

Discovery (Part III)

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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.



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"



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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.



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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



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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.



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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.



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

How much?

common: 1 hr prep
1 hr testimony
2 hours



(But bring a checkbook...)



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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



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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)



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How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

Confirm you have

a. every report



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How to prepare to TAKE a doctor deposition

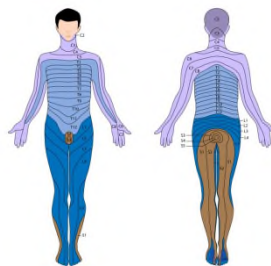
Step #1: subpoena entire file

Why?

Confirm you have

b. every pain chart

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



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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



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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.



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How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

e. every ETC, ETC, ETC



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Let me tell you...



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



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Step #2: Determine your objectives

What do you hope to achieve?



Clarify doctor's report(s)?

Why not request supplemental?



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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)



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Step #3: Compare reports, charts, lists



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



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STEP #3 (con't)

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



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

NO!
(expect less & less stipulations)



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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..."



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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?



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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)



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The BEST depo ever?

CANCELLED

The one that never occurs



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Improve your chances of getting what you want without a depo



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Medical Miracles! (How to cut-off TD)



(AKA Do doctors like having depo taken)



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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."



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PTP MMI

OR
QME
OR
AME

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



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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)



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DR'S DEPOSITION FEE

**ASK
AN
EXPERT!**

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

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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)



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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)



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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)



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NOT EVERY ANSWER CAN BE COMPELLED



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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?



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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."



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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



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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



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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...

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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.**



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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



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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



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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



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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



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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"



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What's "good cause"?



it depends
(don't you love it!?)



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F:

- 3 ERs
- injury aoe/coe after original depo

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

R: may be relevant to

- PD
- apportionment



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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



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Contra

F: depo
obtained surveillance

I: good cause?

H: no

R: no "substantial prejudice" or "irreparable harm"



(hint: send to doctor; use at trial)



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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



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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



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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.



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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")



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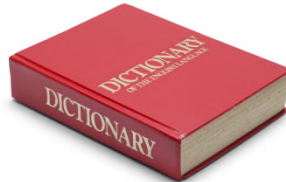
- F: EE & ER noticed depo 6 wks apart
1st depo (EE's) took place
ER "reserved the right" to a 2nd
- I: good cause?
- H: no
- R: both parties were given (and used) opportunity
to complete questioning at 1st depo

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



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- 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)



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- 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



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



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"



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How Much Is A CAAA Member Really Worth?

AA says,

"Show me the money"



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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



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Things have changed!

How to make up the difference...?



LC 5710!!!



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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.



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"reasonable...attorney's fees"

What does "reasonable" mean?

What's "reasonable" in your mind?

Bet CAAA disagrees!



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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!



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"Attorney Fee Guidelines & Recommendations"

Amount recommend will likely be allowed, if:

1. AA requests
2. Defense doesn't object



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"Attorney Fee Guidelines & Recommendations"

Which Boards...,?

Most!



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



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"Attorney Fee Guidelines & Recommendations"

Need a copy?

Go to WCAB District Office

Google?



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



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

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



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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.



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How much experience does AA have?

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



Tuesday, November 3, 2015

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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.

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Sections:	Worker's Compensation	Law School:	UCLA SOL; Los Angeles CA

Status History

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

Explanation of member status

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

Trick question!



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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



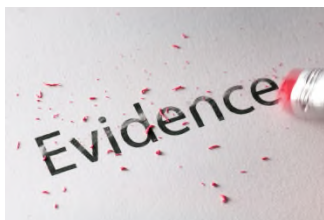
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Haller

"irrelevant"?

"immaterial"?



"inadmissible hearsay"?

"mere opinions"?

Now that's great defense language!



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Where does *Haller* leave us?

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

Other considerations...?



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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."



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"effort" and "care"?

Did AA properly object to questions?

Review files?

Read a newspaper...emails?

Fall asleep?



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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)



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

NOW WHAT?

Need another multiplier...



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MULTIPLIER

Start/stop time

1. Transcript
2. Hearing report



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MULTIPLIER

"Reviewing file"?



Heck no!



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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!



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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?



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Review 5710 order (immediately)

Timely object, if appropriate



When?

