FACTUAL DENIALS

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OVERVIEW

- BURDENS AND AOE/COE
- SOURCES OF GATHERING INFORMATION TO MAKE DETERMINATION
- DISCOVERY TOOLS TO OBTAIN NEEDED INFORMATION
- TOOLS TO ENFORCE DISCOVERY
- PRO AND CONS ON MAKING DETERMINATION ON CLAIM

WORKERS COMPENSATION FRAMEWORK

- PURSUANT TO ARTICLE XIV SECTION 4 OF THE CALIFORNIA CONSTITUTION THE LEGISLATURE WAS GRANTED THE POWER "TO CREATE, AND ENFORCE A COMPLETE SYSTEM OF WORKERS' COMPENSATION"
- THE RIGHT TO WORKER'S COMPENSATION BENEFITS IS WHOLLY STATUTORY AND IS NOT DERIVED FROM COMMON LAW

DuBois v. WCAB (1993) 5 Cal. 4th 382, 388

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STATUTORY SOURCES

- THE CALIFORNIA LABOR CODE
- CALIFORNIA CODE OF REGULATIONS (TITLE 8 BEING INDUSTRIAL RELATIONS)
- WCAB RULES (FORMERLY COURT AD RULES)
- WCAB POLICY AND PROCEDURE MANUEL
- LOCAL BOARD RULES

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BURDENS OF PROOF

- THE APPLICANT CONTINUES TO HAVE THE INITIAL BURDEN OF ESTABLISHING AN INDUSTRIAL INJURY BY THE PREPONDERANCE OF THE EVIDENCE
- THE APPLICANT ALSO HAS THE BURDEN OF PROVING OVERALL LEVEL OF PERMANENT DISABILITY AND THE APPROXIMATE PERCENTAGE OF PERMANENT DISABILITY CUASED BY THE INDUSTRIAL INJURY

ESCOBEDO V. WCAB (2005) 70 CCC 604, 612

THE DEFENDANT HAS THE BURDEN OF PROOF ON APPORTIONMENT TO NON-INDUSTRIAL FACTORS- *KOPPING V. WCAB* (2006) 142 Cal. App. 4th 1099

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AOE/COE

- PURSUANT TO LABOR CODE SECTION 3600 “LIABLITY FOR THE COMPENSATION PROVIDED BY THIS DIVISION..SHALL, WITHOUT REGARD TO NEGLIGENCE, EXIST AGAINST AN EMPLOYER FOR ANY INJURY SUSTAINED BY HIS OR HER EMPLOYEE ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT”
- ARISING OUT OF EMPLOYMENT- THE PROXIMATE CAUSE OF THE EMPLOYERS INJURY
- IN THE COURSE OF- THE TIME AND PLACE WHERE THE INJURY OCCURRED

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What is substantial evidence?

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SUBSTANTIAL EVIDENCE

- A DETERMINATION BY THE WCJ AS THE TRIER OF FACT MUST BE SUPPORTED BY SUBSANTIAL EVIDENCE
- EVIDENCE IS NOT SUBSTANTIAL IF IT IS BASED ON INCORRECT LEGAL THEORIES OR SURMISE, SPECULATION, CONJECTURE OR GUESS.

HEGGLAN V. WCAB (1971) 4 Cal. 3d 162; *PLACE V. WCAB* (1970) 3 Cal. 3d 372

THUS IT IS IMPORTANT TO BE THOROUGH IN YOUR FACT GATHERING IN MAKING A DETERMIANTION WHETHER TO ACCEPT OR DENY A CASE

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SUBSTANTIAL EVIDENCE

- Lack of substantial medical evidence to link work activity to the injury that the IW is reporting/ complained of.
  - CT vs specific. Was there a repetitive injury?
  - Is their scientific medical evidence to link work activity to alleged/ claimed injury

VS

- Lack of substantial factual evidence to deny a claim.
  - This is not just based on the lack of evidence linking working activity to an injury, but that the IW was never exposed to what he/ she is claiming caused the injury.
  - IW is exaggerating their exposure, i.e, fraud

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SOURCES OF EVIDENCE

- FROM THE APPLICANT
- FROM THE EMPLOYER
- FROM WITNESS/ COWORKERS
- FROM THE MEDICAL PROVIDERS
- FROM THE INVESTIGATOR
- FROM EDD

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FROM THE APPLICANT

- THE CLAIM FORM
- THE APPLICATION
- THE APPLICANT'S STATEMENT
- THE APPLICANT'S DEPOSITION
- THE APPLICANT'S VERSION OF JOB DUTIES AND WAGES
- PRIOR CLAIMS AGAINST THIS EMPLOYER OR PRIOER EMPLOYERS

