefits to injured employees. Its funding and management is closely linked to this benefit delivery system and it must compete for precious budget dollars and the attention of administrators in a way similar to any component of a large state agency. Unlike traditional trial courts, the WCAB cannot independently demand adequate funding and threaten to shut down operations, as was discussed by the judges at some California Superior Court locations a few years back. It cannot hire and fire key clerical staff at will, as Federal District Court judges have the power to do.

Its rules of practice are the result of a mix of legislative directives and administrative regulations, rather than a unified, self-created set of procedures. Its leadership is split between an Administrative Director and the Commissioners, all of whom are temporary political appointees rather than professional judges with lifelong tenure. And the day-to-day operation of the WCAB is inexorably intertwined with a labyrinth of state civil service rules, personnel requirements, and budgeting practices over which no one within its organization, not even the Administrative Director or the Commissioners of the Appeals Board, has a single shred of control. In that context, it is not surprising that otherwise rational and reasoned recommendations from prior studies have had mixed success in being implemented in the manner and the scope intended by their authors. Unless there is a comprehensive and cooperative effort from all segments of the workers' compensation community (including the Legislature) to adequately address the needs of the dispute resolution process, there is little chance for meaningful change following the publication of this report as well.

THE PRIMARY NEEDS OF THE CLAIMS ADJUDICATION PROCESS

Throughout this report, we have attempted to point out areas that are clearly in need of addressing by WCAB and DWC administrators, the Legislature, and other state agencies. Because the needs are many and the issues involved in each recommendation are complex, it would serve little purpose to repeat them in this chapter. However, there are three major concerns we have that deserve the special and immediate attention of policymakers.

Rationalizing Controlling Rules and Regulations

As explained elsewhere, we believe that the convoluted and sometimes conflicting system of Labor Code statutes, Commissioners' Board Rules, Administrative Director Rules, the Policy & Procedural Manual, and the set of official forms are in ***immediate*** need of a unified effort of coordination (with substantial input from the workers' compensation community). This would involve judges, the DWC, and the Appeals Board in order to update obsolete requirements, to clarify areas needing additional guidance, and to give practitioners and WCJs the

confidence to perform their duties without fear that they are failing to comply with the mandates of one rule when they follow another. That being said, we also believe that these sources of authority for the workers' compensation adjudicatory system already provide the framework necessary for reducing delay, nonuniformity, and costs to a reasonable minimum.

No revision to P&P Index #6.7.4, for example, could make it any plainer: Continuances are discouraged and granted only upon a showing of good cause. No amendment to LC §5500.3, for example, could more effectively spell out its mandate that no branch office or WCJ may "require forms or procedures other than as established by the appeals board." In simple English, for example, LC §5502(d)(1) says that a "regular hearing shall be held within 75 days after the declaration of readiness to proceed is filed." The operative word here is "shall," not "may." And it is difficult, for example, to conceive how LC §5313 could be interpreted to mean anything other than that within 30 days of submitting a case following trial, the judge is to issue an opinion and a decision. Many other provisions of the Board Rules, Administrative Director Rules, and the Policy & Procedural Manual are equally emphatic about what judges, attorneys, and administrators are supposed to do. These rules do not need toughening up or adding draconian sanctions. Making sure that they are coherent and not in conflict with one another is, nevertheless, an immediate priority as is the task of providing meaningful and realistic guidance as to what policymakers mean by terms such as "not favored" or "good cause."

Thankfully, the beginnings of a comprehensive revision effort are currently under way. The Appeals Board is considering a number of extensive changes and updates to its rules of practice and procedure,[394] a number of which are outgrowths of ideas shared through the distribution of our *Candidate Recommendations* document in fall 2001. This is an excellent start, but just as important to the overall process is a need to view the development of controlling authority for workers' compensation adjudication as a shared responsibility of both the Appeals

[394] Workers' Compensation Appeals Board, *Notice of Proposed Rulemaking–Rules of Practice and Procedure* (2002).

Board and the Administrative Director of the DWC. All rules, no matter where they can be found in the California Code of Regulations, need to speak with a single voice. The system has suffered from years of Balkanizing the sources of its authority. Unless there is a joint consensus among WCAB judges, Appeals Board Commissioners, DWC administrators, and the litigant community as to what will work in practice, the end result will be the same mishmash of rules that can be bent or ignored without a second thought.

Can all of the many problems we observed during the course of our research be solved solely through any changes in rules that might develop out of such a review? Because the core sources of much of the delay, excess litigation costs, and nonuniformity are rooted in chronic staff shortages throughout this system, the answer is, unfortunately, no. We saw a number of instances where well-meaning regulations and administrative directives were ignored by local office staff for the understandable reason that to follow these rules to the letter would result in even further delay in case processing. A coherent and workable set of procedural rules must have adequate numbers of staff in place to carry them out. Failure to provide that staff will simply result in business as usual.

Updating DWC Claims Adjudication Technology

The workers' compensation courts are woefully in need of a long-overdue overhaul of their technological infrastructure. Operating with a two-decade-old case management system, these courts expend countless person-hours in "hand-feeding" their cumbersome and problematic computers. Existing staff shortages have been made more acute because this outmoded system requires a considerable level of duplicate data entry; moreover, its use as a management tool to better target judicial resources to problem cases is extremely limited. Statistics regarding staff performance levels the system generates are routinely ignored because they are unreliable or unhelpful. In a court where as many as 200,000 new cases are filed each year, this lack of a modern and centralized case management system ensures that administrators will have

little concrete understanding of how well the workload is being processed on a day-to-day basis.

Clearly, the case management system must be replaced at the earliest opportunity. The automation of conference and trial calendaring, long a bottleneck causing much unneeded delay, is even a higher priority. But any overhaul must be in addition to, and not in exchange for, adequate funding for current personnel requirements. Once a modern case management system is in place and the long-touted benefits of electronic filing come to pass, then the need for support staff will lessen and cost savings can be realized. Until then, those responsible for resource allocation must be willing to support both full staffing levels and the concurrent costs of any infrastructure upgrade. If a choice must unfortunately be made at the present time, then the immediate interests of litigants would be best served by full staffing.

