

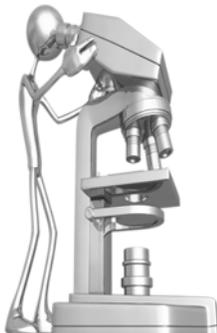
Top 10 Litigation Tips

By Colleen S. Casey
Copyright © 2010



1. Causation of Injury v. Disability

Doctor's rationale should distinguish between:



- Causation of **injury** affects **MT**
(If cause of injury = 1% industrial, IW gets 100% MT needed to treat injury)
- Causation of **disability** affects **PD**
(If cause of disability = 1% industrial, IW gets 1% of the PD rating payout.)

1. Causation of Injury v. Disability

Dr. Watson states:

“Ms. Sherlock slipped off a step near the entrance to her office. She fell onto her outstretched arm and sustained a proximal humeral fracture. The fracture has healed with no loss of range of motion or any other type of disability. Therefore, she did not sustain an industrial injury.”



1. Causation of Injury v. Disability



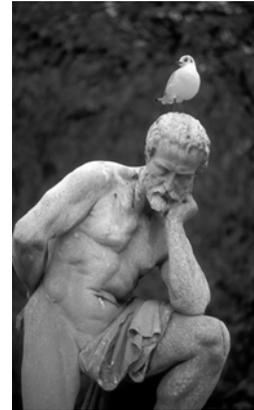
- *Employers Mutual Liability Insurance Company of Wisconsin v. Industrial Accident Commission (Gideon)* (1953) 18 CCC 286.
- *Reyes v. Hart Plastering*, (2005) 70 CCC 223 (WCAB SPD)

Both cases held that idiopathic seizure causing the IW's fall at work, resulted in industrial injury.

1. Causation of Injury v. Disability

Rolda v. Pitney Bowes (2001) 66 CCC 241
(En banc)

1. Did psych injury involve “actual events of employment” (**legal issue** – IW’s b/p)
2. Is there > 50% industrial causation (**medical issue**– IW’s b/p)
3. Were there personnel action(s)? If so, were they lawful, nondiscriminatory & in good faith? (**legal issue** – D’s b/p)
4. Were personnel action(s) the substantial cause (35-40%) of psych injury (**medical issue** – D’s b/p)



1. Causation of Injury v. Disability

Sonoma State University v. WCAB (Hunton)
(2006) 71 CCC 1059 (1st DCA)



Hunton was a police dispatcher

Ind. Injury (adjustment disorder)

Industrial Cause: 100%

Non-industrial: 0%

Psych disability

Industrial Factors: 35%

Non-industrial: 65%

2. Comply with New Regs

Over 600 new or revised regulations were proposed by the DWC in the past 14 months. Most have been approved by the OAL and are now in effect.

To view specific regulations, the statement of reasons and explanation of the new regulations, click on the appropriate DWC or DIR website link.



2. Comply with New Regs

The new WCAB regulations can be found at:

- <http://www.dir.ca.gov/DIRRulemaking.html>
(Click on 2008 or 2009 archive)

The new DWC regulations can be found at:

- <http://www.dir.ca.gov/dwc/dwcRulemaking.html>
(Click on 2008 or 2009 archive)

CA.GOV Welcome to the California DEPARTMENT OF INDUSTRIAL RELATIONS

Skip to: [Content](#) | [Footer](#) | [Accessibility](#) Search DIR Site

DIR Labor Law Cal/OSHA **Workers' Comp** Apprenticeship Statistics & Research Mediation Boards Media

Injured Worker Employer EAMS A - Z Index I&A Claims Adjudication DEU Medical Unit RRTW UEBTF/SIBTF

I WANT TO . . .

- Search for an active workers' comp case
- Know my rights
- Know what to do when I get hurt on the job
- Find a fact sheet or I&A guide
- Find a form
- Find a publication
- Find a report
- Find a DWC office
- Contact DWC
- Participate in DWC rulemaking
- Participate in a DWC forum
- Participate in a WCAB forum
- Participate in DWC's 17th annual educational conference

To review proposed & current regs, click here >>>

Division of Workers' Compensation

The Division of Workers' Compensation (DWC) monitors the administration of workers' compensation claims, and provides administrative and judicial services to assist in resolving disputes that arise in connection with claims for workers' compensation benefits.

DWC's mission is to minimize the adverse impact of work-related injuries on California employees and employers.

Information just for you...

- [Injured Worker](#)
- [Employer](#)
- [Claims Administrator](#)
- [Attorney](#)
- [Self-Insured Employer](#)
- [Medical Provider](#)
- [Young Workers](#)

Workers' compensation programs and units

- [Audit & Enforcement Unit](#)
- [Claims Adjudication Unit](#)




Bring 'em Back



CA.GOV Welcome to the California DEPARTMENT OF INDUSTRIAL RELATIONS

Skip to: [Content](#) | [Footer](#) | [Accessibility](#) Search DIR Site

DIR Labor Law Cal/OSHA **Workers' Comp** Apprenticeship Statistics & Research Mediation Boards Media

Injured Worker Employer EAMS A - Z Index I&A Claims Adjudication DEU Medical Unit RRTW UEBTF/SIBTF

I WANT TO . . .

- Search for an active workers' comp case
- Know my rights
- Know what to do when I get hurt on the job
- Find a fact sheet or I&A guide
- Find a form
- Find a publication
- Find a report
- Find a DWC office
- Contact DWC
- Participate in DWC rulemaking
- Participate in a DWC forum
- Participate in a WCAB forum
- Participate in DWC's 17th annual educational conference

Division of Workers' Compensation - Proposed rulemaking

This chart provides a quick overview of the regulations and their status. For details and history, click the appropriate link. Final regulations can be accessed on the [Office of Administrative Law \(OAL\)](#) Web site approximately one week after they become effective.

