



# **2024** EMPLOYMENT LAW Conference

Off to work we go!

## ***Strategies for Defending Work Comp Claims Based on Sexual Harassment/Hostile Work Environment***





# *Welcome*

## DISCLAIMER

This publication/presentation is only intended to provide educational information about the subject matter covered. It is not intended to, nor does it constitute legal advice. More specifically, it is provided with the understanding that the authors/presenters do not render legal, accounting, or other professional advice/services. If legal advice or other expert assistance is required, seek the services of a competent professional.

Persons using this publication/attending the presentation, who are dealing with specific legal matters should exercise their own independent judgment and research original sources of authority and local court rules. The authors/presenters make no representations concerning the contents of this publication/presentation and disclaim any warranties of merchantability or fitness for a particular purpose.



# Presenters:



**John M. Langevin**

**Floyd Skeren Manukian Langevin**

**Senior Partner**

(951) 347-0330  
John.Langevin@floydskerenlaw.com



**Phuong N. Nguyen**

**Floyd Skeren Manukian Langevin**

**Partner**

(805) 889-5871  
Phuong.Nguyen@floydskerenlaw.com

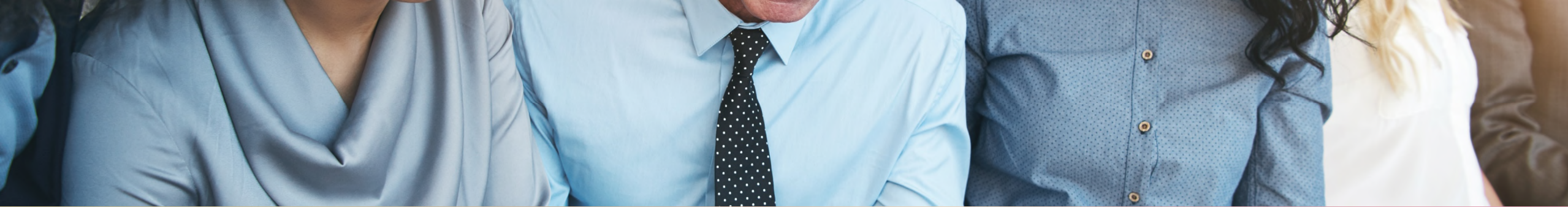


**Louisa M. Graw**

**Floyd Skeren Manukian Langevin**

**Partner**

(562) 706-7642  
Louisa.Graw@floydskerenlaw.com



# Types of Workers' Compensation Claims Arising from Sexual Harassment/Hostile Work Environment





# TYPICAL CLAIMS

Typically, workers' compensation claims arising from sexual harassment / hostile work environment allegations are psychiatric, which most often includes depression, anxiety or adjustment disorder.

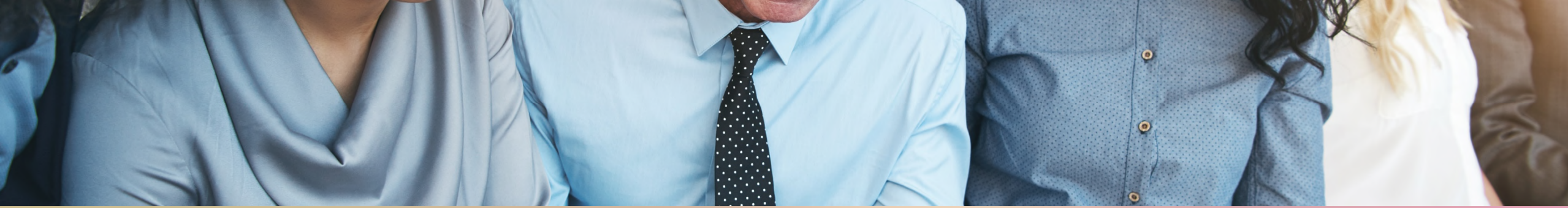
# OTHER CLAIMS

Other workers' compensation claims arising from sexual harassment / hostile work environment allegations may be physical in nature and may include hypertension, heart disease, headaches, gastrointestinal disorders and even diabetes.



# ESOTERIC CLAIMS

Esoteric workers' compensation claims arising from sexual harassment / hostile work environment allegations may include drug addiction, alcoholism, skin rash / hives and even cancer.



