

DWC 19th Annual Conference Top Tips for Trial



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Top Tips for Trial



1. Where we've been & Where we are now (Make sure physician uses current legal standard.)
2. What can you cite and when can you cite it
3. What's in and What's Out (Submission of Evidence)
4. Accuracy v. Fraud
5. Timing is Everything – When does “+5 days for mailing” rule apply?

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1. Where We've Been: 2006 - 2007

12.7.06 *Costa v. Hardy Diagnostic, (Costa I)* (2006) 71 CCC 1797; WCAB en banc re rebuttal of 2005 PDRS rating using VR experts.

11.13.07 *Costa v. Hardy Diagnostic (Costa II)*, (2007) 72 CCC 1492; WCAB en banc re rebuttal of 2005 PDRS rating using VR experts. *Costa I* affirmed.



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1. Where We've Been - 2009

2.3.09 *Almaraz v. Environmental Recovery / Guzman v. Milpitas Unified (Almaraz /GuzmanI)*, (2009) 74 CCC 201; WCAB en banc – rebuttal of strict AMA rating.

2.3.09 *Ogilvie v. City and County of SF, (Ogilvie I)* (2009) 74 CCC 248; WCAB en banc – rebuttal of DFEC.

9.3.09 *Almaraz v. Environmental Recovery / Guzman v. Milpitas Unified (Almaraz II/GuzmanII)*, (2009) 74 CCC 1084; WCAB en banc – rebuttal of strict AMA rating

9.3.09 *Ogilvie v. City and County of SF, (Ogilvie II)* (2009) 74 CCC 1127; WCAB en banc – rebuttal of DFEC.

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1. Where We've Been – 2010



6.3.10 *Blackledge v. BofA*, (2010) 75 CCC 613 (WCAB en banc) WCAB defined the roles of Dr, WCJ & rater in determining PD.

8.19.10 *Milpitas Unified v. WCAB (Guzman III)*, (2010) 75 CCC 837; 6th DCA affirmed the decision of the WCAB w/opinion.

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1. Where We Are Now - 2011

6.16.11 - *SCIF v. WCAB*
(*Almaraz III*), (2011) 76
CCC 687 (5th DCA writ
denied)

7.29.11 - *Ogilvie v. WCAB*,
(2011) 76 CCC 624; 1st
DCA – rebuttal of DFEC
(10.26.11 Petition for
Review denied by S.Ct.)



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1. Where We Are Now

Funez v. BOS Sheet Metal and Air Conditioning,
(NPD) 2011 CWC PD LEXIS 115

“In rejecting the scheduled AMA Guide WPI analysis, the AME opined that applying the AMA Guides “... would be inequitable, disproportionate, **unfair**, and an inaccurate measurement of the employee's permanent disability” *an incorrect legal standard*.



The applicant after receipt of the board's 9/3/09 en banc did nothing to obtain further op of the AME re whether the AMA Guide WPI of the applicant's orthopedic PD could be rebutted under the new legal standard set forth by the board's en banc decision of September 3, 2009.”

(Make sure M/L is in sync w/ the most CURRENT legal standard.)

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2. What Can You Cite

Citable AND Binding:



Cal Rule of Court 8.1115(d) states “a published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.” (i.e. **published DCA opinions**)

WCAB en banc decisions are citable and binding precedent. (See **8 CCR §10341**; *City of Long Beach v. WCAB (Garcia)* (2005), 70 CCC 109, fn. 5 *Gee v. WCAB*, (2002) 67 CCC 236; fn. 6; **Govt. Code §11425.60(b).**)

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2. What Can You Cite

Citable BUT not Binding:



In general, WCAB panel decisions are citable, but are not binding precedent.

See Footnote 7 in *Guitron v. Santa Fe Extruders* (2011) 76 CCC 228 en banc: “...Appeals Board panel decisions are not binding precedent...we consider them to the extent we find their reasoning persuasive. Unlike unpublished appellate court opinions, which, pursuant to California Rules of Court, **Rule 8.1115(a), may not be cited or relied** on ... WCAB panel decisions are citable, even though they have no precedential value.

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2. What Can You Cite



WCAB Noteworthy Panel Decisions (NPD) are citable, but are not binding precedent, and they are NOT a WCAB Significant Panel Decision (SPD).

WCAB Significant Panel Decisions (SPD) are citable, but are not binding precedent. (See *Smith v. WCAB*, (2000) 65 CCC 277, page 280 at fn 2.)

