Did Captain Hook Lose His Hand In a Workers' Compensation Accident?:

Key Tips for Preventing, Defending, and Resolving Post-Termination Work Comp Claims.

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INTRODUCTION: DEFENDING GOOD FAITH PERSONNEL ACTION

We will be reviewing:

- ✓**What are "Good Faith Personnel Actions" by the Employer?**
- ✓**How do they arise?**
- ✓**What are the laws covering the "Good Faith Personnel Action" of an Employer?**
- ✓**How should employers respond?**
- ✓**What are the defenses?**

Let's take a closer look...

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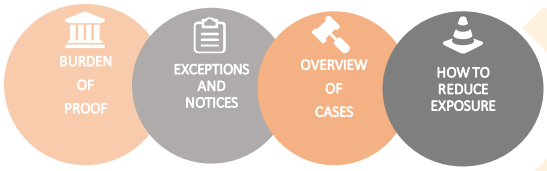

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WHAT IS A "GOOD FAITH PERSONNEL ACTION":

- **For psychiatric injuries to be denied compensability, an employer must establish that the personnel actions substantially causing the injuries were:**
  - **1. "Personnel actions" within the meaning of Labor Code, Section 3208.3;**
  - **2. The actions were taken in "good faith" as that term is interpreted by our California Supreme Court;**
  - **3. The actions were "lawful and nondiscriminatory"; and**
  - **4. The actions were a "substantial cause" of the employee's psychiatric conditions.**

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GOOD FAITH AS INTERPRETED BY CA SUPREME COURT

- California Supreme Court in declaring that: "*To be in 'good faith,' the personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design.*"
- Actions must be "*lawful*" under the laws, "*nondiscriminatory*" (an action is discriminatory if it fails to treat all persons equally where no reasonable distinction can be found between those favored and those not favored), and
- Finally to deny compensability for the psychiatric condition caused by the personnel actions, the actions must be a "*substantial cause*" of the psychiatric condition.

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HOW DO THEY ARISE?

HERE ARE SOME EXAMPLES:

- ***Transfers;***
- ***Demotions;***
- ***Layoffs;***
- ***Performance evaluations, and***
- ***Disciplinary actions such as warnings, suspensions, and terminations of employment.***

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LAWS GOVERNING "GOOD FAITH PERSONNEL ACTION"

- The burden of proof rests upon the party asserting the issue, which will be the employer, in most cases involving whether the employer's actions were taken in good faith.
- *City of Oakland v. W.C.A.B. (Gullet)* (2000) 67 Cal.Comp.Cases 705 (Published), where the Court of Appeal, First District, noted that the Legislature's "good faith personnel" action defense was for the purpose of allowing employers a greater degree of freedom in making its regular and routine personnel decisions.
- In *Schultz v. W.C.A.B.* (1998) 63 Cal.Comp.Cases 222 (Writ Denied), the Board noted "that there is no clear-cut legal definition of what may constitute a lawful, non-discriminatory, good faith personnel action within the meaning of the statute. Therefore, a case-by-case analysis is required."

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ROLDA V. PITNEY BOWES (2001) 66 CAL.COMP.CASES 241

- The WCJ must follow a multilevel analysis to determine whether a claimed psychiatric injury is compensable and whether it is barred by a Labor Code section 3208.3(h) defense that the alleged injury was caused by an employer's lawful, nondiscriminatory, good faith personnel action. In *Rolda v. Pitney Bowes,* the Appeals Board stated, in part:
  - 1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination;
  - (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence;
  - (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and
  - (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence.
- Although a medical evaluator has no *authority* to decide what is or is not a personnel action, the medical evaluator must give an opinion as to whether the psychiatric injury, if found, was caused by the personnel action. It is the responsibility of the Judge to decide whether the personnel actions were lawful, non-discriminatory, good faith actions.

EXAMPLES OF HOW WCAB HAS HELD WHAT IS OR IS NOT A GOOD FAITH PERSONNEL ACTION:

- ***Zurich-America Ins. Co. v. W.C.A.B. (Quintero)*** **(1998) 63 Cal.Comp.Cases 725 (Unpublished), the Court of Appeals, Second District, annulled a Board decision and discussed the definition of a *good faith personnel action*. In this case the employee became upset over his performance evaluation, a scuffle ensued and the police were called. The Board held that the employee's reaction to his performance review was not the result of a good faith personnel action.**
- **However, on appeal, the court held that "personnel action" in this case was a "lawful, nondiscriminatory, good faith" decision.**

