



DWC 2021 Annual Conference Virtual Litigation

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Virtual Litigation



Discovery Timeline - Burden of Proof - Colleen Casey

Steps For Presenting Your Case at Trial – Jason Marcus

Unique Issues Regarding Witness Testimony & Importance of Trial Briefs – Saul Allweiss

How to Organize and Submit Evidence & Role of Interpreters - Nikki Mehrpoo-Jacobson

1. Discovery Timeline

Create Running Chronology:

Date of birth

Date of hire #1 employment

Date of 1st injury – body parts

Date PTP started MT for 1st injury

Period of TD

Date 1st QME report – ortho*

Date 2nd QME report – psych*

Date Supp report – ortho or psych or PTP?

Date #1 employment ended

Date of hire #2 employment

Date of 2nd injury – body parts



If 2 different injuries, need 2 AJD#. 8 CCR 10455 (previously #10104)

1. Discovery Timeline

Regulations REVISITED:

WCAB – Rules of Practice and Procedure

8 CCR Section §§10300-10995

https://www.dir.ca.gov/t8/ch4_5sb2.html

To download conversion chart translating old numbers to new numbers (also called a concordance):

<https://www.dir.ca.gov/wcab/WCABProposedRegulations/Rulemaking-August-2019/Rulemaking-August-2019.htm>



1. Discovery Timeline

Examples of Changes:

- **§10382(d)** Joinder requires 10-day objection period or NIT. If objection, then Judge must set for hearing.
- **§10390(b)(2)** Codification of now expressly prohibits identifying a TPA as a party
- **§10456(c)** Failure to plead affirmative defense in Answer will result in exclusion of related evidence, unless Board exercises its discretion otherwise 10540 - Procedures for filing petition to terminate TD



1. Discovery Timeline

Examples of Changes:

- **§10629** - A party designated to serve any document is required to file the POS w/in 10 days of designation
- **§ 10670(c)** – “Where a willful suppression of evidence is shown to exist, it shall be presumed that the evidence would be adverse, if produced.” (= Adverse Inference)
- **§10759(b)(1)** - Exhibits listed must be specifically “identified” on MSC statement. (Prior rule 10629 only required this specificity on list of exhibits at time of trial.)



2. Developing the Record

Old Republic v. WCAB (Cortes), (2020)

85 CCC 504

“The WCJ has the authority to develop the record further, and allow or order additional medical evidence when required for substantial evidence and consistent with due process.”

LC §§5701; 5906

Tyler v. WCAB, (1997) 62 CCC 924

McDuffie v LA (2002) 67 CCC 138



2. Developing the Record

Marshall v. WCAB, (2020) 85 CCC 499

“The fact that IW was exposed to birds while working for D was not “newly discovered evidence,” as Dr. Fishman stated in 6 of his reports, that avian antigens were a cause of interstitial lung disease.

The WCJ believed that IW knew by 7/31/2015 that birds could be a source of his disease. The WCJ also observed that while LC §5701 empowers the WCAB to reopen the record for additional **discovery**, the WCAB’s authority should not be used to “rescue” or unfairly reward a party that, due to its own lack of diligence, fails to meet its burden of proof.



2. Developing the Record

Bullet Proof Evidence

- Are your exhibits admissible?
LC §6412 - Employer's first report of Injury (Form 5020) never admissible as evidence
- Do your exhibits = substantial medical evidence?
- Have the evaluating physicians based their conclusions on
“reasonable medical probability”



2. Developing the Record

Bullet Proof Evidence

- **§10682** – Requirements for Physician's Reports (former **10606**)
- **§10785** – Requirements for VR reports (former **10606.5**)



2. Developing the Record



Labor Code § 4628(e):

Result of failure to comply w/
“minimum standards” ... report =
inadmissible as evidence and QME
shall forfeit **payment.**

2. Developing the Record



8 CCR §10682 (formerly § 10606):

“...failure to comply will **not make the report inadmissible** but will be considered in weighing the evidence.”

As a general rule, the Labor Code trumps the regulations, but...

2. Developing the Record



Effective Date of Report = Date it is signed

8 CCR § 41(c)(6): Date of report = date it is completed and ready for signature and service on the parties. OK to date report on the date of exam ONLY if full written text of report is complete and ready for service.

8 CCR § 35.5(b): QME shall state date the exam was completed **and street address where exam performed...the QME shall enter the date the report is signed next to the QME's signature.**

Why is this SO important????