Regulatory area and authority	Status	Regulations effective
Medical provider network, employee information and workers' compensation claim form (DWC 1) and notice of potential eligibility (NOPE) Proposed regulations Title 8 California Code of Regulations Sections 9767.3, 9767.6, 9767.8, 9767.12, 9767.16, 9880, 9881, 9881.1, 10139	Notice of public hearing Oct. 8, 2009	
Workers' compensation information system (WCIS) Proposed regulations Title 8, California Code of Regulations Sections 9701-9702	Notice of public hearing Dec. 15, 2009	

- [DWC forum](#)
- [DWC rulemaking](#)
- [DWC rulemaking 2009 archive](#)
- [DWC rulemaking 2008 archive](#)
- [DWC rulemaking 2007 archive](#)

<<<Click here for 2009 regs

2. Comply with New Regs

<u>Type of Reg:</u>	<u>Specific § in Title 8</u>	<u>Eff Date:</u>
DEU Rules	10150 – 10168	11.17.08
RTW Rules	10116-10133.58	11.17.08
W.C. Ct Rules	10210 – 10297	11.17.08
WCAB Rules	10301 – 10996	11.17.08

<u>Type of Reg:</u>	<u>Specific § in Title 8</u>	<u>Eff Date:</u>
QME Regs.	1 – 159	1.13.09
MPN & Notices	9767.3 - 9767.13 9881 - 9881.1, 10139	Not final
Health Care Org	9771, 9778, 9779, 9779.5 & 9779.9	11.4.09
MTUS	9792.20-9792.26	6.18.09
Audit Regs	10100.2 – 10115.2	5.20.09

3. Requesting a QME Panel

§30(a). QME Panel Requests Unrepresented Workers

TIME LIMIT for Medical Unit to issue QME Panel ONLY for Unrep IW



§139.2 When requested by an employee or employer per §4062.1, the MD shall assign 3-member panels of QMEs **within 5 working** days after receiving a request for a panel. If a panel is not assigned within 15 working days, the employee shall have the right to obtain a medical evaluation from any QME of his or her choice. (Note: Business not calendar days.)

3. Requesting a Panel QME

§30. QME Panel Requests - Represented Workers

Medical Unit has **30 calendar days** (not business days) to issue Panel QME before WCJ Issues Order

§ 32.1(c) In the event the Medical Director is unable to issue a QME panel in a **represented case** within thirty (30) **calendar** days of receiving the request, either party may seek an order from a Workers' Compensation Administrative Law Judge that a QME panel be issued. Any such order shall specify the specialty of the QME panel or the party to be designated to select the specialty.

In addition, this document must be faxed to the DWC Medical Unit, attn. Sue Honor, (510) 286-0693.

3. Requesting a Panel QME

Proposed §32.1(c) Order (Rep IW only)

IT IS HEREBY FOUND THAT _____,
filed with the Medical Director a Form 106 –
Request for QME Panel in the specialty of
____, in this matter on _____. To date, no
QME Panel has yet been issued. Therefore
the 30 day period set forth in 8 CCR Section
32.1(c) has elapsed.

3. Requesting a Panel QME

Proposed §32.1(c) Order (Rep IW only)

IT IS ORDERED THAT the Medical Director,
Division of Workers' Compensation, issue
within 30 days of the date of service hereof, a
QME panel in the specialty of ____ within a
reasonable geographic area of applicant's
residence, which is located within zip code
_____. Within 10 days of the panel assignment, the parties shall
confer and attempt to agree on a medical evaluator from the panel. If the
parties are unable to reach agreement by the 10th day, each may then
strike one name from the panel and the remaining name shall serve as
the QME. Upon the failure of one of the parties to strike a name from
the panel within three working days of gaining the right to do so, the
other party may select any physician who remains on the panel to serve
as the QME.

3. Requesting a Panel QME

§32.6 Additional QME Evaluations

The Medical Director shall issue a panel of QMEs upon receipt of an order of a WCJ or the Appeals Board, that **includes a finding** that an **additional evaluation** is reasonable and necessary to resolve disputed issues under LC §§4060, 4061 or 4062.



3. Requesting a New QME Panel



What if the parties need a New QME Panel? For instance, what if the 1st QME was an internist, but the injury is a complicated spinal impairment?

3. Requesting a New QME Panel

Consider the following questions:

1st question: Is the Panel QME request for a *2nd* QME (new *specialty* 8 CCR §31.7) or is it to *replace* the existing QME (8 CCR §31.5)?

2nd question: Is the worker represented or unrepresented?

3rd question: Is there sufficient documentation to show good cause for the **parties to petition** the medical director for a new QME or will a WCJ's Order be required?

3. Requesting a New QME Panel

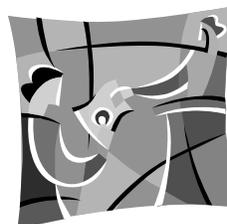
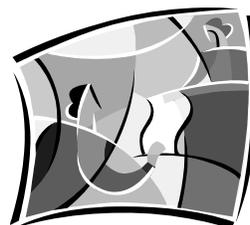
Hint: If you are going to complain about a doctor's breach of a technicality, you must do it **before you read the doctor's report,** or the report will not be tossed.



3. Requesting a New QME Panel

If parties request WCJ to issue Order,
there are 4 options:

1. **Replacement QME** - unrepresented worker
2. **Replacement QME** - represented worker
3. **2nd QME** - unrepresented worker
4. **2nd QME** - represented worker



3. Requesting a New QME Panel



Medical Unit Needs Following Info:

- Prior Panel QME #
- Requested medical specialty (Use number Code)
- Provide prior requested medical specialty
- Zip code of residence or work place of IW

3. QME Regs – Rule 30 v. LC §4060



1. **§30(d)(2)** Once the D accepts the claim, a panel QME may only be requested per LC §§4061 or 4062.
2. **§30(d)(4)** If the 90 day period has expired, D must get ORDER from WCJ finding that the 5402(b) has been rebutted.

3. QME Regs – Rule 30 v. LC 4060

3. **§30(d)(3)** Once the D denies the claim, only the IW may request a panel QME.

Example :

Defense Dan denies Sheila Wynn's back claim several weeks after she files her claim.

Sheila files a DOR for an AOE/COE hearing.

Sheila shows up with a PTP report indicating her back injury is industrial.

Defense Dan shows up with no medical evidence. Who will win?



