



## **BRADFORD & BARTHEL'S 100% PD CHEAT SHEET DEFENSES**

Even in cases in which the AMA *Guides* and Permanent Disability Rating Schedule (properly applied) do not give rise to 100% PD, many applicant's attorneys (AA) are citing Labor Code §4662, and various cases [including two recent panel decisions: *Baldrige v Swinerton* and *Boatright v Argonaut; LeBoeuf v WCAB* (1983), and *Ogilvie III* (2011)] for the proposition that **applicant is entitled to 100% Permanent Disability!**

**WARNING SIGNS** - Hints applicant is pushing for 100% PD

### **DOES YOUR INJURED APPLICANT:**

- Receive TD long-term and/or qualify for other on-going disability programs (public or private)?
- Have complaints of debilitating painful conditions?
- Rely (addicted?) on debilitating medication?
- Have an attorney?
- Have a VR and/or DFEC "expert"?
- Have medical opinions she/he cannot work in the "open labor market" or has lost all "future earning capacity"?

### **WHAT YOU SHOULD NOT DO:**

- Agree to AME
- Go to an "Agreed" VR or DFEC "expert"
- Fail to Object to applicant's VR/DFEC "expert's" reports, bills and liens
- Fail to prepare for trial & recon

### **WHAT YOU SHOULD DO:**

- Rely on PTP and/or PQME [avoid allowing WCAB presumption that the AME is a neutral expert, *Power v WCAB* (1986) 179 Cal.App.3d 775]
- Consider utilizing your own DFEC/VR expert
- Subpoena applicant's DFEC/VR "expert's" file
- Depose applicant's DFEC/VR "expert"
- Depose physician upon whom AA relies
- Object to all reports, bills, liens from applicant's DFEC/VR "expert"



**OBJECTION LETTERS SHOULD:**

- Cite LC §5811(a) “in all proceedings...before the appeals board, costs between the parties may be allowed” (note: “may” is not mandatory)
- Challenge so-called expert’s status as an “expert”. [Cite *Costa* // “[T]he qualifications of each...expert must be determined on a case by case basis.”]
- Cite LC §4621(a), arguing costs incurred by AA’s expert were not “reasonably, actually, necessarily incurred...when actually incurred.”
- Cite LC §4664(a) “The employer shall only be liable for the percentage of permanent disability directly caused by the injury [aoe/coe]”
- Cite *Ogilvie III’s* interpretation of *LeBoeuf*, limiting “its application to cases where the employee’s diminished future earnings [or inability to compete in the open labor market] are directly attributable to the employee’s work related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency to speak English, or an employee’s lack of education...” (underline added)

**DON’T FORGET:**

- If AA attempts to introduce his/her “expert’s” reports and/or testimony, cite above objections and CA Evidence Code 720 (defining who is—and is not— “qualified to testify as an expert”)
- Object to admissibility of expert’s testimony, citing Labor Code §5703(j) (“Direct examination of a vocational witness shall not be received at trial except upon a showing of good cause.”)

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