CWCR panel decision summaries are citable, but are not binding precedent. (See *Griffith v. WCAB*, (1989) 54 CCC 145 at fn. 2. See also *Smith v. WCAB*, (2000) 65 CCC 277, page 280 at fn 2.)

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2. What Can You Cite



NOT Citable AND NOT Binding

Unpublished appellate court (DCA) opinions, may not be cited nor relied on, except as specified by **Rule 8.115(b)**, pursuant to California Rules of Court, **Rule 8.115(a)**.

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2. What Can You Cite

Citable AND Binding



WCAB **en banc decisions** remain in effect unless and until the DCA or Supreme Court overrules or stays the WCAB's decision per LC §5956. (See *Daggle v. Sierra Sands Unified School District*, (2005) 70 CCC 1480.)

LC §5956 states: “The filing of a petition for, **or the pendency of**, a writ of review **shall not of itself stay or suspend the operation** of any order, rule, decision, or award of the appeals board...” (Emphasis added.)

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2. What Can You Cite

NOT Citable AND NOT Binding

(Slightly Different Rule for DCA Ops)



DCA decisions are automatically vacated if an application for Writ for Review is granted by the California Supreme Court. (WCAB decisions are **NOT** automatically vacated if Writ is granted by DCA.)

Cal Rules of Ct §8.1105(d) states: “a [DCA] opinion is no longer considered published [in effect] if the Supreme Court grants review or the rendering court grants rehearing.”

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3. What's in and What's Out



WCAB Is Not Bound by Rules of Evidence

But what about Privilege?

Attorney-client? Doctor-patient? Work product? Litigation privilege? 5th amendment? Husband-Wife Communications?

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3. What's in and What's Out

LC §5708 states, The WCAB
“shall not be bound by the ...
statutory rules of evidence...”

LC §5709 states, “No
order...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 ...statutory rules of
evidence.”



**“Guess what? I
just found out that
hearsay evidence
is admissible at
your workers’
comp trial?”**

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3. What's in and What's Out

Division 8 Cal Evidence Code, deals with privileges and **DOES** apply in workers' comp trials.

Ev. Code §910 states: "... the provisions of this division apply in **all** proceedings. ...any statute making rules of evidence inapplicable in particular proceedings... **do not make this division inapplicable to such proceedings.**"

(Emphasis added.)



"That may be true, sweetheart, but the Husband – Wife confidentiality privilege still applies."

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3. What's in and What's Out



Hardesty v. McCord & Holdren, Inc.,
(1976) 41 CCC 111

The WCAB held that the Evidence Code relating to privileges apply in WCAB proceedings per the official comments of the California Law Revision Commission explaining the purpose of **Evidence Code §910.**

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3. What's in and What's Out

Hardesty v. McCord & Holdren, Inc.,
(1976) 41 CCC 111

Law Revision Commission comments state:

"Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact.

Privileges, however, are granted for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding.



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3. What's in and What's Out

What if a privilege is not found in Division 8 of the Evidence Code, but in the CCP instead?



Work Product Privilege:

CCP §2018.030. (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

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3. What's in and What's Out

Stephens v. WCAB, (1999) 64 CCC 287 (2nd DCA, writ denied) “The WCJ discussed the attorney **work product privilege** and noted that this privilege is **not absolute**....

In the instant case, the undersigned has determined that failure to disclose this information may unfairly prejudice the employer in preparing their case, while such disclosure would not discourage the applicant's attorney from properly preparing her case, nor would such disclosure result in the defendants taking unfair advantage of the applicant's attorneys industry and effort.”



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3. What's in and What's Out



LC §6412 - Employer's first report of Injury (Form 5020) never admissible as evidence.

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4. Accuracy v. Fraud

Be diligent about presenting accurate information to the court at all times.

8 CCR §10842: “A failure to fairly state all of the material evidence may be a basis for denying the petition.”



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4. Accuracy v. Fraud



An injured worker can be convicted of fraud for knowingly exaggerating symptoms to an examining doctor.

People v. Eliodoro, (2001)
66 CCC 594.)

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4. Accuracy v. Fraud

Cal Ind Ins Co. v WCAB (Whiteley),
(2011) 76 CCC 1332 (2nd writ
denied)

“A stipulated award can be set aside if
the claims adjuster knowingly
minimized disability and complaints
by a material misstatement in the
Award.”

See *Aliano v. WCAB* (1979) 44 CCC
1156 (3rd DCA writ denied.)