3. QME Regs – Rule 30 v. LC §4060



LC §4060(d): “If a medical evaluation is required to determine compensability **at any time** after the claim form is filed, and the employee is **not represented** by an attorney, the employer shall provide the employee with notice **either:**

- (1) that the employer requests a comprehensive medical evaluation to determine compensability **or**
- (2) that the employer has not accepted liability and the employee may request a comprehensive medical evaluation to determine compensability.

Either party may request a comprehensive medical evaluation to determine compensability.” (Emphasis added.)

4. Request for Ratings from DEU

ONLY Attach a copy of the medical report if it has not yet been filed.

For full instructions on how to Request a DEU rating click on:



<http://law.lexisnexis.com/practiceareas/Workers-Compensation-Law-Blog/Workers-Compensation/EAMS-How-to-Request-a-DEU-Rating>

STATE OF CALIFORNIA
DWC DISTRICT OFFICE
DOCUMENT COVER SHEET

+

+



Is this a new case? Yes No Companion Cases Exist Walkthrough Yes No

More than 15 Companion Cases

09/26/2008
Date (MM/DD/YYYY)

ADJ1234567 Specific Injury Cumulative Injury **01/07/2008**
Case Number 1 Cumulative Injury (Start Date: MM/DD/YYYY) (End Date: MM/DD/YYYY)
(If Specific Injury, use the start date as the specific date of injury)

SSN: _____

Body Part 1: _____ Body Part 2: _____

Body Part 2: _____ Body Part 4: _____

Other Body Parts: _____

Please check unit to be filed on (check only one box)

ADJ DEU SPF UEF VOC INT RSU

Companion Cases Specific Injury

Case Number 2 Cumulative Injury (Start Date: MM/DD/YYYY) (End Date: MM/DD/YYYY)
(If Specific Injury, use the start date as the specific date of injury)

Body Part 1: _____ Body Part 2: _____

Body Part 2: _____ Body Part 4: _____

Other Body Parts: _____

DWC-CA form 10232.1 Rev. 11/2008 - Page 1 of 8

+

DOCUMENT SEPARATOR SHEET



DEU (Not ADJ)

Product Delivery Unit _____

Document Type **DEU FORMS**

Document Title **REQUEST FOR CONSULTATIVE RATING**

Document Date **09/26/2009**
MM/DD/YYYY

Author **DEFENSE DAN OXNARD**

Office Use Only

Received Date _____
MM/DD/YYYY

|

DWC-CA form 10232.2 Rev. 11/2008 Page 1



State of California
Division of Workers' Compensation
Disability Evaluation Unit

REQUEST FOR CONSULTATIVE RATING DEU Use Only

Indicate type of request:
 Mail-in Walk-in

INSTRUCTIONS FOR MAIL-INS:
 1. Attach a photocopy of the medical report(s) for which a rating is being requested, if not previously on file. Do not send original reports.
 2. Serve a copy of this request on the representative for the opposing party.

INSTRUCTIONS FOR WALK-INS:
 1. Attach this request form to copies of the medical reports that you wish to have rated.
 2. List below the doctor's names and dates of reports to be rated.
 3. If a deposition is to be rated, mark or list the pages to be reviewed by the rater.

SSN (Numbers Only) ADJ1234567	Date of Birth 08/29/1975
Case Number 1	Date of Injury 1 01/07/2008
Case Number 2	Date of Injury 2
Case Number 3	Date of Injury 3
Case Number 4	Date of Injury 4
Case Number 5	Date of Injury 5

Injured worker
 First Name _____ MI _____
 Last Name _____ SUFFIX (State)
 Occupation (attach description if unclear) **IRON WORKER**

DWC-AD Form 104 (0113) (Rev. 11/2008) (Page 1) RCR

5. Review the New Rules on MT

MT is **not** apportionable.

***Granado v. WCAB*, (1968) 33
CCC 647 (Ca. S. Ct.)**

“If medical expense reasonably necessary to relieve from the industrial injury were apportionable, an IW, who is disabled, may not be able to pay his share of the expenses and thus forego treatment.”



5. Review the New Rules on MT

Granado v. WCAB, (1968) 33 CCC 647 (Ca. S. Ct.)



“Moreover, the uncertainties attendant to the determination of the proper apportionment might cause employers to refuse to pay their share until there has been a hearing and decision on the question of apportionment, and such delay in payment may compel the injured workman to forego the prompt treatment to which he is entitled...”

5. Review the New Rules on MT

**Specific enabling legislation for
MTUS regs = LC §4604.5(b):**
(enacted on 4.19.04 by SB899)

Extent and scope of MT shall be
determined by **Medical
Treatment Utilization
Schedule (MTUS)**

MTUS replaces prior law -
LC§4062.9 - PTP's
presumption of correctness



5. Review the New Rules on MT



MT = MTUS - LC §4604.5(b)

On 6-15-07, the **1st version** of the MTUS was issued, which was essentially ACOEM's (American College of Occupational and Environmental Medicine) Practice Guidelines.

8 CCR §§9792.20-9792.22.

5. Review the New Rules on MT



MT = MTUS - LC §4604.5(b)

On 7-18-09, the **2nd version** of the MTUS were revised, reorganized and reissued and include excerpts from both ACOEM & ODG.

§§ 9792.20 – 9792.26

5. Review the New Rules on MT

POP QUIZ – Definitions of the MTUS:

1. ODG means:

- a. “Valley Girl speak” for “Oh Dear God.”
- b. “Text Speak” for emoticon k:-(.
(Oh Dear God, There’s an ax in my head!)
- c. “Doctor Speak” for “**Official Disability Guidelines**” - Primary source of DWC Chronic Pain Guidelines, rather than Chapter 6 of ACOEM.



5. Review the New Rules on MT

2. “Chronic Pain”: §9792.20 (c):



- (a) Any pain lasting more than 6 months after the date of injury (DOI)?
- (b) Any pain that’s not acute?
- (c) Any pain that persists beyond the anticipated time of healing?
- (d) Any time there’s an IT rollout of a new computer system?

5. Review the New Rules on MT

3. “Evidence-based”: §9792.20 (e) means:

- (a) Any thing a Judge labels as an “Exhibit” and admits into evidence?
- (b) Based on a doctor’s clinical judgment?
- (c) Based on verified statements by Dr. Ben Casey, Dr. Marcus Welby or Dr. Gregory House?
- (d) Based...on... medical journals included in MEDLINE? (website = www.pubmed.gov.)