Providing Appropriate Staffing Levels

Even with a more workable set of procedural rules and a modernized and efficient technological infrastructure, the workers' compensation courts will continue to evidence serious problems in delay, excess litigation costs, and nonuniformity for one reason alone: There are not enough personnel on board at the present time to process the current workload.

This is a system that has been operating with a reduced workforce for many years. In recent times, the district offices have had only about 80% of the number of authorized positions actually on duty and in the office, primarily because of a lack of funds to fill the positions but also because of a high turnover rate for some classifications and other absences. In office after office we visited, these shortages were clearly the most visible sources of delay in case processing, of perceptions that an office was not doing all that it could to serve the workers' compensation community, and of low morale among staff members. But if this is the case, why has there not been a total collapse?

Four factors have served to prevent the system from becoming hopelessly backlogged in the face of severe understaffing. First, the numbers of new case filings and demands for judicial intervention have

declined from their peaks in the early 1990s. Those same years are ones remembered by longtime practitioners as being characterized by unconscionable delays in getting a matter before a WCAB judge and hallways filled with boxes of unprocessed Declarations of Readiness. With the reduction in demand, available resources have been better able to handle the workload and average processing times have made great progress toward meeting statutory maximums. As evidenced by our canvassing of branch offices, at the locations that do the most business, an MSC can often be held about 30 to 50 days following the receipt of the DOR and a two-hour trial could be held anywhere from 40 to 50 days later. At worst, a trial would be held no later than 100 days from the filing of a DOR, a figure that is more than the 75-day ideal described in the Labor Code but a far cry from much larger averages found in previous years. While other locations still reflect longer interval times for these measures, the staff-to-workload ratio and time interval compliance for the system as a whole over the past few years has improved. Future upturns in filing rates or downturns in staff levels will no doubt play havoc with the ability of branch offices to perform even at these unremarkable levels.

A second factor has been the apparent willingness of staff members to work outside their classification to help perform the tasks currently assigned to sections experiencing shortages: secretaries are acting as calendar clerks, hearing reporters are opening up case files, and judges are doing their own filing when needed. Though laudable, this is a short-term solution at best.

A third method of addressing an unfavorable staff-to-workload ratio or continuing delay is by “packing” the calendar. In order to deal with the number of Declarations that are being filed, some offices are scheduling 60 Mandatory Settlement Conferences per conference day for each of its judges. This leaves an average of all but seven minutes per case during the available conference calendar hours for a judge to bring the parties together for settlement, review any settlement that is reached, or help the parties narrow the issues to be heard at trial. The critical time required for a judge to review the case file independently before the parties have approached to seek mediation

services has essentially been eliminated. While such packing would be understandable during periods of unexpected illnesses or vacations, it is hard to imagine that litigants view the services being provided by the WCAB in a positive light when it happens month after month.

Finally, the branch offices are performing a type of triage so that those tasks that are subject to Labor Code mandates receive the greatest amount of attention. Clerks, for example, give the highest priority to identifying DORs that come in the mail and setting them for an MSC in the shortest time possible; while this is an understandable approach, it means that they dispense altogether of duties such as screening DORs for sufficiency, that they place significant restrictions on when they are able to do other chores such as pulling files for walk-through settlements, and that they endlessly defer tasks such as archiving older files for the State Records Center. This may temporarily reduce the effect of shortages on the most public of statistics but only at the expense of other responsibilities that are no less important in the long run. Eventually, the need to complete these chores will become too great to put off any longer and the backlog in key areas will once again grow.

Notwithstanding the fact that in recent years the WCAB has been the beneficiary of both a fortuitous decline in filings and the increased efforts of staff members to compensate for missing personnel, eventually the situation will take a turn for the worse if most of the vacant authorized positions remain unfilled (and if filled positions continue to exhibit high turnover or lengthy absences). The most pressing need is found in the clerk’s section. Though individual shortages exist within other parts of a typical DWC district office (most notably with judges at offices where the trial calendar is especially packed and at offices whose DEU raters have a serious backlog of cases), the high turnover rate for this particular classification makes keeping experienced staff on board extremely difficult. The heavy dependence on “pushing paper” in the WCAB requires a minimum amount of clerical personnel to keep the cases flowing; at some locations, that core number of workers is clearly not available.

During this research, we were asked on more than one occasion what ought to be the "correct" number for each classification found within the DWC given the annual numbers of Applications opening up new cases, Declarations of Readiness requesting that cases be placed on the trial track, proposed settlements for review, trials held, or some other measurable benchmark. The difficulty for generating such a number lies in the fact that each office at the present time is effectively operating under different rules, has a caseload and a local bar with expectations that differ from other locations, and has had different experiences with long-term shortages. Accurately assessing each office's individual needs requires routine on-site review that would have exceeded our project's time and resource constraints. We believe that the DWC's internal needs assessment process described more fully in ***CHAPTER 10*** is a reasonable one as presently performed. Based on our observations of activity at offices where there were significant discrepancies between the authorized numbers and actual filled positions, and from observations at offices where the shortfall was less acute or even nonexistent, the DWC's estimates do not appear to be overly generous. Our sense is the present numbers of *authorized* positions are a reasonable target for administrators seeking to find an optimum level for *current* conditions. Once achieved, the process of fine-tuning these numbers becomes easier to accomplish.

In simplistic terms, we believe that the district offices could by and large meet the DOR-MSC and the DOR-trial time requirements of the Labor Code if they were *actually* provided with no more than the number of staff members (clerks, judges, raters, etc.) that they are *already* authorized for in 2001, assuming that the number of annual filings and requests (such as those for MSCs, trials, settlement reviews, etc.) generally remain at 2001 levels and that the other changes in procedures and policies described elsewhere are adopted as well. The district offices certainly do not need additional authorized positions that are never filled or exhibit long-term vacancies and exist only as an unrealized fiction. The only staffing number that should be of interest to policymakers and administrators attempting to gauge the efficiency

and effectiveness of the DWC is the count of persons actually present and available for work each day.

