

Medical Reports in the Almaraz/Guzman Era

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Curriculum Vitae

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- WCJ at the Stockton WCAB District Office since 12/2006
- Adjunct Professor of Law—Humphreys Law School
- Certified Specialist in Workers' Compensation Law
- CA State Bar Specialization Exam Grader
- Stockton WCAB Bench and Bar Coordinator
- Private Practice 1996-2006
- J.D. Pacific McGeorge School of Law--1996
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Disclaimer

The opinions expressed by the speaker on this topic are her own and are not endorsed by or represent the opinions or policies of the Department of Industrial Relations, other judges or the WCAB commissioners.



Your goal in writing reports

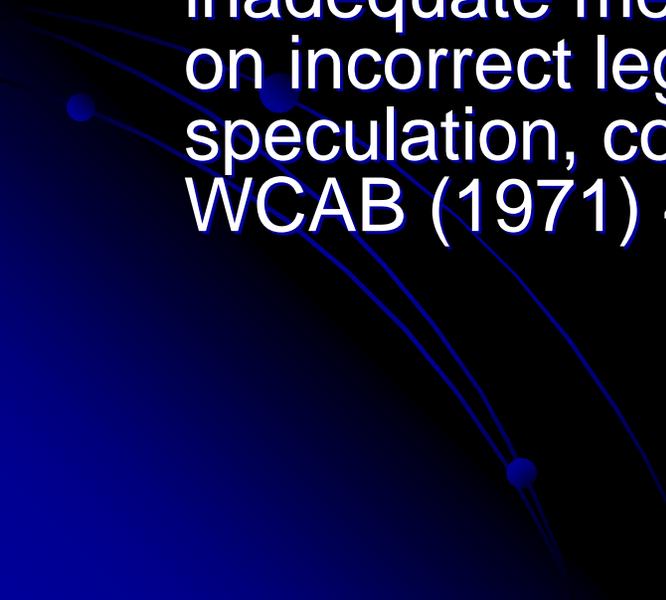
- Your report should constitute substantial evidence
- In order to be followed, a medical report must constitute substantial evidence



WCAB's Definition of Substantial Evidence

- “A medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his or her conclusions.” *Granado v. WCAB* (1970), 69 Cal.2d 399.
- Why not? Don’t we ultimately rely on a physician’s overall conclusions????

WCAB's Definition of Substantial Evidence

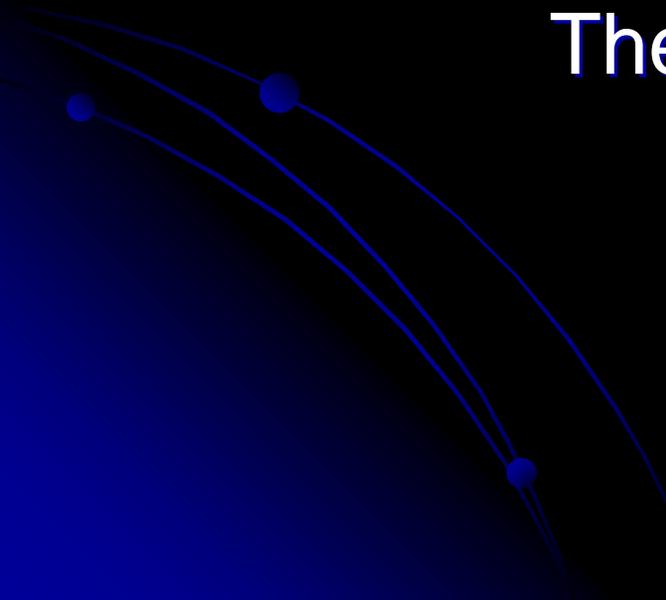
- “In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability.” *McAllister v. WCAB* (1968) 69 Cal.2d 408.
 - “A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess.” *Hegglin v. WCAB* (1971) 4 Cal.3d 162.
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WCAB's Definition of Substantial Evidence

- Because...
- “The chief value of an expert’s testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based.”
- People v. Bassett (1968) 69 Cal.2d 122.

What Constitutes Substantial Evidence?

The evaluator's focus



Substantive Considerations

- The type and form of the evidence presented
 - Documentary versus other evidence
 - Oral testimony
 - Lay testimony
 - Expert testimony
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Workers' Compensation Cases

Relevant cases for Medical-Legal
Evaluators



Minniear v. Mt San Antonio Community College District, (1996) 61 CCC 1055 (en banc)

- With regard to medical opinion presumed correct, such opinion may be overcome by a preponderance of medical opinion indicating a different conclusion.
- Evidence from a lay witness on an issue requiring expert opinion is not substantial evidence.

