



BRADFORD & BARTHEL'S 100% PD CHEAT SHEET DEFENSES

While recent appellate court decisions have made it clear that Labor Code section 4662(b) is not a catch all or lend license to do an end-run around the Guides and the 2005 Permanent Disability Rating Schedule (see e.g. *Dept. of Corrections v. WCAB (Fitzpatrick) (2018) 83 Cal.Comp.Cases 1680 and Applied Materials v. WCAB (2021) 86 Cal.Comp.Cases 331*), injured workers and the applicant's bar are not without recourse in trying to reach permanent total disability. Those cases do not prevent an injured worker from rebutting the schedule by other means. Below is a list of things to look for in order to better assess the potential risk of a permanent total disability case and some guidance on how to defend such a case.

WARNING SIGNS

Hints applicant is pushing for 100% PD

DOES YOUR INJURED APPLICANT:

- Have an attorney?
- Receive TD long-term and/or qualify for other on-going disability programs (public or private)?
- Have complaints of debilitating painful conditions?
- Rely (addicted?) on debilitating medication?
- Have a VR and/or DFEC "expert"?
- Have medical opinions injured worker cannot work in the "open labor market" or has lost all "future earning capacity"?
- Have a civil case, especially one with large 3rd party recovery?

WHAT YOU SHOULD NOT DO:

- Agree to AME
- Go to an "Agreed" VR or DFEC "expert"
- Fail to Object to applicant's VR/DFEC "expert's" reports, bills and liens
- Fail to prepare for trial & recon

WHAT YOU SHOULD DO:

- Rely on PTP and/or PQME [avoid allowing WCAB presumption that the AME is a neutral expert, *Power v WCAB (1986) 179 Cal.App.3d 775*]
- Use your own DFEC/VR expert to plan defense, especially cross-examination(s) of PTP/QME and/or Applicant DFEC/VR expert



OBJECTION LETTERS SHOULD:

- Cite LC §5811(a) “in all proceedings...before the appeals board, costs between the parties may be allowed” (note: “may” is not mandatory)
- Challenge so-called expert’s status as an “expert”. [Cite *Costa II* “[T]he qualifications of each...expert must be determined on a case-by-case basis.”]
- Cite LC §4621(a), arguing costs incurred by AA’s expert were not “reasonably, actually, necessarily incurred...when actually incurred.”
- Cite LC §4664(a) “The employer shall only be liable for the percentage of permanent disability directly caused by the injury [aoe/coe]”
- Cite *Ogilvie III*’s interpretation of *LeBoeuf*, limiting “its application to cases where the employee’s diminished future earnings [or inability to compete in the open labor market] are directly attributable to the employee’s work-related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency to speak English, or an employee’s lack of education...” (underline added)

Note: The Administrative Director was charged with the responsibility to draft a fee schedule for vocational reporting, but that has never been finalized so the Board really has no guidance on what is a reasonable fee.

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