

Taking Statements of Employers, Injured Workers & Witnesses

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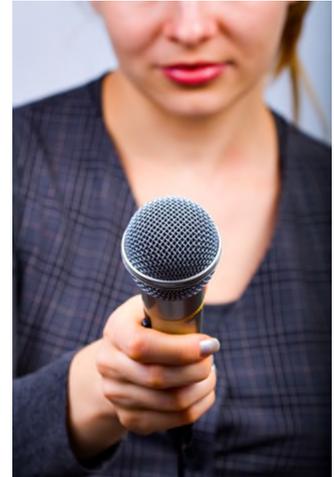


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The Importance of Interviews

- Interviews and statements are a discovery tool (like depositions and subpoenas)
- Interviews and statements are proper even before an Application is filed (contrast with depositions: If no Application is filed, no depositions can occur and subpoenas cannot be issued).



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Why Take Statements?

- Preserve testimony and recollections while fresh.
- Create written record to refresh months or years later during trial testimony
- Better to learn the “whole truth” (eg, bad news) early so there are no surprises later and to facilitate a reasonable settlement analysis.
- Impeachment: Applicant says X occurred, but three witnesses say no, the weight and credibility of contrary testimony may defeat applicant’s assertions
- Helps defense counsel by highlighting issues—DA doesn’t have to start from scratch or recreate the wheel. Statements also help DA prepare for depositions by focusing on important issues.



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Types of Witnesses



Percipient (fact) witness: someone with personal knowledge about the facts at issue—(eg witness to a fall, hears a crash, etc.)

Caveat for trial: Is the testimony admissible? But during discovery, even inadmissible evidence is discoverable (eg, deponent can testify about hearsay, speculation, etc.) At trial, the standard is higher—does the witness have personal knowledge of the facts they are testifying to?



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Types of Witnesses



Expert witness: Witness with special expertise, experience or education that can give opinions about a disputed issue.

- A witness can be both a factual and expert witness (eg, emergency room doctor can testify as to facts and give an opinion on diagnosis, causation).
- **Evidence Code 800:** If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.
- Applying Evidence Code Section 800: Coworker finds applicant lying next to a broken ladder, moaning and holding his arm. The witness can offer his opinion that he fell because the ladder broke, despite not having personal knowledge of these facts.
- But can the witness testify that the applicant's arm was broken? Sprained? Probably not. That's a medical opinion that is not rationally based on his perception and is not helpful to understanding what the witness is testifying about (eg, finding applicant after a fall.)



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Taking Witness Statements



- Pro: Preserves testimony, locks in factual assertions.
- Con: Can be discovered by Applicant, may contain damaging information.

Are witness statements protected as defense attorney work-product?

Not always. If a statement is taken by claims adjuster or employer, it is likely not protected by work product privilege.

Witness statements are typically not protected/privileged and are discoverable, even if initially provided to DA when claim becomes litigated.

Witness statements or summaries prepared by an attorney: These statements are generally protected by work-product privilege, especially when the statement contains attorney impressions, thoughts, recommendations, etc.

Exception: If attorney sends non-lawyer investigator, clerk, etc. to interview witnesses and take statements, those may be discoverable, especially if no attorney thoughts or impressions are made in the report.



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Bottom Line:

The courts generally protect the work of attorneys from disclosure in discovery, but otherwise support full disclosure of evidence, including witness statements. Unless the statement was prepared by defense counsel and contains the attorney's legal reasoning, impressions, conclusions, etc., assume that the applicant will eventually see the statement.

The court in Martin v. WCAB summarized this as follows: "In Workers' Compensation proceedings the [applicant's] attorney cannot afford to take the deposition of [defense] witnesses as there is no provision for deposition fees of witnesses. In addition, to hire an investigator to take their statements would again be expensive. Because of the limited [attorney] fees ... it would be prohibitive to have applicant's counsel either take the deposition of the witnesses or hire an investigator to take [their] statements."

The court is saying that applicants are at a disadvantage compared to defendants regarding conducting investigations and therefore they can "piggyback" on the work done by defendants in taking statements.



