

Discovery

By Donald Barthel, LLP
Law Offices of Bradford & Barthel, LLP



Bradford & Barthel, LLP



@bradfordbarthel



bradfordbarthellp



Bradford & Barthel, LLP



Bradford & Barthel LLP



TOOLS FOR YOU AT:
www.bradfordbarthel.com

BLOG Articles
bradfordbarthel.blogspot.com/

AMA Rating Department
bradfordbarthel.com/areas-of-practice/bb-ratings/

CE Videos
bradfordbarthel.com/education/

CE Webinars
bradfordbarthel.com/education/



3

You're on notice: there's a claim
What do you do?



```
graph TD; A["CLAIM FORM  
(w/in 1 working day)"] --> B["NOPE letter  
(w/in 1 working day)"]; A --> C["ACCEPT/DENY  
(90 days hopefully  
sooner...but woe if  
later)"]; B --> D["CALCULATE AWW  
(start TD w/in 14 days  
knowledge of injury &  
discovery)"]; B --> E["START PD  
w/in 14 day of  
ending TD"]; C --> F["MOD/ALT  
AVAILABLE?"]
```



www.bradfordbarthel.com

4

Let's to learn!

Must you investigate all of this?

YEP!

Why?

"Upon notice or knowledge of a claimed industrial injury an employer has both the right and duty to investigate the facts in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he take the initiative in providing benefits."

Ramirez v. WCAB (1970) 35 CCC 383, 388



www.bradfordbarthel.com

5



§10109. Duty to Conduct Investigation; Duty of Good Faith.

- 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.



www.bradfordbarthel.com

6

§10109. Duty to Conduct Investigation; Duty of Good Faith.

- 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.



www.bradfordbarthel.com

7

§10109. Duty to Conduct Investigation; Duty of Good



2. The claims administrator may not restrict 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.



www.bradfordbarthel.com

8

§10109. Duty to Conduct Investigation; Duty of Good Faith.



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



www.bradfordbarthel.com

9

Failed to conduct a reasonable and timely investigation?

WCAB may make adverse inference in favor of the applicant.

Hughes Aircraft Co. v. WCAB (Zimarik) (2004) 69 CCC 408 (writ denied)

F:

- allegation: psych arising out of exposure
- ER had duty to investigate and provide MSDS
- Failed to perform duty



H:

applicant was exposed to toxic chemicals and this contributed to injury

R: adverse inference



www.bradfordbarthel.com

10

DO NOT RELAY ON THIS...



...but some cases suggest adverse inferences should not be made on ultimate issues of causation

Hamilton v. WCAB (2011) 76 CCC 265 (writ denied)

F:

- allegation: multiple sclerosis from toxin exposure
- ER did not provide MSDS
- EE didn't demonstrate additional MSDS info was necessary

H: no adverse inference

R: Evidence Code, case law don't require adverse inference be made as to ultimate issue of causation (even if inference could be drawn that applicant was exposed to workplace toxins)

WCJ/WCAB panel make ALL the difference



www.bradfordbarthel.com

11

WC discovery guided by...

Labor Code § 5307

a. The appeals board may...

4. Regulate and prescribe the nature and extent of the proofs and evidence.



www.bradfordbarthel.com

12

CCP instructive, but not mandatory (WCAB has own rules)



Hardesty v. McCord & Holdren, Inc. (1976) 41 CCC 111, 113
(panel)
Schooley v. City of Walnut Creek (1998) 26 CWCR 234 (panel)



www.bradfordbarthel.com

13

DISCOVERY...

...what a party does to

1. learn, or
2. create

evidence to use to prove/defend case
(and provide appropriate benefits)



www.bradfordbarthel.com

14

Discovery tools include:



1. **mandatory filing of Application & Answer delineating what is admitted and what is at issue (LC 5500)**

LC 5500:

No pleadings other than the application and answer shall be required. Both shall be in writing and shall conform to forms prescribed by the appeals board in its rules of practice and procedure, simply but clearly and completely delineating all relevant matters of agreement and all issues of disagreement within the jurisdiction of the appeals board, and providing for the furnishing of any additional information as the appeals board may properly determine necessary to expedite its hearing and determination of the claim.



www.bradfordbarthel.com

15

Discovery tools include:

2. **subpoenaing of witnesses and documents (LC 130)**



www.bradfordbarthel.com

16

Discovery tools include:



3. deposition of witnesses (LC 5710)

Labor Code § 5710

- a. The appeals board, a workers compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state. To that end the attendance of witnesses and the production of records may be required. Depositions may be taken outside the state before any officer authorized to administer oaths.



www.bradfordbarthel.com

17

LC 5710:



- b. Where the employer or insurance carrier requests a deposition to be taken of an injured employee, or any person claiming benefits as a dependent of an injured employee, the deponent is entitled to receive in addition to all other benefits:
1. All reasonable expenses of transportation, meals, and lodging incident to the deposition.
 2. Reimbursement for any loss of wages incurred during attendance at the deposition.
 3. A copy of the transcript of the deposition, without cost.



www.bradfordbarthel.com

18

LC 5710:



4. A reasonable allowance for attorney's fees for the deponent, if represented by an attorney licensed by the State Bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by, the appeals board, but shall be paid by the employer or his or her insurer.



www.bradfordbarthel.com

19

LC 5710



What's a "reasonable" fee? More about that later!

5. A reasonable allowance for interpreter's fees for the deponent, if interpretation services are needed and provided by a language interpreter certified or deemed certified. The fee shall be in accordance with the fee schedule...



www.bradfordbarthel.com

20

Discovery tools include:

5. examination copying of hospital and physician records relevant to the claim (CCR 10626)

§10626. Examining and Copying Hospital and Physicians' Records.

Subject to Labor Code section 3762, and except as otherwise provided by law, **all** parties, their attorneys, agents and physicians shall be entitled to examine and make copies of all or any part of physician, hospital, or dispensary records that are relevant to the claims made and the issues pending in a proceeding before the Workers' Compensation Appeals Board.



What does LC 3762 say?

- a) Except as provided in subdivisions (b) and (c), the insurer shall discuss all elements of the claim file that affect the employer's premium with the employer, and shall supply copies of the documents that affect the premium at the employer's expense during reasonable business hours.
- b) The right provided by this section shall not extend to any document that the insurer is prohibited from disclosing to the employer under the attorney-client privilege, any other applicable privilege, or statutory prohibition upon disclosure, or under Section 1877.4 of the Insurance Code.



What does LC 3762 say?



- c) An insurer, third-party administrator retained by a self-insured employer pursuant to Section 3702.1 to administer the employer's workers' compensation claims, and those employees and agents specified by a self-insured employer to administer the employer's workers' compensation claims, are prohibited from disclosing or causing to be disclosed to an employer, any medical information, as defined in Section 56.05 of the Civil Code, about an employee who has filed a workers' compensation claim, except as follows:
1. Medical information limited to the diagnosis of the mental or physical condition for which workers' compensation is claimed and the treatment provided for this condition.
 2. Medical information regarding the injury for which workers' compensation is claimed that is necessary for the employer to have in order for the employer to modify the employee's work duties.



www.bradfordbarthel.com

23

Discovery tools include:



6. exhumation and autopsy in cases of industrially related death (LC 5706 and LC 5707).

CA Labor Code § 5706

Where EE died AOE/COE, WCAB may require an autopsy. If the body is in the custody of the coroner, coroner shall, upon the request of the WCAB or of any party, afford reasonable opportunity for the attendance of any physicians named by the appeals board at any autopsy ordered by him. If the coroner does not require, or has already performed the autopsy, he shall permit an autopsy or reexamination to be performed by physicians named by the appeals board. No fee shall be charged by the coroner for any service, arrangement, or permission given by him.



www.bradfordbarthel.com

24

Labor Code § 5707



WCAB may order exhumation for autopsy. If dependents, or a majority thereof, having custody, refuse to allow the autopsy, it shall not be performed. In such case, it is a disputable presumption that the injury or death was not AOE/COE.



www.bradfordbarthel.com

25

NOT ENOUGH DISCOVERY TOOLS!?!?

Tough...

unless the LC doesn't provide a remedy sufficiently adequate and convenient to accomplish "substantial justice", as req'd by Constitution:

"shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character"

WCAB must allow discovery "in the manner... which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of [the Workers' Compensation Act]."

Abron v. WCAB (1973) 38 CCC 591, 594



26

The Big Picture



- claim form filed
- 90 days to deny (LC 5402)
- what do you do? DISCOVERY (immediately)
- what kind of discovery?

LIMITED!



www.bradfordbarthel.com

27

Why discovery started by a DWC-1 is limited...?

Need WCAB jurisdiction for much discovery

DWC-1 does not = WCAB jurisdiction

APPLICATION does = jurisdiction



www.bradfordbarthel.com

28

What types of discovery

BEFORE
&
AFTER

Application is filed?