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5. Timing is Everything



When does the “+5 days for mailing” rule apply?
See *Messele v. Pitco Foods, Inc; California Insurance
Company*, (2011) 76 CCC 956 (WCAB en banc)

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5. Timing is Everything



CCP 1013(a) “+ 5 days for mailing” rule applies to documents served by **mail only**. (Rule is “+2 days” if service is by **fax or email** - **CCP 1013(e) & 1010.6(a)(4).**)

8 CCR 10507 “+ 5 days for mailing” rule applies to documents served by **mail, fax or email**

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5. Timing is Everything

POP QUIZ #1:

LC 4062.2(c): Does the **“+ 5 day for mailing rule”** apply to the time period for striking a doctor from a QME Panel?



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5. Timing is Everything

POP QUIZ #1:

LC 4062.2(c): Time period for striking a doctor from a QME Panel.

Hint: The action which triggers the time period is the **striking** of a doctor's name. It is **not service of a document**.



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5. Timing is Everything

POP QUIZ #2:

LC 4062.2(b): Does the **“+ 5 day for mailing rule”** apply to the time period for requesting a QME Panel from the medical unit?



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5. Timing is Everything

POP QUIZ #2:

LC 4062.2(b): Time period for requesting a QME Panel from the medical unit.

Hint: The action which triggers the time period is **service of a document**, (i.e. service of the “first written proposal” of an AME.)



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5. Timing is Everything

POP QUIZ #3:

LC 5903: Does the **“+ 5 day for mailing rule”** apply to the time period for filing a Petition for Recon from a WCJ’s final order?



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5. Timing is Everything

POP QUIZ #3:

LC 5903: Time period for filing a Petition Recon from a WCJ's final order.

Hint: The action which triggers the time period is **service of a document**, (i.e. “**service** of any final order” of the WCJ.



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5. Timing is Everything

POP QUIZ #4:

LC 5950: Does the **“+ 5 day for mailing rule”** apply to the time period for filing an application for a Writ of Review from a WCAB decision?



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5. Timing is Everything

POP QUIZ #4:

LC 5950: Time period for filing a Writ of Review w/ DCA.

Hint: The action which triggers the time period is **not service of a document**. Time period is triggered by **filing** of the WCAB decision.



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5. Timing is Everything



- 5/24/11** IW get MT from PTP
- 7/11/11** **D FAXes objection of to AA & offers AME**
- 7/12/11** AA mails a ltr to D, rejecting AME, and proposing Dr. Tingle as the AME.
- 7/16/11** **Upon receipt of AA's letter, D emails AA rejecting Dr. Tingle as the AME.**
- 7/24/11** D submits QME Panel Request
- 7/26/11** AA submits QME Panel Request

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5. Timing is Everything

Defendant's Request:

D does primarily civil litigation & assumed that since he FAXed his objection and AME proposal to AA, **CCP §1013(a)** “+5 days for mailing” rule would not apply.

D thought that as long as he submitted his Panel QME request 12 days (10 days “+2 days for mailing” rule per **CCP §1010.6(a)(4)**) after the first proposal, he would be in compliance with **LC 4062.2**.



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5. Timing is Everything

Defendant's Request:

He didn't know that **8 CCR §10507** and the case of *Messele, supra* adds the “+5 days for mailing” to the AME agreement time frame period.

His **Form 106** would be rejected by the Medical Unit as premature.



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5. Timing is Everything

Applicant Attorney Request:



AA read **8 CCR §10507** and the *Messele* case. She was fully aware of the 10+5 day AME agreement time frame.

Unfortunately though, she missed the part that indicated parties must wait until **AFTER** the 15th day had ended, before submitting their **Form 106**.

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5. Timing is Everything

Applicant Attorney Request:



AA should have waited until July 27, 2011, the 16th day (after the initial proposal) to submit her request for a Panel QME.

Therefore, AA's **Form 106** would also be rejected by the Medical Unit as premature.

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TOP TEN LITIGATION TIPS FROM A JUDICIAL PERSPECTIVE

HON. PAIGE S. LEVY

DISCLAIMER

- ▶ THE OPINIONS EXPRESSED HERE ARE NOT THE OPINIONS OF THE STATE OF CALIFORNIA, THE DIR, THE WCAB, THE DWC, OR OTHER JUDGES. EACH CASE IS DIFFERENT AND MUST BE EVALUATED ACCORDINGLY

#10: SUBSTANTIAL EVIDENCE

- ▶ REPORTS MUST BE SUBSTANTIAL EVIDENCE TO BE ADMISSABLE
- ▶ IS THE REPORT AMA COMPLIANT?
- ▶ IS THE REPORT COMPLIANT WITH THE HOLDING IN BLACKLEDGE V. BANK OF AMERICA (2010)
- ▶ 75 Cal.Comp.Cases 613
- ▶ HAVE ALL OF THE RECORDS BEEN REVIEWED?