3. Burden of Proof



Are you meeting your burden of proof with appropriate evidence?

- **Trial briefs are argument, not evidence;**
- **Does each exhibit have a proper foundation?**



For instance if you need to establish that a document was FAXED to a particular party, what evidence will you present to prove that?

3. Burden of Proof



Burden of Proof doc was **FAXed** (i.e., RFA or UR decision) Reg 9792.9.1 (a)(1):

1. The document generated by receiving FAX machine which has been electronically date stamped with the date the transmission when received; or
2. The document sent by FAX which indicates the date, time and place of transmission and the FAX # to which it was sent; or



3. Burden of Proof



3. The document sent by FAX with an unsigned copy of the affidavit or certificate of transmission (which indicates the FAX # to which it was sent); or
4. The document sent by FAX with the FAX transmission report (which indicates the FAX # to which it was sent.)



Will a plain slip of paper marked as Exhibit “3” with the following work?

RFA was FAXed to claims adjuster, Francine Miller on May 5th at 6:30pm.

3. Burden of Proof

Parties' Burden of Proof

LC §5705: The burden of proof rests on the party holding the **affirmative** of an issue.

Parties must prove each fact supporting his or her position by a preponderance of the evidence.

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

**Preponderance of the Evidence =
"More likely than not" or 51% standard.**



3. Burden of Proof

LC §5705. Burden of Proof rests upon the party...
holding the affirmative of the issue.

Corona v. California Walls, (2020) 85 CCC 1043,

“Applicant's termination from was not for cause, or due to his own misconduct, but was due to COVID-10 shelter-in-place orders. As a result, defendant has not met its burden to show that it is released from paying applicant TD benefits.

The fact that it was impossible for D to offer modified duties to IW because of the COVID-19 orders is inconsequential.

See also *Dennis v State of CA* (2020) 85 CCC 389



3 Burden of Proof

Ceballos v. TriMark, (2020) 85 CCC 955

“It is D's burden to show that there was in fact other work reasonably available to IW that he could have performed during his healing period.

(*Huston v WCAB*, 44 CCC 798)

D cannot meet this burden simply by showing that the modified work is no longer available for other reasons, such as layoffs due to changing economic circumstances, etc.”



3 Burden of Proof

Ceballos v. TriMark, (2020) 85 CCC 955

IW explained the reason he turned down the modified work was “that he was concerned about continuing to work as a Starbucks barista during the COVID-19 pandemic.

It is well settled that an injured worker may refuse modified duty that they reasonably believe could put their health at risk. One good example is a bogus offer of modified work that fails to honor the prophylactic restrictions put in place by the treating physician.

See also *Njoki v 24 Hour Fitness*, 2016 Cal Wrk Comp PD LEXIS 669.



3 Burden of Proof

Ceballos v. TriMark, (2020) 85 CCC 955

“I may take judicial notice that any retail food service job such as at Starbucks involves a high volume of personal contacts with a large number of individuals.

The CDC has advised that such environments do pose risks and that ‘The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.’”

(website:<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>)



Steps for Presenting Your Case



1. Your case begins long before your Trial date
 - Marshalling your evidence in anticipation of a trial

Steps for Presenting Your Case

2. Pre-Trial Conference Statement

- Start working on the PTCS before the MSC
- More is more – be detailed - LC 5502(d)(3)
- Effective use of Stipulations - 8 CCR 10759(c)
- Narrow your issues
- Clearly identify your exhibits - 8 CCR 10759(b)(1)
- Documents not listed on PTCS may be excluded from evidence (8 CCR 10670(b)(1))

Steps for Presenting Your Case



3. Pre-Trial Preparation
 - Client preparation
 - Witness preparation - Subpoenaing witnesses
 - » LC 130, 8 CCR 10640
 - Pre-Trial briefing

