Trial Time

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Trial Time

What can you expect at trial?
How do you prepare?
What are your rights?
Responsibilities?
What do you do at Trial?
Burdens of Proof?

Loosen your tie!

LC 5708: WCAB is "bound by the common law or statutory rules of evidence and procedure."

It "may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties"

Relaxed...but essential!

Scott v. WCAB (1983) 48 CCC 217

36,000 foot overview:

Parties are to submit for decision all matters properly in issue and produce relevant necessary evidence, including:

- witnesses
- depo transcripts
- documents
- medical reports
- payroll statements
- all other evidence that is relevant, admissible and essential in the proof of a claim/defense (WCJ will decide all three)

36,000 feet up...

Post trial, WCJ

- "make and file findings upon all facts involved in the controversy"..."within 30 days after the case is submitted"
- renders decision (soon...hopefully)
- explain reasons/grounds for decision
- await the Recon!

Civil & Criminal law have lots of fancy rules...

NOT US

LC 5708: WCAB is not "bound by the common law or statutory rules of evidence and procedure."

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

NO FANCY RULES HERE

LC 5709

- "No informality in any proceedings or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed."
- "No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure."

Attorney: "Objection! Hearsay"

WCJ: "I'll let it in" (aka GOOD LUCK WITH THAT!)

Legislative informality canNOT trump

constitutionally protected
DUE PROCESS

- not all evidence admissible
- must have some probative force
- hearsay limited to "when it is best calculated to ascertain the substantial rights of the parties"

Pacific Employers Insurance Co. v. IAC (Collins) (1941) 6 CCC 270, 273

- not admissible if obtained via "fraud and deceit" (think fraudulently obtained video or Facebook friending)

Redner v. WCAB (1971) 36 CCC 371

WCJ must follow some rules:

14th Amend (due process)

=

fair & open hearing

=

- right to present evidence
- right to present witnesses
- right to cross-examine opposing witnesses
- right to present rebuttal evidence

"Bifur what....!?!?!

Most WCJs don't like 'em, but
BIFURCATED TRIALS are an option

CCR 10560: "The parties are expected to submit for decision all matters properly in issue at a single trial…However, a workers' compensation judge may order that the issues in a case be bifurcated and tried separately upon a showing of good cause."

Bifurcation Pros

- Got an SOL defense?
- Want to decide whether need to conduct other expensive discovery?

BIFURCATE!

aka first go to trial re SOL

- win? close file!
- lose? start discovery train

BIFURCATION

Who decides?

WCJ

Can Petition for Removal if

WCJ won't bifurcate

Save time (and money)

- Can stip to witness's (depo) testimony in lieu of trial testimony
- Can take "judicial notice" of evidence not listed

Saves money
(more about this later)

- At trial?
  No evidence, or minimal and insubstantial evidence?

- Get ready for sanctions!

Torres v. AJC Sandblasting (2012) 77 CCC 1113
(appeals board en banc)

Introduce testimony...and...?

1. reports of attending or examining physicians;
2. reports of special investigators appointed by WCAB to investigate and report on any scientific or medical question;
3. reports of ER (time sheets, book accounts, reports and other records);
4. properly authenticated copies of hospital records;
5. all publications of DWC;
6. all official publications of CA and U.S. governments;
7. excerpts from expert testimony received by WCAB on similar issues of scientific fact scientific fact in other cases and the prior decisions of the appeals board on similar issues;
8. relevant portions of medical treatment protocols published by medical specialty societies;
9. current MTUS;
10. VR expert reports

Reports of attending/examining physician:

MUST have examined...UNLESS

- dead
- UR reports

Labor Code says "authenticated records"

(but don't take it too seriously)

F:

WCJ excluded payroll records b/c def failed to:

- lay a foundation
- properly authenticate
- have W testify as to trustworthiness of the record

H: admitted

R:

- WC not bound by rules of evidence when admitted, weight/sufficiency of evidence are weighed by the WCJ

(not some unsophisticated jury)

NEVERTHELESS, always plan to authenticate (Ws are nice to have!)

Copies are ok!

A non-erasable optical image reproduction of a writing as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by Evidence Code Section 1270) in the regular course of that business, is admissible provided

additions
deletions
changes

are not permitted by:

the technology,
a photostatic reproduction

Not permitted by:

- microfilm
- microcard
- miniature photographic
- photographic copy or reproduction, or
- enlargement thereof

Once admitted, the copy is

presumed to be accurate

Opposition shows evidence of inaccuracy/unreliability?

Burden shifts to prove otherwise

"by a preponderance of the evidence"

Got technology?

WCAB can still demand a hard copy!

No VR testimony (must be reports)

EXCEPT

- "good cause"

What's that?

Don't know!

- What isn't it?

Good cause shall not be found if the vocational expert witness has not issued a report and the party offering the witness fails to demonstrate that it exercised due diligence in attempting to obtain a report." CCR 10606.5(a)

Arguing VR report inadmissible?

Use LC 5703(j) and CCR 10606.5(b)

List of requirements is longer than your arm!

Hearsay

"an out-of-court statement introduced to prove the truth of matter asserted therein"

General rule (in other courts): inadmissible
General rule (in other courts): a gazillion exceptions

WCAB: WCJ will allow it to establish "any fact at issue"

London Guarantee and Accident Co., Limited v. IAC (Murray)
(1927) 203 Cal. 12, 14

However, admissible only "when it is best calculated to ascertain the substantial rights of the parties"

Better approach: make the one who uttered the statement a witness
(and/or see if a hearsay exception applies)
(and get ready to prove declarant is unavailable)

Pacific Employers Insurance Co. v. IAC (Collins) (1941) 6 CCC 270, 273

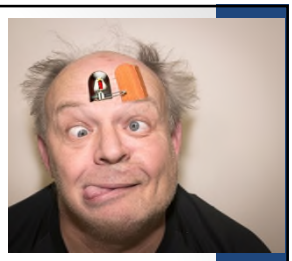
Don't medical reports include hearsay? Double hearsay, in fact!?

YEP!

No worries?

CCR 10606(a): (a) The Workers' Compensation Appeals Board 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.

Medical reports...



Let's not get totally crazy!

F:

- EE tells doctor he was told brake lining he worked on contained asbestos
- no evidence Dr knew anything about brake linings
- no evidence IW knew what the brake linings were made of
- no evidence of exposure

H: medical evidence precluded

R: triple hearsay

Skip Fordyce, Inc. v. WCAB (Barry)
(1983) 48 CCC 904, 912-13

Barry

"There is no evidence Dr. Merliss himself knows anything about the composition of the actual brake linings worked on... Even assuming [IW] made a direct statement to Dr. Merliss about asbestos exposure, there is likewise no evidence of [IW's] own competence with respect to knowledge of brake lining composition. Such double or triple hearsay is not the sort of evidence upon which responsible persons customarily rely in the conduct of serious affairs. They are the untested statements or surmised statements of persons of no proven competence to make them and are in themselves insufficient to sustain findings on material facts."

- "someone" told IW
  - who reportedly told doctor
    - who repeated it in writing

"Offer of proof"

(aka reasonable heads save time & money)

- parties avoid calling W by stip'ing to testimony
- may be enough to support award, so

PROCEED WITH CAUTION

(don't get burned by waiving due process)

"Offer of Proof"

Stip limited to what testimony would say

NOT truth of the testimony

(can still rebut)

Judicial Notice

Sun sets in the west

Sea water is salty

(things even an AA would understand!)

Judicial Notice

Here are the matters subject to mandatory judicial notice under Evid C §451:

- CA and US law;
- CA city and county charters;
- Reg of state and fed agencies;
- CA rules of prof conduct and rules of court;
- Fed rules of pleading, practice, and procedure;
- English words, phrases, and legal expressions; and
- Universally known matters (based on a reasonable person test).

Judicial Notice

Matters subject to discretionary judicial notice under Evid C §452 include:

- law of sister states;
- resolutions and private acts of US and CA legis;
- reg and legisl enactments of public entities;
- official acts of legisl, exec, and judicial depts of US or any state;
- court records from any CA court or fed or sister state court of record;
- local, sister state, and fed rules of court;
- foreign law;
- matters of common knowledge; and
- matters subject to immediate and accurate verification

Judicial Notice

Ex. PDRS
Ex. prior decision in the same case
Ex. MPNs approved by DWC (see website)
EX. DWC-1

Faulkner v. WCAB (2004) 69 CCC 1161 (writ denied)

EX.
- EE testified to no prior injury
- WCJ impeached with med records from prior w/c claim

Amoroso v. WCAB (1999) 64 CCC 1388 (writ denied)

Stay awake

Object
(don't waive your objection)

- ex. hearsay
- ex. privileged
- ex. not disclosed/produced at/before MSC
- ex. cumulative
- ex. irrelevant

"No rule of procedure is more firmly established than that which requires a party who considers making an objection to the admission of testimony, to make such objection known to the court or tribunal before whom such evidence is sought to be introduced, at the time it is offered by the opposite party. It would be manifestly unfair and unreasonable to permit one party to remain silent, and by his silence to tacitly acquiesce in a proceeding, and thereafter to allow him, after an adverse decision, to nullify this decision by insisting upon an objection which he refused to make when the opportunity was afforded him at the original hearing."

McFeeley v. IAC (1923) 65 Cal. App. 45, 48

Lights, Camera, Action!

You *might* be able to film your trial
(this is the land of Hollywood, after all!)

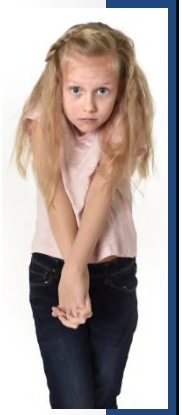
WCJ ain't going to be excited about it (and CCR 10760 says it's in "his or her discretion [to] permit, refuse, limit, or terminate recording")

BUT
if you're so inclined,
WCJ's decision will weigh...