#10: SUBSTANTIAL EVIDENCE

- ▶ IS THE HISTORY ACCURATE?
 - ▶ DID THE DOCTOR SIGN THE MEDICAL REPORT?
- Substantial evidence in workers' compensation generally means evidence that is credible, reasonable, and of solid value, which a reasonable mind might accept as probative on the issues and adequate to support a conclusion. *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164

#10: SUBSTANTIAL EVIDENCE

- ▶ A medical expert's opinion which is based on incorrect or inadequate facts, conjecture, an erroneous examination or legal theory, or is no longer germane or beyond the physician's expertise, is not substantial evidence. (Place v. Workmen's Comp. App. Bd. (1970) 3 Cal.3d 372, 378)

#9: SETTLEMENT DOCUMENTS

- ▶ COMPLETE THE DOCUMENTS IN FULL
- ▶ KNOW WHAT THE SETTLEMENT IS BASED ON
- ▶ KNOW WHY THE ATTORNEY IS ENTITLED TO A CERTAIN FEE
- ▶ HAVE THE MEDICALS ATTACHED
- ▶ HAVE THE MEDICALS EVEN IF YOU HAVE FILED THEM IN EAMS
- ▶ KNOW WHAT THE REPORTS RATE

#9: SETTLEMENT DOCUMENTS

- ▶ IF WALKING THROUGH PRO PER SETTLEMENTS
 - ALL BENEFIT LETTERS TO THE APPLICANT
 - OFFER OF MOD/ALT/REG WORK PER L.C. 4658(d)
 - ALL OFFER LETTERS TO THE APPLICANT
 - OFFER OF QME
 - WAIVER OF QME
 - RATING-DEU OR CONSULT
 - ALL MEDICALS

#8: MOTIONS TO COMPEL

- ▶ DEPO/QME/AME
- ▶ BRING ALL DOCUMENTS TO SUPPORT THE MOTION
- ▶ IF DEPO: LETTER TO APPLICANT AND NOTICE OF NON-APPEARANCE AND ANY BASIS FOR THE FAILURE TO APPEAR
- ▶ IF PANEL QME: COPY OF PANEL AND ALL INFORMATION REGARDING THE STRIKING PROCESS

#8: MOTIONS TO COMPEL

- ▶ BRING THE NOTICES TO APPLICANT
- ▶ BRING THE CHECK TO APPLICANT FOR MILEAGE/PARKING
- ▶ FOR AME: BRING AGREEMENT INFORMATION
- ▶ NOTICES TO APPLICANT
- ▶ MILEAGE/PARKING DOCUMENTATION

#7: MEDICAL PROVIDER NETWORKS

- ▶ MPN IS NOT AN ISSUE FOR AN EXPEDITED HEARING
- ▶ NEED FOR MEDICAL TREATMENT IS AN ISSUE FOR EXPEDITED HEARING REG. 10252
- ▶ CAN YOU TRY THE VALIDITY OF AN MPN PRIOR TO CASE IN CHIEF BEING HEARD?

#7: MEDICAL PROVIDER NETWORK

- ▶ HAVE ALL OF THE CORRECT NOTICES BEEN GIVEN TO THE APPLICANT?
- ▶ IF THE APPLICANT WAS NOT PROPERLY PLACED IN THE MPN WAS APPLICANT PROPERLY CHANGED INTO THE MPN?
- ▶ REG. 9767.1-9767.16
- ▶ CAN THE APPLICANT FIGURE OUT HOW TO CHANGE TREATERS IN THE MPN?

#6: FILING EXHIBITS

REG. 10233

REQUIRES YOU TO FILE THE AME REPORTS, QME REPORTS AND TRT DR. REPORTS AT THE TIME OF THE FILING OF THE D.O.R. OR WHEN FILING AN OBJECTION TO THE D.O.R. OR WITHIN 10 DAYS OF THE D.O.R. BEING FILED IF NO OBJECTION FILED

#6: FILING EXHIBITS

- ▶ ALL OTHER DOCUMENTS THAT ARE BEING PROPOSED AS EXHIBITS WITH RESPECT TO THE ISSUES RAISED ON THE D.O.R. THAT HAVE NOT PREVIOUSLY BEEN FILED, AND IN YOUR POSSESSION SHALL BE FILED AT THE TIME OF MSC IF CASE SET FOR TRIAL, UNLESS OTHERWISE ORDERED BY THE WCJ OR WCAB.
- ▶ SAME RULE APPLIES WHEN FILING AN EXP. D.O.R.