29

Yee-Sanchez v. Permanente Medical Group

(2003) 68 CCC 637

H: except for DOIs 1/1/90-12/31/93 ("window period")...

WCAB has NO PRE-APP JURISDICTION over a claim



www.bradfordbarthel.com

30

PRE APP, can't:

- notice a depo
- subpoena a witness
- subpoena medical records
- subpoena other records/documents



www.bradfordbarthel.com

31

Problems relating to pro per arise pre-app?

WCJ may refer EE to I&A
(who can help pro per re right to file App)



32

Noncompelled, pre-app actions



that may be taken:

1. Request IW attend exam by QME
2. Request IW execute a release of medical records
3. Request IW provide various documents (such as wage information)
4. Interview injured employee or other potential witnesses ("pretty please"!)
5. Subrosa

IW fails to respond/fully comply:



NO ORDER COMPELLING (until app is filed)

www.bradfordbarthel.com

33

ER abused pre-app process by trying to conduct compelled discovery?

WCJ can use Post-App Filing remedies



1. \$ Sanctions (e.g., for noticing a depo, subpoenaing a W to a depo or subpoenaing med records, docs)
2. Evidentiary sanctions, including
 - a. excluding improperly discovered material from and/or
 - b. precluding related post-app discovery efforts
3. \$ sanctions for breaching duty to file an app (LC 5813)
4. LC 4650(d) and/or LC 5814 penalties for delays in paying benefits occasioned by a failure to file app
5. Liability above for atty's fees IW may incur in connection with the ultimately filed DOR



www.bradfordbarthel.com

34

Judge created discovery methods

1. W statements taken during investigation (may be discoverable by the other party when ordered by the appeals board)



Hardesty v. McCord & Holdren, Inc. (1976) 41 CCC 111

www.bradfordbarthel.com

35

Judge created discovery methods

2. EE is entitled to have an expert inspect the employer's premises



Abron v. WCAB (1973) 38 CCC 591

www.bradfordbarthel.com

36

Judge created discovery methods

3. sub rosa (if created w/out fraudulent inducement). (more about that later!)



Redner v. WCAB (1971) 36 CCC 371, 379



www.bradfordbarthel.com

37



many discovery methods provide by CCP
don't apply to w/c



www.bradfordbarthel.com

38

Want to get around this?

Better be ready to argue!



WCAB may refuse to allow interrogatories

Smith v. County of Monterey, 2013 Cal. Wrk. Comp.
P.D. LEXIS 399



But see....

www.bradfordbarthel.com

39

Lubin v. Berkley East Convalescent Hospital (1976) 41 CCC 283

H:

- in rare instances, written interrogatories to an opposing party may be the only practical way of obtain discovery*
- if so, rogs should:
 1. brief
 2. call for specific factual information, not legal conclusions
 3. not be unduly burdensome

Parties may agree to written interrogatories.



www.bradfordbarthel.com

40

Contra...

Nadey v. Pleasant Valley State Prison
Cal. Wrk. Comp. P.D. LEXIS



F:

- Def sought interrogatories
- WCJ: there are other, less cumbersome, discovery methods

I: Rogs allowed?

H: Yes (panel); it was error to not compel IW's response to defendant's written inquiry

R: 4663(d)

This is a big deal!

Save time!

Save money!



www.bradfordbarthel.com

41

Bright line rules re what is
(and isn't)
appropriate discovery?



www.bradfordbarthel.com

42

NOPE!



LC 5708:

WCAB is **not** "bound by the common law or statutory rules of evidence and procedure."

WCAB "**may** make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of [Division 4 of the Labor Code]."



www.bradfordbarthel.com

43

NO bright line rules, con't

LC 5709: "No informality in any proceedings or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed"

WCAB is not bound by the rules of evidence found in the Evidence Code

LC 5709: "[n]o order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure."



44

S.Ct has opinions re 5708/5709

In discussing LC 5708 and LC 5709: "[the WCAB] from its early days, has not been bound by common law or statutory rules of evidence and procedure, and, in addition to being allowed to receive hearsay evidence and to proceed informally, it has been authorized and permitted to adopt decidedly less stringent rules and regulations."



French v. Rishell (1953) 18 CCC 82, 84

www.bradfordbarthel.com

45

WCAB says it well...



"liberal pretrial discovery is desirable and beneficial for the purpose of ascertaining the truth, checking and preventing perjury, detecting and exposing false, fraudulent and sham claims and defenses making available in a simple, convenient and inexpensive way facts which otherwise could not be proved except with great difficulty, educating the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlement expediting litigation safeguarding against surprise preventing delay, simplifying and narrowing the issues and expediting, and facilitating both pretrial preparation and trial."

Yep! It applies to the defense too!

Hardesty v. McCord & Holdren, Inc. (1976) 41 CCC 111, 114



www.bradfordbarthel.com

46

WCJ is waivering?

Questions re relevancy should generally result in permitting the proposed discovery



Ameri-Medical Corp. v. WCAB (Rhooms) (1996)
61 CCC 149, 169



www.bradfordbarthel.com

47

Can't completely ignore evidentiary rules...

WCAB relying on X evidence?
X must have **some** probative value



National Convenience Stores v. WCAB
(Kesser) (1981) 46 CCC 783



www.bradfordbarthel.com

48

PROBATIVE

Tendency to prove or disprove one of the legal elements of a case; make an element more likely or unlikely:
“tending to prove or disprove”



www.bradfordbarthel.com

49

Rule of Thumb re Pre-trial Discovery:

TEST: whether "reasonably calculated" to lead to the discovery of "admissible evidence"



Maled v. Diamond Learning Center, Inc., 2015
Cal. Wrk. Comp. P.D. LEXIS 226



www.bradfordbarthel.com

50

Some Express Limitations



Examples

LC 3208.4: "In any proceeding involving an injury arising out of alleged conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning sexual conduct of the applicant with any person other than the defendant, shall establish specific facts showing good cause for that discovery on a noticed motion to the appeals board.



www.bradfordbarthel.com

51

Some Express Limitations



"The procedures set forth in Section 783 of the Evidence Code shall be followed if evidence of sexual conduct of the applicant is offered to attack his or her credibility. Opinion evidence, evidence of reputation, and evidence of specific instances of sexual conduct of the applicant with any person other than the defendant, or any of such evidence, is not admissible by the defendant to prove consent by or the absence of injury to the applicant..."



www.bradfordbarthel.com

52

Some Express

Examples

- atty-client privilege
- physician-patient privilege
- HIV/AIDS limits
- med info obtained by insurer/TPA may not be disclosed to ER (LC 3762(c)).



www.bradfordbarthel.com

53

W statements/interviews are permissible (even pre-app)



PROS: take eye W statements asap (memories are fleeting)

- greatly assist: deciding whether to accept/deny case
- identify fraud
- obtain dispassionate report of what really happened

NOTE: investigative statement taken before retaining DA?



Potential problems...

54

CONS



- statement may be discoverable
- claiming "work product privilege"?
- =absolute privilege if a writing reflects "an attorney's impressions, conclusions, opinions, or legal research or theories"
- =qualified privilege against discovery of "general work product"...

likely discoverable if doesn't reflect atty's:
 impressions
 conclusions
 opinions
 legal research
 legal theories



www.bradfordbarthel.com

55

Take aways



1. if in doubt, have atty take statement
2. if possible, avoid recordings (paper, computer, etc)

Can't SDT something that

- has an absolute privilege, or
- doesn't exist

(Ex non W/C doctor to prepare for doctor/QRR depo)



www.bradfordbarthel.com

56

W statements derived from atty interview

=
protected "work product"



CCP 2018.030

- a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

Finally!

"inextricably intertwined" as a defense weapon

TAKE THAT, Benson!



www.bradfordbarthel.com

57

Supremes say...



Coito v. Superior Court of Stanislaus County

atty's recorded W interview may be entitled
to **absolute** protection:

"when a witness's statements are 'inextricably intertwined' with explicit comments or notes by the attorney stating his or her impressions of the witness, the witness's statements, or other issues in the case."



www.bradfordbarthel.com

58

AND



"when the questions that the attorney has chosen to ask (or not ask) provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important...the very fact that the attorney has chosen to interview a particular witness may disclose important tactical or evaluative information, perhaps especially so in cases involving a multitude of witnesses"



www.bradfordbarthel.com

59

Not all W statement obtained by atty
"reveal the attorney's thought process"

Coito v. Superior Court of Stanislaus County (2012)
54 Cal. 4th 480

if atty sends an investigator to interview, and
investigator asks few if any questions while taking
statements

=

"these statements would reveal nothing significant
about the attorney's impressions, conclusions, or
opinions about the case."



www.bradfordbarthel.com

60

Not all W statement obtained by atty "reveal the attorney's thought process"

RULE: W statements obtained for atty are not automatically entitled as a matter of law to absolute work product protection

RULE: "a witness statement obtained through an attorney-directed interview is, as a matter of law, entitled to at least qualified work product protection."