CONTINUED…

- ***Arnold v. W.C.A.B.*** **(2008) 73 Cal.Comp.Cases 481 (Writ Denied), Court of Appeals, First District, the WC Appeals Board held that applicant's claim for psychiatric injury on January 14, 1999, (caused by the investigation of him for alleged improper touching of a female deputy) was barred by Labor Code section 3208.3(h). The Board relied upon findings of a *full civil service hearing* to conclude that the investigation and subsequent suspension of applicant for alleged sexual harassment constituted a regular and routine personnel decision made and carried out with subjective good faith and that defendant's conduct met the objective reasonableness standard.**
- ***Neighborhood Legal Services of Los Angeles et al., v. W.C.A.B. (Rivera)*** **(2002) 67 Cal.Comp.Cases 1367 (Writ Denied), case involving an applicant's psychiatric problems caused by her inability to learn new skills relating to a new computer system were not personnel actions within the meaning of Labor Code section 3208.3(h).**

CONTINUED….

- In *Los Angeles Unified School District v. W.C.A.B. (Ramirez)* (2001) 66 Cal.Comp.Cases 645 (Writ Denied), the Board reversed the WCJ, holding that the applicant's work-related psychiatric injury met the threshold of compensability pursuant to Labor Code section 3208.3(b)(1). The Board found the actions of the applicant's supervisor, specifically yelling at the applicant and "losing her cool" during an exchange regarding applicant's sick pay and vacation time, contributed to applicant's psychiatric condition and did not constitute a good faith personnel action under Labor Code section 3208.3(h).
- In *Townsend v. W.C.A.B.* (2001) 66 Cal.Comp.Cases 663 (Writ Denied), the Board found that applicant's psychiatric injury was substantially caused by her transfer to another job location, but the transfer was a non-discriminatory good faith personnel action and thus, her psychiatric claim was barred by Labor Code section 3208.3(h).
- In *Kaiser Foundation Hospital v. W.C.A.B. (Berman)* (2000) 65 Cal.Comp.Cases 563 (Writ Denied), the Board upheld the WCJ's holding that applicant's psychiatric injury from the effects of increased workload was not barred by Labor Code section 3208.3(h). The WCJ indicated that the definition of good faith personnel action should not be given an overly broad construction and that narrowing the term would be consistent with Labor Code section 3202 (Labor Code 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)

CONTINUED…

- Counseling was not considered a "personnel action" in *County of Alameda et al., v. W.C.A.B. (Kan)* (2006) 71 Cal.Comp.Cases 827 (Writ Denied), as it does not involve discipline or a threat of discipline.
- If an employer's personnel requirements exceed an employee's medical abilities, failure to comply may not be a violation of Labor Code section 3208.3(h). Commenting on this in *Sunsweet Growers, Inc. et al., v. W.C.A.B. (Milliron)* (1999) 64 Cal.Comp.Cases 1432 (Writ Denied)
- In *Garbers v. W.C.A.B.* (1999) 64 Cal.Comp.Cases 250 (Writ Denied), the applicant, a supervisor, became upset after an unfavorable review and letter of reprimand and left work and sought immediate medical treatment, which subsequently included psychiatric treatment and medication. The Board, in reversing the WCJ's decision, found that the evidence showed defendant's actions were taken in good faith.
- *In Larch v. Contra Costa County* (1998) 63 Cal.Comp.Cases 831 (W.C.A.B. Significant Panel Decision) The WCAB held that an employer's disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee's deficiencies so that no reasonable manager could have imposed such discipline.

WHAT ARE THE DEFENSES?

- **GOOD FAITH PERSONNEL ACTION is the defense to a psychiatric claim arising from the acts of an employer resulting from employment decisions. Best way to defend your actions is by making employment decisions in which you can prove the action taken was *done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design*.**
- **Always document why personnel decisions are made. Consider how you would defend your employment decision a year from now in court. Be clear in your facts, put in a timeline of dates and events, identify other employees involved so as to create a well documented good faith personnel decision.**

HOW SHOULD EMPLOYERS' RESPOND?

- **Make sure you provide your claims examiner and defense attorney, a complete copy of the personnel file, including all documentation supporting the good faith personnel decision.**
- **Make sure to provide a list of all witnesses, their contact information and what they will testify to, which should support with your personnel decision.**
- **Make sure your claims examiner and attorneys has complete and accurate facts as to what occurred.**

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INTRODUCTION

We will review:

- **What are post-termination claims?**
- **How do they arise?**
- **What are the laws covering post-termination claims?**
- **How should employers respond?**
- **What are the defenses?**

Let's take a closer look...