The bottom line is that failing to provide the DWC with funding adequate to attract and retain a full complement of qualified staff members is hypocritical given the repeatedly voiced claims of legislators and others that the workers' compensation courts are not doing all they should to meet the needs of the public they were created to serve.

ADDRESSING DELAY, EXCESS COSTS, AND NONUNIFORMITY

The Unique Demands of Workers' Compensation Dispute Resolution

Why should so much emphasis be placed on getting the fastest resolution possible for workers' compensation disputes? Though the average time from Declaration of Readiness to trial (about 120 days in 2000) is greater than allowed by law, compared with traditional civil courts (especially in large urban areas) the WCAB is lightning fast. Moreover, the legislative time mandates must be viewed in light of the fact that workers' compensation trials are not trivial events but instead can involve tens of thousands of dollars in direct payments and nearly unlimited health care benefits for life. Yet we demand that the trial judges of the WCAB make fair and reasoned decisions in these extremely serious matters in a relatively short time.

In a similar vein, why should WCAB and DWC administrators care so much about the private costs of litigating disputes within its courts? In other forums, concerns over capping runaway discovery seem to have taken a back seat to dealing with other issues of delay and growing backlog. In contrast, procedural innovations for the WCAB such as those represented by the 1966, 1989, and 1993 reforms have always been developed with an eye toward holding the costs of prosecuting and defending workers' compensation claims to an absolute minimum.

Finally, why has there been so much discussion about unifying the way the various district offices operate? Attorneys in traditional civil practice seemingly operate successfully before multiple California county Superior Courts and before multiple Federal District Court locations despite having to learn and obey idiosyncratic local court

rules that sometimes need a book of 100 pages to explain fully. For the WCAB, on the other hand, state law demands that each office function in essentially the same manner, even to the point of mandating that all 25 offices adhere to a uniform time for court events.

The answers to these questions lie in the fact that workers' compensation is not simply a special version of tort or employee-employer relations law. It is a different system altogether that has, since the early part of the 20th century, asked injured workers to give up their rights to seek essentially unlimited damages in exchange for a benefit delivery system that is as rational, swift, evenhanded, and efficient as humanly possible. This system has also asked employers to give up most of their rights to oppose claims of liability for workplace injuries and to pay for benefits by assuring them that transaction costs will be held to the absolute minimum. Adjudicating any disputes that arise within this complex and highly integrated system is no less important to maintaining the promises inherent in that 90-year-old social bargain than is setting reasonable insurance premium rates, establishing occupational health and safety programs, auditing the actions of insurers and employers, preventing fraud, or ensuring the quality of medical care providers. Though only one of five workplace injuries in the state of California ever receives the attention of the WCAB, unless such disputes are dealt with in a manner that is as "just, speedy, and inexpensive" as possible, the entire underpinnings of this bargain can be called into question. As such, making sure that the WCAB is adequately staffed and equipped, is adequately managed, is provided with a well-thought-out procedural framework, and processes its caseload in an efficient, fair, and uniform manner is a serious and ongoing responsibility owed to employees and employers by legislators and state bureaucrats.

Fulfilling the Mandate

Over the course of this research, a number of well-meaning parties suggested that the underlying roots of long-standing problems in adjudicating workers' compensation disputes are obvious and that as such, addressing the system's dysfunctions is only a matter of fixing a

few specific areas to the exclusion of all others. During our investigation, it became clear that this was simply not the case. For example, one common answer we heard to the question of why the WCAB sometimes appears to be unable to follows its own rules and policies was that workers' compensation judges are rogue bulls, unable to be controlled or educated and who are often following their own private agenda. The reality is that the vast majority of workers' compensation judges are dedicated, competent, ethical, and fair judicial officers who at all times attempt to discharge their duties in the best way they know how.

Another suggested source of stakeholder dissatisfaction is that the very idea that a workers' compensation system can rationally and methodically rate injuries is self-contradictory in light of the fact that many of the indicators of these injuries are subjective in nature; as such, there is no realistic way to consistently resolve disputes over the extent of disability. The reality is that, by and large, judges deliver decisions every day that are within the expectations of parties on both sides.

Another explanation for a lack of progress is that the current leaders of the DWC and the Commissioners of the Appeals Board are uncommitted to the ideal of a fast-acting, low-cost, user-friendly system of adjudication. The reality is that, by and large, they appear desirous of fulfilling their statutory missions.

Another explanation is that Department of Industrial Relations and Division of Workers' Compensation administrators' hands are completely tied by budget considerations and state guidelines, with little room for innovation. The reality is that, should they choose to do so, they have the power to divert some resources from other DIR and DWC activities in order to provide the Claims Adjudication Unit with additional staff members, additional equipment, and additional office space it conceivably may need to better meet the time line requirements. While such realignment would no doubt come at the expense of other legislatively mandated programs within the DIR and DWC (some of which have already been reduced to minimal levels through inadequate state

budget allocations), it is possible to give dispute resolution a much higher priority in planning than is currently the case.

Another view is that attorneys are obstructionists who seek to vex and delay at every opportunity, thus thwarting the good intentions of judges and administrators. The reality is that, for the most part, the livelihood of a workers' compensation attorney depends on moving large numbers of cases through the judicial process as quickly and as smoothly as possible.

Another opinion is that the time standards are too severe and that it is impossible to consistently meet them in a way that promotes justice. The reality is that, in many instances, an injured worker is desperately counting the days waiting for resolution of a process that has taken years, sometimes waiting for this final accounting in order to prevent the loss of his or her car, house, or family. To this worker, the existing time standards are very reasonable.

In short, there is no single, simple reason why the WCAB/DWC trial courts have not met the expectations of a wide variety of stakeholders. What is clear is that if the way in which the courts operate continues to be plagued by unnecessary delays that frustrate injured workers and their employers, by unreasonable private and public litigation costs and by unexpected outcomes due to idiosyncratic procedures, the California workers' compensation system is failing to serve its statutory and historical mandate. In developing our recommendations, our hope was to offer a comprehensive blueprint for judicial and administrative reform that will help the WCAB and the DWC fulfill that mandate.