61

Coito v. Superior Court of Stanislaus County (2012) 54 Cal. 4th 480

Absolute protection decided case by case

How it's done:

A. "A party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its claim or defense or will result in an injustice.



62

Coito

How it's done:



B. "If the party resisting discovery alleges that a witness statement, or portion thereof, is absolutely protected because it 'reflects an attorney's impressions, conclusions, opinions, or legal research or theories'... that party must make a preliminary or foundational showing in support of its claim.



www.bradfordbarthel.com

63

Coito

How it's done:



- C. "The trial court should then make an in camera inspection to determine whether absolute work product protection applies to some or all of the material."
- D. "If any or all of the interviews are not absolutely protected, the trial court should consider whether plaintiff can make a sufficient showing of unfair prejudice or injustice..."



www.bradfordbarthel.com

64

Hardesty v. McCord & Holdren, Inc.
(1976) 41 CCC 111

H: atty work-product rule does not apply to info gathered by investigator or adjuster:

- a) who is not an agent of the atty, and
- b) who obtained the info before atty was retained.



www.bradfordbarthel.com

65

Hardesty v. McCord & Holdren, Inc.
(1976) 41 CCC 111

H: statements taken by a party, agent or atty (including statements taken by a PI) should be disclosed if not protected by privilege

H: investigators' reports regarding surveillance also may need to be turned over



www.bradfordbarthel.com

66

Martin v. WCAB (1997) 62 CCC 1500

F: insurer hired an outside agency at the request of DA to take statements of IW's

- co-workers
- supervisors
- denied claim based on investigation
- IW requested copy of investigation
- ER claimed atty-client, work-product privileges



www.bradfordbarthel.com

67

Martin v. WCAB

H-1 WCAB info protected by atty-client privilege

H-2 DCA reversed; not protected



www.bradfordbarthel.com

68

Martin v. WCAB



- many factors must be considered in determining whether there is a privilege
- W statements should be more freely disclosed in w/c:

The applicant's attorney cannot afford to take the deposition of [defense] witnesses as there is no provision for deposition fees of witnesses. In addition, to hire an investigator to take their statements would again be expensive.



www.bradfordbarthel.com

69

Martin v. WCAB

- when co-EE's only connection is as an independent W (not as co-def or as the natural person to speak for the employer):

co-EE's statements
NOT=
privileged
(even if requested by DA) in preparation for
litigation



www.bradfordbarthel.com

70

W statement obtained by atty-directed interview

not (or not automatically)
protected by absolute
work product rules...

Consider **qualified work product**



www.bradfordbarthel.com

71

W statement obtained by atty-directed interview

are
as a matter of law entitled
to
qualified work product
rules...



72

Statements not covered by absolute work product protection?

Want to avoid these issues? Increase likelihood of obtaining absolute protection by

- having atty conduct interview
- having atty give specific instructions/questions before the interview



www.bradfordbarthel.com

73



Strengthen's absolute protection claim b/c reflects atty's

- mental impressions
- strategies, and/or
- legal theories



www.bradfordbarthel.com

74

Demand made for W statements?

You believe it is privileged?

THEN

1. advise opposing counsel
2. issue is brought before WCJ
3. in camera (“in the chamber”; private) review

You can't demonstrate statements were obtained at direction atty?

YOU PRODUCE (or face sanctions)

City of Fresno v. WCAB (Tristan) (2015) 80 CCC 178 (writ denied)



www.bradfordbarthel.com

75

Statements ordered disclosed?

Disclose!

(but when do you do it?)



Easy question...unclear answer



www.bradfordbarthel.com

76

HOLDING DEPO HOSTAGE?

AA refuses depo until DA provides:

- a. docs
- b. investigative reports
- c. W statements

civil court = improper

w/c = gray area



www.bradfordbarthel.com

77

El Pollo Loco v. WCAB (Vallejo) (1998) 63 CCC 1281 (writ denied)

H:

IW entitled to own recorded statement before his depo could proceed



www.bradfordbarthel.com

78

Armando v. Endodontic Associates Corp., 2010 Cal. Wrk. Comp. P.D. LEXIS 216

H: IW may require production of documents (including statements) before depo

CONTRAST

Denton v. Department of Forestry, 2011 Cal. Wrk. Comp. P.D. LEXIS 471

H: ER not required to produce W statements until after IW's depo



www.bradfordbarthel.com

79

Armando v. Endodontic Associates Corp.
2010 Cal. Wrk. Comp. P.D. LEXIS 216

F: IW Pet to Compel production of:

- W statements
- PI observations (written)
- examiner notes

ER says “no” until after depo

H: depo postponed until:

1. docs produced,
2. priv. claims reviewed by WCJ



www.bradfordbarthel.com

80

Denton v. Department of Forestry 2011 Cal. Wrk. Comp. P.D. LEXIS 471

- F: IW delays until W statements produced
H:
1. IW to give depo
 2. W statements to be produced 10 days after signed depo or signature waived



www.bradfordbarthel.com

81

Denton



"The WCJ has discretion to make such orders as will balance the interest of the parties and result in substantial justice being produced in an unencumbered, inexpensive and expeditious manner. A hard and fast rule that witness statements should be produced when requested would be inconsistent with the practice concerning production of *sub rosa* only after the depositions, and it would take from the defendant an effective tool with which to test the applicant's recollection and credibility."

"[T]he timing of production of requested witness statements is best left to the WCJ to determine based upon: the need to encourage parties to investigate both the good and bad aspects of their positions; the need to prevent a party from taking advantage of the industry of the other; and, the need to prevent undue prejudice which will result in an injustice."



www.bradfordbarthel.com

82

*Brumm, Iriart v. State of California,
California Highway Patrol*
2013 Cal. Wrk. Comp. P.D. LEXIS 7

Facts:

- CHP's death blamed on drugs for work stress
- Def obtained statements (super, capt, co-ees, family)
- Statements demanded pre-depo



www.bradfordbarthel.com

83

*Brumm, Iriart v. State of California,
California Highway Patrol*
2013 Cal. Wrk. Comp. P.D. LEXIS 7

I: which comes first?

H: depo

R: widow's truthfulness about decedent did not depend on her review of statements

arguments for disclosure pre-depo failed to show signif/prejudice or irreparable harm



www.bradfordbarthel.com

84

Compare & Contrast:



Cramer v. Grossmont Union High School District

2013 Cal. Wrk. Comp. P.D. LEXIS 599

H: ER req'd to produce IW's own statement pre-depo

"While providing statements of other witnesses to a deponent in advance of deposition can have the potential to confuse or unduly influence a deponent, those risks do not appear as significant when the deponent is merely reviewing his or her own statement."

"[I]t can be plausibly argued that allowing applicant to review, in advance of his deposition, his statements (obtained at a point in time more contemporaneous with the injury) would actually aid the parties in fact finding because his memory would be refreshed as to events that transpired."



www.bradfordbarthel.com

85

COSTS OF TAKING IW's DEPO

1. All reasonable expenses of transport (meals and lodging)



local? = mileage

too impaired to drive? = transportation costs

too far to drive? = planes, trains, automobiles (Great movie!)

2. Reimbursement for a missed wages (TD? No worries)
3. Copy of transcript
4. Atty's fees
5. Interpreter's fees for the deponent, if necessary (CCR 9795.3).



www.bradfordbarthel.com

86

PAY MILEAGE UP FRONT!



*Abdou Foods, Inc. dba The Alley Dog N Burger v. WCAB
(Romo) (1990) 55 CCC 121 (writ denied)*

- F: ER failed to provide transport. costs
EE refused depo
Trial proceeds
- H: no denial of due process to proceed to trial



www.bradfordbarthel.com

87

Hypothetical!

- EE misses noticed depo (or 2...or 3)
- Def obtains Order Compelling
 - For good measure, Order includes
 - threat to suspend proceedings and/or
 - bar benefits
- EE fails to appear.

Suspend Proceedings?

Bar benefits?

NOPE!



www.bradfordbarthel.com

88

"Suspend proceedings & bar benefits"

WCAB may compel IW to attend depo

BUT

canNOT suspend proceedings/bar benes for failure to attend depo

Hudson v. CNA Ins. Co.
(1993) 21 CWCR 208 (panel decision)



www.bradfordbarthel.com

89

CONTRAST: failure to appear at med exam (LC 4053, 4054)

4053. So long as the employee, after written request of the employer, **fails or refuses to submit to such examination** or in any way obstructs it, his **right to begin or maintain any proceeding** for the collection of compensation shall be **suspended**.



www.bradfordbarthel.com

90

4054. **If the employee fails or refuses to submit to examination after direction by the appeals board**, or a referee thereof, or in any way obstructs the examination, his **right to the disability payments** which accrue during the period of such failure, refusal or obstruction, **shall be barred.**



Remedies?

