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Preparing for Trial - An Examiner's Handbook

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Selected Labor Code Sections and Regulations

Selected Regulations

§10109. Duty to Conduct Investigation; Duty of Good Faith.

(a) To comply with the time requirements of the Labor Code and the Administrative Director's regulations, a claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.

(b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.

(1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information, whether that information requires or excuses benefit payment. The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.

(2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.

(c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.

(d) The claims administrator must document in its claim file the investigatory acts undertaken and the information obtained as a result of the investigation. This documentation shall be retained in the claim file and available for audit review.

(e) Insurers, self-insured employers and third-party administrators shall deal fairly and in good faith with all claimants, including lien claimants.

Note: Authority cited: Sections 59, 129.5, 133, 5307.3, Labor Code. Reference: Article 14, Section 4, California Constitution; Sections 124, 129, 133, 4061, 4550, 4600, 4636 through 4638, 4650, 4701 through 4703.5, 5402 and 5814, Labor Code;Ramirez v. WCAB, 10 Cal.App.3d 227, 88 CR 865, 35 CCC 383 (1970); and Section 790.03(h)(3), (5), (13), Insurance Code.

§17236. Written Notice to Party in Lieu of Subpoena.

(a) In the case of the production of a Party of record in the proceeding or of a Person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the Party or Person. For purposes of this Rule, a Party of record in the proceeding or Person for whose benefit a proceeding is prosecuted or defended includes an officer, director, or managing agent of any such Party or Person.

(b) Service of written notice to attend under this Rule shall be made in the same manner and subject to the same conditions provided in section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(c) The Hearing Officer shall have authority under Rule 47 [Section 17247] below to sanction a Party who fails or refuses to comply with a written notice to attend that meets the requirements of this Rule and has been timely served in accordance with section 1987 of the Code of Civil Procedure. However, the Hearing Officer may not initiate contempt proceedings against the witness for failing to appear based solely on non-compliance with a written notice to attend served on the Party's attorney. A Party seeking sanctions for another Party's failure or refusal to comply with a written notice to attend shall have the burden of showing to the satisfaction of the Hearing Officer that the written notice to attend was properly issued and timely served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1987, Code of Civil Procedure; sections 11450.50 through 11455.30, Government Code; and section 1742(b), Labor Code.

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Selected Labor Code Sections

3600. (a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence.

(4) Where the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee. As used in this paragraph, "controlled substance" shall have the same meaning as prescribed in Section 11007 of the Health and Safety **Code**.

(5) Where the injury is not intentionally self-inflicted.

(6) Where the employee has not willfully and deliberately caused his or her own death.

(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(8) Where the injury is not caused by the commission of a felony, or a crime which is punishable as specified in subdivision (b) of Section 17 of the Penal **Code**, by the injured employee, for which he or she has been convicted.

(9) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision.

(10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:

(A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.

(B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

(C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(D) The date of injury, as specified in Section 5412, is

subsequent to the date of the notice of termination or layoff.

For purposes of this paragraph, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 72411, 87740, and 87743 of the Education **Code** shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person.

A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this paragraph, and this paragraph shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this paragraph inapplicable to the employee.

(b) Where an employee, or his or her dependents, receives the compensation provided by this division and secures a judgment for, or settlement of, civil damages pursuant to those specific exemptions to the employee's exclusive remedy set forth in subdivision (b) of Section 3602 and Section 4558, the compensation paid under this division shall be credited against the judgment or settlement, and the employer shall be relieved from the obligation to pay further compensation to, or on behalf of, the employee or his or her dependents up to the net amount of the judgment or settlement received by the employee or his or her heirs, or that portion of the judgment as has been satisfied.

(c) For purposes of determining whether to grant or deny a workers' compensation claim, if an employee is injured or killed by a third party in the course of the employee's employment, no personal relationship or personal connection shall be deemed to exist between the employee and the third party based only on a determination that the third party injured or killed the employee solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation.

4663. (a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

(e) Subdivisions (a), (b), and (c) shall not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

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4664. (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

(B) Vision.

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders.

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

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4551. Where the injury is caused by the **serious** and **willful** misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half, except:

(a) Where the injury results in death.

