COA May 2017
Tips for Writing Med-Legal Reports

By: Colleen Casey

DISCLAIMER

The following material and any opinions contained herein are solely those of the author and are not the positions of the Division of Workers' Compensation, Department of Industrial Relations, the WCAB or any other entity or individual.

The materials are intended to be a reference tool only and are not meant to be relied upon as legal advice.

1. Dr. Shall Perform Exam – LC §4628

Labor Code §4628(a): Only the physician who signs the medical-legal report shall examine the injured employee and prepare report including:

(1) Taking a complete **history**.
(2) Reviewing and summarizing **prior medical records.**
(3) Composing and drafting the **conclusions** of the report.

1. Dr. Shall Perform Exam – LC §4628

Labor Code §4628(a): EXCEPTION:

The physician's nurse may perform those functions routinely performed by a nurse, such as taking blood pressure, etc.

Otherwise, the QME and ONLY the QME should handle all remaining tasks of report preparation.

1. Dr. Shall Perform Exam – LC §4628

Labor Code §4628(j) – Declaration & Signature

"I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true."

The foregoing declaration shall be **dated** and **signed** by the reporting physician and shall **indicate the county** wherein it was signed.

1. Dr. Shall Perform Exam – LC § 4628

Labor Code §4628(e) Failure to comply with the requirements of this section **shall make the report inadmissible as evidence** and shall eliminate any liability for **payment** of any medical-legal expense incurred in connection with the report.

2. Body Parts & Type of Injury Reg §10606

(1) the **date** of the examination;

(2) the **history** of the injury;

(3) the patient's **complaints**;

(4) a listing of all **information received** in preparation of the report or relied upon for the formulation of the physician's opinion;

(5) the patient's **medical history**, including injuries and conditions, and residuals thereof, if any;

2. Body Parts & Type of Injury Reg §10606

(6) **findings** on examination;

(7) a **diagnosis**;

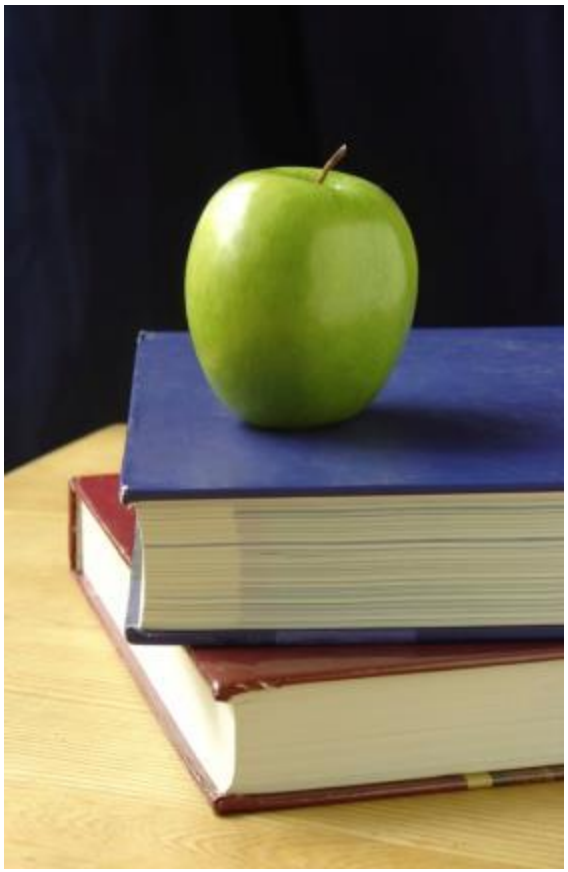
- include ALL body parts and diagnosis from each **direct injury**,
- include ALL body parts and diagnosis from **compensable consequences**, if any.
- state whether injury or injuries = **specific** injury or **cumulative trauma** or **both**.