A. Importance of maintaining public trust and confidence in the system;
B. Importance of promoting public access to the system;
C. Parties' support of or opposition to request;
D. Nature of case;
E. Privacy rights of all participants, including witnesses;

37

F. Effect on any minor;
G. Effect on any ongoing law enforcement activity in the case;
H. Effect on any subsequent proceedings;
I. Effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness;
J. Effect on excluded Ws who would have access to the TV testimony of prior Ws;



38

K. Security and dignity of trial;
L. Undue admin or financial burden to DWC or participants;
M. Interference with neighboring hearing rooms;
N. Maintaining orderly conduct of proceeding;
O. Any other factor WCJ deems relevant.

So you really want to be Steven Spielberg?

- make written request to the PJ for permission
- at least five business days pre-proceedings
- district office promptly notifies parties of request has been filed
- WCJ will then rule on the request
- WCJ may—but need not—hold a hearing on the request

Trial time = work time

aka meeting burden of proof

Under LC 5705:

"The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."

LC 3202.5:

parties/lien claimants burden = "preponderance of the evidence."

What's preponderance?

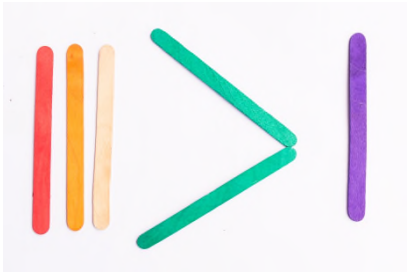
LC 3202.5 "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth."

(50% + a little!)

What's preponderance?

LC 3202.5 "[w]hen weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

one good witness > lots of lousy ones!



He who wants something goes first!

Must first prove:

a. injury (or death)
b. aoe
c. coe

"causation" proven by a "reasonable medical probability"

What is "reasonable medical probability"?

TOUGH QUESTION!

Entire journal articles dedicated to that question!

Best answer...is in the negative:

A MEDICAL REPORT MUST BE BASED UPON REASONABLE MEDICAL PROBABILITY, IT MUST NOT BE SPECULATIVE, IT MUST BE BASED ON PERTINENT FACTS AND ON AN ADEQUATE EXAMINATION AND HISTORY AND IT MUST SET FORTH REASONING IN SUPPORT OF ITS CONCLUSIONS.

MARLENE ESCOBEDO vs. MARSHALLS (2005) 70 CCC 604 at 621

Applicant's Burden

IW must first prove every element of his/her claim(s):

a) aoe
b) coe
c) causation (to a reasonable medical probability)
d) entitlement to benefits:
   - TD, and/or
   - PD, and/or
   - Etc

IW's Burden

Must ER assist?

NO!

Curry-White v. Berkeley Unified School District, 2016 Cal. Wrk. Comp. P.D. LEXIS 610

I: Can WCAB order ER to help pro per obtain req'd form to subpoena records?

H: no

R: impermissibly shifts burden of proof

ER's Burden

NONE (until IW succeeds)

Ex. If proves aoe/coe

ER's burden:

a. affirmative defense, or
b. SOL

Ex. If proves "approx [%] of [PD] directly caused by the industrial injury"

ER's burden: proving "approximate [%]" of PD caused by non-industrial factors (apportionment) (LC 4663, 4664)

ER's burden

Ongoing benefits awarded?

ER's burden: prove termination is permitted

LC 5814 (unreasonable delay/refusal of benes)

EE proves unreasonable/refusal

ER proves defense (genuine doubt from med/legal perspective)

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

132a

EE must establish the following:

1. EE filed or made known intent to file a w/c claim before or at the time of the discrimination…
2. ER fired, threatened to fire, or discriminated against EE because of injury or claim;
3. ER's act singled out EE as a direct consequence of the work-related injury or claim.

ER burden:

1. no claim filed, or
2. ER unaware of any intent to file, and
3. no discrimination because of claim/intent to file claim
   - never happened
   - business realities permitted the action

Conclusive Presumption

"rebuttable"

(can be rebutted)

vs

"conclusive"

(cannot be rebutted)

Conclusive Total Dependency Presumptions

1. under 18 y/o
2. physically or mentally unable to earn
3. living with deceased at time of death
   (or decease was legally liable)*

=

conclusively presumed total dependent
(even if partially dependent on someone else)

*If can't prove 1-3, can still prove dependency

53

Total Dependency for Spouse

LC 3501(b) "A spouse to whom a deceased employee is married at the time of death shall be conclusively presumed to be wholly dependent for support upon the deceased employee if the surviving spouse earned thirty thousand dollars ($30,000) or less in the twelve months immediately preceding the death."

For presumption, must prove:

1) marriage to deceased at time of death; and
2) earned less than $30,000 in 12 prior months

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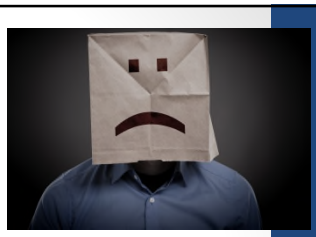
54

Fun Factoid



Irrelevant to LC 3501(b) that:

1. "dependent" wasn't living with decedent
2. "dependent" wasn't actually "dependent" on decedent!

STILL get conclusive presump

Can't prove elements of conclusive?

Can still prove via rebuttable presumption

Permanent Total

LC 4662: conclusively are presumed to be total:

1. loss of both eyes or sight

Permanent Total

LC 4662: conclusively are presumed to be total:

2. loss of both hands or their use

Permanent Total

LC 4662: conclusively are presumed to be total:

3. an injury resulting in a practically total paralysis; and

Permanent Total

LC 4662: conclusively are presumed to be total:

4. an injury to the brain resulting in incurable mental incapacity or insanity.

*presumption may not be rebutted by other evidence

Want to know definition of:

- loss of both eyes or hands?
- "practically total paralysis"?
- "mental incapacity or insanity"?

Me, too (don't bother looking to case law)

PD Existing Prior to Current Injury

LC 4664(b), "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury."

"I got better" won't work any longer!

BUT first, ER must prove:

- existence of prior PD award
- overlap (partial or total)

ex. "no heavy lifting" vs "no heavy lifting, bending & stooping"

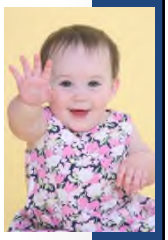
disability

LC 5814 Penalties Post Order/Award

Under LC 5814(c): "Upon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claims for penalties have resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award."

LC 5814 Penalties Post Order/Award

LC 5814(c): "Upon submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or expressly excluded in the statement of issues being submitted."



Interpretation:

"AA, timely raise the issue or permanent 'waive' goodbye!")

63

Uninsured Employers Benefits Trust Fund Payments

LC 3732(k) compensation paid by the UEBTF per an award is conclusively is presumed to be

a. a reasonable in amt, and
b. proximately caused by the event or events that caused IW's injury or death

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64

Rebuttable Presumptions

Employment

EE must show that, at the time of the injury, he/she was "performing service growing out of and incidental to his or her employment" (LC 3600(a)(2)).

LC 3357 "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

EE wants this presumption?

he/she must proving was "rendering service"

burden shifts: prove IC, or

otherwise excluded from w/c protection

ex. no express/implied K present

ex. beneficiary of charitable nonprofit (TSA)

Trial Time
Part II

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69

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70

LC 2750.5: rebuttable presumption

IW performing services for which a contractor's license is required, or performing services for a person who is required to obtain such a license

=

"employee"

(not Indep Contractor)

LC 2750.5 *can* be rebutted:

- sufficient evidence proving indep contractor status, or
- works < 52 hrs OR earns < $100 during 90 days pre-DOI

LC 3352(h)

90 Day Rule

Injury presumed (rebuttable) aoe/coe if not denied "within 90 days after the date of the claim form is filed under Section 5401" [LC 5402(b)]

Need need prove:

a. timely filed claim with ER
b. ER failed to deny w/in 90 days

Burden shifts

ER can rebut only by evidence discovered subsequent to the 90-day period (excluding evidence that ER could have obtained with "reasonable diligence"

SCIF v. WCAB (Welcher) (1995) 60 CCC 717

Public Safety Officers

LC 3212 - LC 3213.2

Public Safety Officer must prove:

1. statutorily favored EE
2. statutorily covered condition
3. condition manifested when officer was serving in a listed agency

=

prima facie evidence of

injury aoe/coe

Public Safety Officer

Prima facie presumption tough to overcome some conditions developing/manifesting in the service of ER "shall in no case be attributed to any disease existing prior to that development or manifestation." (nonattribution clause)

What's left for ER to prove

(given the nonattribution clause)?

PROVE:

a. contemporaneous
b. nonwork-related event
c. was the sole cause of the injury

canNOT use evidence that the injury was attributable to a pre-existing disease

If nonattribution clause doesn't apply, ER can rely on evidence that injury was

- attributable to pre-existing disease not
- aoe/coe

77

Awarded TD

- EE awarded TD?
- Doctors say "MMI"?
- DO NOT CUT OFF TD

Must file Petition to Terminate (CCR 10462 - CCR 10466)

LC 4651.1: Where a petition is filed with the appeals board concerning a continuing award of such appeals board, in which it is alleged that the disability has decreased or terminated, there shall be a rebuttable presumption that such temporary disability continues for at least one week following the filing of such petition.... Where the employee has returned to work at or prior to the date of such filing, however, no such presumption shall apply.

Upshot?

- Before EE RTW, ER must prove not TD
- After EE RTW, EE must prove TD entitlement

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78

Very Naughty Behavior!

CCR 10622: ....*Where a willful suppression of a medical or vocational expert report is shown to exist in violation of these rules, it shall be **presumed** that the findings, conclusions and opinions therein contained would be adverse, if produced.*

- EE must prove suppression was "willful" (not just negligent...or stupid)
- Only rebuttable (can be overcome via substantial evidence! ... 50%+)

Unemployment Compensation Disability Liens

UDL lien field?

Rebuttably presumed it:

- correctly states
  - amts paid
  - to IW
  - by EDD

EDD need not prove amts paid to IW

(why would they lie...?)

Nonindustrial Death for Refusal to Authorize Autopsy

LC 5707: "If the body of a deceased employee is not in the custody of the coroner, the appeals board may authorize the performance of such autopsy and, if necessary, the exhumation of the body therefor."

YUCKY!