5. Review the New Rules on MT

4. “Functional improvement” §9792.20 (f)

- a. A clinically significant improvement in activities of daily living?
- b. A reduction in work restrictions as measured during the history and physical exam?
- c. A reduction in the dependency on continued medical treatment?
- d. All of the above?



5. Review the New Rules on MT

REPORT CARD				
GRADING PERIOD	1	2	3	4
READING	A			
WRITTEN COMMUNICATION	A			
MATHEMATICS	C			
SCIENCE/HEALTH	B			
SOCIAL STUDIES	B			
ART	A			
MUSIC	A			
PHYSICAL EDUCATION	C			
Grade Average	B			
Attendance:	Present	48		
	Absent	2		
	Tardy	1		
<small>A = Excellent • B = Good • C = Satisfactory • N = Needs Improvement U = Unsatisfactory • I = Insufficient / Incomplete</small>				
Student:	Grade:	Year:		

5. “Strength of Evidence” §9792.20(m)

- The amount an IW can bench press
- The weight to be given to scientifically based evidence (an “A to I” grading system.)
- Whether the evidence supports the claim beyond a shadow of a doubt.

5. Review the New Rules on MT

MTUS Grading System (See 8 CCR §9792.25 (c)(1)(B) for MTUS criteria & ranking):

- A = Strong evidence-base = one or more high quality studies (HQS)
- B = Moderate evidence-base = at least one HQS...
- C = Limited evidence-base = at least one study of intermediate quality.
- I = Evidence is insufficient or irreconcilable.

5. Review the New Rules on MT

ACOEM Grading System:

- A = Strong research-based ev = multiple RCTs
- B = Moderate research-based evidence=one RCT
(high quality)
- C = Limited research-based evidence=one RCT (high or
low quality)
- D = Doesn't meet meeting inclusion criteria

MTUS was reorganized into 4 general sections:

Part I: Description of MTUS

(Definitions §9792.20; Intent §9792.21;
General Approach §9792.22)

Part II: Clinical Topics §§9793.23.1-9792.23.9

(One reg. for each body part = ACOEM)

Part III: Special Topics (Only advance to Part III, if instructed to do so in Part II)

- a. Acupuncture §9792.24.1
- b. Chronic Pain §9792.24.2
- c. Treatment After Surgery §9792.24.3

Part IV: Presumption of Correctness §9792.25



5. Review the New Rules on MT

Part III – Special Topics:

§9792.24.2-Chronic Pain

The 2006 ODG’s Chronic Pain Guidelines provide a specific outline for MT for chronic pain:

- A 13 step process to determine history of chronic pain.
- A 6 step guide for the physical examination of chronic pain.
- Multilayer instructions to properly assess of the degree of pain, with a summary of recommended MT.



5. Review the New Rules on MT



Part III – Special Topics

C. Treatment Post-Surgery §9792.24.3 (Mandated by LC §4604.5(d)(3).)

EXCEPTIONS TO 24 VISIT CAP

5. Review the New Rules on MT

For DOI > 1.1.04, the # of visits are limited to

- 24 chiropractic
- 24 occupational therapy
- 24 physical therapy

(LC §4604.5(d)(1))



5. Review the New Rules on MT



Part III – Special Topics **C. Treatment Post-Surgery**

§9792.24.3 Provides exceptions to 24 visit cap and indicates frequency and duration of postsurgical treatment for specific surgeries. (Most recommendations are from the Official Disability Guidelines (ODG).)

5. Review the New Rules on MT

The MTUS Guidelines are presumed correct. LC §4604.5(a); 8 CCR §9792.25(a)

A **preponderance** of the **scientific medical** evidence is required to rebut this presumption of correctness.



5. Review the New Rules on MT



LC § 5703(h) & (i):

The MTUS is admissible as evidence, even if the UR report containing the guideline is untimely and therefore not admissible.

Other medical treatment protocols and guidelines are also admissible.

6. Settlements – Stipulated Awards

LC §4658(d)(3)(A):

Parties must comply with 8 CCR §§
10117 when submitting a Stipulated
Award for Approval. (DOI >1.1.05)

If PD payments are decreased 15%
because the IW has returned to
work, then **file in EAMS** a copy of
Form 10118 or 10133.53 to prove
compliance with LC §4658 or the
matter may be delayed and set for an
adequacy hearing. (§10117(b)(3))



The image displays two screenshots of web browser windows showing forms from the State of California Division of Workers' Compensation. The left window shows Form 10118, titled "NOTICE OF OFFER OF REGULAR WORK For injuries occurring on or after 1/1/05". The right window shows Form 10133.53, titled "NOTICE OF OFFER OF MODIFIED OR ALTERNATIVE WORK For injuries occurring on or after 1/1/04". Both forms include fields for Claims Administrator Type, Employer, Employee name, and position.

Form 10118 (Left Window):
State of California
Division of Workers' Compensation
Retraining and Return to Work Unit
NOTICE OF OFFER OF REGULAR WORK
For injuries occurring on or after 1/1/05
DWC - AD 10118
THIS SECTION TO BE COMPLETED BY EMPLOYER OR CLAIMS ADMINISTRATOR (All information in this section must be completed):
Claims Administrator Type
 Insurance Company Third Party Administrator Employer
Case Number _____
Claim Number _____
Claims Administrator _____
(Name of Claims Administrator)
Injured Employee First Name _____ MI

Form 10133.53 (Right Window):
State of California
Division of Workers' Compensation
Retraining and Return to Work Unit
NOTICE OF OFFER OF MODIFIED OR ALTERNATIVE WORK
For injuries occurring on or after 1/1/04
DWC - AD 10133.53
THIS SECTION COMPLETED BY CLAIMS ADMINISTRATOR (All information in this section must be completed):
Claims Administrator Type: (Please Choose One)
 Insurance Company Third Party Administrator Employer
Employer (name of firm) _____
is offering you _____ (Employee name)
the position of a _____ Name of Job
You may contact _____

6. Settlements – C&Rs

Tip : Handle Settlements Properly:

A party may unilaterally rescind a C&R after both sides have executed the document:



- A. When the injured worker has died.
- B. When one of the parties rips up the C&R and tosses it in the trash.
- C. When there has been alleged duress, fraud or unilateral mistake.
- D. None of the above per LC §5002.
- E. All of the above, except D.