2. Body Parts & Type of Injury Reg §10606

Regulation 8 CCR §35.5(d):

"At the evaluator's earliest opportunity and no later than the date the report is served, the evaluator **shall advise** the parties in writing of any disputed **medical issues outside of the evaluator's scope of practice** and area of clinical competency in order that the parties may initiate the process for obtaining an additional evaluation… **In the case of an Agreed Panel QME or a panel QME, the evaluator shall send a copy of the written notification provided to the parties to the Medical Director at the same time."**

3. Work Restrictions - Reg §10606



(8) State opinion as to the nature, extent, and duration of disability and **work limitations**, if any;

See also p.22 of AMA Guides, "Explain any conclusion about the need for restrictions for… complex activities such as work."

Do not base Whole Person Impairment (WPI) on work limitations.

Use the AMA Guides to determine WPI.

4. Causation of Disability - Reg §10606

(9) **cause of the disability**;

Causation of injury = a "complexity factor"

Causation of disability NOT a "complexity factor"

- **Causation of injury affects MT**

If cause of IW's injury = 1% industrial, IW gets 100% MT & TD & Death Benefits. Involves AOE/COE analysis.

- **Causation of disability affects PD**

If cause of IW's disability = industrial, IW gets PD% payout, less % of apportionment to non-industrial factors.

4. Causation of Injury - Reg §10606

8 CCR §9795 – Fees for Medical-Legal

CODE-ML103- RV 75 Complex Comprehensive Med-Legal. **"complexity factors" include but are not limited to:**

(6) Addressing the issue of **medical causation [*of injury, not disability*] upon written request of the party** or parties requesting the report;

ONLY address causation of injury, if injury is denied AND if the parties have requested an AOE/COE evaluation.

If injury is accepted, then causation of injury IS NOT AN ISSUE, and may NOT be included as a "complexity factor," (although causation of disability WILL be an issue.)

4. Causation of Disability - Reg §10606

(12) apportionment of disability (NOT injury), if any;

- **Causation of injury affects MT**

If cause of IW's injury = 1% industrial, IW gets 100% MT & TD & Death Benefits. Involves AOE/COE analysis.

- **Causation of disability affects PD**

If cause of IW's disability = industrial, IW gets PD% payout, less % of apportionment to non-industrial factors.

4. Causation of Injury - Reg §10606

(13) a determination of the percent of the total causation resulting from **actual events of employment**, if the injury is alleged to be a **psych**iatric injury;

Xerox Corp v. WCAB (Schulke), 2017 Cal. Wrk. Comp. LEXIS 13:

Heart attack = industrial death. QME found 10% of cause of heart attack due to work stress. QME distinguished **physical** from **psych** injury. AA pled ONLY physical injury, not a psych injury. No need to meet higher **LC §3208.3** psych injury threshold, since heart attack was physical injury, NOT a psych injury.

4. Causation of Injury - Reg §10606

Burden of Proof for Psych Injury:

Rolda v. Pitney Bowes (2001) 66 CCC 241
(En banc) (per **LC §3208.3**)

1. Did psych injury involve "**actual events of employment**" (**legal issue** – IW's b/p)

2. Is there > 50% industrial causation of the psych injury? (**medical** issue– IW's b/p)

3. Were **personnel action(s)** involved? 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 the psych injury (**medical** issue – D's b/p)

5. Medical Treatment - Reg §10606

(10) treatment indicated, including past, continuing, and **future medical care**;

(Do not discuss disputes over MT.)

Reg 35.5(g)(2): "For any evaluation performed on or after July 1, 2013, and regardless of the DOI, an AME or QME **shall not provide an opinion on any disputed medical treatment issue,** but shall provide an opinion about whether the injured worker will need **future medical care** to cure or relieve the effects of an industrial injury."

5. Medical Treatment - Reg §10606

8 CCR 1(t) "**Future medical care**" means MT as defined in LC 4600 that is reasonably required to cure or relieve an IW of the effects of the industrial injury after an injured worker has reached MMI or P&S status including a description of the type of the MT which might be necessary in the future.

8 CCR 9785(a)(7) "**Future medical treatment**" is treatment which is anticipated at some time in the future and is reasonably required to cure or relieve the employee from the effects of the injury.