# FACTUAL INVESTIGATIONS





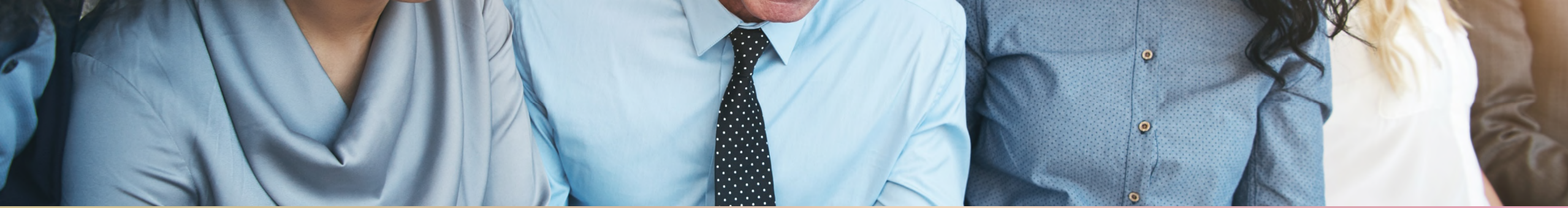
# INVESTIGATION

- Determine the parties involved and interview.
- Questions should be open-ended.
- Do not breach medical privacy of the claimant.

# INVESTIGATION

## Continued...

- Consider having counsel conduct interviews to preserve work product privilege.
- Gather all relevant documents, which includes emails, the complete personnel and supervisors file.
- Obtain any relevant videos.
- Conduct a medical canvass and social media check.



# PERCEPTION VS. REALITY





## REALITY

Labor Code Section 3208.3 requires, as a condition of compensability, that workers' compensation claims for psychiatric injuries are caused by "actual events of employment."

These actual events of employment must be the "predominant cause" (at least 51%) of the psychiatric injury; that is, they are more of a cause than any non-industrial factors.

Otherwise, the claim of psychiatric injury is not compensable.



# PERCEPTION

- An employee's subjective misperception of the events of the workplace cannot support an award of psychiatric injury.
- That is, an employee may not receive benefits for a psychiatric injury based on a subjective belief that co-workers or supervisors were harassing him or her without proof of the harassment.
- An employee's perception of harassment is not an actual event of employment. Labor Code Section 3208.3 requires the employee to establish **objective evidence** of harassment, persecution or other basis for the alleged psychiatric injury. *Verga v. WCAB*, (2008) 73 Cal. Comp. Cases 63.

# PERCEPTION

## Continued...

- “Honest perception” of discrimination did not support award when there was no evidence of discrimination. *Haywood v. WCAB* (1996) 61 Cal. Comp. Cases 509 (writ denied)
- Applicant's misperception of discrimination could not support award when the WC Judge found no objective evidence of discrimination. *Herrera v. WCAB* (1995) 60 Cal. Comp. Cases 771 (writ denied)



# EXCLUSIVE REMEDY



# LABOR CODE SECTION 3602(a) STATES:

Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer.



# FEHA

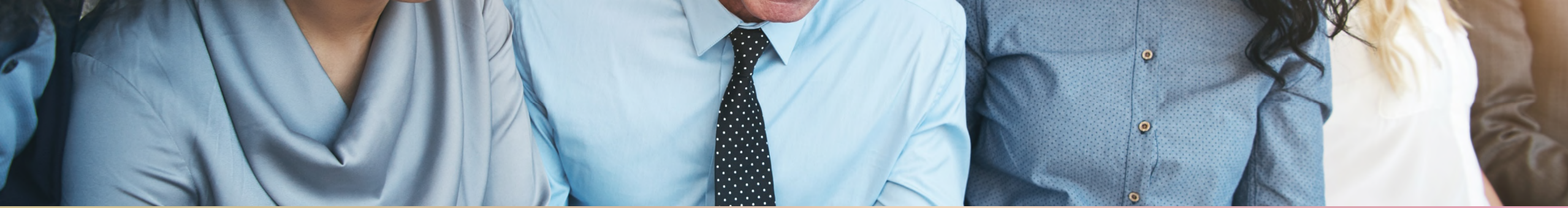


- The compensation bargain does not encompass FEHA claims. *Gantt v. Sentry Insurance*, (1992) 57 Cal. Comp. 192.
- FEHA was meant to supplement, not be supplanted by, existing anti-discrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights claims against discrimination. *City of Moorpark v Superior Court of Ventura County (Dillon)* (1998) 63 Cal. Comp. Cases 944.

# ***M.F. v. PACIFIC PEARL HOTEL MANAGEMENT LLC***

In *M.F. v. Pacific Pearl Hotel Management LLC*, (2004) 69 Cal. Comp. Cases 956, the Court of Appeal held that a housekeeping employee stated a claim under the FEHA, and overcame the workers' compensation exclusivity doctrine, when she alleged facts showing:

- (1) she was raped while working on the employer's premises by a drunk non-employee trespasser;
- (2) the employer knew or should have known the trespasser was on the employer's premises for about an hour before the rape occurred; and
- (3) the employer knew or should have known that, while on the employer's premises, the trespasser had aggressively propositioned at least one other housekeeping employee for sexual favors.