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FROM THE EMPLOYER

- THE PERSONNEL FILE
- THE WAGE STATEMENT
- THE JOB DESCRIPTION
- EMPLOYER WITNESSES
- FORM 5020- THIS PROVIDES A WEALTH OF INFORMATION TO INCLUDE ITEM 35 (OCCUPATION); 38-39 (EARNINGS); 13 (DATE OF RETURN TO WORK); 17 (DATE OF KNOWLEDGE ON PART OF EMPLOYER)

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FROM MEDICAL PROVIDERS

- WHO IS PTP PURSUANT TO LABOR SECTION 4600 DESIGNATION LETTER
- IF PTP HAS BEEN DESIGNATED LOOK TO DOCTORS FIRST REPORT OF OCCUPATIONAL INJURY (FORM 5021)- LIKE EMPLOYERS REPORT IT HAS WEALTH OF KNOWLEDGE TO INCLUDE MECHANISM OF INJURY, DIAGNOSIS, EXAMINATION AND TESTING AND RECOMMENDATIONS ON MEDICAL CARE
- IF HEALTH INSURANCE APPLICABLE OBTAIN GENERAL PHYSICIAN RECORDS

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FROM THE INVESTIGATOR

THE DEPTH AND SCOPE OF YOUR INVESTIGATION MAY BE DEPENDENT ON WHAT FACTS YOU HAVE OBTAINED FROM OTHER SOURCES

- ON SITE INSPECTION AND PHOTOS
- INTERVIEW OF WITNESSES
- SOCIAL MEDIA INVESTIGATION
- PRIOR AND CONCURRENT EMPLOYMENT
- SEARCH OF PRIOR CLAIMS AND ACCIDENTS
- INTERVIEW OF WITNESSES
- SUB ROSA

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FROM EDD

- HAS APPLICANT FILED FOR BENEFITS ON THIS CLAIM?
- IF SO WHAT IS RATE OF PAYMENT TO SEE IF CONSISTENT WITH WHAT YOU HAVE AS TO WAGES?
- WHAT DID APPLICANT PROVIDE TO OBTAIN SUCH BENEFITS?
- WHICH DOCTOR CERTIFIED APPLICANT FOR BENEFIT AND FOR WHAT BODY PARTS?
- EVEN IF NO CLAIM OF THIS CLAIM CAN ALSO SEE IF APPLICANT HAS PRIOR CLAIMS AND WHETHER THEY ARE INDUSTRIAL OR NOT
- TRY TO CUT OFF POSSIBLE DUPLICATION ISSUES

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Presumption of Injury

- 90 day rule: Form and Substance of Denial
- Denial from the carrier/ TPA must be in the form of a written denial letter CCR 9812(i) which states that that claims administrator must deny payment of any/ all WC benefits for the claim to the IW, the reason for it, and the IW's remedies.
- Must be sent no later than 14 days after the determination to deny (CCR 9812(f)(4)

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Claim Professional Roles

- The Claims Professional has a positive duty to investigate the claim. This is both a duty, and an opportunity. Early investigation is potentially a good means to avoid costly mistakes in deciding either to admit or deny a claim.
- The Labor Code gives the adjuster 90 days to attempt to get enough information to make a good determination, with documentation, as to whether a case should be denied.
- The Delay period does bring with it liability for medical treatment, however, in most cases the dollar value of that treatment will be considerably less than the ultimate liability for a case that should have been accepted but was inappropriately denied.

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Investigate the Issues

- Communication with the employer is extremely important. Statements from supervisors or co-workers may provide sufficient documentation to support a denial.
- They may shed further light on facts which support admitting the claim and taking control of it.
- If it appears, from initial employer contact, that there are witnesses who can shed light on the facts of the case either way, an investigator should be assigned to take statements as soon as possible.
- B&B recommends that reports of investigators be undertaken for, and addressed to, counsel as this may protect them from unwanted discovery as attorney work product.

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Denial of the injury

The Denial Is Based on the Facts Surrounding the Injury Itself. Two common reasons for denying a workers' comp claim are

1. The injury was unrelated to work because it was caused by a “preexisting condition.”
2. The injury happened offsite and away from work.

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Basis for Denial

- Denials of all compensability for a claimed injury need to occur within the first 90 days after presentation of the completed claim form.
- Failure to issue a denial within the prescribed time mandates that the case is presumptively compensable, leaving the defendant with the option of disputing nature and extent of injury, but not the fact that is compensable under the Labor Code. *LC 5402(b).*
- In addition, the duty to provide the claim form runs from the date the employer has knowledge from any source whatsoever. *LC 5402(a).*

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Subsequent Denial

Keep in mind that a claim may be denied later if a subsequent investigation reveals that the injury is not compensable. This can be done if benefits were procured by fraud or if the information was discovered outside the 90-day investigation period.