"If the dependents, or a majority thereof, of any such deceased employee, having the custody of the body refuse to allow the autopsy, it shall not be performed."

WHAT HAPPENS THEN?

"In such case, upon the hearing of any application for compensation it is a ***disputable presumption*** that the injury or death was not due to causes entitling the claimants to benefits under this division."

WITNESS TESTIMONY

not everyone gets to talk

"lay witnesses" - yes (generally)

“physicians", "VR experts" - no (generally)

Regardless, some issues require "expert" opinion

(lay testimony won't win the day all by itself)

Up to the WCJ to make credibility decisions

Want to make sure you've got testimony

do NOT forget the subpoena!

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."

"A continuance may be granted for rebuttal medical testimony subject to Labor Code Section 5502.5."

Why reports (doesn't WCJ want to assess credibility?)

"Utilization of written medical reports allows for the expeditious handling of cases by eliminating time consuming and often unnecessary oral medical testimony. Further, the written report provides the physician with the opportunity to provide a well-reasoned, orderly presentation of facts, findings, and opinions."

Insurance Co. of North America v. WCAB (Kemp)

(1981) 46 CCC 913, 922

- saves time
- saves money
- due process ok b/c either party can depose
- parties and WCJ likely know experts reputation

Can doctors/VR experts *ever* testify?

You bet!

But there MUST be a very good reason!

ex. doctor is percipient witness

Testimony

IW often (need not) testifies...usually as a lay witness

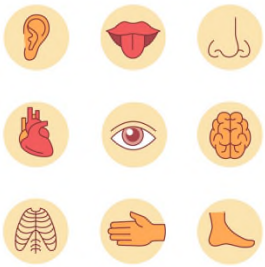
A **lay witness**, also known simply as a "**witness**," is any person who gives testimony in a case, but who is not an expert.

Why does IW testify?

- Explain what happened
- How it happened
- Benefits alleged
- Etc, etc.

May testify to what senses tell them

- Sight
- Taste
- Touch/feel (pain)
- Smell
- Hear



VERY IMPORTANT

Seem credible

Be sympathetic

Why not have IW testify?

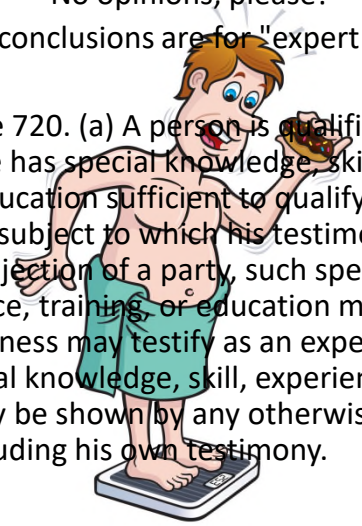
Duplicative

Unsympathetic

"Does this outfit make me look fat?"

No opinions, please!

Opinions/conclusions are for "expert witnesses"



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 on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Typical witness?

co-ees

Called by IW to support claims

Called by ER to undercut IW's testimony

Can testify to all that is "relevant"

CAUSATION

Lay testimony can be used to prove aoe/coe

- Ex IW run over by car
- lay testimony = enough to prove causation
- (no medical needed...other than for extent of benes)

CAUSATION

- Is causation a matter of "scientific medical knowledge" (ex. was exposure carcinogenic?)?

Needed:

- expert evidence
- lay testimony no sub. evidence for causation

Ex. lay W (IW) testifies to stressors at works

- expert determines diagnosis, causation and compensability

Is witness credible? Persuasive?

WCJ & WCAB decide!

WCJ supported by "substantial evidence"?

WCAB gives WCJ opinion "great weight"!

Why?

Can see, hear (smell?) the witness

(WCAB has only transcripts)

WCJ's ability to "observe the demeanor of the witnesses and weight their statements in connection with their manner on the stand" is missing

Contrary "substantial evidence"

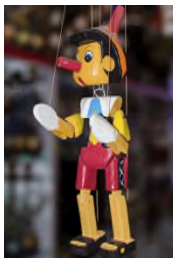
WCAB on recon can:

- make own credibility determinations
- reject WCJ's opinions
- enter its own determination(s)

What about WCJ credibility rulings on depo transcripts (w/out trial testimony)?

WCAB more comfortable re-weighing credibility issues

I only said you lie SOME OF THE TIME!



- WCAB need not wholly accept or reject of W's testify
- Can believe some disbelieve other portions

GENERAL

Accept testimony that is:

uncontradicted, and

unimpeached

Will reject "mere speculation and conjecture"

GENERAL

"self-serving" does NOT mean inadmissible

can draw inferences from available evidence
(aka "connecting the dots")

Does IW win if no other witnesses?

Not Necessarily…

Can disbelieve (even if not contradicted) so long as

a. there is a rational basis, and
b. not acting arbitrarily

Cross-examination is VERY helpful!

War Story Time!

Time to lie...

...does it matter?

- testimony inconsistencies
- false histories
- etc

Taken together or individually may by sufficient to find IW hasn't met burden

But do all liars lose?

Q. "When you were hired you claimed you were John Smith?"

A. "Correct"

Q. "You provided an SS# that was issued to John Smith?"

A. "Correct"

Q. "But now you claim you are Bob Brown?"

A. "Correct"

Does IW lose?

Does IW lose?

NOT NECESSARILY!

Hunt-Wesson Foods, Inc. v. WCAB (Echeverria) (1983) 48 CCC 878 (writ denied)

But if WCJ thinks IW lied on the stand…

IW loses (right??!?)

NOT NECESSARILY

F:

- IW gave different histories to different doctors
- one doctor received no history at all
- IW didn't seek tx for 2 weeks post alleged injury

H (WCJ, WCAB): case fabricated

...DCA says...

"Not so fast, bucko!"

WCJ ignored:

- co-EE testimony (who witnessed injury)
- med evidence consistent with pathology to
- claimed body part (made medical sense)

HOLDING: remanded to further develop the record

Rushing v. WCAB (Cate) (1971) 36 CCC 49

Reasonable Medical Probability

Best to have doctor say/write the "magic words"

WCAB concerns:

- >The physician must use a correct legal theory. (See *Zemke v. WCAB* (1968) 68 Cal.2d 794, 33 CCC 358 (Supreme Court en banc))
- > The physician's opinion may not be based on "surmise, speculation, conjecture or guess." (See *Garza v. WCAB* (1970) 3 Cal.3d 312, 35 CCC 500 (Supreme Court en banc))
- > The physician's report must NOT be "based upon inadequate medical history or examinations." (See *West v. IAC* (1947) 79 Cal. App. 2d 711, 12 CCCC 86)

WCAB loves medical reports/records (really!)

CCR 10606

Exhausting (but not exhaustive) list includes:to:

1. treating physician reports;
2. QME reports;
3. AME reports;
4. court-appointed "regular physician" reports;
5. self-procured reports;
6. diagnostic studies or tests;
7. subpoenaed nonindustrial treatment records; and
8. medical research studies.

Trial Time: Medical Evidence

"Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential…lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence."

Peter Kiewit Sons v. IAC (McLaughlin) (1965) 30 CCC 188, 192

Although lay testimony in some cases may support a finding that an injury arose out of and in the course of employment, in most cases expert medical evidence is required to establish industrial causation. If medical evidence is required, it must establish causation by a reasonable medical probability. It is not enough for the physician to simply repeat an applicant's allegations of injury. The physician must offer his or her opinion as to the cause of the injury.

True, lay testimony can occasionally support aoe/coe finding

BUT
usually need experts for causation
(to a "reasonable medical probability")

Need doctor's own opinion
(not mere recitation of IW's story)

Caceres v. Koosharem Corp., dba Select Personnel Services (Select Staffing), 2012 Cal. Wrk. Comp. P.D. LEXIS 613

"[W]henever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue"

Liberty Mutual Insurance Co. v. IAC (Serafin) (1948) 13 CCC 267, 271

ABSOLUTELY, POSITIVELY

have expert opinion for causation of:

- CT
- occ disease
- psych

Also needed for determinations re:

- treatment
- MMI
- TD
- PD
- Apportionment

What is a "medical report"?

Is it like pornography

US Supreme Court Justice Potter: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. **But *I know it when I see it***,"

Broad definition

"[A]ny written communication from a physician which in any way refers to the case in which he or she has been asked to report should be filed and served pursuant to the Board rules"

(Be careful what you ask for!)

Payne v. Mattel, Inc. (1980) 45 CCC 745
(appeal board *en banc*)

Broad definiton

CCR 10616: "A written communication from a physician containing any information listed in Section 10606 this is contained in any record maintained by the employer in the employer's capacity as employer will be deemed to be a physician's report and shall be served"

What's covered by Section 10606?
Better to ask what's NOT covered!
(verbal reports rock!)

Section 10606

1) date of exam;
2) history of injury;
3) complaints;
4) a listing of all info received in preparation of the report;
5) patient's medical history;
6) findings on exam;

Section 10606

7) diagnosis;
8) opinion as to the nature, extent, and duration of disability and work limitations, if any;
9) cause of disability;
10) treatment indicated;
11) opinion as to whether or not PD has resulted, whether is stationary. If stationary, a description of the disability;

Section 10606

12) apportionment;
13) a determination of the percent of the total causation resulting from actual events of employment, if the injury is alleged to be a psychiatric injury;
14) reasons for opinion; and,
15) signature of physician.

We can't have it all!

Despite fact that everything—it seems—is "medical evidence"

some is nondiscoverable

- must be relevant (at the very least!)

ex. broken leg

- don't try for psych records
- HIV has it's own rules (NEVER deal with HIV records without *thoroughly* reviewing the rules!)

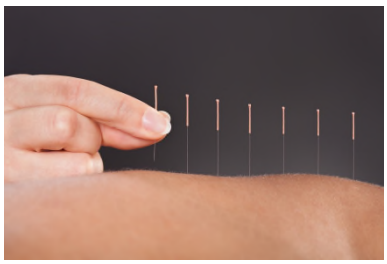
Not all medical evidence is equal

Some can't be used!