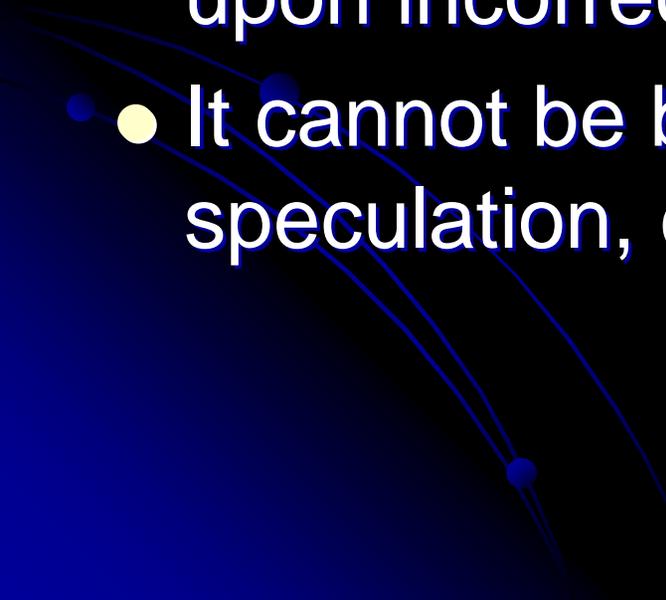
Kopping v. WCAB, (2006) 71 CCC 1229 (3rd Dist.)

- With regard to apportionment, Labor Code section 4464(b) creates a conclusive presumption of the continued existence of PD where the claimant received a prior PD Award.
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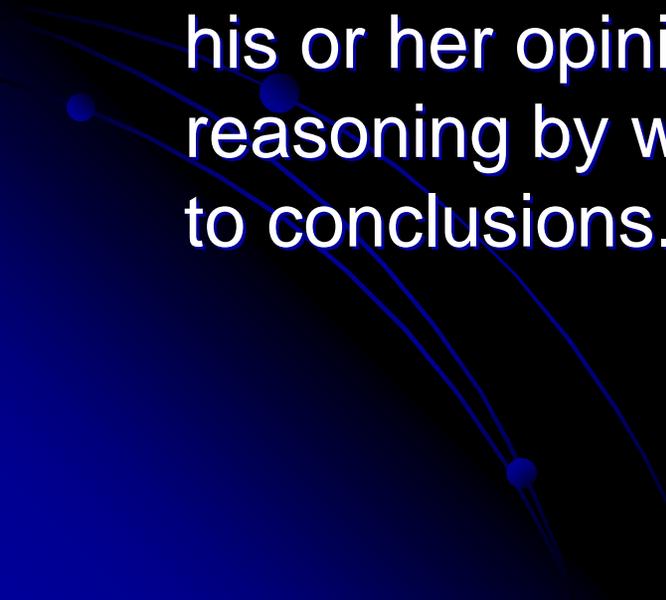
Escobedo v. Marshalls, (2005) 70 CCC 604 (en banc)

- It is well established that any decision of the WCAB must be supported by substantial evidence.
- To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability.
- It must be based upon germane facts.
- It must be based upon an adequate history.

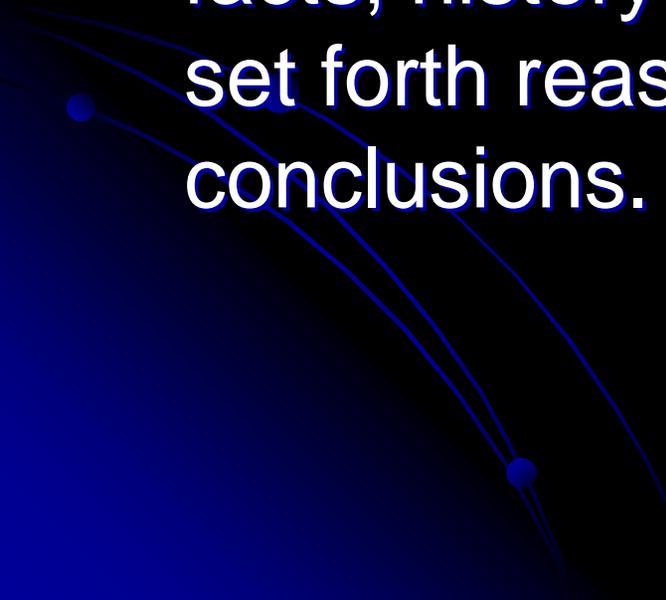
Escobedo v. Marshalls, (2005) 70 CCC 604 (en banc)