Partial Denials

- Disputes over parts of the body and disabilities claimed go to nature and extent of injury.
- Failure to issue a denial of a claimed body part while admitting others does not invoke any kind of presumption against the defendant in a litigated case. *Clark v WCAB* (2001) 66 CCC 269 (writ denied)

Reason for Denial

- Denials of all compensability for a claimed injury may be based on legal issues such as alleged lack of WCAB jurisdiction, lack of an employment relationship, and affirmative legal defenses such as the "post termination claim," intoxication.
- Denials may also be based on medical evidence indicating that the cause of a claimed disability is not a work injury.

Duty to Investigate

- Failure of the injured worker to accompany the claim with evidence supporting it is not, in and of itself, a basis for denial. The law imposes a duty on the defendant to investigate the claim before making a determination. *8 Cal. Reg. 10109*. This duty is so specifically set forth in the rule:
- *(a) To comply with the time requirements of the Labor Code and the Administrative Director's regulations, a claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.*

Duty to Investigate (con't)

- *(b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.*
- *(1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information, whether that information requires or excuses benefit payment. The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.*

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Duty to Investigate (con't)

- *(2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.*
- *(c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.*

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Duty to Investigate (con't)

- *(d) The claims administrator must document in its claim file the investigatory acts undertaken and the information obtained as a result of the investigation.*
- *(e) Insurers, self-insured employers and third-party administrators shall deal fairly and in good faith with all claimants, including lien claimants.*

Based on a Med opinion?

- There are many cases where the question of compensability depends on a medical opinion. Keep in mind, if the claim professional denies the claim, the ability to request a panel QME under LC 4060 is lost, except to the IW.
- When the request for the panel is made, one question is if the case is denied.
- If it is still delayed when the request is made, the panel can be assigned.
- You can deny the claim if you have substantial documentation after requesting the panel assignment from the DWC, but before the panel QME exam takes place

Based on a Med Opinion?

- LC4061 and 4062 are available where disputes may be raised as to parts of the body injured, MMI status and nature and extent of PD.
- Once a QME/ AME is assigned to evaluate the case, the DR can opine on all issues, including AOE-COE. LC 4062.3(i)

Bad denials are bad!

Issuing denials without a solid evidentiary basis at the time the case is denied may subject the adjuster to penalties for bad faith denial. Labor Code 5814 provides for penalties payable to the injured worker for up to 25% of the amount delayed, up to $10,000. A separate 10% penalty must be added to any periodic indemnity payments that should have been made absent the unsupported denial. LC 4650(d). In addition, the 104 week cap for temporary disability does not begin to run even when EDD has been paying benefits in the interim.

Bad denials are bad!

Finally, if there has been an increase in indemnity rates between the time the case is denied and the time it is determined temporary disability must be paid, all the retroactive temporary disability due must be paid at the new, higher rate.

Audit Penalties

Audit penalties for failure to have appropriate documentation in the claims file supporting the denial are specified in 8 Cal. Reg. 10111.1(d)(1) and can be up to $5,000 for each occurrence. The proper test is whether, at the time the denial is issued, there is documented evidence of some substantiality in the claims file that would cast a reasonable doubt as to whether the matter is compensable at all. Evidence is different from rumor, speculation, or conjecture

Audit Penalties

Evidence is different from rumor, speculation, or conjecture. Evidence is not, as we tend so often to see, a knee-jerk reaction that "We don't normally accept those types of claims."

Problems with Discovery

Issuing a denial of all compensability for a claim immediately limits the discovery options available to the adjuster. Example, a case where determination of compensability requires medical expertise, the issuance of a denial precludes the adjuster from requesting a PQME assignment pursuant to LC 4060. *8 Cal. Reg. 30(d)(3)*. IW can procure treatment with any doctor or medical group that will willingly run up tens of thousands of dollars of treatment costs on a lien basis.

ISSUES IN REVIEWING EVIDENCE

- IS DATE OF INJURY CONSISTENT?
- IS MECHANISM OF INJURY CONSISTENT?
- WAS THIS PERSON A LONG TERM EMPLOYEE? (IS APPLICANT STILL WORKING)
- WAS THIS PERSON A GOOD EMPLOYEE?
- DID THE APPLICANT HAVE A PHYSICALLY DEMANDING JOB?
- EMPLOYMENT BEFORE, DURING AND AFTER EMPLOYMENT AT ISSUE

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ISSUES IN REVIEWING EVIDENCE (PART 2)

- IS THERE A GAP IN TIME BETWEEN THE DATE OF INJURY AND WHEN IT WAS REPORTED? (REPORTED AFTER EMPLOYMENT ENDED?)
- IS THERE A GAP IN TIME BETWEEN DATE OF INJURY AND DATE OF FIRST MEDICAL TREATMENT?
- ANY WITNESSES TO INJURY?
- PRIOR AND SUBSEQUENT CLAIMS?
- PRIOR OR PENDING SURGERIES?
- OBJECTIVE FINDINGS- ARE THERE SIGNIFICANT TEARS OR BULGING?