Want to determine entitlement to TD/PD?

don't bother with:

- acupuncturists
- MCCCs



LC 3209.3(e) and LC 3209.8

Want an admissible test?

Make sure it follows all the rules

LC 4628(e)

Doctor must provide

a. complete history
b. review of prior medical records
c. summary of prior med records
d. conclusions
e. perform the evaluation
f. disclose names/qualifications of anyone who helped
g. sign under penalty of perjury

Don't forget

Treating reports admissible for disputed med issues

BUT

MUST USE LC 4062.1 and 4062.2 for resolved

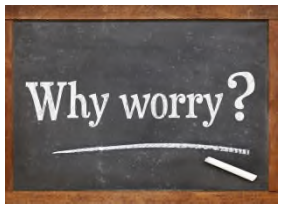
rep'd and proper disputed issues

Otherwise...inadmissible

Is evidence susceptible to an inference

opposite to what WCJ found?

No worries...



...so long was findings are supported by inferences "fairly drawn from the evidence"

Riskin v. IAC (Miner) (1943) 8 CCC 278; Judson Steel Corp. v. WCAB (Maese) (1978) 43 CCC 1205

Substantial Medical Evidence

What is it?

Evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be reasonable in nature, credible, and of solid value."

Braewood Convalescent Hospital v. WCAB (Bolton) (1983) 48 CCC 566, 568

"Factual findings of the [WCAB] are not supported by substantial evidence in light of the entire record where they are in conflict with all of the evidence, or where they are based on inferences which cannot be fairly drawn from the evidence, evidence which lacks probative force, a purely fanciful conclusion, or the creation of nonexistent evidence or the creation of a conflict in the evidence which does not otherwise exist."

Insurance Co. of North America v. WCAB (Kemp) (1981) 46 CCC 913, 916-917

To qualify as substantial, the medical opinion must be

"predicated on reasonable medical probability"

A no go if....

- known to be erroneous
- based on facts no longer germane
- based on inadequate medical histories
- based on inadequate medical examinations
- based on incorrect legal theories (*Escobedo*)
- based on surmise, speculation or conjecture
- fails to offer the reasoning behind the doctor's opinions
- extends beyond the doctor's area of expertise
- ambiguous

SUBSTANTIAL EVIDENCE TEST

Look at....ENTIRE entire record

(not just bits/pieces of report)

SUBSTANTIAL EVIDENCE TEST

1) look at ML reporting requirements

"Unless a medical report complies with section 10606 of the WCAB Rules neither the workers' compensation judge, the WCAB nor this court on review can make a rational decision on whether such report constitutes the kind of evidence on which a reasoned decision can be based."

Insurance Co. of North America v. WCAB (Kemp) (1981) 46 CCC 913, 922

Reasonable Medical Probability

What is it?

NOT to a scientific certainty (too tough)

NOT speculative (too little)

(but bordering on speculative!)

F: death case; fireman; lung cancer

WCAB = defense verdict

R: insufficient evidence re:
a. toxicity of inhaled smoke
b. amt of exposure
c. way inhalation resulted in cancer

(no convincing evidence)

Sup Ct says...

Not so fast...

Doctor said "probable" smoke had carcinogens

..."may well" be same as cigarettes

...carcinogens come from incomplete combustion

Summary:

- IW inhaled toxic smoke
- "reasonable" to assume it caused his c

IW need not demonstrate:

- Toxicity
- amt inhaled

"Future scientific developments will tell us more about lung cancer. Ultimately it might be possible to pinpoint with certainty the cause of each case of the disease. But the Legislature did not contemplate years of [loss without injury] pending such scientific certainty. Accordingly, we and the [WCAB] are bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or 'convincing.' We must do so even though the exact causal mechanism is unclear or even unknown."

McAllister v. WCAB (1968) 33 CCC 660, 667

Report doesn't need to use magic words

("reasonable med probability")

But magic words (RMP) won't transform a insubstantial report into substantial evidence

Report only provides a "possibility of causation"?

Insufficient (speculation; guess)

Temporal coincidence (as opposed to cause & effect)?

not sufficient

Speculative? Insubstantial!

Say "no" to "surmise, speculation or conjecture"

Med opinion must be:

- supported by factual/medical basis
- not based on conclusory opinions/assumptions

Inference (ok)

vs

Conjecture (NOT!)

- inference is based on medical probability supported by facts
- conjecture/speculation is not (speculative)

Facts

- slip and fall
- no tx for 2 months
- QME: no injury; evaluate for neuro disease
- WCAB agreed

SCt says,

"nope"

R: *doctor's opinion = "speculative"

- didn't ask why delayed tx.
- many possible reasons

*accepted mechanism of injury
+
uncontested symptoms
=
speculation to conclude no injury
speculation to claim alternate neuro disorder

Place v. WCAB (1970) 35 CCC 525.
Compare Patterson v. WCAB (1975) 40 CCC 799

General rule: opinion based on scientific tests/studies

=

substantial medical evidence

Need to defeat "speculative and conjectural" argument?

Look for

a) statistical correlations, and
b) probability relationships

Doctor "guess" = disaster

Opinion based on predicted future ailments/restrictions?

Speculative!

Note:

doctor says "guess" or "speculative“

BUT report as actually sub medical evidence?

It may come in!

F: doctor admitted opinion was "speculative in a sense"

H: substantial evidence!?!?

R: "Of necessity every medical opinion must be in a sense speculative and this does not destroy the probative value of such an opinion"

"[T]he honest medical opinion of a specialist in a given field is proper evidence upon which the board may rely on making an award and will constitute substantial evidence, even though these opinions are not based on a verifiable certainty."

Think apportionment!

Foremost Dairies, Inc. v. IAC (McDannald) (1965) 30 CCC 320, 329
Peterson v. WCAB (1968) 33 CCC 693, 700-701

insubstantial = erroneous

opinion is wrong?

not substantial evidence!

How can a medical opinion be erroneous?

(let me count the ways!)

How can a medical opinion be erroneous?

F:

- multiple body part injury
- dr says "not disabled“
- failed to find ruptured disc (diagnostic error)

H: can't rely on resulting reports to deny TD

R: reports are demonstrably erroneous

How can a medical opinion be erroneous?

facts supporting opinion = false & inaccurate

F: doctor: cancer not caused by asbestos

R:

- no asbestos found in IW
- later study did find asbestos

H: initial report false/inaccurate (that is, insubstantial evidence)

How can a medical opinion be erroneous?

not consistent with inferences that should be drawn from the facts

Facts no longer germane

Ever wonder why WCJs are almost always will to OTOC because of "stale reports"?

report must be:

- relevant to, and
- provide accurate depiction of...

CURRENT med condition

Facts:

- back = 42% = F&A
- new & further filed (committed to mental hospital)
- WCAB, relying on original medicals = defense win

SCt: annulled

R:

- WCAB relied on meds that failed to consider signif subsequent events
- evidence was unrelated & not probative of current med condition

National Convenience Stores v. WCAB (Kesser) (1981) 46 CCC 783, 790

Let's not discriminate!

Old does NOT (necessarily) = insubstantial

Alleging report is out of date must be:

- Specific
- supported by the evidence (not mere conjecture)

Reports predating trial by years can be ok if "based upon the essential facts extant at the time of the Board's decision."

Cano v. WCAB (2000) 65 CCC 625

Inadequate History/Exam

No history from applicant?

NOT substantial evidence

History material to conclusions inaccurate?

NOT substantial evidence

West v. IAC (Best) (1947) 12 CCC 86

20th Century Fox Film Corp. v. WCAB (Conway) (1983) 48 CCC 275

False history?

ATTACK

F:

- IW told AME re "major argument" just prior to heart attack
- AME: job stress contributed to heart disease
- Truth: argument happened months prior to heart attack

H: AME report not substantial evidence

Los Angeles Unified School District v. WCAB (Henry) (1981) 46 CCC 94

WCAB is no stranger to exaggeration

Questions to answer:

- how extreme is the exaggeration, and
- how material is it to doc's conclusions?

Inadequate history = problematic

Telephone exam re ortho injury ≠ not substantial evidence

Espinoza v. Intergem, 2012 Cal. Wrk. Comp. P.D. LEXIS 236

Query: what about video conferencing exam?

Incorrect Legal Theories

Sometimes doctors don't limit their malpractice to medicine!

They must know/understand:

- PD
- TD
- MMI
- Apportionment
- Etc

Ex failure to find MMI because of erroneous belief that this would cut-off medical care (happens more often than you might think)

Ex. per *Escobedo*, there is no apportionment

Incorrect legal theory re apportionment

Want substantial evidence?

Doctor must:

- demonstrate understanding of apportionment
- detail the nature of the apportioned
- define basis for doctor's opinion (so WCAB can ascertain whether correct legal theory is used)

E. L. Yeager Construction v. WCAB (Gatten) (2006) 71 CCC 1687, 1691

Are you ready for this...?

QME testified he wouldn't apply Guzman (even where legally appropriate)

H: not substantial evidence

R: incorrect (though admirable! lol) legal theory!

Failure to Explain Opinion

Can't be conclusory

"Gotta do some 'splaining, Lucy"

Without explanation, WCAB can't:

- weigh the evidence
- assess whether supported by reasonable analysis

F: LC 4600(d) - 2005 PDRS applies to pre-1/1/05 DOIs "where there has been either no comprehensive [ML] or no report by a [PTP] indicating the existence of [PD]"

two weeks pre-1/1/05, one sentence PTP report: "I believe [PD] is within a reasonable medical probability emanating from the injury"

H: didn't bring matter under 1997 PDRS

R:

- not substantial evidence
- lack of reasoning to support conclusory sentence

SCIF v. WCAB (Echeverria) (2007) 72 CCC 33

Other unacceptable "conclusions"

- "fair"
- "reasonable"

Escobedo

F:
- bilateral knee injury
- 50% apportioned to "other factors"
  (preexisting arthritis)

Substantial b/c doctor explained "medically reasonable" basis for apportionment:

1. "trivial nature" of aoe/coe injury
2. "almost immediate onset of" opposite knee's symptoms
3. "obvious significant degenerative arthritis in both knees"

(2005) 70 CCC 604, 622 (appeals board en banc)

E.L. Yeager Construction v. WCAB (Gatten)

(2006) 71 CCC 1687

F: 20% of spine PD apportioned to DDD

H: substantial evidence

R: doctor...
- relied on MRI
- testified to "reasonable medical probability"

Gatten

"We find nothing questionable about a medical expert's reliance on an accepted diagnostic tool. A medical expert may well view a person's history of minor back problems as being more significant in light of the evidence of substantial degeneration of the back shown by an MRI. [The doctor] did so here. His conclusion cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of these facts. This was a matter of scientific medical knowledge and the Board impermissibly substituted its judgment for that of the medical expert."