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LABOR CODE SECTION 3600 (a)(10)

BURDEN OF PROOF IS ON THE DEFENDANT TO PROVE THE STATUTORY DEFENSE OF POST-TERMINATION

- **There are 10 statutory defenses that the legislature has enacted, which preclude the recovery of workers' compensation benefits to an employee if the employer can establish any of the conditions.**
- **All claims, not just psychiatric, sustained after July 16, 1993, must meet the rigid requirements of Labor Code section 3600(a)(10).**
- **Where the claim for any compensation (except psychiatric injuries) is filed after notice of termination, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation can be paid unless the employee demonstrates by a preponderance of the evidence that one of the specified conditions applies.**

LABOR CODE SECTION 3600 (a) (10)

(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person, except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee, if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrated, by a preponderance of the evidence, that one or more of the following conditions apply (see §4.7 for psychiatric injuries)".

EMPLOYER MUST FIRST PROVE TWO FACTS!

- **The reporting of an injury is after notice of termination or layoff, including voluntary layoff,**

AND

- **The claim is for an injury occurring prior to the time of notice of termination or layoff.**

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BURDEN OF PROOF

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BURDEN OF PROOF

- **Employer meets burden of proof;**
- **Burden then shifts to employee (applicant) to prove exceptions.**

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EXCEPTIONS AND NOTICES

WHAT MUST THE APPLICANT PROVE?

- THE EMPLOYER HAS NOTICE OF THE INJURY, AS PROVIDED UNDER CHAPTER 2.

OR

- THE EMPLOYEE'S MEDICAL RECORDS, EXISTING PRIOR TO THE NOTICE OF TERMINATION OR LAYOFF, CONTAIN EVIDENCE OF THE INJURY.

- THE DATE OF INJURY, IS SUBSEQUENT TO THE DATE OF THE NOTICE OF TERMINATION OR LAYOFF, BUT PRIOR TO THE EFFECTIVE DATE OF THE TERMINATION OR LAYOFF.

OR

- THE DATE OF INJURY, AS SPECIFIED IN SECTION 5412, IS SUBSEQUENT TO THE DATE OF THE NOTICE OF TERMINATION OR LAYOFF.

WHAT CONSTITUTES PROPER NOTICE?

- **LABOR CODE SECTION 3600 (a)(10)(d)**
  - **Employee is provided notice of termination/layoff once final decision to not reemploy that person;**
  - **Termination or layoff must occur within 60 days of notice.**

DOVER V. FRESH START BAKERIES, INC. (2006) CAL.WRK.COMP. P.D. LEXIS 53 (NOTEWORTHY PANEL DECISION)

- **If the notice of injury was contemporaneous with notice of termination of employment;**
- **Not given in retaliation for termination;**
- **The injury will not be barred by labor code section 3600 (a)(10).**

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BAD-FAITH NOTICE

- **LABOR CODE SECTION 3600 (a)(10)(d)**
  - **Employer frequently issues notices of termination or lay-off;**
  - **Is deemed to be a bad faith personnel action;**
  - **This section will be inapplicable to the employee (added 1/1/94).**

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UNION REPRESENTATIVE'S NOTICE OF INJURY

- **LABOR CODE SECTIONS 3600 (a)(10) OR 5402**
  - **A union representative is not an agent or representative of an employer for purposes of receiving notice of an industrial injury;**
  - ***United Parcel Service et al., V. W.C.A.B.***
    - **(White) (1999) 64 Cal.Comp.Cases 1369 (unpublished).**

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THE EMPLOYER HAS NOTICE OF THE INJURY PRIOR TO THE NOTICE OF TERMINATION OR LAYOFF

AS PROVIDED UNDER CHAPTER 2 (COMMENCING WITH SECTION 5400)

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WHAT CONSTITUTES "NOTICE OF INJURY PRIOR TO NOTICE OF TERMINATION OR LAY-OFF"?

- ***ROCKWELL INTERNATIONAL ET AL., V. W.C.A.B.*** **(STAFFORD) (1997) 62 CAL.COMP.CASES 106 (WRIT DENIED)**
- ***NORTH COUNTY TRANSIT DISTRICT V. W.C.A.B.***

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EXAMPLE OF "NO NOTICE OF INJURY"

- ***LISTING V. W.C.A.B.*** **(1998) 63 CAL.COMP.CASES 459 (W**

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THE EMPLOYEE'S MEDICAL RECORDS, EXISTING PRIOR TO THE NOTICE OF TERMINATION OR LAYOFF, CONTAIN EVIDENCE OF THE INJURY

LABOR CODE SECTION 3600(a)(10)(b)