5. Medical Treatment - Reg §10606

New Paradigm Post SB863 > 1/1/2013

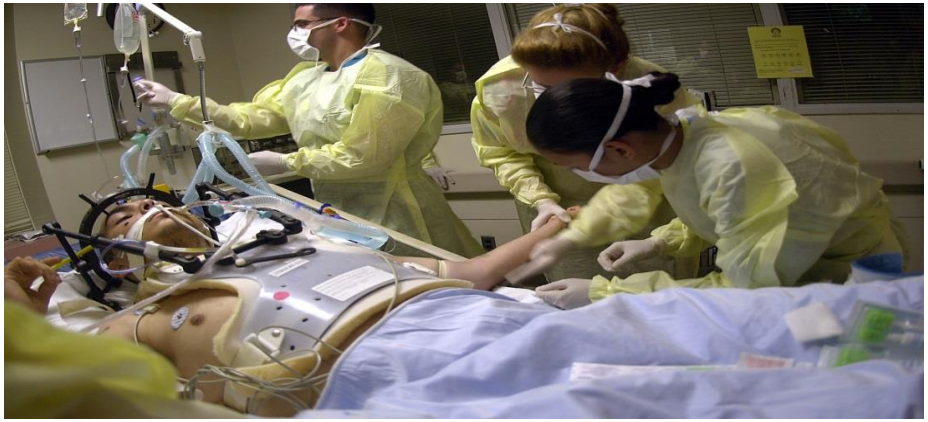
I. Role of the AME/QME

- Causation of Injury – AOE/COE (which triggers liability for MT)
- P&S/MMI date – TD benefits
- Cause of death - Death benefits
- Causation of disability - PD/Apportionment
- **Further/future** Medical Treatment

II. Role of the PTP

- MT Requests & **disputes over MT**, as well as other issues

6. P&S = MMI - Reg §10606



(11) opinion as to whether or not **permanent** disability has resulted from the injury and whether or not it is **stationary** (P&S). If stationary, a description of the disability with a complete evaluation;

AMA Guides defines:

Permanent impairment at page 602: An impairment that has reached maximal medical improvement.

Maximal medical improvement (MMI) at page 601: A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated.

7. How & Why? Reg §10606

(14) the **reasons** for the opinion;

Must base opinion on "**reasonable medical probability**" and discuss "**how and why**" on each issue.

Dawson v. County of LA, 2017 Cal. Wrk. Comp. P.D. LEXIS 28 **(See Exhibit 1)**

For a medical expert's opinion to be substantial evidence it must be framed in terms of reasonable medical probability that is based on pertinent facts, an adequate examination, an accurate history and set forth proper reasoning in support of its conclusions.

See ***Escobedo v. Marshalls,*** (2007) 70 CCC 604

7. How & Why? Reg §10606

Explain reasons & all medical terms

Dr. Christiaan states, “Mr. Barnard’s history of injury seems reasonable, even though **Waddell signs** exist. Still, I can state with **reasonably medical probability** that his ankle injury is industrial and that his level of WPI is 17%.”

Are Waddell’s signs indicated?

Acosta v. Sacramento County Employees' Retirement System, (2010), 75 CCC 109;

See Footnote 1: "**Waddell's signs**" are five indicators of nonorganic sources (such as psychological conditions or malingering) of lower back pain, which were first described in Gordon **Waddell** et al., *Nonorganic Physical **Signs** in Low-Back Pain*, 5 Spine 117, 117–25 (Mar.-Apr. 1980). (Wick v. Barnhart (2006) 173 Fed. Appx 597, 598) A finding of three or more indicators is considered "clinically significant.”

7. How & Why? Reg §10606

Explain reasons & all medical terms

Dr. Herta states, "**If** Mr. Oberheuser's history of the injury can be believed, then it is **reasonably medically possible** that his ankle injury is industrial."

Explain WHY Mr. Oberheuser's credibility is mentioned.

- Does the mechanism of injury match applicant's description of the injury?
- Is the applicant a poor historian?
- Does there appear to be magnification of symptoms? Or malingering?
- Are there inconsistencies in the medical reports?
- Is there other inconsistent evidence in the record? Applicant's **history** versus info in her **personnel records?**

8. Signature - Reg §10606

(15) the **signature** of the physician.

(Insert date next to signature. Effective date of report = date signed.)