Gatten

"The doctor made a determination based on his medical expertise of the approximate percentage of [PD] caused by degenerative condition of applicant's back. Section 4663, subdivision (c), requires no more."

(YES! WE CAN APPORTION TO DDD!)

And who has DDD?

(ALL of old dogs!)

That's not what I do!

Orthos can't play psych
Psychs can't play ortho
DCs can't.....(fill in the blank)

"[A] medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises."

Zemke v. WCAB (1968) 33 CCC 358, 363

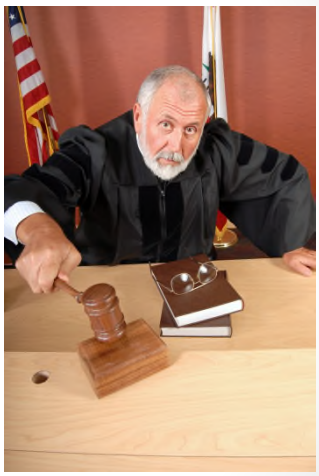
Doctor, Best not play WCJ!

Example:
whether there is an injury aoe/coe can be a factual/legal question (not for docs)

"A report which offers a....conclusion as to whether or not the case is 'compensable' intrudes upon a matter which is not a medical question, but one for ultimate determination by the [WCAB]"

Doctor opinions on such issues do not
=
substantial evidence

NO ONE cares if doctor thinks
Going & Coming Rule applies!



Doctor, Don't Play Judge

F:

- IW had prior hernia
- subsequent hernia
- QME said nonindustrial b/c not at work:

H: not substantial evidence

R:

- whether away from work is a factual issue
- whether local impacts compensability is a legal question

Ferreira v. WCAB (1974) 39 CCC 248

Evidence not admissible at trial

Opinions based on it are NOT substantial

CCR 35(e): can't forward to AME/QME:

1. MLs rejected as untimely
2. evals/consults written by anyone other than PTP or evaluator through the LC 4060-4062 process that addresses impairment, PD or apportionment (unless ruled admissible by WCAB)
3. any med report, record or other info stricken or found inadequate by the WCJ

Any of this sent to the AME/QME?

- report may be stricken
- watch out for sanctions

Mosby v. Best Buy, 2011 Cal. Wrk. Comp. P.D. LEXIS 229

Got movies?

Got popcorn?
Got problems?

F:

- PI deceitfully befriended IW
- partied; got drunk; induced to ride a horse

H: stricken; not substantial evidence

R: "Evidence obtained by fraud and deceit in violation of the rights of the applicant, however, is not 'best calculated to ascertain the substantial rights of the parties and carry out *justly* the *spirit* and provisions" of the workmen's compensation laws. The high purposes of the compensation law should not be perverted by resort to evidence perfidiously procured. We therefore conclude that the board may not rely upon evidence obtained, as in the present case, by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken.'"

Redner v. WCAB (1971) 36 CCC 371

Reports here; reports there!

Trial time = multiple med reports (usually)

PTP, AMEs (multiple), QMEs (multiple)

Conflict potential?

You bet!

This is a job for...

...WCJ/WCAB

LC 3202.5 **3202.5.** All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. Preponderance of the evidence means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. **When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.**

Conflicting reports?

"the question of whether applicant is a credible witness is different from the question of which physician is the more persuasive one. The latter question does not depend on demeanor but instead calls for an evaluation of the physicians' reasoning processes."

Power v. WCAB (1986) 51 CCC 114, 117

Get it right the first time

(at trial)

Why?

WCAB's findings/conclusions based on substantial evidence

=

questions of fact (conclusive and final)

"The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. . . . [In reviewing the appeals board decision] the court shall enter judgment either affirming or annulling the order, decision, or award, or the court may remand the case for further proceedings before the appeals board." ... 'The findings and conclusions of the appeals board on questions of fact are conclusive and final' so long as, 'based upon the entire record,' they are 'supported by substantial evidence."

LeVesque v. WCAB (1970) 35 CCC 16, 25

HUH?

DCA, etc can't re-review conflicting substantial evidence

AMEs are mighty powerful...

"[W]e begin by presuming that the agreed medical examiner has been chosen by the parties because of his expertise and neutrality. Therefore, his opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive."

There is a "presumption in favor of the opinion of the AME." AME opinions are given "great weight" and "considerable weight."

Power v. WCAB (1986) 51 CCC 114, 117
Green v. WCAB (2005) 70 CCC 294, 308
Isaeff v. WCAB (1997) 62 CCC 813 (writ denied)
Zuther v. WCAB (1998) 63 CCC 1451 (writ denied)

Is this "great" and "considerable weight" a good thing?

What do YOU think?

Even AMEs can be (rarely) rejected

****but it's got to be pretty outrageous****

F: AME says,

- no objectives
- pt not needed (cause all "normal")
- DC not needed (cause all "normal")
- surgery not needed (you guessed it)

BUT give IW OTCs!?!?!

H: not substantial evidence

R: OTC opinion was contracted by own report!

Rodriguez v. WCAB (1994) 59 CCC 14

Though tough to destroy,

AMEs must follow same rules

Not substantial evidence if:

- known to be erroneous
- based on facts no longer germane
- based on inadequate medical history
- based on inadequate exam
- based on incorrect legal theory
- based on surmise, speculation or conjecture

Panel Presumption

(like old fashion PTP presumption?)

NOPE!

"the opinion of the panel QME is not entitled to a presumption of accuracy. Rather the panel QME's opinion is entitled to no more or less weight than the opinion of a treating physician."

"the [PQME's] opinion is entitled to no more or less persuasive weight than the opinion of the treating physician, and that the trial judge must consider the entire record and decide the facts and controversy based upon substantial evidence in light of the entire record."

The point?

PTP = substantial evidence; QME = not: PTP wins

PTP =not; QME = substantial evidence: QME wins

Neither substantial evidence: look elsewhere

Both = substantial evidence: either can win (up to WCJ)

Felix v. Verizon Wireless, 2008 Cal. Wrk. Comp. P.D. LEXIS 541

Cruz v. Petaluma Poultry Processors, 2009 Cal. Wrk. Comp. P.D. LEXIS 574

Careful agreeing to QMEs (and turning them into AMEs!)

"In this case, the parties agreed to a PQME with Dr. Fishman...Dr. Fishman was not an AME but was jointly selected by applicant and defendant to perform a PQME and his report and deposition were jointly submitted into evidence at trial.....[A] medical evaluator to which the parties have agreed to submit medical-legal issues has presumably been chosen by the parties because of that evaluator's expertise and neutrality. Therefore, the opinion of such selected evaluators should ordinarily be followed unless there is good reason to find that opinion unpersuasive."

Dorsey v. City of Torrance, 2013 Cal. Wrk. Comp. P.D. LEXIS 418

It's not a PTP

PQME

AME

What is it?

Court Appointed Doctors

Independent Medical Examiner (IME)

I know, I know...you can (no longer) find the term in your labor code...don't worry about it

5701. The appeals board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the timebooks and payroll of the employer to be examined by any member of the board or a workers compensation judge appointed by the appeals board. ***The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician.*** The testimony so taken and the results of any inspection or examination shall be reported to the appeals board for its consideration.

When can an "IME" be assigned?

Post-trial/submission of the case, WCJ can assign if determines:

a. the medical record requires further development
b. the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record; and
c. the parties cannot agree to an AME

"Court Appointed" (IME)

- assigned only if no substantial evidence to support award
- thus, if "IME" is substantial, it is followed

PRACTICE POINT: WCJs will use this threat to:

a. get the parties to settle, (facing further discovery costs; unassigned doctor = crap shoot; stuck with IME--like AME), and/or
b. convince parties to use AME

NOTE:

- if there is no substantial evidence...
- EE has failed to prove claim

Why IME instead of "take nothing"?!?!

Ask!
Challenge!

Range of Evidence

General Rule:

WCAB decides to follow Doctor A?
Must give full weight to all of A's findings!

"It is well settled that the board, if it relies at all on the report and testimony of a medical examiner must give full weight to *all* of the findings of that doctor, and may not omit a factor of disability described by him....An award which ignores such factors lacks substantial evidence to support it."

Franklin v. WCAB (1971) 36 CCC 429

ONLY a "general" rule!
WCAB can rely on a "range of evidence"

"Arriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily involves some measure of conjecture and compromise by the finder of fact as certainly would occur in the mental processes of a so-called expert witness. When the commission is confronted with widely divergent views as to the extent of the loss of function of the body, ... it may make a determination within the range of the evidence as to the degree of disability. ... The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence."

Liberty Mutual Insurance Co. v. IAC (Serafin) (1948) 13 CCC 267

Range of Evidence

Most often used when

PD reports appear equally valid*

*Much bigger issue pre-1/1/05 (AMA Guides)

Range of Evidence

Picking and choosing parts of different reports for different issues?

No worries!

Holding: AMA-based PD awarded using

1. PQME's report re PD/apportionment =back
2. PTP's report re PD/apportionment = knees

NBC Universal Media, LLC v. WCAB (Moussa, Andramos) (2014) 79 CCC 191 (writ denied)

"So stipulated"

Can't agree to everything?

Settle OR Trial

Can agree to something?

Stips

Stipulations:

Pro: expedites process

(perturb WCJ if ain't got none)

Con: you're stuck! (=admission!)

193

CCR 10496 "Awards and orders may be based upon stipulations of parties in open court or upon written stipulations signed by the parties."