6. Settlements – C&Rs

Tip: Handling Settlements:

§5002 provides:

“A copy of the release or compromise agreement signed by both parties shall **forthwith** be filed with the appeals board.”

Once all parties have signed the C&R, it should be filed ASAP with the WCAB. However, it is not “valid” until an Order issues approving the C&R.



6. Settlements – C&Rs



Tip: Handling Settlements:

§5001 provides:

“No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee.”

6. Settlements – C&Rs

Chavez v. IAC, (1958) (Supreme court En Bank) 23 CCC 38.
Applicant died after C&R was executed, but before WCJ approved. D argued that A’s death = lack of consideration, and rescinded C&R. WCJ’s refusal to approve C&R upheld.

The Supreme Court stated, “A party to a contract may rescind if the consideration fails in a material respect for any cause (Civ. Code, § 1689, subd. 4) and it thus appears that a party may rescind a contract otherwise valid, when the consideration in whole or in part fails before the contract has been fully performed.”

“...the statute declaring a compromise not valid unless the commission approves it (5001) is not intended to afford a ground for rescission once the agreement is submitted to the commission.”

But what if the C&R has not been filed yet?

6. Settlements – C&Rs

Light v. Summit Drilling, (1979) 44 CCC 1083. (WCAB en banc) Applicant died after C&R was executed, but before WCJ approved. D argued that A's death = lack of consideration, and rescinded C&R. WCJ's approval of C&R upheld.

Referring to Chavez, "The wording of the majority opinion appears to leave the approval or disapproval of a compromise agreement after the death of an applicant to the discretion of the Appeals Board."

"In similar situations, it has generally been held that the Compromise and Release Agreement is binding and the parties cannot unilaterally rescind it prior to the Board's approval or disapproval."

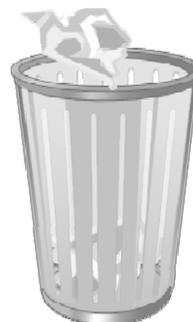
6. Settlements – C&Rs

Ramirez v. WCAB, (1997) 62 CCC 1062

Applicant's attorney felt misled by a material issue and ripped up fully executed C&R threw it in the trash.

Defense atty pulled C&R from the trash, taped it back together and presented it to WCJ ex parte for approval.

WCJ's approval of the C&R **was not affirmed**, because the Applicant was deprived of due process. He was entitled to an opportunity to be heard on the issue of whether C&R was based on fraud, duress or **mutual** (not unilateral) mistake.



Litigation Tips about Evidence

LITIGATION TIPS about EVIDENCE

Trial Judges are charged with the following five duties in regard to the cases they must try:

- I Review the evidence and listen to the testimony**
- II about a dispute the parties have submitted to the judge,**
- III. determine what the facts are,
- IV. know and apply the appropriate law to the facts and
- V. issue a decision resolving the submitted dispute.

The following is a discussion of the first two duties.

I. **REVIEW THE EVIDENCE AND LISTEN TO THE TESTIMONY**

Court decisions must be based on evidence that is:

- A. relevant to an issue in dispute
- B. substantial
- C. admissible
- D. persuasive

A. RELEVANT to an issue in dispute: If the issue in a dispute is over the rate at which TTD should be paid, wage information is relevant, medical reports are not. If the issue is what type of treatment is reasonable and necessary, medical reports are relevant, testimony about job duties and payroll records are not. Only the designated, relevant portions of treatment records should be submitted, CCR § 10629(d)&(e) and P&P § 1.46. Non-relevant evidence should not be offered and should not be admitted.

TIP: *Avoid the common mistake of sloppy careless attorneys, hearing reps and claims specialists; don't try to submit a copy of everything in your file. Doing so tells the judge you haven't a clue what your case is about, you are lazy, and you are hoping the judge will sort through your file, do your work, and find some evidence that will help your case.*

B. SUBSTANTIAL: The court must base its decision on substantial evidence. The court has defined what constitutes substantial evidence in many of its decisions, such as:

Escobedo v. Marshalls (2005) 70CCC 604 at 621, and *McAllister v. WCAB* (1968) 69 Cal. 2d 408, 33 CCC 660, a physician must state the reasons for his/her findings with reasonable medical probability, rather than merely stating a conclusory opinion.

Heggin v. WCAB (1971) 4 Cal. 3d 162, 36 CCC 93; *Place v. WCAB* (1970) 3 Cal. 3d 372, 35 CCC 526; *Zemke v. WCAB* (1968) 68 Cal.2d 794, 33 CCC 358, a report is not substantial evidence if it is based on facts that are no longer germane, based on an inadequate history, an inadequate medical examination, an incorrect legal theory, surmise, conjecture or guess.

People v. Bassett (1968) 69 Cal. 2d 122, 70 Cal. Rptr. 193. The opinion of the expert is no better than the reasons upon which it is based.

TIP: *Read your evidence as soon as you receive it. Read it from the perspective of a judge. If it isn't air tight, get your doctor to issue a supplemental report, fixing any defects.*

C. ADMISSIBLE:

OBTAINED APPROPRIATELY: Medical evidence must have been obtained in accordance with the law, LC §§ 4060, 4061, 4062, 5400, 5401, 5402(b) to be admissible. If the medical evidence isn't admissible, the judge cannot consider it or base an opinion on it.

Medical compensability of an alleged injury may only be determined through the medical-legal process of LC §§ 4060, 4062.2. Once a defendant denies a case, defendant may not obtain a panel QME report regarding the compensability of an alleged industrial injury, (only the injured worker may request a panel QME exam), QME Regulation § 30(d)(3), effective 2/17/09. Once 90 days have elapsed from the filing of the claim form and the alleged injury is presumed compensable, LC § 5402(b), defendant may not obtain a

Panel QME report regarding compensability, QME Reg. 30(d). Remember, treatment reports are always admissible (LC 4060(b)).