8 CCR §41(c)(6) Date report on **date it is completed and ready for signature and service on the parties**. No report shall be dated on the date of the evaluation examination unless the full written text of the report is completed and ready for signature and service on that same date.

8. Signature - Reg §10606

8 CCR **§35.5** (b) Each QME shall state in the body of the report the date the exam was completed **and the street address at which the examination was performed**. If the QME signs the report on any date other than the date the examination was completed, **the QME shall enter the date the report is signed next to or near the signature on the report.**

Why is this SO important????

8. Signature - Reg §10606

Use of electronic signature:

Torres v. Auto Zone, 2013 Cal Wrk Comp PD 230

"Dr. Moelleken, in his report of January 14, 2013 **(Exhibit #4)** indicates his personal use of an electronic signature, there is no signature stamp or auto pen used. This procedure is used by the undersigned and is not deemed as contrary to Workers' Compensation Laws. (***See US Fire Ins Co v. WCAB, (Love)*** (2007) 72 CCC 865.)

An **electronic signature** does not render treating doctor reports inadmissible."

9. Failure to Comply – Admissibility?

Will failure to comply with "minimum standards" of Labor Code 4628 make report inadmissible as evidence and forfeit payment?

Labor Code 4628(e) Failure to comply with the requirements of this section shall make the report inadmissible as evidence and shall eliminate any liability for payment of any medical-legal expense incurred in connection with the report.

8. Failure to Comply – Admissibility?

Will failure to comply with "minimum standards" of 8 CCR §10606 make report inadmissible as evidence and forfeit payment?

8 CCR §10606 "Failure to comply with the requirements of this section 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...

10. Report - Internally Consistent

Doctors must provide a thorough analysis for all opinions and conclusions.

Tautologies don't work, but succinct reasoning may.

10. Report - Internally Consistent

Physician issued medical legal report which included the following:

"I can state that my apportionment determination of 25% to non-industrial causes is based on **reasonable medical probability**.

I can state this, because I believe **there's a strong chance** that the IW had an arthritic condition in his knee prior to his industrial injury."

10. Report - Internally Consistent

Dr. No writes,

"As I have discussed above, this patient has a severe cervical injury. Therefore, he is precluded from turning his head to the left or the right. However, he is able to return to work in his usual and customary position as a City bus driver."

11. Service of Reports

TIME GUIDELINES – SERVICE

§38(a) Must serve report w/in **30 days** of exam **(or party may request replacement QME)**

§38(c) QME may request 30 day extension of time from Medical Director - Form 112

§38(i) Supp Reports must be w/in **60 days of request**, parties may agree to 30 day extension

Serve on both parties simultaneously

& in the same manner.

Do not FAX to one party and mail to the other party.

11. Service of Reports

Reg §35(i):

If evaluator is **missing medical records** the evaluator may contact the PTP… to obtain such record(s).

If the party fails to provide records within 10 days after the date of the evaluation, and the evaluator is unable to obtain the records, the evaluator shall complete and **serve the report** to comply with the statutory time frames...

The evaluator shall **note** in the report that the **records were not received**…

Upon request by a party, or the Appeals Board, the evaluator shall **complete a supplemental** evaluation when the relevant medical records are received.

For a supplemental report the evaluator need not conduct an additional physical examination of the employee if the evaluator believes a review of the additional records is sufficient.

11. Service of Reports

Don't issue conclusion w/o the required tests or consult.

WRONG:

Dr. Nightengale writes,

"IW has a right medial meniscus tear, with associated Baker's cyst and right calf pain.

It is noteworthy that the vascular consultation that I recommended eighteen months ago has yet to be performed. I believe it was denied by UR.

The IW is MMI as of today and based on the AMA Guides, 2% WPI is provided for pain. There is no evidence or other findings that are rateable per the AMA Guides, so I'll have to go with 2% WPI."

11. Service of Reports

Go ahead and issue report

& note missing diagnostic.

Right:

Dr. Nightengale writes,

"IW has a right medial meniscus tear, with associated Baker's cyst and right calf pain.

It is noteworthy that the vascular consultation that I recommended eighteen months ago has yet to be performed. I believe it was denied by UR. I must have the results from this vascular consultation and will address it in a supplemental report.