#5: WCAB FORMS

- ▶ <http://www.dir.ca.gov/dwc/forms.html>
- ▶ OBTAIN YOUR FORMS ON LINE
- ▶ DON'T EXPECT THE WCAB TO HAVE FORMS FOR YOU
- ▶ ALWAYS HAVE THE FOLLOWING DOCUMENTS WITH YOU: MINUTES OF HEARING; C&R; STIP/AWARD, STIPS & ISSUES; COVER SHEETS, SEPARATOR SHEETS, LIEN STIPS, QME FORMS

#5: WCAB FORMS

- ▶ HAVE YOUR FORMS READY AHEAD OF TIME
- ▶ THE WEBSITE HAS ALL OF THE INFORMATION ON PARTIES/HEARINGS/CASE STATUS/LIEN CLAIMANTS

#4: UTILIZATION REVIEW

- ▶ S.C.I.F. VS. W.C.A.B. (SANDHAGEN) (2008) 44 CAL. 4TH 230
- ▶ We conclude the Legislature intended to require employers to conduct utilization review when considering requests for medical treatment, and not to permit employers to use [section 4062](#) to dispute employees' treatment requests. The language of [sections 4610](#) and [4062](#) mandates this result

#4: UTILIZATION REVIEW

- ▶ U.R. IS REQUIRED BY LAW
- ▶ LABOR CODE SECTION 4610
- ▶ U.R. TIMELINES
- ▶ WAS DEFENDANT COMPLIANT WITH U.R. TIMELINES, IF SO, AND TREATMENT DENIED APPLICANT MUST OBJECT AND FOLLOW 4062
- ▶ DISPUTES ARE RESOLVED BY 4062
- ▶ WHAT IF APPLICANT DOESN'T OBJECT TO U.R.?

#3: MANDATORY SETTLEMENT CONFERENCE

- ▶ OPEN NEGOTIATIONS PRIOR TO THE MSC
- ▶ HAVE DISCOVERY DONE—DISCOVERY IS CUT OFF AT MSC (5502)
- ▶ THE MSC IS THE PLACE TO EITHER SETTLE THE CASE OR SET FOR TRIAL
- ▶ CONTINUANCES NOT FAVORED (L.C. 5502.5)
- ▶ IF DISCOVERY IS NOT COMPLETE MAKE SURE THAT YOU OBJECTED TO D.O.R. TIMELY AND THAT OBJECTION IS VERIFIED

#3: MANDATORY SETTLEMENT CONFERENCE

- ▶ FILL OUT STIPS AND ISSUES
- ▶ HAVE THEM DONE AHEAD OF TIME
- ▶ MAKE SURE THAT ONE FOR EACH CASE #
- ▶ COMPLETE AND SIGNED
- ▶ ON ISSUES PAGE DO NOT USE THE "OTHER ISSUES" BOX FOR ARGUMENT
- ▶ IF DON'T FILL SOMETHING OUT ON ISSUES PAGE IT MAY BECOME A STIPULATION

#2: LIENS

- ▶ FOR CLAIMANTS: SERVE DOR AND NOTICE ON ALL PARTIES
- ▶ SHOW UP! (REG. 10240)
- ▶ SERVE BILL, LIEN AND REVIEW
- ▶ LIST BILL REVIEW REP ON STIPS & ISSUES
- ▶ KNOW YOUR LEGAL ARGUMENTS AND THE BASIS FOR THEM
- ▶ ARGUMENTS WITHOUT MERIT ARE SANCTIONABLE (REG. 10561)
- ▶ HAVE ALL OF YOUR EXHIBITS/DOCUMENTS READY

#2: LIENS

- ▶ FOR DEFENDANT: SERVE ALL EVIDENCE IN WHICH YOU ARE USING TO REDUCE LIEN ON L.C.
- ▶ DUTY TO SERVE MEDICALS WHEN LC BECOMES PARTY (REG. 10608)
- ▶ COME WITH AUTHORITY AND HAVE SOMEONE ON CALL WITH AUTHORITY (REG. 10240)
- ▶ L.C. HAS BURDEN OF PROOF ON ALL AFFIRMATIVE ISSUES TAPIA V. SKILL MASTER STAFFING 73 Cal. Comp. Cases 1338