Which means, if your non-medical reason for denying the claim doesn't hold up, defendant has no medical evidence to rebut the treating reports. This is especially true with the good faith personnel defense to a psychiatric injury. If defendant denies the psychiatric injury on a good faith personnel action defense without a Panel QME report, guess the outcome of the AOE/COE issue when the only admissible medical evidence is the treating psychiatrist's report which states 51% of the cause of applicant's psychiatric condition is due to work overload and pressing deadlines and 20% from harassment by supervisor. Even if defendant proves the alleged 'harassment by the supervisor' was really good faith personnel actions, defendant has no medical evidence to rebut the treater's medical opinion that 51% of the cause was due to other job stressors than those personnel actions.

TIP: *Avoid the common defense mistakes of failing to get a medical report before the case is denied.*

TIP: *Don't deny a cumulative trauma claim based on the post-termination defense of LC § 3600(a)(10) as that affirmative defense generally, does not apply to cumulative trauma claims. Get a panel QME report even if applicant is alleging a specific date of injury. If the treater suddenly finds the injury was really caused by cumulative trauma, defendant will be without any medical rebuttal, and the post-termination defense will not hold up.*

TIP: *Don't deny a claim based on the good faith personnel action defense LC § 3208.3(h), without a Panel QME report. Part of defendant's burden in asserting LC § 3208.3(h), is to prove what percentage of the psychiatric injury was caused by good faith personnel actions as opposed to all other causes. The percentage can only be determined by a medical expert, not an attorney and not a judge.*

DISCLOSED on STIPULATIONS & ISSUES AT THE MSC: To be admissible at trial, the proposed evidence must have been listed on the Stipulations and Issues prepared at the MSC, [LC§ 5502(e)(3)]. Parties cannot bring in evidence, or testimony at trial, calling it 'rebuttal evidence' or a 'rebuttal witness', without proving that the evidence was not available prior to

the MSC, had the offering party used due diligence (CCP § 2025.620), or that the offering party could not have anticipated the need for such evidence before the MSC. Absent a showing of due diligence, the WCAB lacks discretion to keep the record open to receive evidence after the close of the MSC, (*Telles Transportation Inc. v. WCAB* (Zuniga) (2001) 92 Cal. App. 4th 1159 [66 CCC 1290]; *County of Sacramento v. WCAB* (*Estrada*)(1999) 68 CCC Cal. App. 4th 1429 [64 CCC 26].) The argument “we didn’t know the applicant, (or witness), would lie at trial”, doesn’t fly if the testimony was about a disputed issue listed on the Stipulations and Issues. If the testimony is the same as that given in an earlier deposition, defendant could have anticipated the need for the late offered evidence, and could have listed it on the Stips & Issues.

TIP: *If you are a claims specialist: Get your medical evidence in line before you deny the case and get the file and evidence to your attorney asap.*

TIP: *If you are a defense attorney: If the case was denied without a medical report, try to mitigate the damages by agreeing to an AME as that may be the only medical evidence you will have at trial, tell your claims specialist asap, what the issues are, and the specific evidence you must produce to defend the case. Follow up on getting the evidence. Educate your claims specialists so that they feel confident in relying on your advice.*

TIP: *If you are an applicant attorney: If defendant denied the case without a medical, make sure the treating physician writes a medical report that is substantial medical evidence as that report will be the only medical evidence in the case. If the treating physician’s report is not substantial evidence the judge will either find that applicant failed to meet her burden and your client will take nothing, or, the court will order the record to be developed and you will be handing defendant a second chance to obtain medical evidence to refute your client’s claim, (which is why God created malpractice insurance).*

TIP: *Don’t offer a deposition transcript as evidence unless the deponent is unavailable and you can prove you made a diligent effort to procure their attendance at trial, (CCP § 2025.620).*

TIP: *If you use pages of a witness’ deposition transcript to impeach a witness’ trial testimony, know the correct way to use such evidence for impeachment purposes. Example:*

1. *ask the witness the same question you asked him/her in the deposition, if he/she answers differently than they did in deposition,*
2. *ask the witness whether they recall having their deposition taken on such and such a date.*
3. *ask the witness if they recall being asked the same question at the deposition that you just asked in the trial,*
4. *if the witness says yes, ask him/her what his answer was in the deposition,*
5. *if the witness says he/she doesn't recall, request the Judge's permission to show the witness page # ____ of the deposition transcript in order to refresh the witness' memory of his/her prior statement's under oath,*
6. *when the judge says OK, hand a copy of the page to the judge and opposing counsel to review, then hand the page to the witness and ask them to read lines _____ to _____. If the judge will allow it, ask the witness to read the lines out loud and into the record.*
7. *Afterward ask the witness if their memory is now refreshed and whether the statements the witness made under oath in his/her deposition, or his/her trial testimony given under oath, is the truth.*
8. *Request the court admit into evidence page ____ of the deposition transcript. Even if your request is denied, the inconsistent testimony and the witnesses will have been put on the record.*

TIP: *Do not bring up for the first time in a Petition for Reconsideration, an issue which was not listed on the stipulations and issues presented at trial. Doing so telegraphs to the Judge and the Appeals Board that you were sloppy and careless about the MSC and trial, and you do not know that the law forbids bringing up a new issue at the time of the Petition. That is not the impression you want to make with the people who must consider the merits of your petition.*

WEIGHT OF EVIDENCE vs. ADMISSABILITY: Whether the report is substantial medical evidence or not, goes to the weight of the evidence, (i.e. whether the judge may rely on the report as a basis for her/his decision), but does not mean the report must be excluded from evidence.

TIP: *Don't make the rookie mistake of objecting to the admission of the opponent's medical report because you don't think it is substantial evidence.*

Get a report from your doctor, pointing out the defects in your opponent's medical report and the medical reasons why the report is inconsistent or speculative.

D. PERSUASIVE: If both parties produce relevant, admissible reports that are substantial evidence, the judge will base her/his opinion on the most persuasive report. What makes a report persuasive is the soundness of the physician's reasoning and how well he/she articulated the basis for the medical opinion. Judges have been around a long time. Over their years in practice, they have read thousands of reports from the same 50 or 100 doctors. If the judge only has to see the name of the physician to know what the doctor will say in his boiler plate report, your report will not be persuasive.

