



FUN WITH DEPOSITIONS!!

Donald Barthel
Bradford & Barthel, LLP

Percipient and Expert Witness Testimony



Testifying is TOUGH

I've been in the...



...as a percipient witness

...as an expert witness



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PERCIPIENT WITNESS:

Think "eye witness"

One who actually...

*sees

*hears or

*has admissible **personal knowledge** of...
the evidence about which s/he is
testifying.



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Expert witness...

has special knowledge or skill gained by...

- *education
- *training and/or
- *experience...



*summoned to give opinion or expert evidence, based on expertise.



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Percipient **AND** Expert in SAME hearing?

YES!



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Evidence Code 800

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.



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Depo Time

What is it?

Recorded statement (court reporter)

Under oath

Semi-formal setting

With counsel (strongly recommended)

Video-taped (rarely)



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Depo Time

Advantages

- Inexpensive (relatively)
- Narrow Issues
- Informality



Depo Time

Disadvantages

- Forget relying on...
 - Intonation
 - Facial Expressions
 - Hand Signals
 - "Uh huhs"



Immediate resolution of squabbles

Depo Time

Oath?

Court Reporter administers

*promise to tell the truth
(same as judge in court)

Perjury applies



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Depo Time

California Penal Code Section 118 defines Perjury:

“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.”



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Depo Time

Perjury Penalties

- *Prison time
- *Probation
- *Fines
- *Community Service
- *Restitution



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Court Reporter

Only types words...

Not –

Grunts
Gestures
Pointing
Nodding



Don't "talk with your hands"



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"TO THE BEST OF MY RECOLLECTION"

"TO TELL YOU THE TRUTH"

Should you use such phrases?

Why?

Why not?



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Take to court only what subpoena requires

Read the summons/subpoena

If says "attend", do just that!

If requires attendance + files, documents, materials...

...take only what is specified.

If testifying & looks at notes, may be **REQUIRED** to hand it over!



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"You may step down"

What does *that* mean?

You're done?

Can go home (work)?

ASK!

"Am I excused?"



IF you're "excused"...

LEAVE!

(unless otherwise instructed)





Lawyer: Did you really tell that police officer that, after the accident, you never felt better in your life?

Witness: Yep, that's what I said.

Lawyer: I want you to explain that, please.

Witness:

Well, you see, I was knocked unconscious in the accident, and when I came to, I saw this officer examining my horse, and then he took out his gun and shot him in the head.

Then he examined my dog and shot him in the head.

Then he came to me and asked

"How do you feel?"



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DOCTOR DEPOSITIONS!



How do *you* do it?



Lawyer: Doctor, before you performed the autopsy, did you check for a pulse?

Witness: No.

Lawyer: Did you check for blood pressure?

Witness: No.

Lawyer: Did you check for breathing?

Witness: No.

Lawyer: So, then it is possible that the patient was alive when you began the autopsy?

Witness: No.

Lawyer: How can you be so sure, Doctor?

Witness: Because his brain was sitting on my desk in a jar.



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Lawyer: But could the patient have still been alive nevertheless?

Witness: It is possible that he could have been alive and practicing law somewhere.



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#1



HAVE A CLEAR AGENDA



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Reasons for Depo

1. B/C client demanded you “do something”!?!
2. Get clarification
3. Find out what doc knows/thinks
4. Pin down one version of “truth”
5. Catch doc’s inconsistencies/impugn credibility



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Reasons for Depo

6. And...let's be honest



Make the doctor look dumb!



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#2



Know AMA Guides at least as well as the physician you're deposing



Rating Department

Have expert review performed



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**B&B Permanent Impairment Ratings
&
Medical File Consultation**

Injured Worker Information:

Name	Ima Hurtin	Birth Date	4/22/71
Claim Number		Injury Date	12/10/08
Occupation/Group	General Pest Supervisor/212	Age at DOI	37

Doctor Information:

Reporting Dr.	Dr. Liberal	Date of Report	11/18/11
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NOTE - This examiner is not listed on the DWC Medical Unit Discipline List
<https://www.dir.ca.gov/dwc/medunitlist/DisciList.html>

DISCUSSION:

Although the documentation suggests that the examinee sustained significant bilateral lower extremity injuries, the doctor's assessment is not fully explained, and he is unclear whether he is assessing WPI or lower extremity values.