1. Contempt

CCP 1218. (a) Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he or she is guilty of the contempt, a **fine may be imposed on him or her not exceeding one thousand dollars (\$1,000)**, payable to the court, or he or she may be **imprisoned not exceeding five days**, or both. In addition, a person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the **reasonable attorney's fees and costs** incurred by this party in connection with the contempt



Remedies?

2. Sanctions

LC 5813. (a) The workers' compensation referee or appeals board may order a party, the party's attorney, or both, to pay any **reasonable expenses, including attorney's fees and costs**, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, a workers' compensation referee or the appeals board, in its sole discretion, may order **additional sanctions not to exceed two thousand five hundred dollars (\$2,500)** to be transmitted to the General Fund.



www.bradfordbarthel.com

93

ER REP AT DEPO

CAAA hates b/c of

1. privacy concerns
2. embarrassment
3. LC 3762(c): "An insurer, third-party administrator retained by a

"...self-insured employer..., and those employees and agents specified by a self-insured employer to administer the employer's workers' compensation claims, are prohibited from disclosing or causing to be disclosed to an employer, any medical information..."

WCAB says "tough luck"



www.bradfordbarthel.com

94

Padilla v. W.C.A.B. (2nd--B226458) 76 CCC 191

F: AA objected to:

1. presence of IW's manager
2. questions re med history & condition

H: ER has a right to be present
(unless IW est'd "good cause" for protective
order)



Padilla

Reasons:

1. waived right to med privacy re injuries at issue
2. LC 3762 doesn't apply to info disclosed by IW at depo



"But I feel intimidated..."

TOUGH LUCK!



Yera v. J.C. Penney
2013 Cal. Wrk. Comp. P.D. LEXIS 189



www.bradfordbarthel.com

97

Yera

- 1) Party has right to be present
- 2) IW failed to identify any privacy right potentially impacted
- 3) "feeling intimidated" doesn't do it... IW has
 - a) AA
 - b) legal remedies to address inappropriate def tactics



www.bradfordbarthel.com

98

"But he'll drive me craz[ier]..."



County of San Bernardino v. WCAB (Foroughi)
(2014) 79 CCC 1200 (writ denied)

Facts:

- psych claim allegedly caused by supervisor
- supervisor appeared at depo
- IW became stressed



www.bradfordbarthel.com

99

Forough

H: supervisor's attendance barred

R: would cause "oppression"

Proof:

- IW's uncontradicted statement that she had "uncontrollable crying, shaking and severe distress" when confronted by supervisor
- report stating ER at depo = "extraordinarily detrimental" to psyche

Solution?

send a different ER rep



www.bradfordbarthel.com

100



Lawyer: Doctor, how many autopsies have you performed on dead people?

Witness: All my autopsies are performed on dead people.



www.bradfordbarthel.com

101

Service of W statements...
Before the depo?
After the depo?

NOT CLEAR

Clarity CAN be found in MSC (all evidence must be disclosed by then)



www.bradfordbarthel.com

102

Ray Andrews Ford v. WCAB
(Thomas) (1994) 59 CCC 789 (writ denied)

H: if ER improperly fails to supply W statement before trial,

W may be denied the opportunity to testify



Hutton v. State of California Department of Corrections, 2015 Cal. Wrk. Comp. P.D. LEXIS 388



www.bradfordbarthel.com

103

Christensen v. WCAB (1999) 64 CCC
559 (writ denied)

H:

W testimony not excluded for failure to serve IF
 IW is unable to prove W statements existed



www.bradfordbarthel.com

104

Bryant v. CA, Dept of Corrections

2017 Cal. Wrk. Comp. P.D. LEXIS 81

H:

before a W's testimony is excluded...ER must have opportunity to justify any late disclosure

Don't say, "The dog ate my homework"!



www.bradfordbarthel.com

105

W unavailable to testify at trial?

Want to avoid having W testify/cross-examined?

Rather enter W statement into evidence in lieu of testimony?

Good Luck!
VERY TOUGH PUTT



106

Up to WCJ

- hearsay is admissible, but only admissible when "best calculated to ascertain the substantial rights of the parties"



Skip Fordyce, Inc. v. WCAB (Barry) (1983) 48 CCC 904, 912

www.bradfordbarthel.com

107

City of Redondo Beach v. WCAB (Gates) (2002) 67 CCC 1345 (writ denied)

F:

- def offered W statement in place of live testimony
- W, IW's supervisor, unable to testify b/c of surgery
- continuance granted; unable to attend next trial
- ER requested W's depo or written statement and admitted in place of live testimony

H:



108

City of Redondo Beach v. WCAB
(Gates) (2002) 67 CCC 1345 (writ denied)

R:

1. IW's right to cross-examine defense Ws would be thwarted (what about at depo?!?!)
2. EE's due process rights would be violated b/c:
EE entitled to opp to observe lay
Ws both on direct and cross-exam (ditto?!?!)



www.bradfordbarthel.com

109

Wanna get out of the office?

LC 5701: The appeals board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made..."

- Not a daily event!
- Can you guess why?



www.bradfordbarthel.com

110

Who does this apply to?

ALL parties



www.bradfordbarthel.com

111

Abron v. WCAB 38 CCC 591

F:

- IW sought to order ER to permit IW's safety expert to inspect place of injury and equipment

R:

- IW sought to investigate possible S&W
- ER refused
- WCJ denied EE's request (and restricted expert's testimony due to failure to inspect premises)



www.bradfordbarthel.com

112

Abron v. WCAB 38 CCC 591



WCAB says, "Tough luck, IW!"

DCA says, "Nope...feel free to perform inspection"

R:

- LC 5701
- LC 3202: This division... 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.
- IW's entitlement to due process



www.bradfordbarthel.com

113

We see subpoenas (or the results of subpoenas)

every week



But do you know how they *really* work?

LC 130: The appeals board and each of its members, its secretary, assistant secretaries, and workers' compensation judges, may administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding in any part of the state.

Where do you get a subpoena signed by a WCJ?

Just ask!



www.bradfordbarthel.com

114

Who can be subpoenaed to depo/hearing?

- App's Ws
- defense Ws
- IW's Ws
- nonparties as W if testimony is "material"



Greenwald v. Carey Distributing Co. (1981) 46 CCC 703, 709 (appeals board *en banc*)



www.bradfordbarthel.com

115

Going to trial?

Listed defense Ws at MSC?
 Want to make sure they attend?
 Subpoena them
 (even if they want to testify!)
 Get confirmation letter

Can you guess why?



116

Got a "hostile witness"?

Be sure to subpoena!

Should you subpoena doctor
to depo?

What do YOU think?



www.bradfordbarthel.com

117

Want to get your hands on records, papers, books, accounts, document?

Issue a subpoena *duces tecum*
("bring with you under penalty of punishment")



www.bradfordbarthel.com

118

Have you received a SDT?

Says that you (custodian of records) are to:

- appear for depo
- with requested docs
- verify under oath are the documents requested by the subpoena



119

Don't worry...that's not how it *really* works!



- you don't personally appear
- docs are copied by subpoena service on site
- custodian signs affidavit verifying compliance with SDT (not an STD...they're different!!!)
- W ordered to appear may be entitled to:
 - Fees
 - mileage for attendance

LC 131



www.bradfordbarthel.com

120

Someone refusing to obey subpoena?



Contempt time (LC 132)



www.bradfordbarthel.com

121

Subpoena Procedure

CCR 10530:

WCAB "shall issue subpoenas and subpoena duces tecum upon request in accordance with the provisions of Code of Civil Procedure Section 1985 and 1987.5 and Government Code Section 68097.1."

Note: CCP applies and is enforced in w/c (a rarity!)



www.bradfordbarthel.com

122

Subpoenas & SDT must use WCAB's forms

DIA WCAB form 30: subpoena

DIA WCAB form 32: subpoena *duces tecum*. The fillable forms are posted on the DWC website: <https://www.dir.ca.gov/dwc/forms.html>.

They are also available at the district offices



123

CCP1985(b): copy of an affidavit must

- be served with a SDT
- show *good cause* for production of requested materials
- specify exact matters or things desired
- detail materiality of the matters
- state the witness has the desired things in his/her possession (or under his or her control)



www.bradfordbarthel.com

124

LC 4055.2 any party who subpoenas records must:

- send a copy of the subpoena to all parties of record in the proceedings concurrent with the service of the subpoena on the person who has possession of the records



www.bradfordbarthel.com

125

CCP 1013:



SDT must be served at least 20 days before date of production

- must be served in sufficient time to allow W to locate and produce the records

Subpoenas requiring the appearance of a medical witness before WCAB must be served not less than 10 days before the time the witness is required to appear and testify (CCR 10537).
(Never?!?!)