Read order



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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"



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"STIPULATE" to rate at depo?

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

Agree or won't let depo proceed?

SANCTIONS!



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Worth the fight?

How much "fat" is too much?



Time to do some math



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Worth the fight?

Consider:



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



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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*)



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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



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DEPOS



CCP 2025.620(b): "[a]n adverse party may use for any purpose, a deposition of a party to the action."
 "It is not ground for objection to the use of a deposition of a party....by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing."

Does this apply to W/C?

not clear



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H: WCAB refused admission of IW's transcript

R: offering party failed to show it exercised
"reasonable diligence" to procure IW's
attendance at trial

Fred F. Hafezi v. WCAB (Mejia) (1996) 61 CCC 708



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Contra



F:

- IW not listed as W at MSC
- WCJ excluded transcript
- transcript listed by both parties
- H: admissible

R: b/c transcript listed, couldn't claim "surprise or prejudice"
when offered into evidence

- transcript admissible whether W listed, available to testify or was subpoenaed to trial

Chino Valley Medical Center v. WCAB (Hanna) (2015) 80 CCC 1226



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But transcripts are hearsay, aren't they?

(out of court statements offered to prove the truth of the statement)



Why admit hearsay?

1. CCP is not mandatory in w/c
2. WCJ may admit evidence that is "best calculated to ascertain the substantial rights of the parties" (LC 5708)



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F:

- W listed by both parties
- ER objected to transcript:
 - IW showed no effort to have
 - W appear at trial

H: admitted

R: testimony needed for S&W claim

- need transcript to "develop the record"
- not bound by CCP
- LC 5798: may make inquiry "best calculated to ascertain the substantial rights of parties"

Linens N' Things v. WCAB (Wiseman) (2001) 66 CCC 281 (writ denied)



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Morales v. WCAB (1997) 62 CCC 1305 (writ denied)

F:

- transcript of IW, taken by 3rd party, not verified (not original; not certified)
- WCJ, relying on transcript, found no employment

I: photocopy admissible?

H: yes

R: *IW rep'd during depo

*IW had access to transcript



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Collins v. Superior Court of Ventura County (2001) (en banc) 66 CCC 706

H: transcripts taken in EE's civil claim

=

admissible at WCAB to determine

ER's credit rights

(so long as party against whom it is offered has
"opportunity to cross-examine the witness before a
WCJ")



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Being Naughty at Depo

Lied under oath?

IC 1871.4:
 fraud="making a knowingly false or
 or fraudulent material statement" at
 depo



People v. Post (2001) 66 CCC 1503



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People v. Post (2001) 66 CCC 1503

PC 118.

(a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

Needed: EE signs & delivers transcript (not need for fraud)

Transcript not signed?

Go for attempted fraud



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Transcript not signed?

STILL admissible

Collins v. Superior Court of Ventura County (2001) 66
CCC 706, 709

FUN FACT

"material false statements at deposition"

=

grounds for termination



105

Conscience bothering you?

F:

- IW lied re prior injuries
- admitted to lie

H: no penalty

R: ER had time to investigate post=admission

U.S. Fire Insurance Co. v. WCAB (Urzua) (2007)
72 CCC 869 (writ denied)



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106

Lights!

Camera!



Action!

Ok to videotape?

ABSOLUTELY
(maybe!)



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107

Mackentire v. Fremont Comp. Ins. Co.(1999) 27 CWCR 189 (panel decision)

F:

- EE appeared at depo but refused video
- ER filed petition to compel (relying on CCP)

H: not

R:

- CCP not applicable
- ER must show good cause
- failed to show irreparable harm
- if videotaping were common, right to "expeditious and unencumbered proceeds" = defeated



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Reed v. 99 Cent Only Stores, Inc. 2011 Cal. Wrk. Comp. P.D. LEXIS 136

Things getting better



F:

- ER depo notice said intended to "videotape/audiotape"
- EE refused; argued no "good cause" shown

H: WCJ ordered attendance at videotaped depo

H: petition for removal denied

R:

LC 5710(a) depositions "to be taken in the manner prescribed by law for like deposition in civil actions"



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Reed v. 99 Cent Only Stores, Inc.



CCP 2025.330(c) states: "The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods."