He references impairment due to ankylosis of both knees and both ankles, although the records do not support that finding.

He does not provide specifics with which to fully evaluate impairment for this injury.

Permanent Disability (2005 PDRS)		
<small>Value assumes maximum wage career</small>		
	PD %	\$ Value
Doctor's Impairment/Rating	58%	\$77,107.50
B&B Impairment/Rating	34%	\$36,570.00
Projected Adjustments	24%	\$40,537.50

NOTE: Underlined text is a direct quote from the AMA Guides.
Text in *italics* is the determination of B&B Rating Service.

DETAILED IMPAIRMENT ANALYSIS

The doctor provides a brief review of the history of injury on page 1 of his report.

"On December 10, 2008, while at work, he was involved in a motor vehicle accident when his vehicle veered off the highway resulting in multiple lower extremity injuries. Initially, he was seen at Mercy Hospital and treated by Dr. Torrance with an open reduction internal fixation of both tibial plateaus and both ankles."

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1. Impairment of the lower extremities is not clearly addressed in this report:

The doctor discusses impairment of the bilateral lower extremities on page 12 of his report.

Right Lower Extremity:

"On the basis of the AMA Guides for Evaluation of Permanent Impairment, 5th Edition, and excluding from this impairment rating any psychological factors that I feel need to be evaluated separately by a different evaluator, this patient turns out to have a 64% impairment as concerns his right knee per Tables 17 - 10, 17-20 to 17-23, a 71% impairment as concerns the right ankle and foot referring to Tables 17-11 to 17-13 and 17-24 to 17-28. Combined with this is the peroneal nerve weakness and hypesthesia which I feel is a grade 1 and considering both the sensory deficit and the dysesthesias that the patient has, this adds another 10% disability to the right lower extremity. In using the combined values chart on page 604, combining the 71% with the 64% leads to a right lower extremity impairment of 90% and adding to that the 10% for the peripheral nerve injury brings the right lower extremity impairment to 91%."

Left Lower Extremity:

"The left lower extremity impairment involves the limited range of motion of the left knee which calculates out to 18% as concerns Table 17-10 and 17-20 to 17-23, and as concerns the left ankle and foot, the impairment calculates out to 15% as concerns the tables listed above for the [left] ankle. This gives a total left lower extremity impairment of 12%."

Combined Bilateral Lower Extremities:

"Combining the 91% impairment of the right lower extremity with the 12% impairment on the left lower extremity gives a whole person impairment of 92%. I feel that on the basis of the patient's pain it is reasonable to add another 2% giving this patient a whole-person impairment of 94%."

In his discussion, the doctor alternates the use of lower extremity impairment value and whole person impairment value.

He references Table 17-10, from page 537 of the AMA Guides, used to evaluate knee impairment due to impaired range of motion.

Table 17-11, 17-12, and 17-13, also on page 537, are used to evaluate ankle impairment due to impaired range of motion.

Tables 17-20 to 17-23, on page 540, are used to evaluate impairment due to knee ankylosis in various mal-alignment positions.

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Tables 17-24 to Table 17-28, on page 541, are used to evaluate impairment due to ankle ankylosis in various mal-alignment positions.

Peroneal nerve deficits are addressed in Table 17-37, on page 552 of the AMA Guides.

The doctor documents diminished range of motion, but he does not describe ankylosis of either knee or either ankle.

As can be seen, neither does he itemize his assignments.

We cannot reproduce the doctor's impairment values, or the method of impairment evaluation. We will provide our best assessment based on the documentation in the report.

2. Our estimate of impairment of the bilateral lower extremities, based on the documentation in the report:

Muscle Atrophy:

On page 2 of the report, he doctor provides circumference measurements of the lower extremities.

Thigh circumference is symmetrical at 53 cm. The calf circumference is 46 cm right, 43.5 cm on the left. The difference of 2.5 cm, if due to atrophy on the left lower extremity, would correlate to 10% LE, from Table 17-6 on page 530 of the AMA Guides.

However, as the right lower extremity is reported to be the more seriously injured, it seems unlikely that there would be atrophy on the left rather than the right.

In the absence of more specific indication, we will not consider impairment due to atrophy.

Range of Motion:

The doctor provides bilateral knee and ankle range of motion measurements on page 2 of his report.

Knees:

Right – 3 – 72 degrees "with moderate crepitus. No instability."