The IW is MMI as of today, however, until I receive the report from the vascular consultation, I am not able to provide a WPI determination."

12. RTW & Voucher

8 CCR 35.5 (2): "If the evaluator declares the IW P&S for all conditions and that the injury has caused PPD, the QME **shall** complete the Physician's Return-to-Work & Voucher Report (**DWC-AD Form 10133.36**) and serve it on the claims administrator together with the medical report."

The form can be found at:
http://www.dir.ca.gov/dwc/DWCPropRegs/SJDB_Regs/Form10133.36.pdf

Why is THIS SO important???

Return To Work & Voucher Report

Physician's Return-to-Work & Voucher Report

For injuries occurring on or after January 1, 2013

☐ The Employee is P&S from all conditions and the injury has caused permanent partial disability

Employee Last Name _____ Employee First Name _____ MI ____ Date of Injury _____

Claims Administrator: _____ Claims Representative _____

Employer Name: _____ Employer Street Address: _____

Employer City: _____ State _____ Zip Code _____ Claim No. _____

☐ The Employee can return to regular work

☐ The Employee can work with restrictions:

		1-2 hours	2-4 hours	4-6 hours	6-8 hours	None
	Stand	☐	☐	☐	☐	☐
	Walk	☐	☐	☐	☐	☐
	Sit	☐	☐	☐	☐	☐
	Bend	☐	☐	☐	☐	☐
	Squat	☐	☐	☐	☐	☐
	Climb	☐	☐	☐	☐	☐
	Twist	☐	☐	☐	☐	☐
	Reach	☐	☐	☐	☐	☐
	Crawl	☐	☐	☐	☐	☐
	Drive	☐	☐	☐	☐	☐
	Reach	☐	☐	☐	☐	☐
R/L/Bilat Hand(s) (circle):	Grasp	☐	☐	☐	☐	☐
R/L/Bilat Hand(s) (circle):	Push/Pull	☐	☐	☐	☐	☐

Lift/Carry Restrictions: May not lift/carry at a height of _____ more than _____ lbs. for more than _____ hours per day.

Other Restrictions: _____

If a Job Description has been provided, please complete: Job Description provided of: ☐ *Regular* ☐ *Modified* ☐ *Alternative Work*

Job Title: _____ *Work Location* _____

Are the Work Duties compatible with the activity restrictions set forth in the provided job description? ☐ *Yes* ☐ *No, explain below*

Physician's Name _____ Role of Doctor (PTP, QME, AME) _____

Physician's Signature _____ Date _____

DWC AD Form 10133.36 (Effective 1/13)

12. RTW & Voucher

The regulations provide that once the claims specialist receives this form, they must send it to the employer. If there is no offer of return to work, then the IW may be entitled to the SJDB voucher of **$6,000.**

Why is THIS SO important???

12. RTW & Voucher

The SJDB voucher triggers the Return to Work Fund Supplement amount which is currently **$5,000.**

Reg §17302(a) provides:

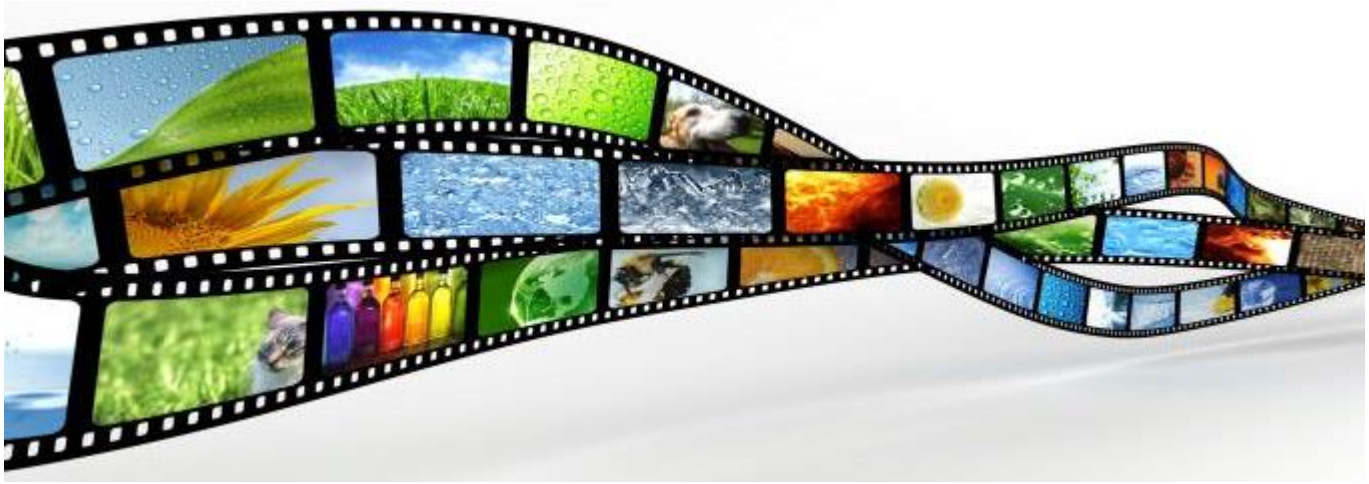
To be eligible for the Return-to-Work Supplement, the individual must have received the Supplemental Job Displacement Benefit (SJDB) Voucher for an injury occurring on or after January 1, 2013.