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Subject Matter in Applicant Statements



General rules:

- Gather as much information as reasonably possible.
- Let the applicant keep talking—don't interrupt. No harm in letting an applicant ramble.
- Don't commit the carrier or employer to anything. (Question: "Will my claim be accepted?" Answer: "We will see.")
- Always ask closing questions after important statements: "Is there any else you want to tell me about [body parts, mechanism of injury, etc.]?" "Have you told me everything you know about [the accident, treatment, etc.?" "Would anyone else have knowledge about this?"
- Don't confront with contrary facts (even if you suspect dishonesty). The time to impeach a witness is when it actually counts—at trial, in front of the judge.



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Specific Questions:

1. Describe the accident/incident
 - a. Ask for specific details about time, location, weather, etc.—Was it raining? Muddy? Wet? Are they hesitating in providing specifics? Make a note—but don't confront. Let them keep speaking.
 - b. Actions before, during and after the incident: Job duties, were they clocked off or break. Where were they returning from or going to?
 - c. Timing: "How long before the accident did you do this?"
 - d. Witnesses: Known or speculated ("Who might have been watching?")
 - e. Equipment or tools being used. What type of shoes were they wearing if they slipped.
 - f. Location of the accident: Ask for a drawing, if necessary.
 - g. Ask follow up questions: "Is there anything else you can think of? Anything else you can add? Anyone who might have seen this or who can provide more information?"



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Specific Questions:



2. Ask whether there are any photos, videos, audio recordings, writings, drawings to their knowledge.
 - a. Taken before, during or after the accident.
 - b. Who might have possession of them?
 - i. This protects against later attempts to introduce photos of bruises etc. at QME exam, trial, etc.
3. What witnesses may have been around?
 - a. Not necessary who did you see witness the incident, but also who might have seen it? Customers, passerbys, etc. Ask them to speculate or surmise.



Specific Questions:

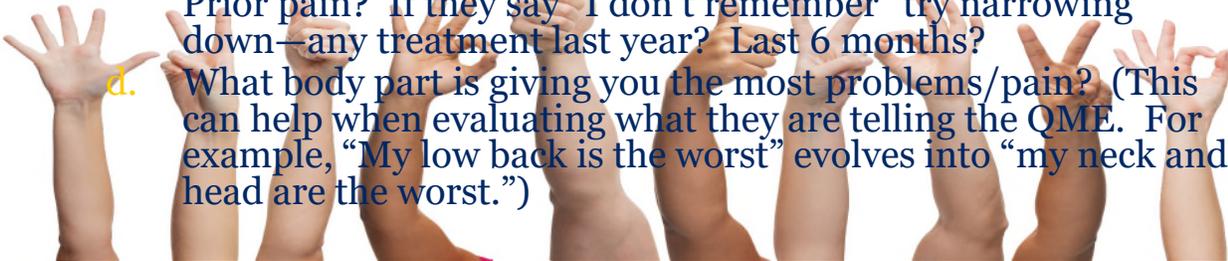
4. What were the company policies surrounding the incident?
 - a. Ask if they were aware of any policies—for example, two person lifts for items over 100 lbs, safety equipment requirements, etc.
 - b. What is the applicant's experience with tools being used (if any)?
5. Ask about specific job duties, not just at time of incident but before and after.
 - a. Who were their supervisors? What coworkers did they work with?
 - b. What was their job title? How long have they had that title?
 - c. Earnings, including prior and future pay raises or reductions.
 - d. Disciplinary actions: suspensions, pay reductions, write-ups. Note: Some applicants are less than forthcoming to admit prior disciplinary actions, so ask broadly (any disciplinary actions, including verbal).



Specific Questions:

6. Injuries alleged:

- a. What body parts are involved? Ask specifics (right or left; lower or upper, etc.)
- b. When did the pain start? Go through each body part.
- c. Any prior treatment for these body parts? Any prior injuries? Prior pain? If they say “I don’t remember” try narrowing down—any treatment last year? Last 6 months?
- d. What body part is giving you the most problems/pain? (This can help when evaluating what they are telling the QME. For example, “My low back is the worst” evolves into “my neck and head are the worst.”)



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Specific Questions:

7. Prior claims and cases:

- a. Prior WC claims or cases. What employer? What body parts? Where did they treat? How did that case resolve?
- b. Prior MVAs.
- c. Prior slip and falls.
- d. Any other unusual vehicle accident (bicycle, bus, etc.)