Left – 0 – 128 degrees "without pain or crepitus and no ligamentous laxity."

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From Table 17-10 on page 537, flexion limited to 72 degrees correlates to "moderate" impairment, 20% LE.

The diminished range of motion of the left knee is not at a ratable level.

There is no indication of ankylosis of either knee.

Impairment due to diminished range of motion is 20% LE for the right knee, 0% LE for the left knee.

Ankles:

Right ankle	LE Impairment (From Tables 17-11, 17-12)
Dorsiflexion: -5	30%
Plantar flexion: 40	0%
Inversion: 0	5%
Eversion: 5	2%

Total = 37% LE

Left ankle

Dorsiflexion: 0	15%
Plantar flexion: 45	0%
Inversion: 5	5%
Eversion: 10	2%

Total = 22% LE

There is no indication of ankylosis of either ankle.

Impairment due to diminished range of motion is 37% LE for the right ankle, 22% LE for the left ankle.

Arthritis:

On page 3, the doctor discussed x-rays, and reported "the most recent films show evidence of severe traumatic arthritis involving both tibiotalar joints with this appearing to be worse on the right."

He does not provide specifics that would allow evaluation of arthritis impairment using Table 17-31, on page 544.

As we noted above, the doctor reported crepitus of the right knee. With the history of direct trauma, and residual pain, that correlates to 5% LE for the right knee. There is no other specific evidence of ratable impairment of either lower extremity.

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DBE:

On page 3, the doctor reported, "The left knee showed healing with anatomic alignment. The right knee showed gross malalignment of both medial and lateral articular surfaces."

The doctor does not provide specifics regarding the angular displacement. From Table 17-33, page 546, a Plateau fracture, displaced, with 10-19 degrees of angulation, would correlate to 25% LE.

The specifics regarding the residual displacement would need to be confirmed, but 10-19 degrees of angular displacement for the bilateral tibial plateau fractures would correlate to 25% LE for each knee.

Peripheral Neuropathy:

Table 17-37, on page 552, is used to evaluate lower extremity nerve deficits.

The maximum value for the superficial peroneal nerve is 5% LE for sensory deficit, and 5% LE for dysesthesia.

The doctor's assessment of 10% LE for the right lower extremity due to peroneal nerve deficit would only be supported by 100% deficit.

Based on the doctor's review of pain and stiffness, and "occasional numbness over the dorsum of his right foot" (page 1), 50% deficit appears more appropriate in this case.

The documentation in the report could support 50% sensory and dysesthesia deficits, for 5% LE for the right lower extremity.

Gait Derangement:

This might be one of those cases for which the doctor considers gait derangement impairment.

On page 1, the doctor reports, "he is usually ambulatory with a cane that he uses in his left hand."

From Table 17-5, on page 529, it would appear that this would correspond to "moderate" gait derangement, in which the individual "requires routine use of cane, crutch, or long leg brace", and would correspond to 20% WPI.

Combination of Evaluation Methods (Table 17-2):

From review of Table 17-2, on page 529:

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Gait derangement stands alone and cannot be combined with any other impairment for the lower extremities. For reference, Gait Derangement of 20% WPI would rate: 17.01.07.00 - 20 - [5]25 - 212E - 23 - 23%

Range of motion cannot be combined with DBE or with arthritis.

DBE can be combined with arthritis.

Peripheral nerve can be combined with DBE, arthritis, or ROM impairments.

We will use:

Right knee:
DBE (25% LE estimate for displaced tibial plateau fracture) combined with Arthritis (5% LE) = 29% LE = 12% WPI.

Left knee:
No documented evidence of ratable impairment.

Right ankle:
ROM (37% LE) = 15% WPI

Left Ankle:
ROM (22% LE) = 9% WPI

Peripheral Nerve:
Superficial Peroneal (5% LE) = 2% WPI

Pain:
In our opinion, the doctor's additional assessment of 2% WPI for pain duplicates the impairment due to pain and dysesthesia assessed for the peroneal nerve.