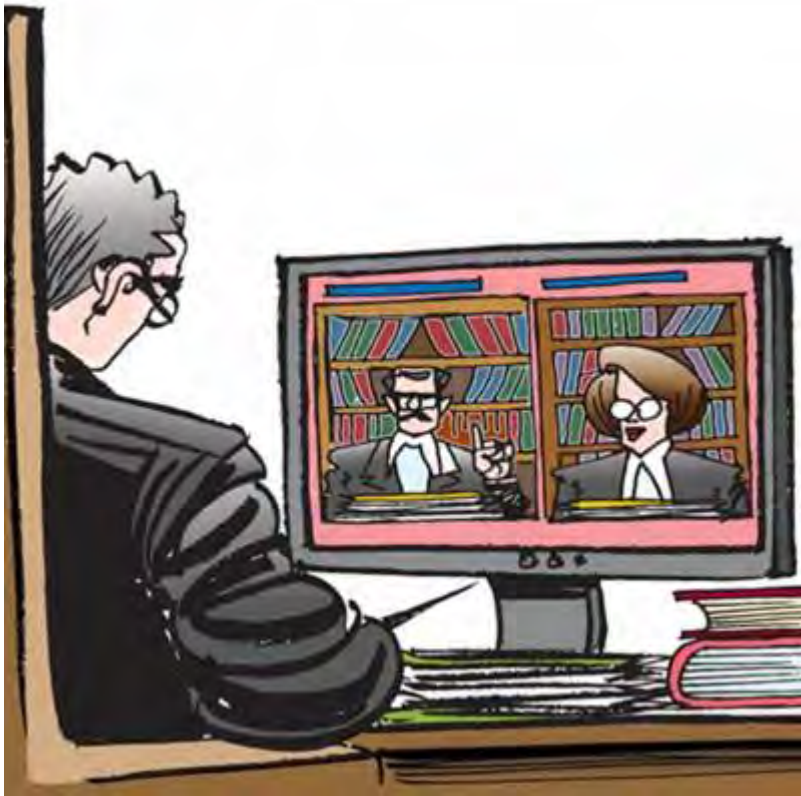
Steps for Presenting Your Case

4. The Trial

- Be prepared – know your file
- Have a roadmap, But be prepared to improvise
- Who has the burden?
- When to rest your case



Steps for Presenting Your Case

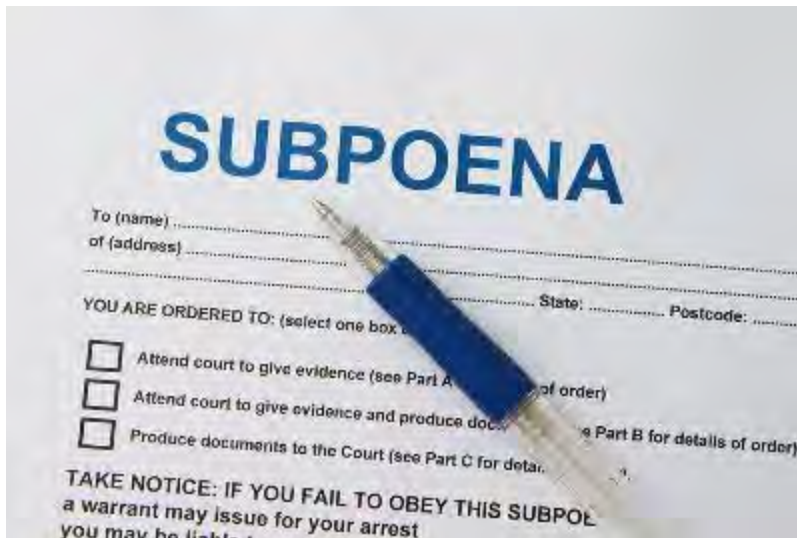


5. Virtual Trial issues

- Logistics
- Technology

6. Post-Trial briefs

Unique Issues Regarding Witness Testimony



- Serve your witnesses with Subpoenas, even if they are “friendly”

Unique Issues Regarding Witness Testimony



- In addition to your normal prep talk to your witnesses about “LifeSize”.
- If you have time do a practice session on LifeSize.

Unique Issues Regarding Witness Testimony



- Warn your witnesses about time frames for hearings and make sure that they are available the entire day.

Unique Issues Regarding Witness Testimony



ComputerHope.com

- Optimally you would want your witnesses to be “hardwired” onto the internet.
- Second best is Wi Fi.
- Least optimal is broad band.

Unique Issues Regarding Witness Testimony



- Give your witnesses the call in number for the Judge.
- Ask your witnesses to wear earbuds.
- Try to have cell numbers and land line numbers for your witnesses.

Unique Issues Regarding Witness Testimony



- In prepping your witnesses for testimony be aware that some communications may not be privileged.

Unique Issues Regarding Witness Testimony



- Prep your witnesses for cross-examination.
- If possible, do a mock direct and cross examination.

Importance of trial briefs

When and how to prepare them

Trial Briefs



- Pre-Trial and Post Trial Briefs;
- No case law or regulation on the topic.