IW may inspect/copy own medical records without requiring a subpoena nor compliance with time limits.

Perea v. Abott Laboratories, 2013 Cal. Wrk. Comp. P.D. LEXIS 224



www.bradfordbarthel.com

126

How it normally works:

1. copy service serves a SDT
2. copy service takes copying machine to records' location
3. facility with records requires for:
 - a. location
 - b. production
 - c. copying of the records



www.bradfordbarthel.com

127

CA Labor Code § 131 (2017)

- each witness who appears by order of the WCAB
- shall receive (if demanded):
 - > fees (same as allowed in civil cases)
 - > mileage (same as allowed in civil cases)

Who pays?

Who ever requested the W be subpoenaed
(unless otherwise ordered by WCAB)



www.bradfordbarthel.com

128

Bet you didn't know this...

if W is subpoenaed by WCAB, fees/mileage are paid by WCAB!

never seen that in 25 years
Have you?



129

Subpoenaed W who is req'd to appear

gets fee for travel to/from and
one day's attendance

Normally paid at time of service



Check presented when subpoena is served

Not paid beforehand, not req'd to appear



www.bradfordbarthel.com

130

IW subpoenaed W to testify?

W fee may be reimbursed as lien against IW's recovery



R: W fee is "a non-medical litigation expense which under ordinary circumstances is borne by the applicant." (not ML)

Summers v. WCAB (1977) 42 CCC 277



www.bradfordbarthel.com

131

GC 68097.1(a):establishes the requirements for service of a subpoena to

- secure the appearance of a peace officer, firefighter, state employee,
- regarding an event or transaction
- that the subpoenaed peace officer "perceived or investigated"
- in the course of duty

Think intoxication defense

Or

Felony rule



www.bradfordbarthel.com

132

GC 68097.2(b):

when a peace officer is subpoenaed to testify, "[t]he party at whose request the subpoena is issued shall reimburse the public entity for the full cost to the public entity incurred in paying the peace officer"



www.bradfordbarthel.com

133

Who is on the hook to pay?

- 1) party who issued the subpoena, AND
- 2) party's atty



GC 68097.2(b) states, "The amount of two hundred seventy-five dollars (\$275), together with the subpoena, shall be tendered to the person accepting the subpoena for each day that the peace officer, firefighter, state employee, trial court employee, or specified county employee is required to remain in attendance pursuant to the subpoena." Per GC 68097.2(c), "If the actual expenses should later prove to be less than the amount tendered, the excess of the amount tendered shall be refunded." Per GC 68097.2(d), "If the actual expenses should later prove to be more than the amount deposited, the difference shall be paid to the public entity by the party at whose request the subpoena is issued."



www.bradfordbarthel.com

134

Why is this doctor so happy? No doctor at WCAB!!!

There's a great reason!

10727. Cross-Exam by Depo. The WCAB favors cross-examination of medical witnesses by way of depo. Reasonable costs in connection with such deposition shall be allowed



What's "reasonable"?
Good question!

Bet doctor and party who issued subpoena
don't agree!



www.bradfordbarthel.com

135

Failed to



- 1) serve subpoena, and
 - 2) tender advanced fee based on estimated time
(normally 2 hours: one for prep, one for cross-ex)
- You've just waived right to examine Dr.

Fee usually hand delivered by atty taking depo
If AA's depo, he/she normally requests reimbursement
from defense as ML expense
Must defense reimburse?

Maybe, Maybe No



www.bradfordbarthel.com

136

LC 5811(a)

"in all proceedings...before the appeals board... costs between the parties may be allowed by the appeals board"

"may"=discretionary (not mandatory)



www.bradfordbarthel.com

137

TEST: 4621(a)

"...the employee...shall be reimbursed for...medical-legal expenses...reasonably, actually, and necessarily incurred...

...The reasonableness of, and necessity for, incurring these expenses shall be determined with respect to the time when... actually incurred."



www.bradfordbarthel.com

138

Need another tool to fight being forced to pay depositions called by IW?

Question whether deponent is really an "expert"

Determined on a case-by-case basis (*Costa II*)



139

Been served subpoena?

Motion to Quash!

Simply don't want to comply?

WHAT COULD POSSIBLY GO WRONG?

let me introduce you to:

SANCTIONS!



140

Been served subpoena? (con't)

WCAB can report to Superior Court the
failure/refusal

&

request an order compelling to obey



www.bradfordbarthel.com

141

Court must enter order:

directing W appear at a certain time/place show
cause for earlier failure to comply



www.bradfordbarthel.com

142

Still failing to obey?

Here comes "contempt" motion



www.bradfordbarthel.com

143

You've never done it that way, right?

There's a great reason you haven't gone to Superior Ct

WCAB has power to issue orders regarding
subpoenas
&
punish by way of contempt for failure to comply
with a subpoena



www.bradfordbarthel.com

144

How it is really done...



1. subpoena issues
2. subpoena is ignored
3. party petitions WCAB for enforcing
4. same party serves order
5. if order is ignored, same party requests contempt proceedings



www.bradfordbarthel.com

145

Plenty of blame to go all around!



doctor can be held in contempt for failure to respond
 &
 atty instructing doctor to refuse to follow valid subpoena
 =
both held in contempt



In re Alleged Contempt of Maxim N. Bach, Esq. (1988) 53
 CCC 474 (appeals board contempt opinion)

146

Who uses paper anymore?

If records are recorded/reproduce pursuant to EC 1551
(includes microfilm, electronic recording)

AND

originals have been destroyed

Shall use:

- legible print
- film
- electronic recording...

...which responding to subpoena



www.bradfordbarthel.com

147

Offering into evidence

- legible print?
- film?
- electronic recording?



WCAB may require paper reproductions



www.bradfordbarthel.com

148

§10618. X-Rays



Want originals?
You go em!

On order of the Appeals Board or workers' compensation judge, a party shall forthwith transmit all X-rays to the person designated in the order.

X-rays shall be subpoenaed only when they are relevant to pending issues and there is a present and bona fide intent to offer them in evidence. X-rays produced in violation of this rule will be ordered returned to their original custodian at the expense of the party causing them to be produced.

Upon reasonable request of a party, X-rays in the possession of, or subject to the control of, an adverse party or lien claimant shall be made available for examination by the requesting party or persons designated by that party at a time or place convenient to the persons to make the examination

WCAB is a little behind
(nothing expressly about MRIs, CT scans)



www.bradfordbarthel.com

149

Why subpoena x-rays, MRIs, CT scans, etc?



have own physician analyze originals
(often subject to more than one interpretation)



www.bradfordbarthel.com

150

CCR 10322:



The records, files and proceedings of the [WCAB] shall not be taken from its offices either on informal request or in response to a subpoena duces tecum or any order issued out of any other court or tribunal. Certified copies of portions of the records desired by litigants shall be delivered upon payment of fees as provided in the Rules of the Administrative Director



www.bradfordbarthel.com

151

Witness has left town (and CA)!?!?



You've got a problem!

CCP "A witness, including a witness specified in subdivision (b) of Section 1987, is not obliged to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service."

H: given that jurisdictional reach of a notice to attend is explicitly limited by CCP 1989, such a notice is *void on its face*; no objection is required.

Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London, England (1995) 34 Cal. App. 4th 554



www.bradfordbarthel.com

152

U.S. Constitution?!?

Yep!

Shemet v. Perry, 2018 Cal. Wrk. Comp. P.D. LEXIS
22

F:

- EE at trial pled the 5th
- ER claimed denial of due process
- WCJ found aoe/coe based on QME

I: denial at due process?

H: no!?!?!?



www.bradfordbarthel.com

153

Shemet v. Perry

R: ER failed to exercise diligence in pursuing its rights

1. didn't make offer of proof at trial as to what questions it sought to ask (but was prevented)
2. didn't claim was prevented from cross-examining EE during depo re allegedly illegal activities
3. Didn't offer EE's depo into evidence at trial

NOR

4. attempted to have them introduced once EE invoked the 5th



www.bradfordbarthel.com

154

Shemet v. Perry

Does Shemet mean ERs can't successfully claim denial of due process when 5th is invoked?

Probably not...ER did a terrible job



155

Do you have a right to cross-examine

ALL
adverse witnesses?

You bet!

WCAB can even compel doctor to
appear/participate

Lineback v. WCAB (Williams) (2001) 66 CCC 772
(writ denied)



www.bradfordbarthel.com

156

Don't blow it!

You may have a right to depose
BUT
not always entitled to do so!?!?
HUH?

