

Discovery (Part II)

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Before we get started...

- To control background noise, all attendees muted.
 - Access PowerPoint: www.bradfordbarthel.com > Education > Upcoming Webinars
 - We will be recording today's presentation; video will be posted to our website & YouTube Channel.
 - We encourage questions which can be submitted through GoToWebinar Panel.
- Certificates will be emailed w/in 24 hours.



Statements ordered disclosed?

Disclose!
(but when do you do it?)



Easy question...unclear answer



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HOLDING DEPO HOSTAGE?

AA refuses depo until DA provides:

- a. Docs
- b. Investigative reports
- c. W statements

civil court = improper

w/c = gray area



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

H:
IW entitled to own recorded statement before his
depo could proceed



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*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



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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



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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



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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."



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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



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*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



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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."



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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).



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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



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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!



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"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)



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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**.



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

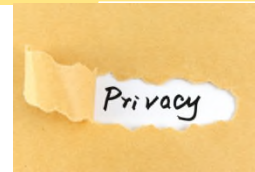
LC 5813. (a) The workers' compensation referee or appeals board may order a party, the party's attorney, or both, to pay any **reasonable expenses, including attorney's fees and costs**, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause 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.



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"



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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)



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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



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"But I feel intimidated..."

TOUGH LUCK!



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



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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



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"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



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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



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

Witness: All my autopsies are performed on dead people.



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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)



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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



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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



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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"!



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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



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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

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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:



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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?!?!)



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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?



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Who does this apply to?

ALL parties



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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)



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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



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We see subpoenas (or the results of subpoenas)

every week

SUBPOENA

(the)
(res)
State:
IE ORDERED TO: (select one box)
Attend court to give evidence (see Part A)
Attend court to produce documents (see Part B)

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!



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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*)



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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?



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Got a "hostile witness"?

Be sure to subpoena!

Should you subpoena doctor
to depo?

What do YOU think?



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

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



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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



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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



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Someone refusing to obey subpoena?



Contempt time (LC 132)



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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!)



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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



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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)



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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



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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



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How it normally works:

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



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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)



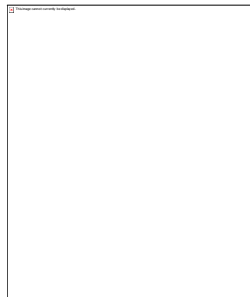
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Bet you didn't know this...

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

never seen that in 25 years
Have you?



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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



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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



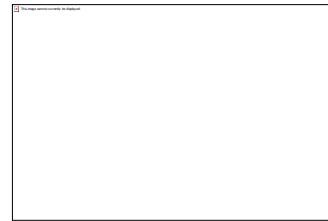
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GC 68097.1(a):establishes the requirements for service of a subpoena to

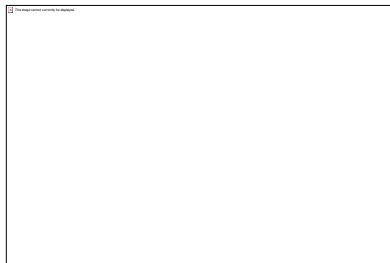
- secure the appearance of a peace officer, firefighter, state employee regarding an event or transaction that the subpoenaed peace officer "perceived or investigated" in the course of duty

Think intoxication defense
Or
Felony rule



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"



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."



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!



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

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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)



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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."



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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*)



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Been served subpoena?

Motion to Quash!
Simply don't want to comply?
WHAT COULD POSSIBLY GO WRONG?

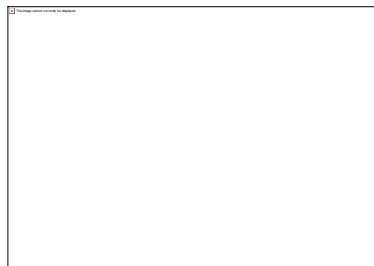
let me introduce you to:
SANCTIONS!



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Been served subpoena? (con't)

WCAB can report to Superior Court the
failure/refusal
&
request an order compelling to obey



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Court must enter order:

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

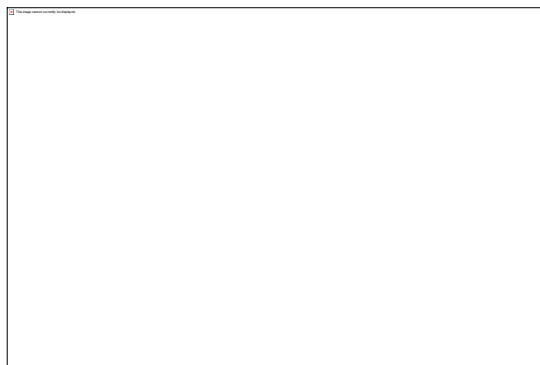


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Still failing to obey?

Here comes "contempt" motion



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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



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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



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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)

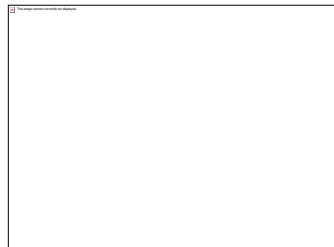
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Who uses paper anymore?

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

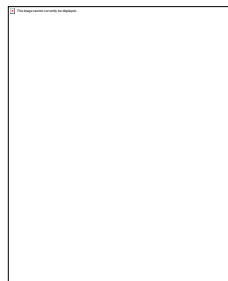


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Offering into evidence

- legible print?
- film?
- electronic recording?



WCAB may require paper reproductions

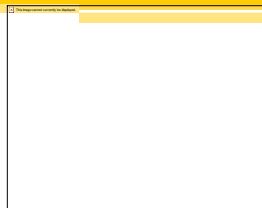


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§10618. X-Rays

Want originals?
You got 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

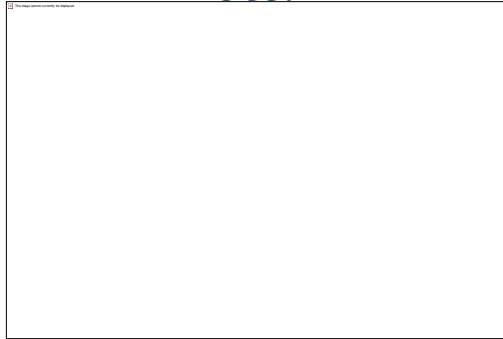
WCAB is a little behind
(nothing expressly about MRIs, CT scans)



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



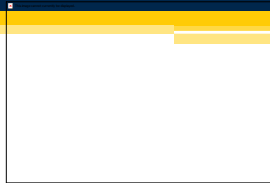
have own physician analyze originals
(often subject to more than one interpretation)



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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



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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



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U.S. Constitution?!?

Yep!

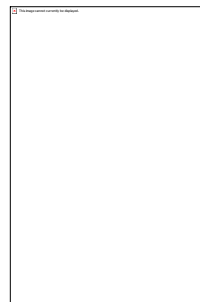
Shemet v. Perry, 2018 Cal. Wrk. Comp. P.D. LEXIS 22

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!?!?!?



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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



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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



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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)



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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

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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



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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)



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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.



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- Certificates will be emailed w/in 24 hours.
- Access today's PPT at www.bradfordbarthel.com
- Did you submit a question we did not have time to answer? A response will be emailed.
- A video recording of today's Webinar will be posted on our website.
- Don't forget to register for our next Webinar on **August 1, 2019 at 12pm with Don Barthel on Discovery (Part III).**