TIP: *Pick a credible doctor. When you pick a wash out doctor, or a Santa Claus who is known for passing out PD, or a surgeon who never met a back he didn't want to operate on, the judge may assume your case, or your defense, is bogus.*

ALTERNATIVE TO PRODUCING EVIDENCE: Stipulations of the parties are binding on the parties and obviate the need for evidence on the issue stipulated to, (*Weatherall* (2000) 65 CCC 1; 65 CCC 1114).

Stipulations of the parties on the Stips & Issues are the operative pleadings of the parties so what is written on the MSC statement trumps anything written, pled or agreed to, before the Stipulations and Issues were prepared, (LC § 5502; *Garibay v. WCAB* (Tropicana Inn) (1994) 59 CCC761; *Weatherall* (2000) 65 CCC 1114).

TIP: *If you don't have evidence on a disputed issue, negotiate a settlement of the issue and try to mitigate your loss. Even if you manage to coax a careless judge into finding in your favor without producing substantial evidence on the issue, the WCAB will note the defect on reconsideration.*

TIP: *Do not attach copies of any evidence to a Petition for Reconsideration, Regulation § 10842(c), attachments will be discarded without being reviewed. Attaching evidence to your petition for reconsideration is a neon sign that you don't know the law, which is the wrong message to telegraph to the WCAB or*

the judge if you want them to take your arguments and interpretation of the law seriously.

II. JUDGES MAY ONLY DECIDE THE ISSUES SUBMITTED

Judges may only address issues which the parties submit to the judge. Judges can't add issues which the parties forgot to raise, (though some issues are raised by operation of law).

ISSUES vs. ARGUMENTS: Know the difference between an 'argument' and an 'issue'. The Stipulations and Issues list almost all of the possible issues parties may submit to a judge. If the issue is on the form, check it off, don't rewrite it on the bottom of the Stips and Issues. An issue is a dispute you want the judge to decide. Think of it as a question, such as: Is applicant entitled to PD and how much? Was applicant TTD from 12/1/05 to 12/25/06? What PD is apportionable to each dates of injury? Is applicant entitled to future medical care for his back? Is defendant entitled to credit for overpaid TTD from 12/26/06 to 1/30/07 in the amount of \$1,250.00? Was the report of Phillip Jackson, M.D. dated 5/5/05 obtained improperly? Should that report be excluded from evidence?

If the issue is not already part of the Stips and Issues form, write the question succinctly, under 'other issues'. If you can't write the issue in a short sentence you are probably adding an argument to the issue.

Examples of how to list an affirmative defense: 'Defendant asserts the Good Faith Personnel Action defense as a bar to the alleged psyche injury', or, 'defendant asserts the Post Termination defense as a bar to the alleged orthopedic injuries'.

Examples of typical arguments (not issues):

1. Dr. Simpson's report is not substantial evidence,
2. Defendant failed to pay TTD at the right rate,

3. Defendant is not liable for Dr. Smith's treatment because it was unauthorized.
4. LC § 4600.

The above examples do not request the judge make a decision about the statement. Such beliefs or assertions belong in a trial brief or points and authorities, not on the Stips and Issues.

TIP: *Draft Stipulations and Issues carefully. Many, many cases are lost because of careless drafting of the Stipulations and Issues prepared at MSC. Issues not raised are waived. Evidence not listed cannot be offered. Incorrect stipulations are binding and no evidence may be offered to refute the incorrect stipulation. Know the difference between an issue and an argument. List issues on the issues page and make arguments in trial briefs. Nothing sings 'clueless attorney' as loudly as arguments and lists of Labor Code sections, scribbled or preprinted on the 'issues' page of the Stips and Issues.*

ANALYZING THE PROPOSED EVIDENCE FOR MSC

TIP: *Every file should have a checklist or spreadsheet listing the issues in dispute, the evidence needed, and whether that evidence is in the parties' possession. Such a spreadsheet helps counsel and claims specialist to form a plan of action for obtaining evidence and identifies strengths and weaknesses in your case so that you know when to negotiate resolution of an issue because you have no evidence, or because your evidence stinks..*

Attached is an example of a defendant's trial worksheet, filled out for a case that is set for MSC at which time discovery will close.

Prep Sheet: Applicant & Defendant

DEFENDANT'S LITIGATION PREP SHEET

CASE#: ADJ66666

APPLICANT: Ima Hurtin

Def: Wedidit Inc.

ISSUE	WHO HAS BURDEN	WHO MUST REBUT	WHAT LAW APPLIES	WHAT EVIDENCE WILL YOU WILL RELY ON	IS IT SUBSTANT. EVIDENCE	DOES ATTY HAVE EVIDENCE	EVIDENCE / WITNESS/ISSUE LISTED ON STIPS & ISSUES
AOE/COE	applicant	def	5402 failure to deny timely;	app relies on own testimony that he rptd injury to spvs Smith. Def relies on: DWC-1 claim form, denial notice, testimony of HR Mgr. Smith.	yes signed, stamped, dated, proof of service, spvs. Interviewed	doc's forwarded to atty 10/08/07	on stips & issues 2/15/10
Affirmative def: good faith personnel action	def	app	3208.3h	def: panel QME Armstrong 12/4/08 says psych probs pre-existing and due to family problems; excerpt from personnel file, testimony of spvs. Smith, co-wkr Daniels	yes	forwarded to atty 12/20/08	on stips & issues 2/15/10
PD	applicant	def		Panel QME Armstrong 12/4/08 and 1/10/09	yes, supports med opinion	forwarded to atty 1/15/09	on stips & issues 2/15/10
Admissibility of applicant's QME rpt Dr. Gettum Good 5/5/07	applicant	def	LC 4050, 4061, 4062	Trial brief pointing out self-procured medical report obtained without compliance of labor code.	maybe	forwarded to atty 10/8/07	on stips & issues 2/15/10
TTD rate	applicant	def	4451; 4453	App relies on his testimony he made a lot, def relies on ??	NO PAYROLL RECORDS	NONE	on stips & issues but no def evidence
TTD for period 10/1/07 to 2/20/08	applicant	def		App relies on own testimony and txr's rpts. Def relies on QME report, spvs testimony, personnel	yes	forwarded to atty 10/8/07	on stips & issues 2/15/10