Entitlement can be waived
Ex failure to cross-ex prior to hearing



Heggin v. WCAB (1971) 36 CCC 93, 103

www.bradfordbarthel.com

157

BELIEVE IT OR NOT...

IW doesn't have an absolute right to attend doctor depo (esp psych)

Wanna guess why?

Potential harm to...

- Applicant
- Doctor
- Defense Attorney

Volk v. Little Company of Mary Hospital, 2016
Cal. Wrk. Comp. P.D. LEXIS 411



www.bradfordbarthel.com

158

REFUSAL to allow doctor depo VERY RARE

Deposing consults

- PTP/QME/AME relied on consult?
- Party have a right to cross-examine consult?

H: no

R: no denial of due process

Aguilar v. WCAB (2005) 70 CCC 885 (writ denied)



www.bradfordbarthel.com

159

Denying depos of consults...

Problem with LC 4663(c)?

(c) ...If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The **physician shall then consult with other physicians** or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.



www.bradfordbarthel.com

160

Doctor Depo Fee

- ML fee schedule (see CCR 9795)
- PTP/QME = \$250/hr for "medical-legal testimony"
- AME=\$250 x 1.25 = \$312.50/hr (minimum = one hour)

PLUS

- "reasonable" prep time (everyone preps for an hour!?!?!)
- "reasonable" travel
- itemized "reasonable & necessary time"



www.bradfordbarthel.com

161

Show me the money...when?



CCR 10536: "Medical examiners **appointed by the [WCAB] or agreed to by the parties** when subpoenaed for cross-examination at the [WCAB] or deposition shall be paid by the party requiring the attendance of the witness in accordance with the Rules of the [AD]. **Failure to serve the subpoena and tender the fee in advance based on the estimated time of the trial or deposition may be treated by the Workers' Compensation Appeals Board as a waiver** of the right to examine the witness. Service and payment of the fee may be made by mail if the witness so agrees.



www.bradfordbarthel.com

162

CCR 10536 = docs "appointed" or "agreed to by...parties" ONLY

Rodas

Pre-payment not req'd pre- IW's depo of def QME

Rodas v. AG Facilities Operations, 2007 Cal. Wrk.
Comp. P.D. LEXIS 14



www.bradfordbarthel.com

163

Pre-payment?
(Best with subpoena)



**CCPC § 2025.270. Date of oral deposition;
Motion to shorten or extend time or for stay**

(a) An oral deposition shall be scheduled for a date at least 10 days after service of the deposition notice.



www.bradfordbarthel.com

164

Pre-payment? (Best with subpoena)

(d) On motion or ex parte application of any party or deponent, for good cause shown, **the court may shorten or extend the time for scheduling a deposition, or may stay its taking until the determination of a motion for a protective order** under Section 2025.420.



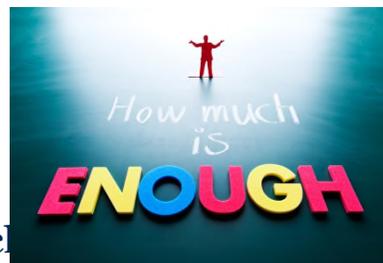
www.bradfordbarthel.com

165

Show me the (pre-payment) money...

How much?

common: 1 hr prep
1 hr testimony
2 hours



(But bring a check)



www.bradfordbarthel.com

166

Got a fee dispute?

May have problems!

F: PTP not cross-ex because of fee dispute

I: PTP report excluded?

H: no

R:

EE not involved in dispute exclusion; would "penalize" EE



www.bradfordbarthel.com

167

POINTER: if fee dispute:

1. doctor should accept sum offered and file lien,
OR
2. ER should pay requested fee; reserve right to credit

Kent H. Landsberg Co. v. WCAB (Esparza) (1999)
64 CCC 454 (writ denied)



www.bradfordbarthel.com

168

How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

Confirm you have
a. every report



169

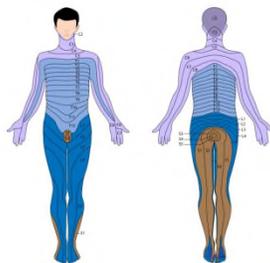
How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

Confirm you have
b. every pain chart

Ex. Does IW claim entire leg/arm hurts from radiating pain?



170

How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

c. every ADL list

Table 1-2 Activities of Daily Living Commonly Measured in Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL) Scales ^{4,7}

Activity	Example
Self-care, personal hygiene	Urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating
Communication	Writing, typing, seeing, hearing, speaking
Physical activity	Standing, sitting, reclining, walking, climbing stairs
Sensory function	Hearing, seeing, tactile feeling, tasting, smelling
Nonspecialized hand activities	Grasping, lifting, tactile discrimination
Travel	Riding, driving, flying
Sexual function	Orgasm, ejaculation, lubrication, erection
Sleep	Restful, nocturnal sleep pattern



171

How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

d. every EPWORTH test

Epworth Sleepiness Scale (ESS)

Situation	Chance of dozing (0-3)			
Sitting and reading	0	1	2	3
Watching television	0	1	2	3
Sitting inactive in a public place—for example, a theater or meeting	0	1	2	3
As a passenger in a car for an hour without a break	0	1	2	3
Lying down to rest in the afternoon	0	1	2	3
Sitting and talking to someone	0	1	2	3
Sitting quietly after lunch (when you've had no alcohol)	0	1	2	3
In a car, while stopped in traffic	0	1	2	3
Total Score				

0 = would never doze 1 = slight chance of dozing 2 = moderate chance of dozing 3 = high chance of dozing
Johns MW. Sleep. 1991;14:540.



172

How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

e. every ETC, ETC, ETC



173

Let me tell you...



...a workers' compensation 'war' story!



174

Step #2: Determine your objectives

What do you hope to achieve?



Clarify doctor's report(s)?

Why not request supplemental?



175

Step #2: Determine your objectives

Undercut doctor's report(s)?

NOW you're talking!

EVERY Inconsistency

EVERY Illogical step

EVERY Refusal to "follow the rules"*

Etc...

Increases chances of reports being rendered unreliable by WCJ

* "[M]edical report(s) predicated upon an incorrect legal theory...do not constitute [substantial] evidence..."

(*Zemke v. WCAB*, 68 Cal. 2d 794)



176

Step #3: Compare reports, charts, lists

- Are doctor's claims internally consistent?
- Are doctor's reports consistent w/IW's claims?



177

STEP #3 (con't)

Compare IW's depo testimony re symptoms to
doctor's report



178

Can we stipulate to the doctor's expertise...

NO!
(expect less & less stipulations)



179

STEP #4

Doctor wants to *Almaraz/Guzman* you?

a. Challenge Expertise

Evidence Code 720(a) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert..."



180

STEP #4

- What is the extent of the doctor's
 - *AMA *Guides* training?
 - **Almaraz/Guzman* training?
- How many M-L reports written?
- How many involving A/G?



181

STEP #4

Doctor wants to *Almaraz/Guzman* you?

a) Why didn't the doctor use the traditional part(s) of the *Guides*?

“Given the comprehensiveness of precision attendant in the chapters pertaining to each system, in most cases a WCJ will credit ratings based strictly on the chapter devoted to the body part, region, or system affected.” (p. 20, 6th DCA)



182

The BEST depo ever?

CANCELLED

The one that never occurs



183

Improve your chances of getting what you want without a depo



184

Medical Miracles! (How to cut-off TD)



(AKA Do doctors like having depo taken)



www.bradfordbarthel.com

185

DEPOSITION OF PHYSICIANS



CCR 10606(a): "The [WCAB] favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a trial except upon a showing of good cause."

CCR 10727 WCAB "favors cross-examination of medical witnesses by way of deposition."



www.bradfordbarthel.com

186

PTP MMI

OR
QME
OR
AME

is calendared...when do you schedule doctor's
depo?



www.bradfordbarthel.com

187

What about UR docs?

NO!

R:

1. no legal basis for supp. report by UR doc,
including depo¹
2. option = IMR

¹*Aguilar v. WCAB* (2005) 70 CCC 885 (writ
denied)



www.bradfordbarthel.com

188

DR'S DEPOSITION FEE



expert opinion?

See LC 4621 (re payment of ML expenses)

percipient witness

no expert opinion fee

Ex: doc witnessed accident

Ex. doc deposed re medical history as relayed by IW

=

not expert opinion

=

no expert fee

=

only standard \$35 daily fee

Brun v. Bailey (Hanley) (1994) 27 Cal. App. 4th 641



www.bradfordbarthel.com

189

DR'S DEPOSITION FEE

Even one medical opinion asked

=

expert fee for entire depo

Paula Insurance Co. v. WCAB (Parham, Bracamontes) (1993) 58 CCC 273 (writ denied)



www.bradfordbarthel.com

190

Depo at WCAB?

Yep...but very rarely (great way to tick off WCJ)

F: disputes re privilege at depo

I: what to do?