-- APPENDICES --

APPENDIX A. COMPLETE LIST OF RECOMMENDATIONS

CHAPTER 11. PERSONNEL AT DWC BRANCH OFFICES

- Clerical staffing should be given the highest priority in future personnel resource allocation decisions; every effort should be made to minimize the number of vacant clerical positions.
- Clerical staff numbers at branch offices should be reviewed in light of actual workload demands, not simply calculated on the basis of the number of authorized or available judges.
- Compensation for clerical positions should accurately reflect the current responsibilities and demands of the job in order to encourage prospective employees to apply and existing employees to remain.
- The creation of a statewide clerical section training and operations manual should be a high priority for DWC administration.
- Top-tier pay levels for the Office Services Supervisor should be increased to retain longtime employees.
- “Cross training” clerks should be a high-priority task for Office Services Supervisors.
- Use of interns or community service workers should be in addition to existing clerical resources, not as a long-term substitute.
- While the idea of a formal “Office Administrator” position with supervisory responsibilities over all nonjudicial staff at each branch office has merit, limited funds should be used for more pressing WCAB clerical and secretarial staff needs. If such positions are nevertheless created, their immediate supervisor should be the Presiding Judge, not a Regional Manager or other DWC administrator.
- At a minimum, the current rate of filling authorized secretarial positions should be maintained. It is not an area needing the same level of immediate additional funding we believe is required for the clerical unit.

- The costs charged to litigants to obtain transcripts from hearing reporters do not currently reflect DWC expenditures and should be adjusted. We believe that an audit should be conducted on a regular basis to determine a per page charge (or other fee structure) for the production of transcripts by DWC hearing reporters. Included in such costs would be the salaries and benefits of the hearing reporters, the salaries and benefits of those who supervise such staff members, and the costs of providing DWC facilities and equipment.
- New DWC hearing reporters should have real-time capabilities when hired. Current DWC hearing reporters should not be given real-time training at DWC expense.
- The use of audio court reporting should be explored, but at the present time, implementation is not a realistic option.
- Adequate incentives should be given to attract and retain a statewide “chief hearing reporter.”
- The creation of a statewide hearing reporter section training and operations manual should be a high priority for DWC administration.
- Presiding Judges need to place greater emphasis on supervising the conduct of the overall business of the District Office even if doing so means that some of their existing caseload will be shifted to other judges at the same location.
- Management skills and a commitment to cutting delay and unnecessary costs should be the primary characteristics of new Presiding Judges.
- Presiding Judges should be given significant input into the selection of new judges for their District Offices.
- The judicial testing process should be regularly reviewed to ensure that it identifies successful candidates with all of the skills and knowledge needed to be efficient and effective judges.
- Current judicial training for handling the court’s business, both for new judges and on an ongoing basis, is inadequate and needs significant improvement.
- A key set of performance measures for each judge should be made available on the DWC website, including the names of cases assigned

to that judge that have not been resolved or acted upon in a timely manner.

- The title of a WCAB trial judge should be uniformly referred to as “Workers’ Compensation Judge” in statutes, regulations, official forms, and informal policy directives.
- Some form of a midlevel regional supervisor should be retained for the purpose of coordinating operations among a manageable group of individual District Offices.
- The DWC should eliminate the gap between the salaries it pays to ancillary service consultants and those offered by other state agencies for similar positions.
- Some segments of the workers’ compensation community are concerned over the potential of significant variation in the way DWC disability evaluators rate similar injuries; the DWC should investigate whether such variation indeed exists.
- As an initial benchmark, rating resources should be sufficient to provide summary ratings to unrepresented workers within two weeks. The DWC should investigate whether summary rating is being performed at an adequate pace.
- Rating resources should be sufficient to provide consultative ratings within the shortest possible turnaround and as an initial benchmark, to provide formal ratings no later than one week after the request. The DWC should investigate whether consultative and formal ratings are being performed at an adequate pace.
- The DWC should provide an adequate number of Information and Assistance Officers at each branch office so that every pro per applicant has had the opportunity for face-to-face counseling at least once prior to the MSC.
- Investigate and address the issue of the rate of workers’ compensation claims made by DWC staff members. Use the opportunity provided to act as a role model for all California businesses in preventing workers’ compensation losses and in reducing their effect upon productivity and employee income.

- Take the steps necessary to change the current practice of designing personnel budgets that automatically result in the DWC's inability to adequately staff its courts.

CHAPTER 12. INTEROFFICE AND INTERJUDGE VARIATION

- Conflicting, vague, or out-of-date rules, procedures, and policies appear to be at the root of discontent over uniformity voiced by the bar and bench; a panel of judges, commissioners, and DWC administrators—with significant input at all stages from the workers' compensation community—should jointly update, coordinate, and conform existing Board Rules, AD Rules, and Policy & Procedural directives as well as official forms.
- Because of its impact and influence on day-to-day workers' compensation practice, the Policy & Procedural Manual should be made readily available to the public.
- Directives affecting procedural rules or substantive rights should be removed from the Policy & Procedural Manual and become subject to the formal administrative rulemaking process used in promulgating Title 8 regulations.
- Some variation in district office procedures may enhance system productivity, be cost effective from the WCAB's standpoint, and be within the guidelines of Labor Code §5500.3 as long as the result does not increase litigation costs or time or impact fundamental fairness; variations in individual judge procedures within a branch office are more likely to pose problems and always should be viewed with suspicion.
- Uniformity in procedures should be of the highest priority in areas where variation may (1) affect the ability of litigants to receive a fair day in court, (2) result in additional and unjustified expense to the branch office or prevent officewide innovations in procedures, (3) provide unknown pitfalls for practitioners, or (4) not be in compliance with explicit statutes, regulations, and rules.
- Minimize the instances when the actions of individual judges are due to unnecessary differences in interpretation; a standing committee

of WCJs and Commissioners with community input should jointly clarify problem areas. Commentary from the drafters forall new rules should be made available as well.