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METHODS TO OBTAIN EVIDENCE

- CAN ATTEMPT TO OBTAIN EVIDENCE THROUGH INFORMAL DISCOVERY BY WAY OF MEETING AND CONFERRING WITH PARTIES
- IF APPLICATION HAS BEEN FILED YOU CAN LOOK TO OBTAIN EVIDENCE THROUGH FORMAL DISCOVERY
- IF NO APPLICATION HAS BEEN FILED AND FORMAL DISCOVERY IS NEEDED, AN APPLICATION ON YOUR END MAY BE NEEDED BUT BEWARE OF ATTORNEY'S FEES IF DEALING WITH AN IN PRO PER APPLICANT

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FORMAL DISCOVERY

- "Although the provisions of the Code of Civil Procedure relation to discovery do not govern proceedings before us, we must give force to the declaration of public policy implicit in those provisions....that liberal pre-trial discovery is desirable…"
- "We think that most cases the specific provisions of the Labor Code and of our rules relating to discovery will provide adequate tools to the practitioner and that he should not go beyond them in search of other remedies. Those provisions include…subpoenaing of witnesses and documents…depositions…mandatory service of all medical reports…

Hardesty v. WCAB (1976) 41 CCC 111, 114

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METHODS TO ENFORCE FORMAL DISCOVERY

- Workers' Compensation Judges have authority to decide discovery disputes and issues orders with respect to such disputes. See *Allison v. WCAB* (1999) 72 Cal. App. 4th 654, 663-664
- BEST OPTION IS ATTEMPT TO MEET AND CONFER ON DISCOVERY DISPUTE BEFORE SEEKING BOARD ACTION
- IF CANNOT RESOLVE INFORMALLY SEEK PETITION TO COMPEL DISCOVERY RESPONSES AND ATTACH ORDER.
- ALSO MAY BE BENEFICIAL TO FILE FOR HEARING ON MATTER PREFERABLY AN MSC FOR IF AT AN IMPASSE AT HEARING CAN MOVE FOR TRIAL ON DISCOVERY DISPUTE FOR RULING

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Potential Bad faith denials

- Issuing denials without a solid evidentiary basis at the time the case is denied may subject the adjuster to penalties for bad faith denial. Labor Code 5814 provides for penalties payable to the injured worker for up to 25% of the amount delayed, up to $10,000.
- A separate 10% penalty must be added to any periodic indemnity payments that should have been made absent the unsupported denial. LC 4650(d).

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Potential Bad Faith

In addition, the 104 week cap for temporary disability does not begin to run even when EDD has been paying benefits in the interim. Finally, if there has been an increase in indemnity rates between the time the case is denied and the time it is determined temporary disability must be paid, all the retroactive temporary disability due must be paid at the new, higher rate.

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BENEFITS OF ADMITTING CLAIM

- MEDICAL CONTROL BY WAY OF MPN NETWORK
- ADMINISTERING OF BENEFITS AND AVOIDANCE OF BUILD UP OF EDD LIEN
- UR REVIEW OF TREATMENT REQUESTS TO BE GOVERNED BY IMR PROCCESS OF PROPERLY AND TIMELY CONDUTED
- APPLICANT ATTORNEY MAY BE MORE COOPERATIVE WITH DISCOVERY AND MORE INCLINED TO SETTLE EARLY ON
- MAY BE MORE INCLINED TO PROCEED WITH AN AME IF MEDICAL LEGAL DISPUTE AND SUCH REPORTING CARRIES GREAT WEIGHT IF SUBSANTIAL PURSUANT TO *POWERS V. WCAB*

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BENEFITS OF DENYING CLAIM

- Not tied down as much with non-MPN physicians as to treatment requests
- UR not in effect but remember may be dealing with retro-active UR if case if ultimately found compensable
- More inclined to proceed with the panel QME route when dealing with medical legal disputes
- Don't have to deal with duplication issues with respect to EDD

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WEBINAR

November 10th @ 12PM PDT

CASE LAW UPDATES

Enjoy an hour with Brittany Rothe-Kushel and Don Barthel as they bring us up to speed on the latest and greatest case law California worker's comp has in store for you!

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