It's important because
it could result in an additional $11,000 for the IW.

13. Interpreters

LC §4620(d) IW entitled to certified interpreter, if necessary, at defendant's expense, at medical exams.

14. Comment on Sub Rosas



Community Hospital v. WCAB, (Bunch), 2011 77 Cal. Comp. Cases 91;

IW with failed back syndrome due to 4 level fusion and other industrial injuries was deemed 100% PD, even though **sub rosa videos** were introduced at trial.

Evaluator should note whether his opinion has changed as a result of viewing the videos and why or why not.

14. Comment on Sub Rosas

Community Hospital v. WCAB, (Bunch), 2011 77 Cal. Comp. Cases 91;

IW was deemed to be 100% PTD because…

"In the videos, IW was doing various ADLs. As a result of having viewed the videos, the AME indicated in a supplemental report that the "depicted individual" appeared to perform activities related to his low back with a limitation to light work, rather than a semi-sedentary restriction… However, the **deposition testimony** of the AME wherein he found IW unable to compete in the open labor market and 100% PTD **had never been retracted**."

15. Use Probative Language

LA County v. WCAB, (La Count,) (2015) 80 CCC 470

Use of the "probative terms such as "synergistic effect" supports "adding method" rather than use of the "Combined Values Chart" when combining WPIs.

"Dr. Fedder concluded that Applicant was PTD and unable to compete in the open labor market. In describing the nature of Applicant's disability, Dr. Fedder noted that there was a **synergistic effect** between Applicant's left shoulder, right hip, and lower back injuries."

15. Use Probative Language

LA County v. WCAB, (La Count,) (2015) 80 CCC 470

"Dr. Fedder explained that Applicant's fall at work caused his lower back and right hip condition for which Applicant used a cane. Applicant's use of a cane caused Applicant to develop left shoulder symptoms. Dr. Fedder believed that, due to their **synergistic effect** on one another, Applicant's orthopedic injuries **should be added** to find impairment, rather than combined using the **Combined Values Chart**. "

15. Use Probative Language

Athens Administrators, administrator for East Bay Municipal Utility District v.WCAB, Richard Kite, (1st DCA writ denied)
2013 Cal. Wrk. Comp. LEXIS 34

QME effectively rebutted the Combined Values Chart (CVC) by explaining how it was more accurate to add the WPIs rather than combine.

See also NPD of ***Lotspike v. J Jill, Travelers,*** 2013 Cal Wrk Comp PD LEXIS 564.

16. Note in Each Report:

- Missing medical records;
- **Inconsistencies in the record;**
- Applicant's credibility – Is there magnification of symptoms?
- **Is applicant a poor historian?**
- Discuss sub rosa videos, if any;
- **Have you requested a diagnostic test that has not been authorized? Or has it been denied by UR? If so, alert the parties immediately.**
- Alert the parties if a condition exists that requires a QME in another specialty;
- **Use probative phrases such as "reasonable medical probability," "functional improvement," and "synergistic effect."**