- Perform regular audits of case files, orders, and branch office and judge practices.
- Disseminate the results of any regular audits in order to “close the loop” for helpful feedback.
- Policymakers need to be in agreement regarding whether increased uniformity in trial decisionmaking is worth the additional demands upon public costs and case resolution time; whether some existing trial decisionmaking safeguards can be safely dropped in the interest of public resource savings; or whether the existing process should be fully funded to achieve the highest level of uniformity.
- Judicial education at the beginning and throughout the career of the WCJs is an effective way to increase trial uniformity.

CHAPTER 13. PRETRIAL PRACTICES AT DWC BRANCH OFFICES

- Whenever practical, trial dates should be assigned in the presence of the parties to avoid calendaring conflicts.
- The workers’ compensation community needs to be cognizant of the fact that in-courtroom time spent conducting trials is only a portion of the total time needed to issue a decision. The idealized model of a WCJ in his or her hearing room with nonstop testimony during all open business hours three days a week is unrealistic and unworkable. Trial-related responsibilities are a significant demand on judicial resources and as such, judges have understandable incentives to minimize the number of trials they actually conduct.
- Modification to current calendaring practices should not be made at branch offices where average conference and trial time intervals meet statutory guidelines and are balanced among the judges.
- If an office experiences routine difficulties in getting trials scheduled within 45 days of the MSC or if such difficulties appear to be limited to certain judges at that location, and if direct and ongoing attention by the Presiding Judge in modifying calendaring

and conference practices either officewide or for individual judges does not appear to resolve these problems, then a judge other than the MSC judge should generally be assigned the trial following the MSC.

- The DWC should evaluate the effects of any office's change in trial judge assignment policy both for assessing whether it should be adopted generally and for determining if the switch has indeed achieved its goals.
- Where the assignment of the trial judge is not directly linked to the identity of the judge presiding over the MSC, it should be made solely on the basis of which judge has the next available trial slot.
- If an office experiences routine difficulties in getting trials scheduled within 45 days of the MSC or if such difficulties appear to be limited to certain judges at that location, and if the problems are related to errors in estimating trial length, then a switch to scheduling by number of trials (rather than by total estimated time) should be considered.
- In order to assist Presiding Judges in setting trial calendaring formulas, the DWC should perform a comprehensive and long-term analysis of this issue.
- If the MSC judge is to continue to be the judge assigned for the trial, then the job of actually setting a judge's trial calendar should be separately handled by a clerk under the supervision of the Presiding Judge.
- Parties requiring a trial date following the conclusion of the MSC should be able to consult with a calendar clerk during all open business hours.
- Better procedures should be put in place to encourage and facilitate the shifting of overbooked cases to available judges on trial day.
- Judges should be required to assess the likely demands on their daily trial calendars no later than one hour after the first scheduled trial time and to immediately provide a status report to the PJ or his or her designee. Judges should also regularly update

the PJ or his or her designee with trial calendar information as trials are completed, cases settled, or other actions taken.

- The PJ's decision as to which judge a case might be reassigned should depend on the amount of time available that day for new trials, not on the overall workload of the WCJ.
- Parties should be required to accept reassignment unless they assert a peremptory challenge available under Board Rule §10453 or can show that the new judge should be disqualified for cause under LC §5311.
- The workers' compensation community needs to collectively assess whether the rules regarding peremptory challenges should be reviewed in light of their impact on case resolution times.
- Only branch offices and judges that have consistent trouble completing their MSC calendars in a morning or afternoon setting should explore formally calling the calendar at the start; when this is not a problem, calling roll leads to conflict with traditional bar practices and should be prohibited.
- Applicants should be allowed to leave the MSC once a judge has determined that settlement is not a likely outcome of their case and that immediate telephonic contact should circumstances change is possible.
- Trial calendars should have a formal roll call at the start. The practice should be uniform across all the judges at each district office. Parties should expect that attendance at the very start of the trial calendar is mandatory absent extraordinary circumstances or prior notice to the judge and other litigants.
- At all branch offices experiencing problems with trial calendars, the start time for all hearings should be 8:30 a.m.; parties should have the expectation that they might have to be at the branch office until 5:00 p.m.
- The DWC should encourage the use of judges pro tem in limited situations that avoid potential problems of favoritism and lack of authority; such use should be evaluated and if appropriate, the practice should be expanded.

- The DWC should review the possibility of archiving files to the State Records Center based upon case-in-chief resolution and inactivity rather than simply the date of case opening.
- The DWC should carefully review the costs and benefits of scanning obsolete files and storing the information electronically.
- No new branch offices should be opened in densely populated counties where open venue is possible.

CHAPTER 14. CASE MANAGEMENT

- Continuances and OTOCs requested in regard to a conference setting that are clearly related to allowing a settlement to be finalized should be freely granted.
- What constitutes “good cause” for continuances or OTOCs should be better defined in relevant statutes and regulations.
- BR §10414, LC 139.6(c)(2), and related rules and official policies should be conformed in order to (1) specifically allow initial DOR screening to be performed by nonjudicial staff, and (2) precisely define what exactly the screener should look for and the criteria to be used for approval or rejection.
- Every timely filed Objection should be reviewed by a judicial officer at a point in time where, if such Objection is justified, it is possible to either refrain from scheduling the MSC or at least provide adequate notice of cancellation.
- Branch offices should be prevented from idiosyncratic interpretations regarding if and when pre-MSC Objection review should take place by an express clarification of the actual meaning of BR §10416.
- Only formal, written Objections made with adequate specificity and filed within the time limits of BR §10416 should be considered. Judges should refuse to entertain requests for continuances or OTOCs that were not previously made as an Objection unless the circumstances of the case changed after the end of the Objection filing and service period.