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PERMANENT DISABILITY RATING SUMMARY

2005 PDRS – based on doctor's report		
Impairment	Page	PD formula
Right lower extremity – peroneal nerve (10% LE)	12	17.01.04.00 – 4 – [3]5 – 212E – 4 – 4% (A)
Right knee – ROM/ Ankylosis (64% LE)	12	17.05.04.00 – 26 – [2]30 – 212E – 28 – 28% (A)
Left knee – ROM/ Ankylosis (18% LE)	12	17.05.04.00 – 7 – [1]8 – 212E – 7 – 7% (B)
Right ankle – ROM/ Ankylosis (71% LE)	12	17.07.04.00 – 30 – [2]34 – 212E – 31 – 31% (A)
+ 2% pain		
Left ankle – ROM/ Ankylosis (15% LE)	12	17.07.04.00 – 6 – [1]7 – 212E – 6 – 6% (B)

Combine:
31 c 28 = 50; 50 c 4 = 52 (A – Right LE)
7 c 6 = 13 (B – Left LE)

52 c 13 = 58% TOTAL PD

2005 PDRS – after B&B analysis		
Impairment		PD formula
Right lower extremity – peroneal nerve		17.01.04.00 – 2 – [3]3 – 212E – 3 – 3% (A)
Right knee – other (DBE, Arthritis)		17.05.06.00 – 12 – [2]14 – 212E – 13 – 13% (A)
Left knee		No evidence of rotatable impairment
Right ankle – ROM		17.07.04.00 – 15 – [2]17 – 212E – 15 – 15% (A)
Left ankle – ROM		17.07.04.00 – 9 – [2]10 – 212E – 9 – 9%

Combine:
15 c 13 = 26; 26 c 3 = 28 (A – Right LE)

28 c 9 = 34% TOTAL PD

Thank you for providing us with the opportunity to review this report.

2012
Date

Donald R. Barthel, Esq.
PD/Impairment Rating Professional
(916) 996-1263

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How to prepare to TAKE a doctor deposition

Step #1: subpoena entire file

Why?

Confirm you have
a. every report



How to prepare to TAKE a doctor deposition

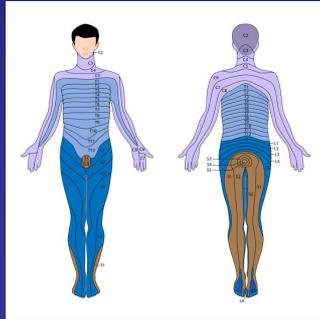
Step #1: subpoena entire file

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^{6,7}

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?

40

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



1) Avoid *Almaraz/Guzman* baloney!



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Dear PTP/AME/PQME/APQME,
When assessing impairment (WPI), it is essential that:

1. *you first provide a WPI impairment percentage via a traditional application of the AMA Guides (5th) as **written**, so as to permit the parties, DEU and WCJ to determine the “scheduled permanent disability” (Almaraz II, p. 35, 47, 49). A “scheduled permanent disability” rating is required prior to any application of Almaraz/Guzman II that you may deem appropriate.*



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2. *if you should determine that a modified impairment assessment pursuant to Almaraz/Guzman II is appropriate, please be certain to:*
 - a. *limit your analysis to the “four corners of the AMA Guides”;*
 - b. *please explain as to whether you believe that this is a “**complex**” or “**extraordinary case**[]”, and, if so, the reasons for your conclusion (see Guzman, 8/9/10, p. 16, 25)*
 - c. *“describe and explain the reason for [any] modification [of a traditional AMA Guides rating] in writing” (Almaraz/Guzman II, p. 23, citing with approval the AMA Guides), and*
 - d. *describe and detail why you believe a modified application of the AMA Guides “most accurately reflects the injured employee’s impairment.” (Almaraz/Guzman II, p. 23)*



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2. *if you should determine that a modified impairment assessment pursuant to Almaraz/Guzman II is appropriate, please be certain to:*
 - e. *advise as to whether the chapter(s), table(s), and method(s) you apply is/are the traditional chapter/table/method per the Guides (example: Chapter 15 for spine injuries, Chapter 16 for upper extremity injuries, etc.). If utilizing a nontraditional section, please advise as to whether and why you believe the section you utilize addresses “completely different biological systems or body parts” than is involved in the alleged industrial injury (see Guzman, p. 23)*



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3. *Credentials: If you should provide an Almaraz/Guzman II analysis that deviates from a strict/traditional application of the Guides as written, please attach a copy of your most recent curriculum vitae and detail the following information upon which you have relied, including:*
- a. *your skill, knowledge and experience in such matters;*
 - b. *“considerations unique to [this] injury” (Guzman, p. 24);*
 - c. *“reliance on “standard texts or recent research data” upon which you have based your “medical conclusions” (Guzman, p. 24);*
 - d. *any additional “extrinsic resources” upon which you have relied (Guzman, p. 24);*
 - e. *the number of Guides-based analyses you have performed since Almaraz/Guzman II (9/3/09);*
 - f. *the number of analyses since Almaraz/Guzman II wherein you have rejected the traditional application of the Guides as written;*
 - g. *a list of all formal training you have received relating to the application of the AMA Guides (5th)*



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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."