- ***MARQUEZ AUTO BODY ET AL., V. W.C.A.B.***
  (KAFKA) (1996) 61 CAL.COMP.CASES 408 (WRIT DENIED)
- ***CITY OF TORRANCE V. W.C.A.B.***
  (MASON) (1997) 62 CAL.COMP.CASES 1275 (WRIT DENIED)
- ***HALL V. W.C.A.B.***
  (1996) 61 CAL.COMP.CASES 1072 (WRIT DENIED)
- ***TRAPOLIS V. W.C.A.B.***
  (1996) 61 CAL.COMP.CASES 1100 (WRIT DENIED)

SUBSEQUENT TO THE DATE OF THE NOTICE OF TERMINATION OR LAYOFF, BUT PRIOR TO THE EFFECTIVE DATE OF THE TERMINATION OR LAYOFF

THE ACTUAL TERMINATION

- **Questions may arise as to when the actual termination occurred because, for the purpose of workers' compensation:**
  - **The employment relationship continues for a reasonable period of time after the technical termination in order to effectuate an orderly termination of the employment relationship.**

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CHARTER COMMUNICATIONS, INC. ET AL., V. W.C.A.B. (MEDEL) (2014) 79 CAL.COMP.CASES 81 (WRIT DENIED)

Facts:

- **Applicant was informed of termination because of a report that he had been observed speeding in a company vehicle;**
- **He was driven home (distance of 50 miles) by a driver the employer had engaged;**
- **During the trip home, the driver lost consciousness and hit a large tree;**
- **The driver died and the applicant was severely injured.**

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CHARTER COMMUNICATIONS, INC. ET AL., V. W.C.A.B. (MEDEL) (2014) 79 CAL.COMP.CASES 81 (WRIT DENIED)

- **WCAB found that the applicant was still an employee of the employer at the time of the accident**
- **Therefore, the applicant was covered under workers' compensation**

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CHARTER COMMUNICATIONS, INC. ET AL., V. W.C.A.B. (MEDEL) (2014) 79 CAL.COMP.CASES 81 (WRIT DENIED)

THE BOARD STATED, IN PART:

- **The WCJ appropriately concluded that the termination of applicant's employment would not be finalized until the town car hired by the employer to take him home had completed that journey.**
- **The WCJ's report observes: "[t]ransporting this employee home right after confiscating both his cell phone and the keys to the vehicle in which he arrived, was a post-termination activity reasonably contemplated and anticipated by the employer. This was evidenced by the uncontroverted testimony at trial that all terminated technicians are transported home by defendant."**
- **The town car was hired for the specific purpose of taking the applicant home after his termination, the town car was in effect an extension of the employer's premises.**

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THE DATE OF INJURY, AS SPECIFIED IN SECTION 5412, IS SUBSEQUENT TO THE DATE OF THE NOTICE OF TERMINATION OR LAYOFF

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LABOR CODE SECTION 5412

- **What is the date of injury in continuous trauma cases?**
- **The date on which the applicant first suffered disability and either knew or should have known that the disability was caused by the employment.**

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VIRGINIA SURETY, INC. ET AL., V. W.C.A.B.
(DIAZ) (2007) 72 CAL.COMP.CASES 1426 (WRIT DENIED)

- **The Board held the applicant's heart attack resulted from a cumulative injury, rather than a specific injury;**
- **Based on a medical opinion, where a physician opined:**
  - **That physical activities performed throughout his work day, were the proximate cause of his heart attack.**

TERMINATION VERSUS RESIGNATION

- ***UNITED STATES FIRE INSURANCE COMPANY ET AL., V. W.C.A.B.***
  (URZUA) (2007) 72 CAL.COMP.CASES 869 (WRIT DENIED)
- ***GIL V. W.C.A.B.***
  (2001) 66 CAL.COMP.CASES 1557 (WRIT DENIED)

MABE V. MIKE'S TRUCKING ET AL.(1998) 63
CAL.COMP.CASES 1394 (SIGNIFICANT PANEL DECISION)

The Court, stated:

- **The language and structure of the statute showed the legislative intent was to filing of false claims in retaliation for being terminated or laid off;**
- **Conclusion that "voluntary layoff" is not synonymous with "quit" or "resignation" is consistent with similar terminology in the Unemployment Insurance Code Section 1256, which provides in part:**
  - **An individual is disqualified for unemployment compensation if the director finds that he or she left his or her most recent work:**
  - **Voluntarily;**
  - **Without good cause, or**
  - **Had been discharged for misconduct connected, with his or her most recent work.**