# COORDINATION OF CROSSOVER CIVIL ISSUES





# COORDINATION



The workers' compensation defense attorney and the employer's employment law attorney should work closely with each other, when the factual allegations are similar in both forums.

Failure to coordinate litigation in each forum could have unexpected adverse consequences.





## *County of Sacramento Sheriff's Dept. v. WCAB (Keillor) (2021) 86 Cal. Comp. Cases 845.*

The WCAB held that a civil verdict in favor of an injured worker may be used in favor of the injured worker in workers' compensation proceedings.

The appeals board held that a defendant was collaterally estopped from asserting that an applicant's stroke was not industrially related when she successfully litigated her civil claim of workplace harassment and retaliation that resulted in the stroke.

# In *Dufresne v. City of Hayward*, No. A116737 (Cal. Ct. App. Mar. 25, 2009)

- Claimant alleged harassment and discrimination in her stress related workers' compensation claim. The city eventually accepted the claim and resolved it with a stipulated award.
- The trial judge in the related civil action allowed evidence that the city accepted the workers' compensation claim and the following argument by the plaintiff attorney to the jury:

“What the city did is they admitted in the workers' compensation case that [plaintiff] sustained an injury at work as a result of prolonged harassment and discrimination. That's an admission on their part.” The attorney continued, “Now, I know that they've come into this trial and they've tried to argue that no, no, no, we didn't make any kind of admission. Or no, we want to argue it. But the fact of the matter is that back in 2001, and again in 2002, and again in 2003, the city knowingly admitted and accepted [plaintiff's] workers' compensation claim. And so that is strong evidence that—I think binding evidence on the city that the harassing conduct that [plaintiff] complained of was a substantial factor, if not the sole factor that caused harm to [plaintiff].”

The jury agreed and awarded the plaintiff \$472,389.00

## *Jefferson v. California Department of Youth Authority*, (2002) 67 Cal. Comp. Cases 727



The California Supreme Court barred an employee's claim for sex discrimination under the FEHA when she settled a workers' compensation claim by way of Compromise and Release Agreement for the same underlying allegations.

The court held that "when, as in this case, an employee has knowledge of a potential claim against the employer at the time of *executing a general release* in a workers' compensation proceeding, but has not yet initiated litigation of that claim, the employee has the burden of expressly excepting the claim from the release. Absent this language, and absent contrary extrinsic evidence, a court will enforce general language ... releasing all claims, including civil claims."

“

# *Claxton v. Waters* (2004) 69 Cal. Comp. Cases 895

The Supreme Court held that the standard preprinted form used to settle workers' compensation claims, former DWC WCAB form 15, did not release an applicant's civil cause of action under FEHA, and settled only claims within the scope of the workers' compensation system.

The court distinguished the *Jefferson* decision on the grounds that the settlement agreement had an attachment expressing the parties' intent to have the release apply to the employee's civil action alleging sex discrimination.

The court added that extrinsic evidence should not be admitted to show that the preprinted form 15 applied to claims outside the workers' compensation system. It laid down the rule that only the four corners of the settlement document should be looked at to see if the parties had intended to settle claims beyond the workers' compensation matters.



# *Steller v. Sears, Roebuck and Co., (2010) 75 Cal. Comp. Cases 1146*

The Court of Appeal held that if the parties want to settle a civil action and a related workers' compensation action, they must obtain approval from the appeals board.

The court noted that Labor Code Section 5001 states in relevant part:

"No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee."





# SUMMARY



# Summary Continued...



Most workers' compensation claims arising from sexual harassment / hostile work environment allegations are psychiatric in nature, but can be related to physical conditions.

# Summary Continued...

- Conduct a thorough and objective investigation.
- Consider using to counsel to interview witnesses to protect work product.
- Determine if the claimant was, in reality, subjected to sexual harassment or a hostile work place environment, or if it's just all perception.





## Summary Continued...

- Exclusive remedy for work related medical conditions is not always exclusive.
- Coordinating of litigation between the workers' compensation attorney and the employment law attorney is critical.
- What happens in a workers' compensation case can impact the related civil action and vice versa.



# Summary Continued...



- A severance agreement will not release liability for workers' compensation claims.
- For “global resolution” an approved Compromise and Release Agreement in the workers' compensation case and a separate general release for civil liability is needed.



# QUESTIONS?



# 2024 EMPLOYMENT LAW Conference

Off to work we go!



# THANK YOU