- "good cause" not req'd by LC 5710/CCP 2025.330
 - videotape makes "a record of the description of the event that cannot be possibly made by a mere stenographic deposition."
 - it allows "the recording of nonverbal as well as verbal responses by a deponent"
 - permits "the recording of both the spoken word and gestures and demeanor of a witness."
 - no improper motive by ER shown
 - no evidence of "unwarranted annoyance, embarrassment or oppression", nor "significant harm or prejudice"
- nothing suggested video would take longer



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What's the rule?

Who knows?!?

Neither case is binding!



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STRANGE TWIST...



F:

- ER argued AA would be "unnecessarily hostile, offensive and obstructive" at depo #2
- asked that depo be held before WCJ

H: aim camera at AA

R:

- saves WCAB resources
- no prejudice/harm to IW

Gonzalez v. LaserCard Corp.
2015 Cal. Wrk. Comp. P.D. LEXIS 191



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Rodriguez v. Waste Management 2018 Cal. Wrk. Comp. P.D. LEXIS 408

F:

- applicant refused to participate in ML exam unless could record with phone

H: not unreasonable refusal

R: CCP 2032.510(a) "The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination."

EE may select method of recording (ct rptr, audio recording)



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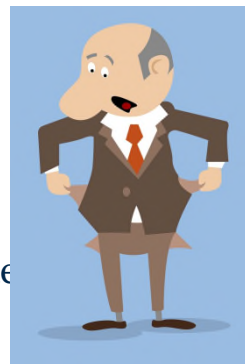
113

Rodriguez v. Waste Management

Don't expect to see too many court reporters at ML exams...

EE bears the cost

R: LC says nothing about court reporter at exam requested by EE



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Suspect

- lies in depo?
- lies to doctor(s)?
- malingering?
- exaggeration?
- undeclared employment?



FILM TIME



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Admissible?

Usually!

Uses?

- Prove fraud
- Ascertain extent of disability



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Showed films?

You've just given WCJ work!

s/he **MUST** summarize in

- Minutes of Hearing
- Summary of Evidence



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CA Constitution = "right to privacy"

NO ABSOLUTE!

NO "reasonable expectation of privacy" for
conditions places at issue in litigation

Can you figure out why?



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The Point?



"right to privacy" doesn't (mostly!):

- prevent taking video
- prevent sharing with doctors



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Duong v. Automobile Club 2014 Cal. Wrk. Comp. P.D. LEXIS 492

F:

EE filmed in

- parking lot
- grocery store



ER wants doctor to review parking lot:

"Invitees and Guests Only: No Trespassing"

&

"Private Property"

store:

"No videotaping, photography, audiotaping anywhere on store premises
without prior consent"

I: violate "right to privacy" (I.e. admissible)?



H: film admissible

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Duong v. Automobile Club

R:

- no code prohibiting PIs from shooting film in violation of post private property owners
- Civil Code 1708.8 ("anti-paparazzi" statute) specifically excepts PIs shooting film due to suspected fraud
- no "reasonable expectation of privacy" where activities are conducted in an open and accessible area within the sight and hearing of
 - the general public, or
 - of customers or visitors to that open and accessible space



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Duong v. Automobile Club

R: location's signs were for the business, not EE

BALANCING EST

right to privacy VS preventing w/c fraud



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Value ("weight") of film determined exclusively by WCAB

Can use to find:

- lack of credibility
- injury not as EE claims
- EE able to RTW



If too short/irrelevant/consistent with EE's claims/testimony...

H: EE –

- uncontradicted
- unimpeached



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credibility impeached

=
"take nothing"?

Nope!



still may use objective evidence (surgical reports),
to make award

Salazar v. WCAB (1997) 62 CCC 711 (writ denied)



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Doctor reviews...

...now what?

Options:

- find activities shown inconsistent w/subjectives
- alter opinion re level of disability
- maintain original opinion

2 or more doctors with different conclusions re film?

WCAB resolves conflict



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Doctor fails to review film



"substantial evidence"?

Yes (if WCJ rules film not inconsistent w/doctor's report)

Alternatively, can assign "regular doctor" (LC 5701)



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Getting films into evidence:

NOT automatically admissible

MUST be "authenticated"

NORMALLY, PI who filmed testifies it accurately depicts what s/he saw

"surveillance films are not ordinarily admitted, unless the operator of the movie camera testifies concerning the manner in which the applicant was observed and relates the technical data pertaining to the taking of the movies."