- To be substantial evidence, a medical opinion must be based upon an adequate examination.
 - The medical opinion must not be based upon incorrect legal theories.
 - It cannot be based upon surmise, speculation, conjecture, or guess.
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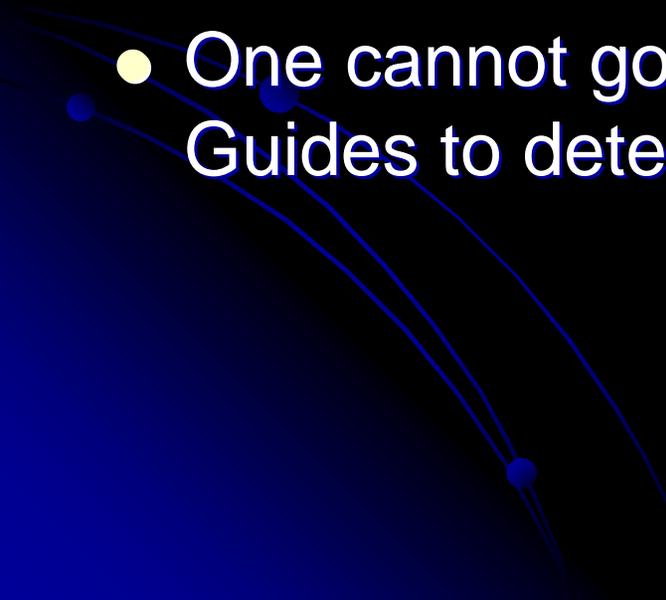
Escobedo v. Marshalls, (2005) 70 CCC 604 (en banc)

- To constitute substantial evidence, the medical opinion must set forth the reasoning behind the opinion, not merely state conclusions.
 - The expert must provide the material from which his or her opinion is fashioned and provide the reasoning by which he moved from the material to conclusions.
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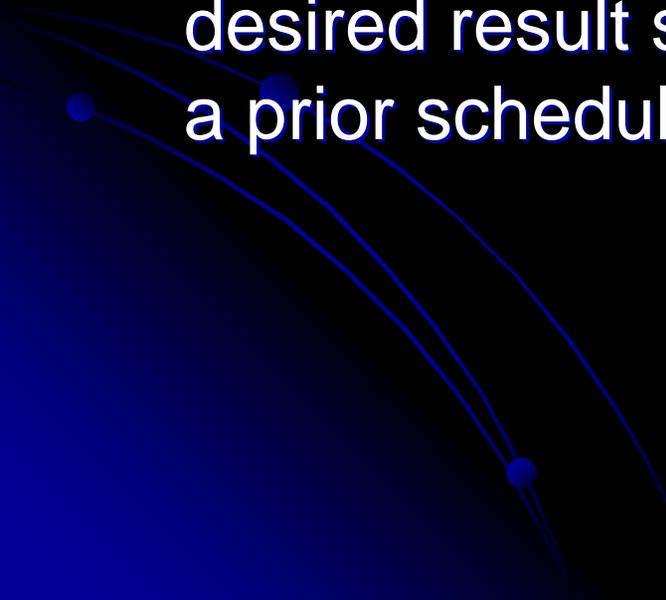
Escobedo v. Marshalls, (2005) 70 CCC 604 (en banc)

- In summary, to be substantial evidence, medical opinion must be framed in terms of medical probability, must not be speculative, must be based upon pertinent facts, history and examination, and it must set forth reasoning in support of its conclusions.
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Almaraz v. Environmental Recovery Services,
(2009) 74 CCC 1084 (en banc) – Almaraz/Guzman
II

- A PD rating established by the PDRS is rebuttable.
 - The burden of rebutting the PDRS rests with the party disputing the rating.
 - WPI under the AMA Guides may be challenged.
 - One cannot go outside four corners of the AMA Guides to determine WPI.
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Almaraz v. Environmental Recovery Services,
(2009) 74 CCC 1084 (en banc) – Almaraz/Guzman
II

- A physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment.
 - A physician may not use any chapter, table, or method in the AMA Guides simply to achieve a desired result such as to approximate PD under a prior schedule.
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Almaraz v. Environmental Recovery Services, (2009) 74 CCC 1084 (en banc) – Almaraz/Guzman

II

- The physician's opinion under the AMA Guides must set forth the facts and reasoning justifying it.
- An opinion cannot be arbitrary. The report must be clear, accurate, and complete and explain the impairment conclusions.
- The opinion must be substantial evidence upon which the WCAB can rely, citing *Escobedo*.
- A WPI not based on the AMA Guides is not substantial evidence.