- An official form for filing Objections under BR §10416 should be developed. The form should emphasize that any declarations made therein are under penalty of perjury and that the reasons against having the case set for trial must be detailed with adequate specificity or else they will be overruled.
- Even with adequate DOR screening, early Objection review, and requirements that opposition to a trial setting be first made with specificity in a timely filed Objection, legitimate continuances and OTOCs will still be a part of many MSCs; mindful of the policy against unjustified delay, judges need the discretion to make such rulings when circumstances require.
- Every legitimate continuance or OTOC should be seen as an opportunity for continuing case management by the judge; whenever practical, no continuance or OTOC should be granted without setting a new date for the next conference and without clearly indicating what tasks are to be performed, who are to perform them, and when they should be accomplished.
- The criteria for what constitutes availability of a representative with settlement authority at conferences and hearings should be more precisely defined. Judges should be given better guidance as to when to aggressively enforce BR §10563.
- Though initial status conferences might seem an attractive alternative to avoid some MSC continuances and OTOCs, their general use in all cases is unnecessary and would be a cause for additional system delay and costs. As such, general status conferences prior to the MSC are not warranted.
- Continuances and OTOCs requested in regard to a trial setting that are clearly related to allowing a settlement to be finalized should be freely granted.
- The rules that reflect continuance and OTOC policy should make a distinction about their use in different types of WCAB conferences and trials.
- Trial continuances and orders taking off-calendar on trial day when not associated with a settlement should rarely be granted except in emergencies.

- Counsel should be required to serve a copy of the order upon their client whenever trial continuances and orders taking off-calendar on trial day when not associated with a settlement are granted.
- Trial continuances on trial day that are due to “Board” reasons should be immediately reported to the Presiding Judge, the Regional Managers, and the Administrative Director.
- Resolving liens at the time of case disposition should continue to be given a high priority by WCAB judges.
- If unable to be physically present, requiring lien claimants to be available by phone or by other method of contact during MSCs would facilitate the required good faith attempt for resolution at the time of settlement; the lien holder community should be consulted for the best way to achieve this goal.
- Restrict the ability of lien claimants to file DORs to a limited period of time beyond the date that the case-in-chief has been resolved if the lien claimant has clearly received proper notice.
- Automatically setting all unresolved liens for trial following settlement is unnecessary if alternatives to the current practice of unrestricted lien DOR filings are explored.
- The rules and regulations regarding the effect of a lien DOR filing should be refined so that all offices across the state either first set the case for a lien conference or for a lien trial.
- Programs designed to identify problems with claims handling practices or potential disputes in workers’ compensation injury claims prior to the time at which judicial intervention is formally sought and to address those problems or disputes should not come at the expense of resources allocated to meet the needs of existing cases.

CHAPTER 15. REVIEW OF ATTORNEY’S FEE REQUESTS AND PROPOSED SETTLEMENTS

- The current set of standards for the awarding of attorney’s fees for indemnity awards are out-of-date and provide little guidance for judges; as a result, conflicts with the applicants’ bar are inevitable. A panel of judges, Commissioners, and DWC

administrators should jointly draft and coordinate explicit policy guidelines in this area and conform existing Board Rules, Administrative Director Rules, and Policy & Procedural Manual directives.

- Deposition fee standards need to be better defined as well to eliminate discontent among the bar and litigants. A panel of judges, Commissioners, and DWC administrators should jointly draft and coordinate explicit policy guidelines in this area and conform existing Board Rules, Administrative Director Rules, and Policy & Procedural Manual directives.
- Despite legitimate stakeholder concerns, WCAB judges should continue to assess the adequacy of all workers' compensation settlements regardless of representation for the foreseeable future.
- In order to minimize concern over unclear settlement review criteria, a joint panel of judges and Commissioners should draft explicit policy guidelines to cover the most common areas of dispute that do not involve settlement valuation. In regard to valuation, the DWC should consider the development of nonbinding evaluation tools to help judges estimate future medical treatment costs.
- Despite potential problems, at the very minimum a walk-through settlement process should be allowed at least one day a week at all branch offices. The conference calendar period appears to be a good place to allow such in-person settlement presentations, but other times should be considered if demand exceeds available judicial resources.
- Refinements to the walk-through settlement approval process that are specifically designed to spread the workload for on-demand reviews among all judges at an office should minimize the potential for "judge shopping."
- A clear and concise statement of DWC and WCAB intentions as to the permitted scope of the walk-through process is needed if the technique is to be expanded to non-settlement-related matters.

CHAPTER 16. TRIAL AND POSTTRIAL PROCEDURES

- Because of its quality assurance role in the trial decisionmaking process and because of its positive impact on private litigation costs, a product similar to a Summary of Evidence should continue to be produced for every trial. The workers' compensation community should be made aware, however, that there are significant public costs associated with producing these documents.
- At the present time, replacing judicially produced Summaries of Evidence with formal transcripts upon demand would likely increase the private costs of litigation and the average time to final disposition.
- At the present time, it is not possible to use the initial draft of the reporter's transcription as a substitute for Summaries of Evidence.
- At the present time, it is not possible to substitute real-time court reporting for the current process of judicially produced Summaries of Evidence; however, the process should be tested on an experimental basis and jointly evaluated by key stakeholders. Controlling statutes and regulations should be amended to allow for the use of real-time transcription as a substitute for a Summary of Evidence.
- With adequate resources and training, judges should always meet the 30-day time limit absent extraordinary circumstances. A trial that has been waiting for a decision for 30 days or longer following submission should be considered presumptive evidence that the judge who heard the case has not completed all daily tasks under his or her responsibility.
- Judges who consistently fail to get decisions out within 60 days after submission where the average at the same office is much less need immediate training in basic organizational and writing skills. The DWC should make assistance and education in the area of efficient decisionmaking a top priority for future judicial training efforts.
- The DWC should consider instituting a separate data collection for the posttrial deliberation process with the goal of determining the

extent to which periods between the end of trial and final decision are due to submission delays and the reasons behind such problems.

- Judges should be allowed the option to adopt their original Opinion and Decision as their Report on Reconsideration as long as they have certified that they have reviewed the Decision in light of the Petition's allegations and fully considered possible modification or rescission.