In re Alleged Contempt of James Buzan and Clifford Sweet, III (1978) 43 CCC 789 (appeals board en banc)



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PI must testify:

- to circumstances surrounding the film
- that evidence accurately depicts his/her observations

"Foundational" facts a must:

F: PI didn't know filming dates gave "impossible estimates for the time elapsed" in the filming

H: inadmissible

R: lack of proper foundation

The Broadway v. WCAB (Nagy) (1985) 50 CCC 383 (writ denied)



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FRUIT OF THE POISONOUS TREE

film not authenticated?

med report relied on film?

=

report inadmissible



129

The Broadway v. WCAB

F:

- AME=unable to compete open labor market
- review sub rosa: AME = films "depicted individual" less significantly disabled
- films not listed at MSC
- films not offered into evidence

I: AME supplemental admissible?

H: no



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The Broadway v. WCAB

R:

1. not substantial evidence
 - not authenticated by AME
 - not authenticated by competent W testimony

2. AME/QME didn't know:
 - when sub rosa was taken
 - whether films are accurate

Community Hospital of Monterey Peninsula v. WCAB
(Bunch) (2011) 77 CCC 91 (writ denied)



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- ER may have doctor review sub rosa without authenticating via evidentiary hearing (but don't rely on this)
- instead, accuracy/authenticity issues should be addressed in discovery process (not hearing)



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- mandatory authentication process before admission at trial does not apply to doctor
- WCJ has discretion re nonmedical info to go to doctor



- if EE has opportunity to depose doctor and cross-exam PI at trial, WCAB more likely to find no "significant prejudice or irreparable harm"



EE not clearly depicted in film?

WCJ can rely on:

- his/her review, and
- PI's testimony

F:

- EE testified not him
- WCJ reviewed; decided it was EE "without a doubt"

H: film admitted

Banuelos v. WCAB (1980) 45 CCC 18



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135

Got a lazy DA?

WATCH OUT!

WCJ may exclude sub rosa if

DA hasn't reviewed

Can you guess why?



Eastman Kodak Co. v. WCAB
(Brinson) (1997) 62 CCC 1591



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TIPS



Try to get multiple days of film

(avoid, "oh, that was a good day. I was horrible the next day after pushing it")

Use one PI (avoids needing multiple Ws to authenticate)

Subpoena PI (and get confirming letter)



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Filming?

Don't be naughty!

Just ask the Supreme Court



Redner v. WCAB (1971) 36 CCC 371

F:

- accepted back
- co-worker of PI claiming to be "Robert Henry" became "friends" with IW; invited to ranch
- got drunk and RH invited IW to go horse riding at party and next day



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Redner

- PI filmed from RH's barn
- ER used to:
 - discontinue TD
 - discontinue treatment
- doctors reviewed = no PD



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Redner

H:

- film not admissible
- reports not admissible

R:

- "fraudulent inducement"
- WCAB cannot rely on evidence in which EE was "deceitfully induced" to perform actions s/he might not otherwise have
- doctors didn't know about conditions under which IW rode



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Think it's bad having evidence excluded?

Watch out for:

- civil fraud action
- trespass claims

"Exclusive remedy rule" ain't going to help!



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When Do You Share the Films?

- discoverable to avoid surprise
- failed to disclose?



142

General Rule: disclose at MSC

HOWEVER

if demanded, must share earlier:

1. after depo, but
2. before QME (or within "reasonable time" post depo)



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F:

- AA made demand for films
- Despite demand, sub rosa provided 5 days pre-MS

H: inadmissible

R: must be provided within a "reasonable time" after demand

Well that clears it up....NOT!



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F:

- film obtained 6 months pre-MSA
- AA sent 4 letters of "continuing demand"
- Sub-rosa served morning of MSA and asked for OTOC for additional discovery

H: inadmissible



R:

- "reasonable time"
- OTOC inconsistent with "objectives of liberal pretrial discovery"

*Monsanto Co. aka Monsanto Co.-Seminis v.
WCAB (McMillin) (2014) 79 CCC 730*



ER doesn't always lose...