CCR 10497 "No finding shall be made contrary to a stipulation of the parties on an issue without giving the parties notice and an opportunity to present evidence thereon."

HUH?

- awards can be based (partially or totally) on stips
- WCAB can't arbitrarily reject (must give notice; opp. to be heard)

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194

What are we talking about?

Stips are "[a]n agreement between opposing counsel ... ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action."

Stips "obviate need for proof or to narrow range of litigable issues"

"A stipulation may lawfully include or limit issues or defenses to be tried, whether or not such issues or defenses are pleaded."

County of Sacramento v. WCAB (Weatherall) (2000) 65 CCC 1

IMPORTANT:

- entered into a stip
- it's treated as FACT (ignore trial evidence to the contrary!)

CCR 10492, "The pleadings shall be deemed amended to conform to the stipulations and statement of issues agreed to by the parties on the record."

- Stips DICTATE the "facts"
- Facts to NOT dictate the stips

Why?

That's the whole reason to have stips!!!!

County of Sacramento v. WCAB (Weatherall) (2000) 65 CCC 1

Stips bind the parties

NOT the WCJ

"The parties to a controversy may stipulate the facts relative thereto...The appeals board may thereupon make its findings and award based upon such stipulation [or] make the further investigation necessary to enable it to determine the matter in controversy."

LC 5702; Huston v. WCAB (1979) 44 CCC 798, 803

197

How does WCAB justify rejecting a stip?

"good cause"

What's "good cause"

Proof the stip has been "entered into through inadvertence, excusable neglect, fraud, ***mistake*** of fact or law, or where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation."

Huston v. WCAB (1979) 44 CCC 798, 804

198

What's a "mistake"?

- must be mutual
- must not be the result of failure to exercise due diligence

Weatherford v. Consolidated Graphics, 2015 Cal. Wrk. Comp. P.D. LEXIS 119

Huston v. WCAB (1979) 44 CCC 798, 804

Stip not justified by the evidence?

Stip lead to bad (unintended) result?

Tough luck, buddy!

Stip doesn't comport with conflicting medical opinion?

Stip'd w/out exercising due diligence?

You guessed it!

Tough luck buddy!

Stip based on miscommunication between

ER and DA?

All together now....!

Tough luck buddy!

Here's a weird one...

Imagine this happens to YOU:

You & AA stip:

1. aoe/coe
2. to use Dr A as AME for TD, PD, treatment
3. discovery remains close

Stips are approved

Imagine this happens to you:

EE reneges, claiming that "the parties had been unable to proceed with an AME examination"

You—rightly say—"what's good for you is good for me!"

"I WITHDRAW MY AOE/COE STIP"

WCAB says,

"Tough luck"!?!?

"Consistent with [citations] defendant can only withdraw from these Stipulations on a showing of good cause. *Such a showing has not been made*. In its Petition for Reconsideration,...[d]efendant alleges...that the Stipulations were contingent on the applicant submitted [*sic*] to the AME examination; that applicant backed out of the Stipulations; and that the Stipulations were withdrawn. This supposed contingency is not apparent, however, from the plain language of the Stipulations. Defendant does not appear to contend to enforce the portion of the Stipulations relating to the AME."

General Motors Corp., C.P.C. Van Nuys Plant v. WCAB (Seifert, Abbenante) (2004) 69 CCC 805 (writ denied).

What's the lesson?

1. enter into stips very carefully
2. use "if, then" language
3. if "if" happens, take action quickly (petition to compel participation in AME exam...)

The legislature/case law messed with you!?!?

Get out of jail free

City of Anaheim v. WCAB (Ott) (2010) 75 CCC 371 (writ denied)

Stip'd when law was "unclear" (and subsequently settled)...?

NOT GOOD CAUSE

"Having assessed the likelihood of a decision in their favor and the accompanying risk of a decision against them, parties in workers' compensation proceedings, as in other cases, may settle a case, accepting less than they want in order to limit the risk of receiving even less or nothing at all."

Fireman's Fund Insurance Co. v. WCAB (Allen) (2010) 75 CCC 1

Can't figure out the stip meant to say?

"When the terms of a stipulation or agreement are unclear and/or ambiguous, there is nothing for the WCJ to approve, reject, or for either party to enforce or withdraw from."

Lopez v. Ed H. Park, Inc., 2015 Cal. Wrk. Comp. P.D. LEXIS 562.

Stipulation options?

Take your pick:

- Stips with Request for Award
- Stips in Pretrial Conference Statements
- Stips in Open Court
- Stip at Deposition
- Written Agreements out of Court

Stips with Request for Award (SRA)

Can agree to terms/conditions/etc to resolve claim (or part of a claim)?

Submit written stips to WCJ

If found adequate, award issues

Submitted SRA?

Reconsidering?

WCAB hasn't taken action...yet?

TOUCH LUCK!

"If one party could, as a matter of right, withdraw from a stipulation at any time before it was acted upon by the WCJ or the WCAB, other parties could not rely upon the stipulation and, rather than being expedited, hearings would be subject to uncertainty and disruption in order for the parties to gather and present evidence on issues thought to have been laid to rest by the stipulation."

Robinson v. WCAB (1987) 52 CCC 419, 423

SRA is awarded?

jurisdiction changes!

can't be changed > 5 years post-DOI

only changed (timely) via petition & good cause

5803. The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division,...At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.

5804. No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counter petition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition. Provided, however, that after an award has been made finding that there was employment and the time to petition for a rehearing or reconsideration or review has expired or such petition if made has been determined, the appeals board upon a petition to reopen shall not have the power to find that there was no employment.

Stips in Pretrial Conference Statement (SPC)

aka "stips and issues"

not WCJ orders

read into the record at trial

Stipulations in Open Court (SOC)

SOC can occur throughout trial

Memorialized in Minutes of Hearing

=

formal agreement

County of Sacramento v. WCAB (Weatherall) (2000) 65 CCC 1
Huston v. WCAB (1979) 44 CCC 798, 803

SOC

magic words: "so ordered"/"so awarded"

Transforms agreement into WCAB order

"To give enforcement to the stipulation it must be treated as if it were a formal findings and award issued by the appeals board."

Huston v. WCAB (1979) 44 CCC 798

No magic words?

=
No order!

F:
- ER stip'd in minutes to increased TD rate
- ER didn't pay
- EE sought penalties (LC 5814 & 5814.5 fee for enforcing stip)

H:
- penalty per 5814 awarded
- 5814.5 fee not awarded

R:
- stip was enforceable
- WCJ didn't say magic words, thus not transformed into benefit award

Smith v. WCAB (2009) 74 CCC 984 (writ denied)

Stips vs informal agreements

"It is generally recognized by the WCAB that stipulations are to be encouraged and...lead to the efficient operation of the court and facilitate the resolution of claims. It must be noted, however, that the agreement by the parties was not set forth as an order...It was viewed by this Judge as an informal agreement and not an enforceable order."

Pedroza v. WCAB (2004) 69 CCC 287 (writ denied)

Depo Stips

Stip'd "on the record"?

Will be enforced...

Watch out for 5710 fees!

Written Agreements outside of Court

No order

No minutes of hearing

Just letters/emails/texts...

Enforceable?

YES!

Written Agreements outside of Court

LC 5702 "The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board."

CCR 10496 "Awards and orders may be based upon stipulations of parties in open court or upon written stipulation signed by the parties"

Writing drafted at court

vs

outside of court

No difference!

Stips can waive defenses

F: ER sent letter to confirming authority to self-procure HHC at $12/hour

H: binding without a showing of good cause

I: isn't there a formal, statutory method for payment requests?

"[A] provider must submit an itemization of services and charges, copies of all reports showing services performed, a prescription or referral by the primary treating physician and any evidence of authorization. However, section 4062.3(a) also provides that the parties can agree to an alternative method of request for payment. By its terms, the stipulation provides that applicant's need for care is based on the medical reports submitted by applicant's medical professionals and that defendant is authorizing ten hours per week, seven days per week of home health care services at the rate of $12.00 per hour without requiring a showing as to what services were provided. Thus, while section 4603.2(a) applies, the parties have already agreed to an alternative method to request payment."

Garcia v. Los Angeles Unified School District,
2015 Cal. Wrk. Comp. P.D. LEXIS 39

Informally agreed to AME?

Withdrawing from the agreement?

Watch out for sanctions!

Rasmussen v. J&J Maintenance, Inc., 2004 Cal. Wrk. Comp. P.D. LEXIS 92

Enforceable "agreement" must be a

true AGREEMENT

(aka meeting of minds)

F:

- ER PD notice est. 30% PD on PTP report
- ER used wrong PDRS
- EE attempted to settle based on notice, arguing enforceable written agreement

H: no

R: (a) not an "offer"; a mandatory LC 4061 notice

4061. "(a) Together with the last payment of temporary disability indemnity, the employer shall...provide the employee one of the following

(1) Notice either that no permanent disability indemnity will be paid because the employer alleges the employee has no permanent impairment or limitations resulting from the injury or notice of the amount of permanent disability indemnity determined by the employer to be payable. If the employer determines permanent disability indemnity is payable, the employer shall advise the employee of the amount determined payable and the basis on which the determination was made..."

(b) notice was not an "offer"
(c) notice was an estimate
(d) EE's letter may have been an offer, but not accepted by ER

Oral Agreements Outside of Court

"[W]e believe it is matter of public policy that, absent extraordinary circumstances, any agreement to be enforced in workers' compensation proceedings should be reduced to writing. This principle will help to ensure there has been a true 'meeting of the minds,' and will avoid unnecessary confusion and litigation."

California Compensation Insurance Co. v. WCAB (Raines) (1997) 62 CCC 1264 (writ denied)

YES:

oral agreements may be valid, BUT tough to define, so deemed unenforceable

Interpretation?

Oral agreement = binding if

1. confirmation is sent w/in 5 business day after the agreement is formed, and
2. there is no objection w/in 3 days of receiving the confirmation

Unenforceable Stips

- contrary to law 

- contrary to court rule 

- contrary to policy 

F: stip to reserve jurisdiction to WCAB beyond 5-year limit

H: unenforceable

R: "Board cannot reserve jurisdiction it never had."