H: try to behave

I: can't behave?

H: file motion to set depo before WCJ

Morales v. Travelers Ins. Co. (2006) 34 CWCR
230 (panel decision)



www.bradfordbarthel.com

191

WCAB controls depositions

Got a discovery dispute?

Wanna compel an answer? Get a protective order?

Ask a WCJ

WCAB can compel

- rep'd IW to attend/participate
- unrep'd IW to attend/participate
- produce id
- nonparty depo (think doctor, QRR)



www.bradfordbarthel.com

192

NOT EVERY ANSWER CAN BE COMPELLED



www.bradfordbarthel.com

193

Claiming the 5th...

Camacho v. Pirate Staffing,
2017 Cal. Wrk. Comp. P.D. LEXIS 531

F:

- ER asked questions re SS#
- AA asserted 5th (priv against self-incrim)
- WCJ drew adverse inference

I: What are the consequences of claiming the 5th?



www.bradfordbarthel.com

194

Camacho v. Pirate Staffing

H: no negative inference (WCJ erred)



R:

1. CCR 10400(h): "Disclosure of the [EE's ss#] is voluntary

Social Security numbers are used solely for identification and verification purposes in order to administer the workers' compensation system.

[SS#] will not be disclosed, made available, or otherwise used for purposes other than those specified, except with the consent of the applicant, or as permitted or required by statute, regulation, or judicial order."



www.bradfordbarthel.com

195

Camacho v. Pirate Staffing

R:

3. ARE YOU READY FOR THIS????

working under different SS# did not reflect on EE's

- credibility
- legitimacy of claim



www.bradfordbarthel.com

196

WCJ gets into the weeds

(if necessary...)

- provide specific guidelines for depo
 - Ex. order avoid of "undue interruption"
 - Ex. order opposing party to wait until cross-ex is complete to ask question
 - Ex. issue an order quashing a noticed deposition



www.bradfordbarthel.com

197

WCJ can't hamstring folks

F:

- psych claim
- non-industrial domestic abuse
- EE wanted to avoid "unnecessary and prolonged emotional trauma"

I: can WCJ limit ER to 50 questions?

H: no

R: psyche is in issue making domestic abuse relevant re causation and apportionment



BUT...

www.bradfordbarthel.com

198

Don't forget CCP 2025.420

- a. Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order...
- b. The court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from **unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.**



www.bradfordbarthel.com

199

Must YOU agree to depo?

- F:
- Def refused to permit adjuster to be deposed after MSC
 - WCJ ordered adjuster appear at hearing
- H: removal granted
- R: WCJ has power to order appearance
- BUT
- H: shouldn't be the "general rule" for a penalty issue
- R: keeps adjuster from other files...to detriment of other EEs

Ward v. State of Calif., Calif. Youth Authority (1996) 24 CWCR 176



www.bradfordbarthel.com

200

Don't depend on it...

F: petition for penalties
 petition to compel depositions of two adjusters
 I: motion to quash ok?
 H: no
 R: EE entitled to discovery
 "inconvenience", "attorneys' fees", "costs" do

NOT =
 "substantial prejudice or irreparable injury"

Bishop v. Schindler Elevator Corp., 2007 Cal. Wrk. Comp.
 P.D. LEXIS 187



www.bradfordbarthel.com

201

Need an order to compel?

Do a "walk-through":

1. file petition and
2. all supporting docs
3. directly with WCJ
4. at time/day of walk-through
5. at appearance file proof of service on

IW

AA

all defendants



www.bradfordbarthel.com

202

Need an order to compel? (con't)

6. WCJ issues order that **MUST** include self-destruct if objection issues w/in 10 days of service



www.bradfordbarthel.com

203

Want another bite at the apple?

Typical: unable to complete
 parties stip to be completed later
 Depo was concluded?
 no one served w/depo notice may
 take subsequent depo

Only option?

- (a) get consent (pretty please), or
- (b) court order

HOW?

- Be charming or
- "good cause"



www.bradfordbarthel.com

204

What's "good cause"?

it depends

(don't you love it!?)



www.bradfordbarthel.com

205

F:

- 3 ERs
- injury aoe/coe after original

H: good cause to depose re employment,
injuries subsequent to first depo

R: may be relevant to

- PD
- apportionment



www.bradfordbarthel.com

206

F: EE claimed additional body parts after depo
 H: good cause

RULE OF THUMB: good cause found where ER
 wouldn't have had opportunity to question EE
 about an issue(s) in first depo



www.bradfordbarthel.com

207

Contra

F: depo
 obtained surveillance
 I: good cause?
 H: no
 R: no "substantial prejudice" or "irreparable
 harm"

(hint: send to doctor; use at trial)



www.bradfordbarthel.com

208

F: depo completed 4 years prior

- many questions were left for EE to "fill in the blanks" re: contribution (never did so)
- rather than timely submitting a motion to compel within 60 days of the depo (C.C.P., § 2025.480.), ER sat on its rights
- noticed second depo
- AA filed motion to quash



www.bradfordbarthel.com

209

H: no good cause; sanctions
 R: per CCP 2019.030(c): "the court shall impose a monetary sanction against a party or attorney who unsuccessfully opposes a motion for a protective order"

ER had alternatives (subpoenas, medical reports)

EXPENSIVE lesson:

- costs and attorney's fees up to \$ 15,610.00
- sanctions up to \$ 2,500.00

Weilmann v. United Temporary Services, 2012 Cal. Wrk. Comp. P.D. LEXIS 163



www.bradfordbarthel.com

210

F: post depo, ER wanted info re "current medical condition"

H: good cause (but limited to that issue)

Zirkle v. United Parcel Service, 2013 Cal. Wrk. Comp. P.D. LEXIS 527.



www.bradfordbarthel.com

211

Already taken AME/QME depo?

Want another?

If doctor has changed mind...

OR

added a material change to the matter..

Feel free

(definitely "good cause")
(but do need "good cause")



www.bradfordbarthel.com

212

- F: EE & ER noticed depo 6 wks apart
1st depo (EE's) took place
ER "reserved the right" to a 2nd
- I: good cause?
- H: no
- R: both parties were given (and used) opportunity
to complete questioning at 1st depo

Canepa v. Golden Gate Canyon Construction, 2012
Cal. Wrk. Comp. P.D. LEXIS 58.



www.bradfordbarthel.com

213

- F:
- no depo b/c EE unable to find the AME after 1st
depo to schedule 2nd
- I: report still admissible?
- H: yes
- R:
- no proof 2nd would be of value
 - 1st depo was "concluded", not "adjourned"
(words matter)

Marquez v. WCAB (1998) 63 CCC 1178 (writ denied)



www.bradfordbarthel.com

214

- F: doctor found no aoe/coe
depo proceeded
post-depo, EE claimed unable to complete depo
b/c doctor retired
- I: 2nd depo allowed? ("good cause"?)
- H: no
- R: depo took longer (4.2 hours over several days)
than needed b/c of AA's:
- actions
 - inactions
- no evidence doctor would change mind



www.bradfordbarthel.com

215

Where do we stick the depo transcript?

CCP 2025.620:

- depo can be admitted at trial, or at any other hearing in the action
- part or all of a deposition to be used against any party who was present or represented at the depo



www.bradfordbarthel.com

216

CCP 2025.620(a)

- transcript can be used at trial for the purpose of
 1. contradicting of the deponent as a witness,
 2. impeaching the testimony of the deponent as a witness, or
 3. "for any other purpose permitted by the Evidence Code"



www.bradfordbarthel.com

217

How Much Is A CAAA Member Really Worth?

AA says,

"Show me the money"



218

Pre-SB 899/863 = lots of dough

PD based on subjectives...?
...work restrictions...?



Cha-ching

Penalties = 10% of entire species...?

Cha-ching

Fees for simple VR work...?

Cha-ching



www.bradfordbarthel.com

219

Things have changed!

How to make up the difference...?



LC 5710!!!



www.bradfordbarthel.com

220

How much should you pay?

THE LAW...

LC 5710(b)(4) says:

(b) Where the employer or insurance carrier requests a deposition to be taken of an ***injured employee, or any person claiming benefits as a dependent*** of an injured employee, the deponent is entitled to receive in addition to all other benefits... (4) A ***reasonable*** allowance for ***attorney's fees*** for the deponent, ***if represented by an attorney*** licensed by the State Bar of this state. ***The fee shall be discretionary with, and, if allowed, shall be set by, the appeals board,*** but shall be paid by the employer or his or her insurer.



www.bradfordbarthel.com

221

"reasonable...attorney's fees"

What does "reasonable" mean?

What's "reasonable" in your mind?