F:

- film: 11/14, 11/15, 12/18
- served approx 5 weeks later (11 days pre-MSC)

H: admissible

R: delay not "sufficiently significant"
disclosed pre-MSC



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Additional problems to watch out for



- not complying with order (ex. failure to show EE films at "mutually agreed time")
- "tainting" films

Ex. editing 2 hours to 25 minutes for EE to review
(even though entire tape was available at court for
viewing and for PI to testify about)



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Watch out! Films can also hurt you!

F: WCJ suspicious ER selectively served films

H: ER ordered to serve all sub rosa and daily logs even though it was post-MSA

"While it is true that this WCJ could just exclude the sub rosa films because of the failure to serve and properly designate the films, without ordering the service of same, it does not preclude an order of service upon Applicant as well. Since the issue of permanent disability was raised, it is quite possible that the films may also increase the permanent disability".

Cardenas v. ML Electric Works, Inc.
2016 Cal. Wrk. Comp. P.D. LEXIS 341.



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Take that depo first!

Even if sub rosa has been demanded,

ER may proceed with EE's depo first

"At his deposition, the least that an applicant should be required to do is to state the truth as to his physical abilities, and his duty to state the truth should not depend on whether the defendant has nor [sic] has not observed and made a record of his daily activities."

Interesting aside: ER must disclose existence or nonexistence of films post-EE's depo

Downing v. City of Hayward (1988) 16 CWCR 76



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Failure to disclose sub rosa or med reports

confirming existence...

A couple to ways to view

- revealed a "reasonable time" after EE's depo?
or
(if not)
- disclosed in time to allow EE "reasonable" opportunity to obtain rebuttal evidence

Hurst v. Home Depot (1996) 25 CWCR 22



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CONFLICTS

CCR requiring service of med reports w/in specified time limits

vs.

wish to delay service of films referencing sub rosa

(esp before EE's depo)

H (en banc) NOPE; CCR mandates service

H: DA guilty of contempt

In re Alleged Contempt of American Motorists Insurance Co. and Harold L. Schmidt (1976) 41 CCC 95



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There are panel decisions contra

BUT

Schmidt was en banc
(aka don't chance it!)



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What about timing surveillance release

with ML evaluations?

(aka can sub rosa be w/held until ML exam?)

WCAB goes both ways!



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Espedal v. Grass Valley Police Department 2012 Cal. Wrk. Comp. P.D. LEXIS 123

F:

- sub rosa not produced before PQME exam
- IW deposed twice then seen by PQME
- after PQME report received (but prior to doctor's depo) ER revealed intent to show films to doctor



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Espedal v. Grass Valley Police Department

I: should sub rosa be excluded?

H: yes; excluded from evidence & QME's review

R:

- not necessarily sufficient that film be revealed pre-MSC
- constit requires "accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character"
- delaying EE's receipt of film until post-MSC violates Constit

"We have to recall that trial by ambush is out of vogue. Much of a party's work product is accessible by the other, and the timing of the production is driven by the facts and equities. Not producing sub rosa until after the applicant's deposition serves the purpose of testing the witness's credibility. After that deposition, the sub rosa must be identified and produced if requested."



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Espedal v. Grass Valley Police Department

- CCR 35: must serve sub rosa on EE 20 days before sending them to the QME
- pre-depo sub rosa must be revealed before time for EE to sign transcript expired



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F:

- WCJ excluded film not reviewed by AME
- disclosed at MSC

H: reversed

R:

- relevant to credibility via impeachment
- b/c not reviewed by doctors pre-discovery closure, sub rosa can't be used to measure PD

Kusljagic v. Community Assistance for Retarded & Handicapped, Inc., 2016 Cal. Wrk. Comp. P.D. LEXIS 47



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PI Reports

Sub rosa and accompanying report...must report be disclosed

on demand?

ONE decision on point says,

"YES!"



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- reports obtained prior to DA being hired (or obtained w/out DA's involvement)

=

no privilege

- reports obtained at DA's request

=

“qualified privilege”

HOWEVER...



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1. identifying PI as trial W, and
2. serving video

=

waiver

R: films/reports are "interrelated elements of the same surveillance"

R: PI's reports = "witness statements" (document what PI saw, heard, etc)

THUS
discoverable!