Some contra cases....

F:
- Stip to resolve fut med issues via AME
- UR/IMR subsequently implemented

H:
- if objecting to UR, EE could go to AME (and avoid IMR)

Bertrand v County of Orange (2014)

Who is trapped in Stip's web?

Atty has authority?
Party rep'd by atty is bound

HOWEVER

1. stip unauthorized
2. stip made without knowledge of client
3. stip made without consent of client

=

unenforceable

Turner Gas Co., Inc. v. WCAB (Kinney) (1975) 40 CCC 253

"Due process dictates that stipulating parties always must be given notice and the opportunity to present evidence on a material fact covered by the stipulation before it is disregarded. But a litigant who does not sign a stipulation is not a party to the contract, and he is not shielded, automatically, by the due process clause. A party who has not signed the stipulation has standing to complain if a stipulation subsequently is rejected by the referee in light of all of the evidence, and if he relied upon it to his detriment. As to nonstipulating parties, actual reliance upon a stipulation is the essential ingredient to a successful claim of lack of due process."

Not enough evidence for WCJ?

s/he can get more!

LC 5502(d)(3)

"Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible 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."

Failed to disclose?

inadmissible

Failed to timely locate?

inadmissible (short of showing not timely discoverable via "due diligence")

Evidence didn't even exist pre-MSC?

tough luck!

- obtaining post-MSC medical?
- obtaining post-MSC video?

MUST show:

- not available
- why not available
- due diligence wouldn't help

Results?

inability to prove case!

Escape hatch: stip

Escape hatch:

failure to timely object by not objecting to evidence submitted post- MSC

Escape hatch:

WCJ's approving keeping discovery open post-MSC (more likely off calendar)

Escape hatch:

surprise evidence introduced by opposition

Tailored discovery closure order

Discovery closed except for specified info

Party not diligent re specified info = possible closure

Possible exception: pro per

"WCAB, denying defendant's petition for removal, affirmed WCJ's order re-opening discovery on day of trial to allow *pro per* applicant to complete her exhibit list, when WCAB found applicant,

- **being unrepresented,**
- **was ignorant of what [MSC] was and,**
- **consequently, failed to attend conference and**
- **did not have opportunity to participate in pre-trial conference statement,**
- **had fundamental misunderstanding of trial process**
- **liberal construction of law mandated that discovery be re-opened to allow applicant her 'day in court'"**

Holland v. Crossmark Holdings, Inc., 2014 Cal. Wrk. Comp. P.D. LEXIS 458

Closing Discovery

vs

Authority to develop the record

5701. The appeals board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the time books and payroll of the employer to be examined by any member of the board or a workers compensation judge appointed by the appeals board. The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician. The testimony so taken and the results of any inspection or examination shall be reported to the appeals board for its consideration.

5906. Upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers compensation judge on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence. Notice of the time and place of any hearing on reconsideration shall be given to the petitioner and adverse parties and to other persons as the appeals board orders.

F: EE's expert viewed subrosa; ER's had not

H: remanded for further development

R: "medical evidence as to nature and extent is lacking. The WCJ was free to reject the opinions of [the employee's] doctors, which included consideration of the surveillance films. However, in order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process, it was necessary for the WCJ or [the] WCAB to have facilitated review of this critical information by Drs. Stalberg and Ruffman, or to employ some other reasonable and fair method considering the circumstances…awarding benefits based on medical opinions lacking crucial information violates the employer's due process rights."

M/A Com-Phi v. Workers' Comp. Appeals Bd.
65 Cal. App. 4th 1020

Problems Trial:

- EE submits illegible reports
- ER reports insubstantial
- insufficient evidence to rule

Option: develop the record

Failed to present sufficient evidence by MSC?

Duty to develop

NOT =

life line

specific duty to disclose evidence

>

general duty to develop record

A WCJ may not leave undeveloped matters requiring further evidence...and has the authority to order the parties to obtain supplemental medical reports based on a WCJ's duty to develop the record...However, in order to avoid circumventing the clear legislative intent to close discovery at the mandatory settlement conference in accordance with Labor Code § 5502(d)(3), before the medical record can be augmented, a WCJ must establish that the existing medical record is deficient and that a decision cannot be made on the existing record alone. However, a WCJ cannot exercise his or her duty to develop the record if doing so would unfairly reward a party who, due to their own negligence, cannot meet their burden of proof pursuant to Labor Code § 3202.5.

Gaytan v. Payless Shoesource, Inc.
2011 Cal. Wrk. Comp. P.D. LEXIS 159

F:

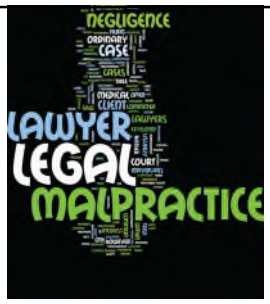
- MSC - "we're ready to proceed"
- problem with EE's QME ("I'll obtain supplemental later")
- WCJ left open discovery post-expedited (over ER's objection)
- EE awarded benes based on supplemental

DCA: reversed

County of Sacramento v. WCAB (Estrada) (1999) 64 CCC 26.

Here, there was no attempt to justify the failure to obtain a supplemental report from Dr. Tempkin. The county objected to the original report and made it known before the settlement conference that it was inadequate. Nevertheless, Estrada proceeded to the settlement conference, declaring under penalty of perjury that discovery was complete and that she was ready to proceed. Accordingly, admission of the supplemental report exceeded the bounds of discretion allowed to the workers' compensation judge by section 5502.

County of Sacramento v. WCAB (Estrada) (1999) 64 CCC 26



F:

- evidence inadmissible
- EE says, "My atty was incompetent (TRUE!)

H:

desire to save EE from AA's incompetence does

NOT =

good cause for further development

Magana v. Bodycote Aerospace Defense and Energy Group, 2015 Cal. Wrk. Comp. P.D. LEXIS 199

The best laid plans...

Tactical decision not to list evidence...?

Blows up in your face?

Tough luck

H: EE estopped from appealing whether records were properly excluded b/c records were purposely excluded (strategic mistake)

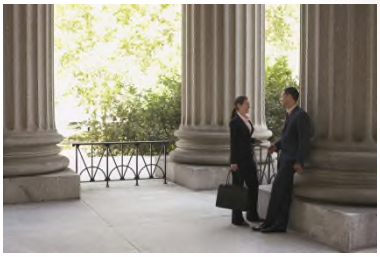
Magana v. Bodycote Aerospace Defense and Energy Group, 2015 Cal. Wrk. Comp. P.D. LEXIS 199

Hide that subrosa for impeachment at your own risk!

Want to reopen discovery?

How about changing counsel?

NOPE



"fact that applicant…changed attorneys...is not a valid reason to develop the record"

Olivares v. WCAB (2005) 70 CCC 1358 (writ denied)

F:

- EE filed DOR
- MSC: wanted to amend to include psyche
- at time of DOR, EE had evidence of potential psyche
- DOR signed under penalty of perjury that discovery was complete

H: ER substantially prejudiced by OTOC

R: EE failed to show due diligence

Burton v. Long Beach Unified School District, 2012 Cal. Wrk. Comp. P.D. LEXIS 170

No party presents substantial evidence?

EE has burden of going forward...

...shouldn't ER win?

Not so fast!

WCAB will likely develop record if

- material deficiencies in specific records/reports
- doctor hasn't reviewed all relevant medicals
- medical not clear; need clarifying supplemental
- material change of facts post-MSC (ex. worsening condition)

Danger: WCAB will likely develop record if

F:

- denied aoe/coe (indep contractor)
- EE unable to obtain ML until found to be EE

H: develop record

Arzola v. Faria, dba Ace Towing and Truck Mobile Services, 2013 Cal. Wrk. Comp. P.D. LEXIS 407

F: WCJ says report is "unclear" "murky"

H: not enough to order further development

Herrera v. City of Fullerton
2013 Cal. Wrk. Comp. P.D. LEXIS 554

F:

- at MSC, ER asserts no substantial evidence ("false, inadequate and inaccurate history")
- WCJ: not substantial evidence
- WCJ: doctor didn't review records contradicting history taken and needed a supplemental

H: reversed

R: EE was on notice of claim that records were

- insubstantial but decided—at own peril—to proceed
- "A party is not entitled to assert she is prepared and ready for trial and then be offered a second chance when it is determined that her evidence is not substantial medical evidence and is not adequate to meet her burden of proof...."

Rivas v. Posada Whittier/Berg Senior Services,
2010 Cal. Wrk. Comp. P.D. LEXIS 114

Developing the Record:

- med opinions deficient (ex. inaccurate, incomplete)?

1. parties obtain supplementals from doctors who have reported
2. supplementals don't do trick, select new doctor (LC 4061/4062)
3. consider AME
4. none of the above works, WCJ appoints "regular physician"
5. Develop record "after trial or submission of a case for decision"

McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 CCC 138 (appeals board en banc)

F:

- significantly relevant sub rosa served just prior to MSC
- WCJ ordered development of record before trial

I: should development await until "after trial or submission of a case for decision"?

H: no

R: "The trial judge would be faced with medical and vocational opinions greatly at odds with the sub rosa evidence, and no way to reconcile the two absent a reopening of the record under sections 5701, et seq. The delays of which applicant complains…would only be exacerbated by such events."

Babbar v. WCAB (2014) 79 CCC 1525 (writ denied)

Doctor demonstrably biased...

1. not substantial
2. no reasonable hope of correcting via supplement

"regular physician" ok!

Agaronyan v. Regents, University of California, 2011 Cal. Wrk. Comp. P.D. LEXIS 561

Extent of Development?

Limits:

Canon 3(B)(7) of the CA Code of Judicial Ethics states that "a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic."