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Specific Questions:

8. Personal history

- Date of birth.
- Full legal name, prior names, married names.
- Marital status, spouse's occupation. Dependents?
- Who live with?
- Who does the household duties/chores?
- Prior injuries, claims, including disability
- Address, contact info, email addresses
- Physical description: height, weight, scars, visible disabilities (Cane or brace?)
- Vehicle(s) driven? How do they get to work?
- Date of hire
- Job requirements (physical)
- Any side jobs or self-employment?
- Has applicant ever been laid off or terminated?
- Are they a union member?
- What prior employers did they work for? Dates and occupations (prior construction work might be relevant!)
- Wages
 - Hours per week—OT
 - Hourly rate
 - Payment dates
 - Any changes in hourly rate in last 52 weeks, or scheduled raises?
- Benefits: Are they collecting or applied for disability, unemployment, Social Security. Food stamps?



Closing Questions:



1. Is there anything you've told me that you would like to change or clarify?
2. Have you understood my questions?
3. Would you like to add anything?
4. Has this statement been taken and recorded with your knowledge and consent?
5. Have your answers been truthful and complete?



WITNESS STATEMENTS:



Similar to applicant statements:

- Gather the facts, let them speak, and don't disclose anything.
- Ask if there are any reasons to question the truthfulness of the claim.
- Has applicant undergone any changes like illness, divorce, financial problems.
- Have they noticed any physical or medical problems with applicant before the injury? Fainting, limping, etc.
- Have any other employees made similar WC claims recently? (Mass "hostile work environment claims")



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EMPLOYER STATEMENTS

Goal: Determine whether there is support for alleged injury;

Whether there are possible defenses (including affirmative defenses); and Employer credibility—are they telling the whole truth?



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Questions about the Incident:

- Time
- Location
- Witnesses
- Duties being performed during incident
- Tools being used, PPE
- Were policies being followed?
- Was the injury on the employer's premises?
- What body parts are claimed/involved?
- Who was it reported to? When?
- Did injury involve lifting?



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Questions about the Applicant:

- Job Duties
- Prior disciplinary actions
- Red flags concerning the claim
- Attendance issues
- Supervisors
- Prior injuries/claims, including disability
- Address, contact info, email addresses
- Marital status, dependents
- Physical description: height, weight, scars, visible disabilities
- Vehicle driven? How do they get to work?
- Date of hire, promotions.
- Job requirements (physical)
- Any side jobs?
- Has applicant ever been laid off or terminated?
- Union member?
- What prior employers did they work for?



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Questions about the Applicant:

Wages

- Hours per week—OT
- Hourly rate
- Payment dates
- Any changes in hourly rate in last 52 weeks, or scheduled raises?

What medical treatment was received?

- What locations?
- Ambulance?
- Was BAC screening performed?



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Questions about the Applicant:

Can modified work be accommodated?

Were there any prior work restrictions before the injury?

Questions about the incident:

What might have prevented the accident?
Can they provide photos, videos, drawings
Subrogation: Did equipment break, etc. during injury?



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Interviewing Represented Applicants

When an applicant is represented, the AA typically instructs their client not to discuss the case with the insurer.

Do not circumvent the AA's representation, including asking the employer to ask applicant questions about the claim.

If the AA's Notice of Representation is not technically correct (wrong employer, date of injury, etc.), do not disregard and contact applicant. Seek clarification or correction from AA.

Even if Applicant becomes represented, the insurer continues to have a duty to investigate (even after claim is accepted or denied) per CCR 10109(b). You must still undertake an investigation, even if you can't speak with applicant directly.

If an applicant is represented and no DA is assigned, there's no harm in asking AA if applicant will agree to an interview. If the applicant refuses to provide a statement and that statement is critical to determining compensability, then a delay or denial may be appropriate—but be careful!



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Closing Comments:

Investigative statements are a powerful tool for defendants. Applicants are typically unrepresented and willing to discuss the claim more openly. This is the best time to gather valuable information and make applicant commit to a narrative (eg, how the injury happened).

The more they speak, the better. Don't be confrontational or accusatory. There's nothing to gain at this stage. The ultimate decision regarding credibility will be made by the WCAB.

If AA subpoenas the claims file and the file is disclosed, the investigative statements will likely be disclosed. Tip: If your claims file is subpoenaed, object, refer to DA (if possible), and offer to meet and confer with AA regarding what documents they need (medical reports, benefit notices versus claims notes, investigative statements).

Be careful what annotations you make—everything you write or record could ultimately be disclosed to the WCAB. If you have questions or concerns of a sensitive nature, contact your DA to discuss. Use attorney-client privilege when needed.



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