(b) Where the injury results in a permanent disability of 70 percent or over.

(c) Where the injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the Division of Occupational Safety and Health, with reference to the safety of places of employment.

(d) Where the injured employee is under 16 years of age at the time of injury.

4552. The reduction of compensation because of the **serious** and **willful** misconduct of an employee is not enforceable, valid, or binding in any respect until the appeals board has so determined by its findings and award as provided in Chapter 6 of Part 4 of this division.

4553. The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars ($250), where the employee is injured by reason of the **serious** and **willful** misconduct of any of the following:

(a) The employer, or his managing representative.

(b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.

(c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

4553.1. In order to support a holding of **serious** and **willful** misconduct by an employer based upon violation of a safety order, the appeals board must specifically find all of the following:

(1) The specific manner in which the order was violated.

(2) That the violation of the safety order did proximately cause the injury or death, and the specific manner in which the violation constituted the proximate cause.

(3) That the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of **serious** injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences.

4554. In case of the **willful** failure by an employer to secure the payment of compensation, the amount of compensation otherwise

recoverable for injury or death as provided in this division shall be increased 10 percent. Failure of the employer to secure the payment of compensation as provided in Article 1 (commencing at Section 3700) of Chapter 4 of Part 1 of this division is prima facie evidence of willfulness on his part.

4555. In case of failure by an employer to secure the payment of compensation, the appeals board may award a reasonable attorney's fee in addition to the amount of compensation recoverable. When a fee is awarded under this section no further fee shall be allowed under Section 4903 but the provisions of Section 4903 shall be applicable to secure the payment of any fee awarded under this section.

4555.5. Whenever a petition to reduce an award, based upon a permanent disability rating which has become final, is denied, the appeals board may order the petitioner to pay to the injured employee all costs incident to the furnishing of X-rays, laboratory services, medical reports, and medical testimony incurred by such employee in connection with the proceeding on such petition.

4556. The increases provided for by this article shall not be limited by the provisions of Chapter 1 of this part relating to maximum amounts in the computation of average earnings.

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Trial Issues – Checklist

First and foremost: know your file materials including applications, claim forms, employer's reports, status of case, medical records and reports. Then answer the question "do I have a triable issue of fact as it relates to any of these issues?"

General Issues

_____ Age of applicant

_____ Occupation of applicant

_____ Average weekly wages

_____ Dual employment

_____ Full-time employment

_____ Part-time employment

_____ Seasonal employment

_____ Statute of limitations

_____ Requirements for psyche injury

_____ Good faith personnel action

_____ Coverage questions

_____ Doctor's first report - mechanics of injury and parts of body vs. claim form and application

Medical-Legal Procedure:

____ Post-2005 injury: treating doctor, panel QME, AMEs, MPN's

Evidence:

_____ Witness statements

_____ Activities check(s)/Subrosa films

_____ Disability and treatment consistent with injury

Claim Status:

_____ Claim denied

_____ Claim admitted

_____ Body parts in issue

Discrimination; Serious and Willful Misconduct:

_____ 132a claims

_____ S&W

Return to Work:

____ Release to return to work

____ Temporary

____ Permanent

____ Accommodations

Third Party Issues:

_____ Subrogation

Pre-Trial Considerations:

_____ Make sure all histories given to doctor are correct

_____ Make sure all favorable witnesses interviewed by trial attorney personally

_____ Have all films to be shown to AME/PQME and opposing counsel

____ Review depositions, medical records, witness statements, and medical reports, rate medicals and determine settlement value range of case

___ Prepare Stipulations/Issues for MSC before MSC, but consider amendment at Conference based on contingencies

_____ Raise all objections and defenses

_____ File all documentary evidence, medical reports included

_____ If trial set, prepare witnesses for testimony

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_____ Subpoena each witness

_____ Consider Trial Briefs: pre-trial or post-trial?

Trial:

_____ Present your witnesses

_____ Cross-examine their witnesses

Post trial:

_____ Findings and Award/Order immediately

_____ Consider Petition for Reconsideration.

_____ If Reconsideration is denied consider Petition for Writ of Review in Court of Appeal or Petition for Hearing in Supreme Court

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Appearing As A Witness

ROLE OF A WITNESS
You, as a witness, have a very important job to do – important not only to the party for whom you appear and to yourself but also to the American system of justice. Lawsuits, as controversies between two or more parties are termed, must be determined on facts and facts alone. In order to produce the facts for the consideration of a jury or judge, people who were present at the time the thing in controversy happened, or who knows facts pertinent to the matter, are relied upon to furnish these facts. Such persons are known as witnesses. They are as essential to the outcome of a suit as the judge, the jury, or the lawyers.