#1: TRIAL

- ▶ CALL READY EARLY!
- ▶ MAKE SURE THE STIPS & ISSUES ARE READY AND COMPLETE
- ▶ EXHIBITS READY WITH SEPARATOR SHEETS
- ▶ CHECK WITH THE JUDGE TO SEE IF THE JUDGE WANTS ANYTHING ELSE DONE BEFORE TRIAL
- ▶ BE READY WITH YOUR ARGUMENTS

#1: TRIAL

- ▶ APPLICANT MUST BE ON SITE (REG. 10240)
- ▶ FOR DEFENSE WITNESSES EITHER ON SITE OR ON CALL (CLOSE BY)
- ▶ EXPLAIN WHY EVIDENCE RELEVANT
- ▶ IF AME AND ARGUING NOT SUBSTANTIAL EVIDENCE MUST BE A STRONG ARGUMENT
POWER VS. W.C.A.B. 51 C.C.C. 114

DWC 19th ANNUAL CONFERENCE



TOP TIPS FOR CONFERENCES

PRIOR TO CONFERENCE

- REVIEW YOUR FILE
- MEET/CONFER WITH YOUR CLIENT
- **ATTEMPT SETTLEMENT!**



REVIEW YOUR FILE

- WHAT ARE THE ISSUES? WHAT DOES DOR RAISE?
- BENEFITS PAID v. BENEFITS DEMANDED
- WHAT DO MEDICALS SAY?
- HOW DO MEDICALS RATE?
- LIENS, 132a, S&W?



REVIEW YOUR FILE

- FILLING OUT THE SUMMARY OF SETTLEMENT CONFERENCE PROCEEDINGS IS AN EXCELLENT WAY TO PREPARE.
- NO, REALLY AND TRULY!



MEET/CONFER WITH YOUR CLIENT

DEFENDANT:

- REVIEW ISSUES: THOSE RAISED AND THOSE THAT MAY BE RAISED
- REVIEW DEMANDS, IF ANY
- MAKE RECOMMENDATIONS



MEET/CONFER WITH YOUR CLIENT

DEFENDANT

- DISCUSS RISKS/PROS & CONS
- DISCUSS POSSIBLE SETTLEMENT PARAMETERS
- UNDERSTAND LEVEL OF AUTHORITY



MEET/CONFER WITH YOUR CLIENT

DEFENDANT

ALWAYS ARRANGE TO HAVE SOMEONE
AVAILABLE WITH SETTLEMENT AUTHORITY!!



MEET/CONFER WITH YOUR CLIENT

APPLICANT

MEET **BEFORE** THE CONFERENCE: PREFERABLY
BEFORE THE DAY OF THE CONFERENCE, AND
NOT JUST AT THE TIME THE CONFERENCE IS
SCHEDULED TO BEGIN



MEET/CONFER WITH YOUR CLIENT

APPLICANT

- DESCRIBE CONFERENCE PROCEDURES - WHAT TO EXPECT
- REVIEW THE ISSUES
- WHAT ARE YOU CLAIMING?



MEET/CONFER WITH YOUR CLIENT

APPLICANT

- DISCUSS POSSIBLE SETTLEMENT OPTIONS
- STIPS v C&R
- DO NOT HIDE THE BALL ON OFFERS MADE
- DISCUSS RISK, STRENGTHS AND WEAKNESSES



PRIOR TO CONFERENCE

- MAKE ANOTHER ATTEMPT TO SETTLE
- IF CANNOT SETTLE, TRY TO FURTHER NARROW THE ISSUES
- COORDINATE APPEARANCES (DO YOU HAVE MORE THAN ONE CASE SET?)
- MULTI-TASK v INEFFECTIVE REPRESENTATION



AT THE CONFERENCE

- ARRIVE EARLY
- GREET YOUR CLIENT BEFORE THE SCHEDULED CONFERENCE TIME
- DO NOT KEEP OPPOSING COUNSEL WAITING WHILE YOU MEET/CONFER WITH CLIENT



AT THE CONFERENCE

- IF YOU HAVE MULTIPLE SETTINGS,
COORDINATE WITH OPPOSING COUNSEL
- MAKE DEMANDS/ OFFERS, THEN ATTEND TO
OTOCS, CONTINUANCES, SETTLEMENTS
- MUCH EASIER IF CONTACTS MADE PRIOR TO
CONFERENCE CALENDAR



AT THE CONFERENCE

THE GOAL AT CONFERENCE:

TO RESOLVE THE ISSUES IN DISPUTE
THERE ARE NO "TRIAL SETTING" CONFERENCES



AT THE CONFERENCE

THE PARTIES ARE REQUIRED TO MAKE GENUINE, GOOD FAITH EFFORTS TO RESOLVE THE DISPUTES PRIOR TO FILING A DOR. THE EXPECTATION IS THAT AT CONFERENCE THE SAME WILL OCCUR



AT THE CONFERENCE

YOUR REVIEW OF THE FILE BEFOREHAND WILL ALLOW YOU TO:

- KNOW THE ISSUES, INCLUDING LEGAL ISSUES
- KNOW THE MEDICAL SUPPORT FOR YOUR POSITIONS ON THE ISSUES
- KNOW THE MEDICAL SUPPORT FOR THE "OTHER SIDE'S" POSITIONS



AT THE CONFERENCE

- ADDRESS PRELIMINARY ISSUES FIRST: OBJECTIONS TO DOR, REQUESTS FOR FURTHER DISCOVERY
- IF CANNOT RESOLVE THESE, ADDRESS THEM TO THE JUDGE AS EARLY AS POSSIBLE
- ONCE JUDGE HAS RULED, PROCEED ACCORDINGLY



I & A AT CONFERENCE

- I & A OFFICERS CAN HELP GUIDE PRO PER INJURED WORKER THROUGH HEARING PROCESS
- DOES NOT JUSTIFY "DUMP AND RUN" TACTICS
- GIVE THE I & A OFFICER A SYNOPSIS OF THE ISSUES
- BE AVAILABLE AS THE I & A OFFICER ASSISTS



AT THE CONFERENCE

- IF CANNOT SETTLE, TRY TO REDUCE THE ISSUES
- FILL OUT THE PRE-TRIAL CONFERENCE STATEMENT CLEARLY AND COMPLETELY
- DO NOT USE "ACCORDING TO PROOF" ON PERIODS PAID OR PERIODS CLAIMED
- DO NOT LIST ISSUES THAT ARE NOT ISSUES
- LIST ALL PROPOSED EXHIBITS



LISTING EXHIBITS

- EACH EXHIBIT SHALL BE IDENTIFIED BY AUTHOR/PROVIDER, DATE AND TITLE OR TYPE.
- EACH REPORT, RECORD OR DOCUMENT HAVING A DIFFERENT AUTHOR/PROVIDER OR DIFFERENT DATE MUST BE LISTED AS A SEPARATE EXHIBIT
- EXCEPTION: EXCERPTED HOSPITAL, PHYSICIAN OR BUSINESS RECORDS



LISTING EXHIBITS

THE PARTY OFFERING EXCERPTED RECORDS SHALL DESIGNATE EACH EXCERPTED PORTION BY TITLE OF RECORD OR DOCUMENT, BY DATE OR DATES COVERED BY THE RECORD OR DOCUMENT, BY THE AUTHOR OR AUTHORS AND ANY AVAILABLE PAGE NUMBERS



LISTING OF EXHIBITS

LIST EACH EXHIBIT BY NUMBER OR INITIAL THAT IDENTIFIES IT AND THE PARTY OFFERING IT:

APPLICANT'S EXHIBIT 1, 2, 3...

DEFENDANT'S EXHIBIT A, B, C...

LIEN CLAIMANT'S EXHIBIT AA, BB, CC...

JOINT EXHIBIT XX, YY, ZZ...



BEFORE THE JUDGE

- PRESENT YOUR POSITION CLEARLY AND SUCCINCTLY – CITE YOUR AUTHORITY
- DO NOT INTERRUPT EACH OTHER
- ADDRESS ONLY THE JUDGE
- STOP WHEN THE JUDGE HAS RULED
- DO NOT ATTEMPT TO RE-ARGUE WHEN BACK BEFORE THE JUDGE



BEFORE THE JUDGE

IF SETTING A CASE FOR TRIAL BE PREPARED TO:

- REVIEW THE ISSUES WITH THE JUDGE
- SET FORTH YOUR POSITIONS ON THE ISSUES
- DESCRIBE THE EVIDENCE IN SUPPORT
- DISCUSS AREAS OF POSSIBLE AGREEMENT
- LISTEN TO THE JUDGE'S THOUGHTS ON THE EVIDENCE AND ISSUES
- FURTHER DISCUSS SETTLEMENT IF NECESSARY



NEVER, NEVER, NEVER

- DISRESPECT OPPOSING COUNSEL OR THEIR CLIENT
- DISRESPECT THE JUDGE
- BULLY AN OPPONENT
- MAKE OR ACCEPT PHONE CALLS IN THE COURTROOM
- NEEDLESSLY ARGUE WITH EACH OTHER OR THE JUDGE



A NOTE ABOUT DOC TITLES

PLEASE USE THE DOCUMENT TITLES FROM THE OFFICIAL LIST.