CHAPTER 17. COURT TECHNOLOGY

- The current Claims Adjudication On-Line System (CAOLS) does not meet the standards of a modern case management information system, requires significant levels of labor to operate, and is a major source of waste and error within the DWC. Immediately begin the process of investigating the best alternatives to CAOLS and immediately initiate the process of securing future funding for replacement, but no new system should be implemented until the confusing and nonuniform state of rules, policies, and procedures has been corrected; the Workers' Compensation Information System is functioning at a mature level; and the diversion of DWC funds for such a project will not result in additional staff reductions.
- Any replacement system for CAOLS should include integration with a document management system as well as an attorney-accessible calendaring system and an electronic filing manager; the capability to interface with systems maintained by other government entities; and provisions for the remote viewing of dockets and pleadings by the public (subject to privacy protections).
- Any replacement system for CAOLS should be done through the services of outside vendors with extensive experience in court case management information systems.
- Any replacement system for CAOLS should be done with input about required features from all segments of the workers' compensation community.
- Funding for the replacement of CAOLS should not come at the expense of current or near-term staff levels.

- While a logical and absolutely necessary future step, direct “e-filing” of pleadings should only be instituted once the DWC has implemented a modern case management system and sophisticated document display technology at each of its district offices. Furthermore, maximum effort first needs to be focused on revising and updating WCAB/DWC forms and procedures before their permanent integration into a system for the electronic exchange of information between litigants and the courts.
- Routine scanning of incoming documents should be deferred until the implementation of a new case management information system and the installation of an adequate number of monitors for the use of judges, attorneys, and litigants throughout each branch office.
- A unified off-the-shelf networked calendaring system that uses California Bar ID numbers to identify the attorneys involved in the case and that allows Internet submission of attorney availability information should be instituted as soon as practical. Every clerk should be trained in the use of the system and be able to calendar requests for conferences and trials from any of the office’s computer terminals. This innovation should be the DWC’s top technological priority once adequate resources for staff levels have been resolved.
- All WCAB trial judges should have access to a personal computer with Internet and e-mail capability.
- All WCAB trial judges should have access to electronic legal research resources.
- The assumption that advances in electronic management information systems or centralized information systems will immediately result in personnel cost savings large enough to justify the expense of such implementation is flawed. Future technological implementations should not be realized at the expense of immediate staff reductions.

CHAPTER 18. “CUSTOMER SATISFACTION” AND THE WCAB EXPERIENCE

- Robes should be worn during trial.

- Informational pamphlets should be made prominently available near the clerk's counter in the branch office's waiting room, not just in the I&A section.
- A highly visible sign in the most common languages spoken in California should be placed in the branch office's waiting room and near the front counter with instructions as to where and how assistance can be obtained in languages other than English and Spanish.
- WCAB hearing notices to litigants should include a simple explanation of what is intended to take place at the conference or trial.
- A more organized way should be developed for workers who are appearing at the branch office for the first time to meet with their representatives or seek the services of an Information & Assistance Officer.
- Décor and design at some branch offices should be upgraded to minimally acceptable, uniform standards.
- Branch offices should maximize space available for attorney-attorney and attorney-client interaction, including leaving hearing rooms unlocked when not in use.

CHAPTER 19. WORKERS' COMPENSATION ADJUDICATION MANAGEMENT AND POLICY

- Immediately fill all existing Appeals Board vacancies to facilitate prompt disposition of reconsiderations, to facilitate en banc decisions, and to facilitate the rulemaking process.
- While the idea of creating a strong and independent "Court Administrator" with a separate line of authority over procedures and the responsibility for judicial supervision has some merit, such a plan would not be the best or most immediate way to address current DWC budget constraints, procedural problems, or litigant discontent.

APPENDIX B. FREQUENTLY USED ABBREVIATIONS

CONTROLLING AUTHORITY

- **ADR**: Administrative Director Rules. Regulations adopted by the Administrative Director of the Division of Workers' Compensation also made a part of Title 8 of the **CCR**s. Many, though not all, of these regulations address the claims adjudication process.
- **BR**: Board Rules. These are the formalized rules of procedure adopted by the Commissioners of the Appeals Board and made a part of Title 8 of the **CCR**s.
- **CCR**: California Code of Regulations formally adopted by administrative agencies. Title 8 is most relevant to workers' compensation.
- **LC**: California Labor Code statutes.
- **P&P**: **DWC/WCAB** "Policy & Procedural Manual" directives for judges and Board staff primarily developed by DWC administrators. Not formally adopted through the rulemaking process. These are the basis of the day-to-day operation of the local offices.

DWC AND DIR PERSONNEL AND UNITS

- **AD**: Administrative Director.
- **AS**: Area Supervisor. A special classification for certain **DWC** administrative employees in the **RU**.
- **CA**: Claims Adjudication Unit. **DWC** unit devoted to providing judges and support staff for claims dispute resolution.
- **CR**: Court Reporter. See **HR**.
- **DEU**: Disability Evaluation Unit. **DWC** unit primarily tasked with assessing the degree of permanent disability for injured workers. Also known as the Ratings Unit.
- **DIR**: The state Department of Industrial Relations.
- **DWC**: Division of Workers' Compensation, a division of the state Department of Industrial Relations.

- **HR**: Hearing Reporter.
- **I&A**: Information and Assistance Unit (also used as an abbreviation for an Information and Assistance Officer). **DWC** unit that provides guidance to injured workers (especially those without an attorney) to initiate and process their claims and assist others such as employers and lien claimants who may have questions about the workers' compensation system.
- **LSS**: Legal Support Supervisor. Supervisor of **SLT**s. Two levels are found within the DWC: **LSS-I** and **LSS-II**. Most Boards have a single authorized **LSS-I**.
- **OA**: Office Assistant. General clerical staff at local offices. Provides services to the Claims Adjudication Unit as well as the Disability Evaluation Unit, Information and Assistance Unit, and Rehabilitation Unit. Two types of OAs are found at district offices: "General" and "Typing." The latter is by far the predominant variety and is paid slightly more than the former.
- **OA-T**: Office Assistant–Typing. Specific designation of most **OA**s at local offices. See **OA**.
- **OD Legal**: Office of the Director – Legal department.
- **OSS**: Office Services Supervisor. Supervisor of a Board's **OA**s. Two levels are found within the DWC: **OSS-I** and **OSS-II**. Most Boards have a single authorized **OSS-I**. An **OSS-I** is roughly equivalent in salary to an **OT** or a **PT**. Two types of **OSS**s are found at district offices: "General" and "Typing." The latter is by far the predominant variety and is paid slightly more than the former.
- **OT**: Office Technician. An office support staff position that is the next higher classification above an **OA** under State personnel rules. Not generally available at individual district offices for routine Claims Adjudication Unit services. Roughly equivalent in salary to an **OSS-I** or a **PT**. Two types of **OT**s are found at DWC offices: "General" and "Typing." The latter is by far the predominant variety but is paid about the same as the former.