IS A WOKERS COMPENSATION CLAIM FOR A PSYCHIATRIC INJURY FILED AFTER TERMINATION BARRED BY THE POST TERMINATION DEFENSE

NO *and* YES

- **NO: NOT A BARR IF THE PSYCHIATRIC INJURY FILED IDENTIFIES THE TERMINATION AS THE MECHANISM OF PSYCHIATRIC INJURY – EXPLORE DEFENSE OF GOOD FAITH PERSONNEL ACTION.**
- **YES: IT IS A BARR IF THE PSYCHIATRIC INJURY INDENTIFIES A MECHANSIM OF INJURY UNRELATED TO THE TERMINATION BUT EVENTS AT WORK PRIOR TO TERMINATION.**

CONCLUSION

QUIZ

1. **All claims, not just psychiatric, sustained after July 16, 1993, must meet the rigid requirements of Labor Code section 3600(a)(10).**
   ( ) True
   ( ) False
2. **The employee must prove, beyond a reasonable doubt, that the injury occurred while at work, before receipt of any termination notice.**
   ( ) True
   ( ) False
3. **An employee's medical records regarding the injury are clear proof that an injury occurred.**
   ( ) True
   ( ) False
4. **Termination or layoff must occur within 30 days of the notice of the same, to be deemed proper notice under LC 3600(a)(10).**
   ( ) True
   ( ) False
5. **The injury will be barred if the notice of injury is contemporaneous with the notice of termination.**
   ( ) True
   ( ) False
6. **Knowledge of a back problem is sufficient for an employee to prove the injury occurred prior to the notice of termination.**
   ( ) True
   ( ) False
7. **The employment relationship continues for a reasonable period of time after the technical termination for workers' compensation claims.**
   ( ) True
   ( ) False
8. **A voluntary layoff is synonymous with quit or resignation and thus a claim filed after any of these can be barred under LC 3600(a)(10).**
   ( ) True
   ( ) False
9. **When an employee has notice of injury after termination, and it is medically established that the injury was caused by work, the employee is still barred from receiving benefits since the employer was not notified of the injury prior to termination.**
   ( ) True
   ( ) False
10. **Employee medical records need only establish evidence of an injury, and do not require that the evidence indicate industrial causation, to successfully prove an exception for a post termination claim.**
    ( ) True
    ( ) False

SPEAKER BIOS

JOHN B. FLOYD, ESQ.

The Law Offices of Floyd Skeren Manukian Langevin, LLP was established in 1987 by John B. Floyd. Since then, the firm has experienced significant and steady growth. Today, the Law Offices of Floyd Skeren Manukian Langevin has 10 offices throughout California. Mr. Floyd is a Certified Specialist and has devoted many years in the workers' compensation field representing insurance companies, self-insureds, municipalities and employers in §132(a) claims and serious and willful actions. He has served as an Arbitrator, Mediator, and Judge Pro Tem, as well as being an expert witness in bad faith claims and is a Certified Administrator for Self-Insurers.

Mr. Floyd has been involved in numerous committees, including California Chamber of Commerce Amicus Committee and the Employers' Fraud Task Force. Additionally, Mr. Floyd is nationally recognized and AV Rated by Martindale-Hubbell. He is also a member of the California Association of Joint Powers Authorities (CAJPA).

Mr. Floyd helped publish Retired Judge David W. O'Brien's treatises on *California Workers' Compensation Claims and Benefits* and *California Unemployment and Disability Compensation Programs*.

AMANDA A. MANUKIAN, ESQ.

Amanda A. Manukian has been with the Law Offices of Floyd Skeren Manukian Langevin, LLP since 2003. Ms. Manukian started her career with the Los Angeles District Attorney's office in 1998, wherein she was assigned to the Special Investigations Unit for 5 years working on high profile cases. She then expanded her career with the State Compensation Insurance Fund, as the Fraud Liaison in helping to establish a strong and effective Fraud Unit for the State Contracts Department. Thereafter, she continued her career with Floyd, Skeren & Kelly, LLP in 2003. She has been with the firm since then, making named partner in 2018.

As a senior partner, she works out of the Pasadena and Westlake Village offices and is the Managing Attorney of the Special Investigations Unit (SIU).

As defense attorney, she has obtained favorable decisions for her clients, to include various take nothing decisions on case in chief issues, including tackling very complex statute of limitation defenses. She has tried and also received take nothings on high exposure 132a and serious and willful petitions before the WCAB.

Ms. Manukian's appellate skills allowed for successful outcomes in filing of countless Petitions for Reconsideration and Removals, Writ of Reviews and Answers to Writ of Review.

She practices the model that every case is defensible, with tailoring a boutique practice to meet and exceed every client's expectations.

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