Importance of trial briefs

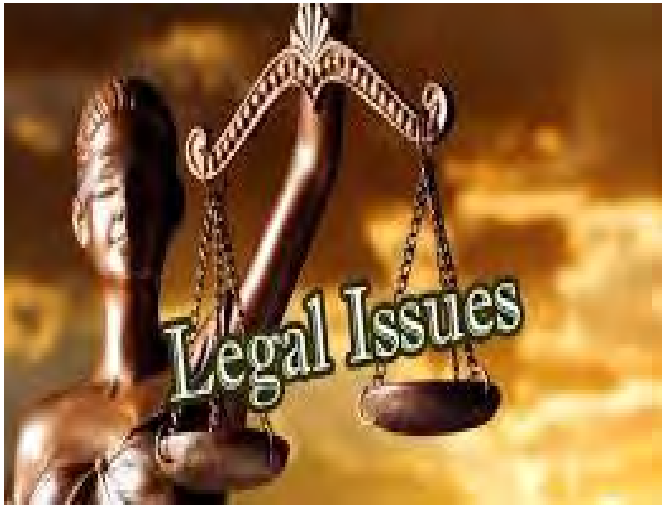
When and how to prepare them



- Pre-Trial
- Ask for permission before you spend time and effort
- There is still a problem as the MSC Judge may give you permission and the trial judge may not be interested.

Importance of trial briefs

When and how to prepare them



- Post Trial Briefs;
- Do you have a legal issue that requires briefing?
- Be sure that you limit your briefing to legal issues, not arguing that facts.

Importance of trial briefs

When and how to prepare them



If you think there is an issue that requires briefing ask for permission before the case is submitted. You may want to ask for permission to file a brief when stipulations and issues are being framed.

Importance of trial briefs

When and how to prepare them



- When asking for permission to submit a trial brief be sure that you have a clear understanding of the briefing schedule.

Importance of trial briefs

When and how to prepare them



- Exception to the rule;
- Arbitration
- Most arbitrators will provide you with a briefing schedule when assigned the case. If he/she doesn't you should reach out to get one.



Virtual Litigation: **EXHIBITS**

1. Rules & Regulations
2. Procedures (Tips & Tricks)

A photograph of a desk setup. On the left is a laptop displaying a video conference with several participants. To the right is a tablet displaying a grid of images. In the foreground, a smartphone is lying face down. A black mug is also visible on the desk.

EXHIBITS: Rules & Regulations

Title 8, California Code of Regulations

§10759(b) & (c): Mandatory Settlement Conferences

§10787(b): At Trial

§10620: Filing Proposed Exhibits

§10677: Oversized Exhibits, Diagnostic Imaging, Physical Exhibits and Exhibits on Media.

A photograph of a desk setup. On the left, a laptop screen shows a Zoom meeting with several participants. In the center, a tablet displays a grid of images, possibly a gallery or social media feed. On the right, a smartphone is lying flat. The desk is wooden, and there's a black mug and a blue container in the background.

EXHIBITS: Rules & Regulations (continued)

POLICY AND PROCEDURAL MANUAL

(DWC – WCAB) 2013 Revision

1.40 FILING AND ORGANIZATION OF TRIAL EXHIBITS –
EVIDENCE, HOSPITAL AND MEDICAL RECORDS

1.45 CONFERENCE AND TRIAL MINUTES AND
SUMMARY OF EVIDENCE

EXHIBIT A

EXHIBIT B

EXHIBIT

EXHIBITS: Procedures...

- 1. Page limits**
- 2. File Scanning & Saving
Protocols**
- 3. Uploading & EAMS**
- 4. Exhibit Lists**
- 5. Exhibit Numbers/Letters**
- 6. EAMS Numbers**

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBITS: Procedures...

- 7. Individual Exhibits or Packages**
- 8. Highlighting**
- 9. Portions of Documents**
- 10. Videos and Images**
- 11. Documents for Impeachment**
 - A. When to submit?**



1. Rules & Regulations

2. Procedures
(Tips & Tricks)

**Virtual Litigation:
INTERPRETERS**



INTERPRETERS

Title 8, California Code of Regulations § 10790.

Interpreters: It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter. Subject to the rules of the Administrative Director, the Workers' Compensation Appeals Board may in any case appoint an interpreter and fix the interpreter's compensation.



INTREPERTERS

- 1. Easier said than done...**
- 2. How to?**
- 3. Best Practices...**

