



Substantial Medical Evidence

Proctors:

- **Dr. Michael Post** completed his post-graduate training at Cornell-North Shore Hospital and Stanford University Medical Center. He is board-certified in Physical Medicine and Rehabilitation with additional board-certification and sub-certification in pain medicine. He is past president of the California Society of Industrial Medicine and Surgery and the California Society of Physical Medicine and Rehabilitation and has been a QME since 1996. He is a founder of RehabOne Medical Group, enjoys evaluating and treating patients with chronic musculoskeletal injuries, and is committed to helping injured workers. He has served the Workers Compensation Community as a PTP, AME, and QME for over 25 years.

Proctors:

- **Winslow West** started his career as a civil lawyer in private practice. He went on to become a workers' compensation defense attorney, and eventually made his way to the Division of Workers' Compensation. He is currently the QME Discipline Attorney for the Department of Industrial Relations/Division of Workers' Compensation.
- **Nicole Richardson** started her career as a workers' compensation defense attorney, and eventually made her way to the Division of Workers' Compensation. She is currently working as a QME Discipline Attorney for the Department of Industrial Relations/Division of Workers' Compensation. She received her BA from University of California, Berkeley and her JD from Santa Clara University.



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Relevant Authority In the Making of a Quality Report

❖ Labor Code § 4628

❖ 8 CCR § 35.5

❖ 8 CCR § 9785

❖ 8 CCR § 9793

❖ 8 CCR § 10682



❖ Labor Code § 139.2

❖ 8 CCR § 10683

Labor Code § 4628(a)

Take a complete History:

- Description, History of Injury, Treatment Course, Prior Injuries, Injured worker's Demographics, Date of injury

Review and Summarize prior medical Records:

- Date of Record; Doctor; Title of Record; Summary (not verbatim records) Does the physician list all information reviewed and relied upon in making the report? CCR § 41(b)(2): Did the physician review all relevant medical and non-medical records? Is there an affidavit by the physician stating the number of pages reviewed?

Composing and Drafting the conclusions of the report.



LC § 4628



- Date and location of evaluation.
- Physician signing the report did the evaluation. Time spent with injured worker is within guidelines (Regulation 49-49.9).
- Disclosure of name of each person who performed any services in connection with the report including diagnostic studies, and review of medical records, patient's history

LC § 4628 & Civil Penalties

- 4628(e) provides: “Failure to comply with the requirements of this section shall make the report inadmissible as evidence and shall eliminate any liability for payment of the medical-legal expense incurred in connection with the report.”
- 4628(f) provides: “Knowing failure to comply with the requirements of this section shall subject the physician to civil penalty of up to \$1000.00 for each violation”
- 4628(g) provides: if a civil penalty is assessed the physician maybe terminated, suspended or placed on probation as a QME.
- 4628(j): physician shall sign the report under penalty of perjury.

8 CCR § 10682

- Date of Evaluation
- History of Injury
- Patients complaints
- List of all information received or relied upon
- Medical history
- Findings on Examination
- Diagnosis
- Cause of disability
- Opinion as to nature and extent and duration of disability and work limitations
- Treatment indicated
- Opinion on PD
- Apportionment of disability
- Reasons for the opinion
- Signature of physician
- If psyche injury percent of total causation resulting from actual events of injury



Substantial Medical Evidence

- ❖ What is it?
- ❖ Why is it important?
- ❖ How did the concept develop?

Physician Perspective

- Substantial Medical Evidence is a LEGAL standard
 - Most physicians are not trained in the law
- Case law defines Substantial Medical Evidence
 - Case law is progressively complex and continually evolves
 - Each case is unique but the legal standard is the same
- Criteria is dependent on
 - Actual Facts, Correct Legal Theories, Sound Reasoning



Medical-Legal Evaluator as Expert Witness

- In the Workers Compensation System the QME, AME or primary treating physician, when writing a medical legal evaluation report, is really acting as an expert witness. The only difference is the expert witness testimony is given in the form of the medical legal report.

Common Pitfalls

- Physician is unclear as to the nature of the medical legal disputes
 - Clear cover letters
- Incomplete data set
 - Provide clear medical record; employment history
- Lack or misunderstanding of legal theories and case law
- Speculation
 - Opinion outside of scope of practice
 - Bias
- Incorrect terminology
 - Exacerbation v. aggravation

Evolution of the Concept of Substantial Medical Evidence

- ❖ Traditional dissertations on substantial medical evidence rely heavily on criminal cases that dealt mainly with the defendant's ability to form intent, competency to stand trial, or to assist Counsel during trial. Obviously these determinations required the services of experts in the realm of psychiatry and psychology.

People v. Bassett (1968)

69 Cal. 2d 122, 141

- The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion.

People v. Marshall (1997)

15 Cal. 4th 1, 31-32

- The value of an expert's opinion depends upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion. Evidence is substantial if it is reasonable, credible, and of solid value.