PREPARING TO TESTIFY
Before appearing in court, go over the facts of the case in your mind. Try to recall as clearly as you can exactly what occurred and the chronology of events.

Make sure you understand how to get to the courthouse and what time you should arrive. Talk to the lawyer who has asked you to testify about when and where in the courthouse you should meet him or her.

On the day you testify you should dress with respect for the judge, jury and the trial. Wear what you would wear to an important business meeting.

TESTIFYING
When you are asked to take the witness stand, get comfortable, sit erectly, and look around you to familiarize yourself with the court surroundings. A trial is an important and serious occasion. Be serious, but act natural and be yourself.

You will testify by responding to questions asked by lawyers. First, the lawyer for the party that asked you to testify will ask you questions. This is called “Direct Examination.” The questions asked on Direct Examination will be designed to have you talk about the facts you know. After Direct Examination is completed, the lawyer for the opposing party will ask you questions. This is called “Cross Examination.” The questions asked on Cross Examination will test the story you told during Direct Examination. The questions may be designed to see if you were able to adequately observe the facts and to test your credibility. The questions asked by both lawyers will have one purpose – to bring out the truth about the facts you know.

RULES
When you are on the witness stand, the first rule is to tell the truth. You will be given an oath to remind you, but be prepared to tell your story simply and honestly. Since your job is to tell the truth, you should not worry about helping or hurting either party in the case. Avoid expressing your opinion about who should win or lose the case – that is the job of the jury. As a witness, your sole duty is to tell it like you saw it. Nothing more, nothing less.

1. Stick to the facts. The only thing that you will be permitted to testify to is what you personally know. Tell only what you saw or know, not what you think happened, what you heard someone else say took place, or what you think will help or hurt one side. Testifying about anything other than what you saw or know makes you highly vulnerable on cross-examination. No matter how skillful a lawyer is in cross-examination, he or she will never confuse or embarrass you if you stick to the facts.

2. Speak slowly and clearly. There is nothing more unpleasant to a court, jury and lawyers than to have a witness who refuses to speak slowly and clearly enough to be understood and heard. Being slow spoken and deliberate in your answers provides you time to think and helps ensure you will not be diverted or

forced into dangerous territory. Speaking loudly and clearly indicates you are confident and certain about what you are saying.

3. Don't lose your temper. You will come across much better and much more credible if you remain calm and do not become defensive, hostile or argumentative. Additionally, if you lose your self-control, you will be much easier to trip up on cross-examination.

4. Never guess at the meaning of a question. If you don't understand a question, ask that it be explained. If you don't understand the question, don't try to answer it. Doing so may only result in confusing the court, the jury and the attorneys. It may also extend the time you are on the witness stand because the lawyers must go back and correct any misinformation given.

5. Answer all questions directly. Give no more information than is asked. It is the lawyer's job to get your story by asking questions. Answer the question you are asked and don't volunteer additional information. If you give more information than asked, you may create areas of cross-examination to the opposing attorney. You may also end up being on the witness stand longer than if you gave only direct, to-the-point answers.

6. If you don't know, admit it. Some witnesses think they should have an answer to every question asked. No witness knows all the facts. If you can't answer a question, say so. Don't be forced into testifying to something you don't know.

7. Don't try to memorize your story. Your obligation is only to tell your story to the best of your ability. You needn't, and indeed shouldn't, try to memorize your story. Your answers will sound too rehearsed and if questions are asked out of order, you could become confused.

8. Allow the attorney to finish speaking before you answer. You will notice that a court reporter will be seated near the witness stand. The court reporter will make a recording of everything said in the courtroom. The court reporter can record only one person at a time. You should be careful that you allow the attorney to completely finish his or her questions before you give your answer.