- **OT-T**: Office Technician–Typing. Specific designation of most DWC **OT**s. See **OT**.
- **PJ** or **PWCJ**: Presiding Workers' Compensation Judge. A WCJ given supervisory authority plus additional administrative duties at each Board. Some smaller Boards do not qualify for an authorized **PJ** position, though one judge is usually designated as the Acting **PJ**.
- **PT**: Program Technician. A special classification for certain **DWC** administrative employees, typically found at Regional Centers for telephone information services. Roughly equivalent in salary to an **OSS-I** or an **OT**.
- **RM**: Regional Manager. A **DWC** employee charged with supervising Board operations in one of three regions across the state.
- **RU** or **Rehab**: Rehabilitation Unit. **DWC** unit that provides guidance for developing vocational rehabilitation plans and resolves disputes between workers and rehabilitation providers.
- **SC**: Stock Clerk. No **SC** position has been authorized since 1990.
- **SIF**: Subsequent Injuries Fund Unit of the **DWC**.
- **SIP**: Self-Insurance Plans Unit of the **DWC**.
- **SLT**: Senior Legal Typist. Secretarial support staff for judges. Most Boards have an **SLT** specifically assigned to each judge.
- **Sn. WCCO**: Senior Workers' Compensation Compliance Officer. See **WCCO**.
- **Sup. WCCO**: Supervising Workers' Compensation Compliance Officer. See **WCCO**.
- **SPT**: Supervising Program Technician.
- **SSL**: Senior Stenographer–Legal. An alternative classification used for secretaries for **WCJ**s. See also **SLT**.
- **SWCC** or **Sup. WCC**: Supervising Workers' Compensation Consultant. A special classification for certain DWC administrative employees in the **I&A** and **DEU** units, typically found at Regional Centers for telephone information services.
- **UEF**: Uninsured Employers Fund.

- **WCALJ**: Workers' Compensation Administrative Law Judge. Alternative name for a California Workers' Compensation Judge.
- **WCC**: Workers' Compensation Consultant. A generic term for the highest journey-level, nonattorney professional staff members of the **DEU** (a rater) or **I&A** (an **I&A** Officer); less typically used for the Rehabilitation Consultants of the Rehabilitation Unit.
- **WCCO**: Workers' Compensation Compliance Officer. A nonattorney professional within the **DWC** Audit unit responsible for auditing insurance companies and self-insured businesses.
- **WCCR**: Workers' Compensation Conference Referee. A judicial position once used to exclusively handle MSCs and other conferences. Conference Referees were made into **WCJ**s a number of years ago.
- **WCJ**: Workers' Compensation Judge. A **DWC** employee invested with the judicial authority of the Appeals Board.
- **WCM**: Workers' Compensation Manager. Upper-level classification for employees in the **I&A** and **DEU** units.
- **WCRC**: Workers' Compensation Rehabilitation Consultant. The highest journey-level, nonattorney professional in the Rehabilitation Unit.
- **YA**: Youth Aid. Hourly employee used occasionally at district offices. Typically paid less than seven dollars per hour.

PLEADINGS

- **App**: Application for Adjudication. Jurisdiction reserving document. The primary method of starting a new case file with the **WCAB**.
- **C&R**: Compromise & Release. A type of settlement agreement. Can also be used to open a new case before the **WCAB**.
- **DOR**: Declaration of Readiness. Notice to the court that one side is claiming the case is ready for trial. Theoretically results in the scheduling of a Mandatory Settlement Conference and then a trial.

- **Stips**: Stipulation with Request for Award. A type of settlement agreement. Can also be used to open a new case before the **WCAB**.

CONFERENCES AND OTHER LITIGATION ACTIVITY

- **MSC**: Mandatory Settlement Conference. A conference designed to promote settlement prior to scheduling a case for trial; if settlement does not occur, the parties define the issues to be tried and the matter is set for a formal hearing.
- **OTOC**: Order Taking Off Calendar. Judicial order usually associated with removing a case from the trial track.

OTHER ABBREVIATIONS

- **AME**: Agreed Medical Examiner.
- **CAOLS**: Claims Adjudication On-Line System. Electronic transactional database maintained by the **DWC** for its Claims Adjudication Unit.
- **CMIS**: Case Management Information System. Electronic database used by courts to track case progress, record the filing of pleadings and the issuance of orders, manage and schedule appearances, generate performance statistics, and other case-related tasks. **CAOLS** is a legacy version of a **CMIS**.
- **DMS**: Document Management System.
- **IMC**: Industrial Medical Council.
- **OMFS**: Official Medical Fee Schedule.
- **QME**: Qualified Medical Examiner.
- **SCIF**: State Compensation Insurance Fund. A state entity that operates as a major workers' compensation insurer.
- **Sr. WCCA**: Senior Workers' Compensation Claims Adjuster. A senior claims adjuster with the State Compensation Insurance Fund.
- **WCCA**: Workers' Compensation Claims Adjuster. A claims adjuster with the State Compensation Insurance Fund. At one time, the position was known as a **WCIR**.

- **WCIR**: Workers’ Compensation Insurance Representative. Former title for claims representatives with **SCIF** (see **WCCA**).
- **WCIS**: Workers’ Compensation Information System.
- **WCIS**: Workers’ Compensation Insurance Supervisor. Supervisor of claims representatives at **SCIF**.

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