Expert Witness testimony as evidence in Civil Cases

- The concept of substantial medical evidence was also affected by the development of standards for expert witness testimony in civil cases.

Bushling v. Fremont Medical Center, (2004) 117 Cal. App. 4th 493, 494

- A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. (Evid. Code, § 801, subd. (a).) Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based.

Borger v. Department of Motor Vehicles (2011) 192 Cal. App. 4th 1118, 1122

- Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of **substantial evidence**. The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion"

Substantial Medical Evidence in Workers' Compensation cases

- The concept of Substantial Medical Evidence has also developed over time through cases decided in the workers' compensation arena which incorporate concepts from criminal and civil law.

Zemke v. WCAB (1968) 68 Cal. 2d 794;
Franklin v. WCAB (1978) 79 Cal. App. 3d 224

- An expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence upon which the board may base an apportionment finding.

Wehr v. Workers' Comp. Appeals Bd
(1985) 165 Cal. App. 3d 188, 194

- A report which is founded on incorrect assumptions of fact and which is speculative and that clearly lacking convincing force and probability of truth cannot be considered substantial medical evidence.

Substantial Medical Evidence, Apportionment, and Genetics

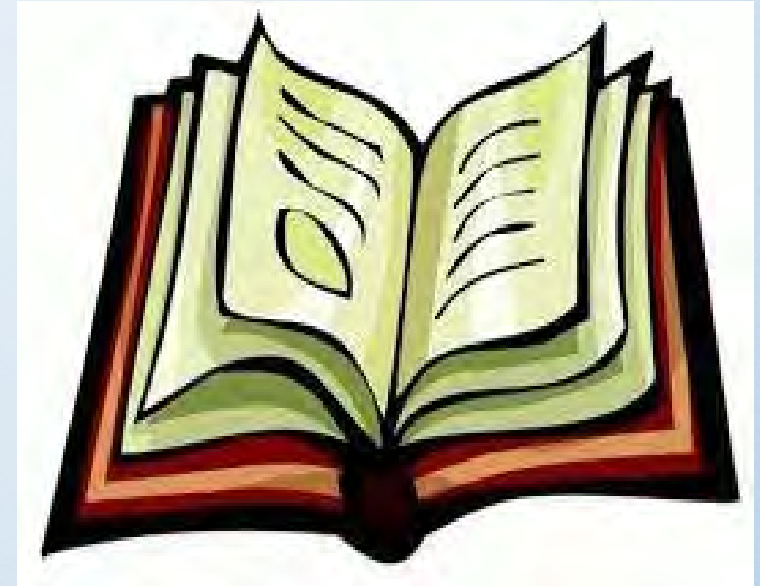
- The emphasis on Substantial Medical Evidence as it relates to apportionment carries over to current cases and controversies.

City of Jackson v. Workers' Comp.
Appeals Bd. (2017) 11 Cal. App. 5th 109

In order for a medical opinion to constitute substantial evidence, it must be predicated on reasonable medical probability. It must also set forth the reasoning behind the physician's opinion. In the context of an apportionment determination, the opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the California Workers' Compensation Appeals Board can determine whether the physician is properly apportioning under correct legal principles. A medical opinion must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on adequate examination and history, and must set forth the reasoning in support of its conclusions.

How and Why

- Reasonable medical probability
 - 51% Threshold
- Doctor must explain the “how” and “why” to support opinions on causation of injury, causation of disability and impairment rating.



Key Elements of an expert's opinion that ensure that it rises to the level of substantial evidence

1. Expert's testimony or opinion must involve matters beyond common experience.
2. Expert's opinion must be based on assumptions of fact supported by the evidence.
3. The assumptions of fact must be the type that are reasonably relied upon by other experts.
4. The controlling factors relied upon by the expert cannot be based on conjecture or speculation.
5. The expert must display a familiarity with the appropriate legal theory to be applied to the facts of the case.
6. The expert must relate the *reasoning* by which they progress from their material to their conclusion. This would be the how and why.

Pearls of Wisdom

- Use the cover letter to the physician as an opportunity to educate:
 - Clarify any medical legal disputes
 - Ask specific and unique questions relevant to the case
 - Provide all relevant documents (medical and job description)
 - If report is not clear seek clarification in supplemental or deposition of physician (pin point what is not clear)
- Evaluator:
 - Obtain complete and accurate history
 - Seek additional information if needed
 - Clearly state the basis for your findings and conclusions
 - Continuing education

Physician Feedback

- If a Judge finds a report not substantial medical evidence, serve this order on the Medical Director and possibly the physician if it is a final order (time for appeal has expired).
- Consider providing a physician with the DEU rating that finds the report is not ratable.
- Provide physician with case resolution from a favorable report.



Thank you