Bet CAAA disagrees!



www.bradfordbarthel.com

222

Be careful:



"Attorney Fee Guidelines & Recommendations"
created by local:

- AAs (who have one thing in mind)
- DAs (who do NOT represent you)
- WCJs (based on generalities)

Good starting point...but NOTHING more!



www.bradfordbarthel.com

223

"Attorney Fee Guidelines & Recommendations"

Amount recommend will likely be allowed, if:

1. AA requests
2. Defense doesn't object



www.bradfordbarthel.com

224

"Attorney Fee Guidelines & Recommendations"

Which Boards...,?

Most!



Sacramento, San Francisco, San Diego,
Salinas....etc.



www.bradfordbarthel.com

225

"Attorney Fee Guidelines & Recommendations"

Need a copy?

Go to WCAB District Office

Google?



Locates **TWO:** Salinas 5 years old!
SFO 5 years old!



www.bradfordbarthel.com

226

Fresh out of law school = \$300!?!?

(Maybe I should do AA work...NOT!)



www.bradfordbarthel.com

227

Specialist?



- min 5 yrs "substantially involved" in w/c
- 100 non-doctor depositions and/or PTC and/or Petitions for Removal
- 20 trials
- 5 Recons and/or Answers to Recons and/or DCA Petitions and/or DCA Answers
- 10 doc cross-ex
- Plus continuing ed.

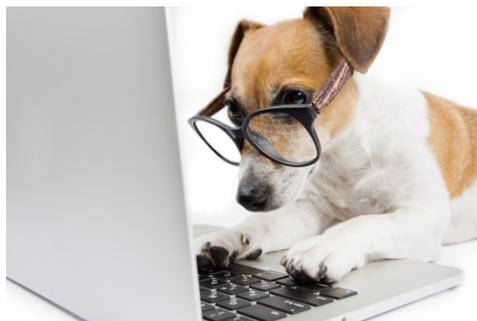


www.bradfordbarthel.com

228

How much experience does AA have?

1. Ask
2. <http://www.calbar.ca.gov/>



229

THE STATE BAR OF CALIFORNIA
Tuesday, November 3, 2015

- ATTORNEYS
- PUBLIC
- FUTURE LAWYERS
- ABOUT US

QUICKLINKS

Consumer Information

How Can I Find and Hire the Right Lawyer?

Will Form

FADS

State Bar Overview

Home > Public > Attorney Search > Attorney Profile

ATTORNEY SEARCH

Donald Ralph Barthel - #153154

Current Status: Active

This member is active and may practice law in California.
See below for more details.

Profile Information

The following information is from the official records of The State Bar of California.

Bar Number: 153154	Address: Bradford & Barthel LLP 2516 River Plaza Dr Sacramento, CA 95833 Map It	Phone Number: (916) 569-0790	Fax Number: (916) 569-0799
County: Sacramento	Undergraduate School: Univ of Michigan; Ann Arbor MI	e-mail: dbarthel@bradfordbarthel.com	
District: District 3	Law School: UCLA SOL; Los Angeles CA		
Sections: Worker's Compensation			

Status History

Effective Date	Status Change
Present	Active
6/10/1991	Admitted to The State Bar of California

Explanation of member status

230

What kind of "evidence" is a "Attorney Fee Guidelines & Recommendation"?

Trick question!



231

WCJ Dennis Stach –after reviewing "evidence" submitted (including "Atty Fee Guidelines")

"...the exhibits...are not only inappropriate under the Labor Code but they are irrelevant immaterial and inadmissible hearsay. They are mere opinions of individuals. Said opinions have not been adopted by administrative directors' office. Each district and each judge has the prerogative of establishing what is reasonable in a way of a fee in the district in which they preside. It is clear under Labor Code Section 5710 the fee is within the discretion of the WCALJ pursuant to Labor Code Section 5710(b) (4) and board rules 10775. It is within the discretion of the WCALJ as to the reasonable fee for services rendered."

3/4/08 Report & Recommendation On Pet for Recon, *Haller v City of Riverside*

Expressly adopting WCJ's reasoning, WCAB den recon



www.bradfordbarthel.com

232

Haller

"irrelevant"?

"immaterial"?



"inadmissible hearsay"?

"mere opinions"?

Now that's great defense language!



www.bradfordbarthel.com

233

Where does *Haller* leave us?

Don't believe "Guidelines & Recommendations"
(but don't ignore them)

Other considerations...?



234

Harvey v Pes Payroll (2007) Opinion & Award of Addt'l Fees

WCAB Comm Caplane (Chairwoman)

-re appropriate fee for app. work attorney's efforts:

"In determining appellate attorneys fees, the Appeals Board considers the attorney's time, effort, care, experience, skill and results in opposing the writ. The Appeals Board also considers the complexity of the issues raised by defendant requiring a response by applicant's attorney, the length of the reply (how many pages), and the number of cases cited. Where the issues are novel, for example, involving the interpretation of a new statute requiring an analysis of legislative intent, or an area of law which has published appellate cases containing holdings in opposition, or a complex issue of law intertwined with a complex factual pattern, or where the issues are numerous, a higher fee is awarded because the case is of "above average complexity."



www.bradfordbarthel.com

235

"effort" and "care"?

Did AA properly object to questions?

Review files?

Read a newspaper...emails?

Fall asleep?

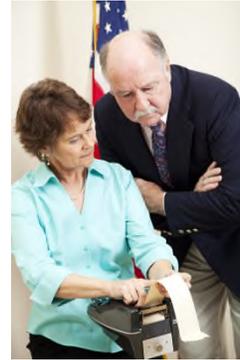


236

Harvey

"Skill and results"?

read transcript for insight!



Harvey

"Complexity of the issues"?



Standard issue back case?
Complicated and convoluted?

It makes a difference!



LC §5801:

when denying Writ of Review filed by def, and DCA finds "frivolous" and "without merit", AA = "reasonable" atty fee for Answer

fees = \$300 ("unquestioned experience")

Stamps v. Kenny-Shea Traylor Frontier Kemper Joint Venture (2010)(Panel)

fees = \$250 (2 year atty; not cert specialist)

Guzman v. Barrett Business Services, Inc (2010) (same Panel as Stamps)



www.bradfordbarthel.com

239

We've got a "reasonable" rate...

NOW WHAT?

Need another multiplier...



www.bradfordbarthel.com

240

MULTIPLIER

Start/stop time

1. Transcript
2. Hearing report



www.bradfordbarthel.com

241

MULTIPLIER

"Reviewing file"?



Heck no!



www.bradfordbarthel.com

242

MULTIPLIER

Client "prep time"

1. Ask IW under oath

2. 30 minutes?

Ok if IW confirms

3. 60 minutes?

Ok if: (a) IW confirms

(b) complicated file/sophisticated issues

4. Longer?

AA: You got some 'splainin' to do!



www.bradfordbarthel.com

243

Travel time?

Some...but remember:

LC 5710(b)(4) provides a "**reasonable** allowance for **attorney's fees**"

AA = STK based

Defense sets depo in SAC (1 hour trip)

Reasonable?

AA = LA based; IW injured in SFO

Reasonable?

Ask?

Why this AA?

No qualified AAs closer?



244

Review 5710 order (immediately)

Timely object, if appropriate



When?

Read order



www.bradfordbarthel.com

245

Check list:

1. Consider
 - "Atty Fee Guidelines"
 - Does AA meet requirements?
 - Billing higher/lower/same?
2. AA's qualifications:
 - Years exp (workers comp based)?
 - Specialist?
3. "effort" and "care" shown?
4. "skill and results" demonstrated?
5. "complexity of the issues"



www.bradfordbarthel.com

246

"STIPULATE" to rate at depo?

Heck no!
(don't know what will happen)

Agree or won't let depo proceed?

SANCTIONS!



247

Worth the fight?

How much "fat" is too much?



Time to do some math



www.bradfordbarthel.com

248

Worth the fight?

Consider:



1. Amt of overcharge
2. Cost of objection (don't calculate hearing)
3. Relationship with AA
4. Bargaining chip



www.bradfordbarthel.com

249

Atty fees for depo:

IW not signing transcript?

No matter: PAY!

Lett v. L.A.C.M.T.A. (2004) 69 CCC 250 (writ denied)
(signif panel dec)

NO aoe/coe finding?

No matter: PAY!

Mitchell v. Golden Eagle Insurance (1995) 60 CCC 205, 210
(*en banc*)



www.bradfordbarthel.com

250



fraud?

no atty fee...maybe pay, maybe not!

Mitchell

H:

1. due process issue to order atty fee w/out opportunity to be heard if fraud is alleged
2. fees deferred until fraud issue resolved
3. same test as ML



www.bradfordbarthel.com

251



Donald Barthel, Esq.
Bradford & Barthel, LLP
2518 River Plaza Drive
Sacramento, CA 95833
(916) 569-0790
dbarthel@bradfordbarthel.com



www.bradfordbarthel.com

252