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)



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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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.

...

(c)...if...the party giving notice of the deposition is a subpoenaing party, and the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer or employment records of an employee, the deposition shall be scheduled for a date at least 20 days after issuance of that subpoena.



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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.



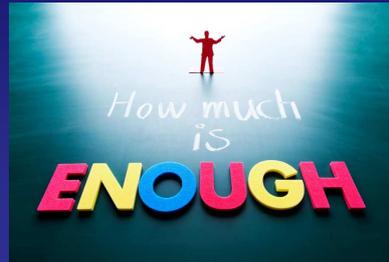
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Show me the (pre-payment) money...

How much?

common: 1 hr prep
1 hr testimony
2 hours



(But bring a checkbook...)



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How Much Is A CAAA Member Really Worth?

AA says,

"Show me the money"



64

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
(or ask for DA)

Google?



Locates ONE (Salinas) 5 years old!



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SALINAS 2010

- \$300 up to 5 yrs w/c exp
- \$350 - 5-9 yrs w/c exp
- \$400 - 10+ yrs w/c exp, or certified specialists



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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/>



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THE STATE BAR OF CALIFORNIA Tuesday, November 3, 2015 Search Calbar Site

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ATTORNEY SEARCH

Donald Ralph Barthel - #153154

Current Status: Active

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

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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!



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!



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Harvey

"Complexity of the issues"?



Standard issue back case?
Complicated and convoluted?

It makes a difference!



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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



MULTIPLIER

"Reviewing file"?



Heck no!



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



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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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AA can take ER witness depos (esp percipient witnesses)

Doesn't happen much...

...Can you guess why?



Hint: *Christensen v. WCAB* (1999) 64 CCC 559
(writ denied) (aka non-reimbursable expense for
AA)

Alternative: Def Witness Statements

Defense: HIRE ME!



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HOLDING DEPO HOSTAGE?

AA refuses depo until DA provides:

- a. documentation
- b. investigative reports
- c. witness 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 copy of her own recorded statement before depo



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

F: IW Pet to Compel production of:

- witness statements
- recorded PI observations
- claims examiner's notes

ER claimed no need to release until after IW's depo

H: depo postponed until:

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



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

F: IW tries to delay until witness statements produced

H:

1. IW to give depo
2. witness statements to be produced 10 days after IW signed depo or after signature waived



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."



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

Facts:

- CHPs officer's death blamed on drugs due to work stress
- Def obtained statements (supervisor, capt, co-ees, family)
- Statements demanded pre-depo
- Atty-client and atty work product privileges found inapplicable



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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: if theory of injury was job stress caused drug taking, 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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OTHER 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, etc.

2. Reimbursement for any loss of wages (TD? No worries)

1. Copy of transcript

2. Atty's fees

3. 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 for failure to
allow depo if ER failed to send IW
transportation expenses



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*99 Cents Only Stores v. WCAB (Arriaga)
(2000) 65 CCC 456 White v. Simi Unif.
School Dist. (1992) 21 CWCR 41 (panel)*

- H: unlicensed rep may defend depo if:
 - (a) adequately supervised by atty, and
 - (b) identified as a non-atty



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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 matter is resolved procedure



3. same test as for ML costs

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"Suspend proceedings and bar benefits"

WCAB may compel IW to attend depo

BUT

canNOT suspend proceedings/bar benes for failure to attend depo

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



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Alternative Weapons To Combat Failure To Attend Depo?

Contempt

Sanctions (LC 5813)



Pet to dismiss for failure to
prosecute



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ER REP AT DEPO

CAA 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 a right to be present at depo
- 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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Lawyer: Do you recall the time that you examined the body?

Witness: The autopsy started around 8:30 p.m.

Lawyer: And Mr. Johnson was dead at the time?

Witness: No, he was sitting on the table wondering why I was doing an autopsy.



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