Trial Tips

TRIAL TIPS
2010 DWC CONFERENCE

1

2010 DWC Conference

LISTEN

LISTEN

LISTEN

2

2010 DWC Conference

- TRIAL
 - Opening the record
 - Appearances—Know who your client is
 - WCJ recitation of Stipulations, Issues and evidence creates the record. It is binding on the parties.
 - Issues not raised will not be decided
 - Evidence not admitted will not be considered

3

2010 DWC Conference

- TESTIMONY
 - Prepare your witnesses
 - Do not ask questions that may create problems
 - Listen to answer-- ask follow up
 - STOP
 - When you get the answer you want
 - When you get the evidence you need

4

2010 DWC Conference

- Questions are not evidence. They provide context to the answer.

5

2010 DWC Conference

- Courtroom Demeanor
 - LISTEN
 - Communicate through the Judge
 - Respect others in the courtroom
 - Theatrics counterproductive in WCAB trials

6

2010 DWC Conference

- LISTEN and OBSERVE
 - Listen as if you are the Judge
 - Observe the Judge

7

2010 DWC Conference

- Post Trial
 - Settlement is still possible
 - Rating instructions
 - Are the equivalent of a Notice of Intent
 - Study for all issues injury, body parts, occupation, earnings
 - Cross-examine the rater if it is rater's error or move to strike if instructions incorrect

8

MSC

Mandatory settlement conference

WHAT IS IT?

It is **not** a **mandatory trial setting conference**. It is an opportunity for parties to engage in settlement talks. Success is achieved at the mandatory settlement conference if you either settle the case or set it for trial. Anything else is failure.

WHAT DO YOU NEED TO BE PREPARED?

1. A file
2. All medical reports and dates of reports you want to list as evidence
3. Witness names (need to be able to contact witness to make sure they are available to testify at the trial you will select a date for)
4. Be aware of all potential issues and be willing to discuss/address them.
5. Have your rating ready to discuss with your judge

HOW YOU CAN AVOID DISCOVERY CLOSURE AT THE MSC:

1. File a timely objection to the DOR (A timely objection however is no guarantee that discovery will not be closed)

HOW TO MAKE SURE DISCOVERY CLOSES AT MSC AND MATTER IS SET FOR TRIAL:

1. Serve all your documentary evidence on your colleague either at the same time as you are serving your DOR or before
2. Send a detailed letter to your colleague, 30 days before filing of the DOR, outlining all your issues and your demand. Include a list of potential witness names with your letter. The list of witnesses should have contact information on it so that your colleague has an opportunity to set the deposition of the witnesses if necessary.

Be prepared for the MSC.

THE MANDATORY SETTLEMENT CONFERENCE STATEMENT:

1. Should you come to the MSC with it completed? Would completing the MSC statement jinx your chance for settling the case?

Preparing the MSC statement will assist you with your preparation for the hearing. It is therefore never a waist of time to prepare such document, even if you do not set the case for trial.

2. Complete the MSC statement carefully. Be detailed oriented.
3. List all issues.
4. Only stipulate to issues you agree with. Your will be held to your stipulations.
5. List the date of the medical report along with the name of the doctor. **Do not say Dr. X.....various reports.**

6. List all your witnesses, including the applicant. List the witnesses by name. **Do not say Ogilvie expert or employer witness.**

WHAT NO JUDGE WANTS TO HEAR:

1. I have no file. My client just called me this morning and asked me to appear.

2. I got the file last night and had no time to review it.

3. I cannot reach my client to obtain authority but I can tell you judge I have no authority to stipulate to anything.

4. I never thought that anyone would raise Ogilvie

5. Almaraz? What is that Judge?

6. I know I can win this case. I have evidence. And I will be sure to list it all on the day of trial.

7. I will be calling an expert. I do not know who it is yet but I am sure they are available on the day of trial.

8. It is true that I did not object to the DOR but I meant to.

9. I need a full day for trial. I have a lot of questions to ask and since I do not know who my witnesses are I had to list 20.

10. Go ahead. Set me for trial. Close discovery. I will just remove you.

Evidence

EVIDENCE

Evidence is what you use to prove your case. Evidence can be presented live (witness testimony), through documents (medical reports, medical records, wage statements) and through videotape (surveillance).

WITNESS TESTIMONY:

1. Who can testify: applicant, members of applicant's household, friends of the applicant, those who witnessed the injury, the employer, vocational counselors...just to list a few.
2. Who cannot testify: medical doctor
3. Know your witness. Do not put on a witness to testify at trial who you did not prepare for trial.

Do not present repetitive testimony. It is a waist of time and may put your trial Judge to sleep.

DOCUMENTARY EVIDENCE:

1. Medical report from a QME
2. Treating doctor reports
3. Medical records (make sure either the treating doctor or the QME...who ever it is you are relying on has reviewed these records and have commented on them in their final report).
4. Wage statement
5. Job description

6. Rehab Expert reports

Do not give every piece of evidence you have to your trial Judge. Only ask to have admitted into evidence pertinent documents.

SURVEILLANCE VIDEOTAPE:

1. You will need the investigator to testify and to produce the video.
2. Make sure you look at the video yourself. Do not take an investigator's word for what the video shows.
3. Make sure the person videotaped is the applicant. Make sure the applicant does not have an identical twin (no kidding here).
4. A videotape without a doctor's review is essentially worthless.

A long video that does not prove anything does not help your case.

TIP OF THE DAY:

Argument is no substitute for evidence. If you have an issue that requires evidence to prove your case, you have to get that evidence and cannot substitute argument in a trial brief or a petition for reconsideration for that evidence. Example: As a defendant, you want to establish that the last year of injurious exposure in a CT case occurred after your employment. You can't fail to obtain expert medical opinion that such injurious exposure occurred at the later employment and come to trial or petition for recon arguing that it is clear, for example, from applicant's testimony, that he had injurious exposure at the other employment.