F:
- IME assigned
- WCJ contacted IME (twice) after case was submitted for assistance

H: naughty

R:
- Canon 3(B)(7)
- denial of due process (parties couldn't cross-exam doctor re issues raised by WCJ)

Fremont Indemnity Co. v. WCAB (Zepeda) (1984) 49 CCC 288

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259

F:
- issue =enough doctors willing to treat EE w/in MPN
- ER provided list of doctors from which EE could choose
- WCJ contacted 4 to determine availability
- ruling: insufficiently available; EE breaks out of MPN

H: remanded

R: WCJ may not conduct investigation of facts
must have parties produce the evidence

Ponce de Leon v. Barrett Business Services, Inc. (2012) 40 CWCR 73 [2012 Cal. Wrk. Comp. P.D. LEXIS 153]

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260

CONTRAST

- ok to take "judicial notice" of MPN list
- on DWC website

Clifton v. Sears Holding Corp. (KMart Corp.), 2012 Cal. Wrk. Comp. P.D. LEXIS 1

ok to conduct investigation if:

1. parties present
2. parties requested

F:

- EE nowhere to be found
- WCJ ordered parties to retain PI to find

H: rescinded:

R: no authority

Rodas v. Kellermeyer Bergensons Services, 2014 Cal. Wrk. Comp. P.D. LEXIS 470

Evidence from Other Cases

Found a medical or depo from another case?

Submit into evidence...

NOT!

admission would deny due process to other party
(can't cross-examine)

But what if you set doctor/deponent's depo?

Costa v. Hardy Diagnostic (2006) 71 CCC 1797 (appeals board *en banc*)

263

POST-MSC EVIDENCE TO REBUT UNANTICIPATED TESTIMONY

F:

- EE testified re forgotten body parts
- Def offered post-trial evidence of re those body parts

I: admissible?

H: yes

R:

- need for evidence only came about b/c of
- EE's (surprise) testimony

Kuykendall v. WCAB (2000) 65 CCC 264

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264

F:

- admitted injury
- EE testifed at trial: no hand strength
- wife testified: memory loss, problems writing, unable to shower, watch kids etc
  - subrosa contradicted all

I: admissible?

H: yes

R:

- false testimony = surprise/unanticipated
- false history to doctors rendered reports insubstantial
- given no report could be relied on, WCAB must ensure review of subrosa by doctors

Upshot?

WCAB will balance unfairness of surprise

vs

Need to disclose by MSC

IF false testimony could have been expected, undisclosed impeachment evidence = disallowed

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

DISCLOSING MED EVIDENCE @ MSC

List it or lose it
(or beg for forgiveness)

LC 5502(d)(3) 3) If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party s proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible 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.

Report is listed on pretrial conf statement...

...but doesn't exist yet!?!?

Admissible?

Redo Beach v. WCAB (Levick)

(1997) 62 CCC 341 (writ denied)

F:

- doctor appointment listed at MSC
- appointment occurred after MSC (earliest available)
- opposition had time to obtain rebuttal (no prejudice)

H: admissible

Contra

DCA:

- just b/c no prejudice to a party does NOT =admissibility

Best bet: argue...

- evidence was unavailable &
- couldn't have been timely obtained via due diligence

It's confusing

Med report listed on PTC statement (but not completed by MSC) isn't automatically:

- inadmissible
- admissible

Don't press your luck!

- 2006 eval
- MSC =2009
- report not yet available

H: inadmissible

R:

- no good cause
- no showing of due diligence
- no objection to DOR

Barajas v. Chocolates Ala Carte, 2009 Cal. Wrk. Comp. P.D. LEXIS 635

ID'ing Witnesses @ MSC

Must id at MSC...not prior

Don't id...you get no testimony unless show:

- W was unavailable, or
- due diligence wouldn't have worked

True of IW....must be listed...or else!

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

Be specific!

- ✓ "Custodian of Records and Co-Employees, and Supervisors”
- ✓ "Representative”
- ✓ "Rebuttal Witnesses”
- ✓ "Any other Pertinent Witnesses necessary to this case”
- ✓ "Applicant's Supervisor"

NOT sufficient

Can't correct at trial time

What are they going to say?

None of your business!

F:

- VR expert listed by name
- statement claimed he would testify re *LeBoeuf*
- at trial admitted: *services were sought after MSC
  - met with IW post-MSC
  - prepared no report
- WCJ said "Nope"
- R: violates ER's due process

WCAB/DCA said..."ER, you lose!"

R:

- LC 5502 requires name of W...nothing more!
  - no need to disclose contents of testimony
  - given that disclosure isn't necessary, later

creation of testimony is ok

HOWEVER...

"No sandbagging allowed"

At MSC WCJ can

- order depos
- make orders re admission of evidence

Thus, ER should ask for "sandbagging" remedy:

1) opportunity to obtain rebuttal
2) opportunity to depose
3) "exclude the witness's testimony as antithetical to the aim of fruitful settlement discussions"

Grupe Co. v. WCAB (Ridgeway) (2005) 70 CCC 1232

How it works down at the board

F:

- IW revealed DFEC theory at MSC for first time
  - id'd expert but offered no reports

H:

- discovery on DFEC not closed
- ER allowed to: obtain own expert take IW's expert's depo

Schrodt v. Shortridge Young Dental Laboratory, 2009 Cal. Wrk. Comp. P.D. LEXIS 179

NOTE:

- not much of a problem with VR expert testimony since 1/1/13...
- ...can you guess why?
- (HINT: LC 5703(j))

May I borrow that?

- Didn't list a witness (such as IW)?
- AA did list IW?
- No worries!

Dole Bakersfield v. WCAB (Arguelles)

(1998) 63 CCC 698

F:

- AA listed IW
- ER listed 3 others (not IW)
- at trial, AA submitted case on the record
- ER tried to cross-exam IW
- WCJ says "nope"...you didn't list IW

DCA says, "WRONG"
R: LC 5502 permits using each others' Ws

Revealing Sub Rosa at MSC

it's a balancing act

Want to:

- surprise IW when lies at trial
- avoid having sub rosa stricken
- MUTUALLY EXCLUSIVE

GENERAL RULE #1:

available before MSC
+
not disclosed at MSC
=
not admitted

GENERAL RULE #2

sub rosa obtained after MSC

+

ER fails to demonstrate why similar evidence could not have been obtained prior to MSC (and thus disclosed at MSC)

=

not admitted

GENERAL RULE #3

subrosa not disclosed at MSC

+

"unanticipated testimony" that can rebut surprise testimony

=

likely admissible

TRUE RULE:

a. how ticked off WCJ is
b. who made WCJ more unhappy

Be Specific

Got lots of records?

ID with specificity (at MSC)

"All reports from Dr X"

or

"All records from Kaiser"

NOT =

ok

(unless ALL = relevant)

See DWC/WCAB Policy and Procedural Manual provides that receipt and retention of voluminous hospital and medical records create a storage problem and make review by the appeals board difficult. So it discourages parties from filing unnecessary or duplicate documents.

Exercised "due diligence"?

- Records *still* not available as of MSC?
  - LC 5502(d)(3) says "no worries"

PROBLEM: "due diligence" not defined!

Get ready for a fight!

Want the records admitted?

It's YOUR job to prove "due diligence"

"[W]hen a party appears at trial and asks the [WCJ] to permit the introduction of evidence which was not disclosed at the time of MSC, the party must explain either why the evidence was not earlier available ***or*** why it could not have been discovered in the exercise of due diligence."

"or" = and

San Bernardino Community Hospital v. WCAB (McKernan) (1999) 64 CCC 986

Trouble Getting Evidence In

Knew of defects in reports as of MSC?

Did nothing about it?

EXCLUDED!

F:

- 3/16 QME
- two supplementals: no changed opinion
- 10/16: AA filed DOR
- ER objected: wanted to take QME depo

H: nope

R: parties have an "affirmative duty" to a conduct a "reasonable and timely investigation"...

Galindo v. American Medical Response, 2017 Cal. Wrk. Comp. P.D. LEXIS 88

...which reminds me

When is the best time to set AME/QME's depo?

A lot earlier than you think!

Successful efforts getting evidence in!

aka

How much "due diligence" is needed

1. must be "reasonable" (whatever that means!?!?)
2. need not show that all possible discovery efforts were fully exhausted

Successful efforts getting evidence in!

F:

- DOH 1999
- depo: testified CTS began one year post-DOH
- trial: testified problems began in 2000 (and got worse until left for treatment in '01)
- post-trial ER conducted a "master trace" finding
  - EE began treatment immediately after 1999 DOH

I:

- can record be reopened to allow evidence subsequently obtained contradicting EE's depo/trial testimony?

H: yes

"The WCJ and WCAB concluded due diligence …was not shown because [ER] failed to explain why the…records could not have been discovered before the [MSC]...However, [ER] pointed out the medical discovery before the mandatory settlement conference was based on [IW's] deposition testimony.

While [ER] could have performed a "master trace" before the mandatory settlement conference, and it may be better practice to routinely check all possible sources of information, it was reasonable to rely on [EE's] deposition testimony and the appropriately discovered medical record which appeared to be straightforward.

Gelson's/Arden Group v. WCAB (Baez) (2003) 68 CCC 1772 (Court of Appeal opinion unpublished in official reports)

No playing games

F: med report disclosed at MSC

BUT

report not prepared b/c IW failed to appear

H: admissible

R: IW should not benefit from her failure to appear!

New problems need new approaches

F:

- IW deported to Mexico
- testified via phone
- ER objected (for first time): ID not verified

H: wife allowed to testify (even though not listed at MSC)

R: b/c issue not raised until trial, need for testimony could not have been discovered via "due diligence" pre-MSC

Vargas v. Becker, Becker Construction, 2017 Cal. Wrk. Comp. P.D. LEXIS 276

Cures are ok...new is not (necessarily)

Lots of ML reporting requirements...

1. substantive defect as of MSC?
   may not "cure" absent "good cause"

2. procedural defect as of MSC
   ex not signed until after MSC – "cure" ok
   ex. LC 139.3 declaration not signed until MSC
   post-MSC "cure" ok!

Cures are ok...new is not (necessarily)

substantive not ok to cure

vs

procedural not

Why?

Signature, declaration, etc

NOT =

new "evidence"...

BUT why aren't parties required to be

fully prepared?

Esp if

a) they filed DOR, or
b) failed to object to DOR

Doesn't seem fair

(it's workers' compensation—get over it!)

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