CUMULATIVE TRAUMA

The “Wearing Out” Disease
In The Beginning...

- Workmen’s Compensation Insurance and Safety Act
  (Cal.Stat. 1917, ch. 586, Section 3(4))

3208 (L/C) Defines injury to include “any disease arising out of employment.
Injury and disease are disjunctive
1947

• Labor Code Sections 5411 and 5412 added
• 5411 – Included the date of cumulative injury as the date of employment on which the alleged incident or exposure occurred.
• 5412 – Only dealt with occupational disease
1968

Labor Code 3208.1 added to specify that an injury may be:

(1) “specific” – occurring as the result of one incident or exposure which causes disability or the need for medical treatment; or

(2) “cumulative” – occurring as repetitive, mentally or physically traumatic activities extending over a period of time, the combined effect of which causes a disability or need for medical treatment.
1973 – AB 767

• 3208.1 – Amended to provide that the date of a “cumulative injury” shall be determined in the same manner as the date of “occupational disease” pursuant to Section 5412.
5412 – Amended to read:

The date of injury in cases of occupational disease or *cumulative injuries* is the date upon which the employee first suffered disability there from and either knew, or in the exercise of reasonable diligence *should have known* that such disability was caused by his present or prior employment.

5411 – Prior to 767 – the date of a cumulative injury was the date of employment on which the alleged incident or exposure occurred.
What does this all mean?

• Prior to AB 767 – The burden of proof was on the injured employee.
• After AB 767 – The burden of proof of the claim shifted to the employer to show that the alleged injury was not work related.
• The infamous 1% rule.
Labor Code 5412
Statute of Limitations

- You will not win if you defend on medicine.
- You must therefore look to 5412 to establish that the “date of injury” was over one year prior to the claimed date and that the employee knew or reasonably should have known it was work related.

This then allows you to raise the Statute of Limitations of one year as an affirmative defense under L/C 5409.
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Statute of Limitations as an Affirmative Defense

“The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not extinguish the right of the employee. Such defense may be waived. Failure to present such defense prior to the submission of the cause for decision is a sufficient waiver.
So How Do You Do It?

• Make sure you have a quality MPN and that the installation and notice process is bullet proof.

• Make sure your carrier/TPA fully understands what you expect of them in defending these claims properly and promptly.
What Should The Examiner Do....

• Delay the claim and investigate.
• Make sure that all treatment prior to accepting or denying is by our MPN doctors.
• Assign defense counsel and notice the injured employee’s deposition immediately.
• Subpoena all prior medical records...Both work and non-work related. Look for the “smoking gun” to help your defense.
At The End of Discovery

• If at the end of the 90 day delay period you have not been able to mount an affirmative defense and have no other grounds to defend...Accept the claim and keep medical treatment within our MPN and control.
A Simple Solution

• Take cumulative trauma out of 5412 and put it back in 5411 where it lived until the 1973 change.