REASON: WORKFLOW AND TASKS ARE GENERATED BASED ON THE TITLE OF THE DOCUMENT THAT WAS FILED.

WRONG DOC TITLE = DELAY!!



Top Tips for Trial

By Hon. Lilla Rados

WALK-THROUGH SETTLEMENTS:

Use a **cover letter** to explain what the settlement is based on. This cover letter should include the following information:

1. Periods of time during which **temporary disability** was paid (support provided by submitting the medical reports that have the applicant off work and also terminate the temporary disability)
2. **Permanent disability:** What medical report is relied upon to determine what the permanent disability is. Provide a rating string. If there is apportionment what medical report supports this. If there is a prior award from which apportionment is taken submit a copy of that prior award.
3. **Future medical care:** This only really needs to be addressed in cases where you are attempting to get a C&R approved. Need to provide a print out of medical benefits paid. Need to explain what the value of the future medical care is and how that value was arrived at.

WALK-THROUGH SETTLEMENTS:

Be prepared to address the following questions:

- a) Did the doctor take into consideration Almaraz?
- b) Is the applicant back to usual and customary? Is the applicant back to work at all? Is there a DFEC analysis that may come into play here? (Ogilvie)
- c) Was an interpreter used to interpret the settlement document to the injured worker?

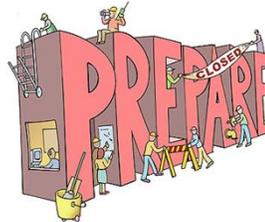


HOW TO PREPARE FOR TRIAL:

1. Read your file
2. Study the Mandatory Settlement Conference statement. Be prepared to address all issues listed on the statement on the day of trial.
3. Make sure you have evidence to support your arguments. Argument is not evidence. You need either a witness or documentary evidence to support your argument in order to create a record.
4. Talk to the witnesses you plan on presenting prior to the day of trial. Prepare them with your questions and prepare them for what they should be expecting during cross-examination.
5. Anticipate what your opponents arguments maybe.

HOW TO PREPARE FOR TRIAL:

6. Read up on current case law. Make sure you are legally correct in your position. If you find contrary authority be prepared to address it and distinguish your case from such authority.
7. Bring an extra copy of your exhibits, just in case the Judge cannot find the one you already submitted.
8. Talk to your client prior to trial and obtain settlement authority.
9. Discuss settlement with your opponent prior to trial. Do not wait till the day of trial to try to settle your case.
10. Write a trial brief.



TRIAL BRIEFS:

1. Definition of “brief”: Short in duration, extent, or length; Concise
2. A trial brief should be a very short, concise statement of your case. Tell your story but only tell the story that matters. Unless the applicant was injured while in high school, there is no need to mention where the applicant went to high school. Discuss only relevant material in your trial brief.
3. Your trial brief does not have to start with “Comes Now”.
4. Support your arguments in your trial brief by evidence. For example if you are discussing applicant’s limitations refer to the doctor’s report by date and page that would support your argument. If you plan on presenting witnesses to support your argument then mention in your trial brief which witness will testify to support the argument.

TRIAL BRIEFS:

5. Research the law and use case citation to support your legal theory. Make sure you point out contrary authority. Do not hide contrary authority. Your trial Judge will find it. It is your obligation as an attorney to mention all authority. If you do find contrary authority explain in your trial brief why your case is distinguishable.
6. There is no requirement to have a trial brief. But it is an excellent way to prepare for trial. And if you really want to get ahead of the game, submit your brief 20 days before trial. That way your opponent will not be asking for an extension of time on submission of the case to file a response brief.



VOCATIONAL REHABILITATION EXPERTS:

1. Is there a need for an expert?
2. When do you have to have the expert?
Should the applicant meet with the expert prior to the MSC? Does the expert need to have a report by the time of the MSC?
3. Is there a need for the expert to testify live? Is a report enough?
4. Do you have any idea what your expert is saying?



SUBSTANTIAL MEDICAL EVIDENCE

Definitions:

- **Substantial evidence** generally means evidence that is credible, reasonable, and of solid value, which a reasonable mind might accept as probative on the issues and adequate to support a conclusion. *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164
- **Substantial medical evidence** is evidence which is credible, reasonable and of solid value, which a reasonable mind might accept as probative on the issues and adequate to support a conclusion. *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App4th 483, 490.