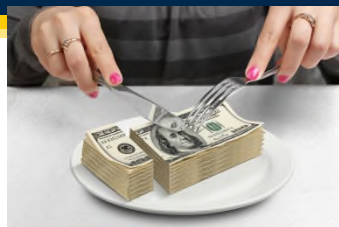
Perez v. Roman Catholic Bishop of San Jose
2017 Cal. Wrk. Comp. P.D. LEXIS 270



"Perhaps you'd like to reconsider that last answer."

161

Film after MSC...?



General Rule: LC 5502(d)(3): MSC cuts off discovery...

"unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."



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DA argument: can't film something pre-MSC that didn't happen until post-MSC

WCAB not crazy about this argument!

TEST: inadmissible unless ER can "provide a specific and detailed offer of proof" as to why similar sub rosa was not

(a) undertaken or (b) disclosed pre-MSC

City of Los Angeles v. WCAB (Dalcour-Martinelli) (1997) 62 CCC 1445



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Not black & white



WCAB sometimes does buy defense argument that activities occurring post-MSC could not have previously been discovered.

"We see no problem with [an insurer's] continuing surveillance of an [injured worker] when [it] feels [the worker] has not been truthful with his or her doctors or at deposition."

"It is reasonable to assume that some [injured workers] may let down their guard after the mandatory settlement conference and perform certain activities which would contradict their deposition testimony, history of injury to physicians or other statements."

Mills v. Republic Indem. Co. of America (1994) 22 CWCR 139



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DCA can be friendly...



F:

- admitted right hand injury
- IW testified: no strength
- wife testified: memory loss, difficulty with self-care, child care, chores
- post-trial film = contradicted testimony (surprise!)



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WCAB H: although IW "willfully misled", ML reports could still be followed

DCA H: NOT!

- "Although evidence was considered in light of the entire record, medical reports and opinions were not substantial evidence sufficient to support a decision where they were based on incorrect or inadequate histories. In order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process, it was necessary for the doctors to have the correct information"...
- evidence obtained/submitted post-MSA as rebuttal to unanticipated testimony is admissible when necessary to accomplish "substantial justice"

M/A Com-Phi v. WCAB (Sevadjan)
(1998) 63 CCC 821



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Hard work will be rewarded!

F:

- ER tried (unsuccessfully) to obtain films 4 times pre-trial
- obtained sub rosa after trial/before submission

H: allowed into evidence



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R:

- relevant to disability
- not cumulative
- ER previously used "reasonable diligence" in discovery efforts

Scott v. WCAB (2008) 73 CCC 1261



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Can films be used in Petition to Reopen?

YES!

5 years post-doi
(LC 5804)



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F:

- 43.5 PD award
- sub rosa & med report = no disability (climbing chair, hammering, etc, etc, etc)
- Pet to Reopen filed
- PI testified film = "cross section" of EE's activities
- EE testified = "no change"

H (DCA): petition granted



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R: "Our review demonstrates to us that the activities illustrated in detail by the film show a relaxed and skilled worker performing in continuous activity which embraced 'bending, stooping, lifting, pushing, pulling and climbing...' completely inconsistent with the disability as originally found. Most seasoned and skilled artisans perform at a pace which to the unskilled observer appears to be "leisurely and unhurried." In our opinion Sommer was working at a pace which would please any employer."

Sully-Miller Contracting Co. v. WCAB (Sommer)
(1980) 45 CCC 683



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171

Don't expect to always win

attempt to reopen

F:

- shortly after stip, ER filed petition to reopen based on sub rosa
- AME reviewed and found NO DISABILITY



H: tough luck, ER

R: though sub rosa was obtained 2 weeks post-stip, ER



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must show:

1. why couldn't be obtained previously, OR
2. EE's condition changed (unlikely 2 weeks post stip)

QUERY:

- did fact that PD was only 24% impact decision?
- what about the fact that IW = police officer?
- different result if ER demonstrated unsuccessful pre-stip sub rosa efforts?

City of Santa Maria v. WCAB (Gowing) (2017) 82 CCC 375



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Don't Forget

- 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 **October 29, 2019 at 12pm with Don Barthel on Discovery (Part III).**