Almaraz v. Environmental Recovery Services,
(2009) 74 CCC 1084 (en banc) – Almaraz/Guzman
II

- Process: A PTP, AME or QME offers an opinion regarding the injured worker's WPI under the AME Guides.
- Injured worker or defendant may challenge that opinion through rebuttal evidence, generally through a deposition or a supplemental report.

Almaraz v. Environmental Recovery Services, (2009) 74 CCC 1084 (en banc) – Almaraz/Guzman

II

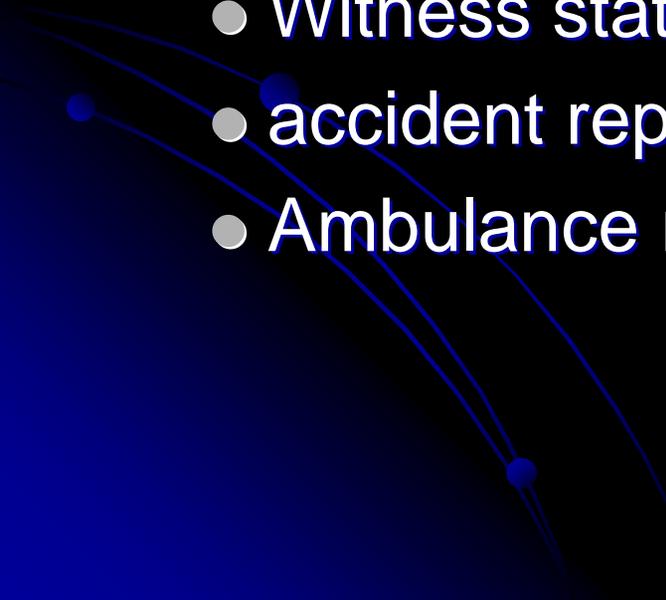
- The burden of rebutting the schedule rests with the party disputing the rating.
- Once all evidence relating to permanent disability has been presented, including both the original and rebuttal evidence on WPI, The WCAB determines the percentage of PD.
- In this regard, it is the WCAB and not any particular physician that is the ultimate trier of fact on medical issues. Remember: the judge is the audience.

Substantial Evidence—is it a concrete or fluid concept?

- Whether the particular portions of the record are substantial evidence at any given time can change depending the record's development and the litigation process.



In the beginning—the Injury

- Don't forget the Best Evidence Rule
 - What evidence is more probative on the issue of injury?
 - Employer records
 - Witness statements
 - accident reports/police records
 - Ambulance records
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Why attorneys depose experts

Establishes the expert's opinion.

Establishes the expert's assumptions and understanding of the law

Establishes the expert's reasoning

Tests the expert's assumptions

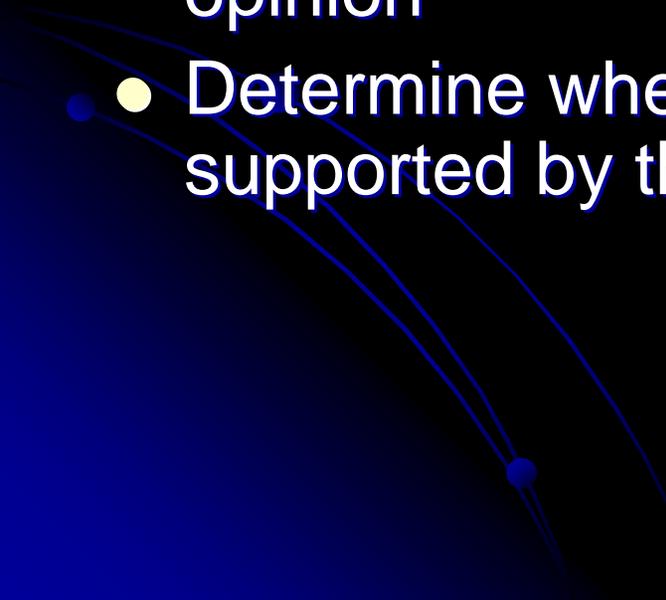
Tests the legal underpinnings of the conclusions the expert reached

Tests the progression from fact to the expert's opinion

Depositions of Physicians

- Review of records
- Review of actual films
- Extent of reliance on injured worker's history
- Understanding of AMA Guides, Almaraz, Escobedo, etc.
- Examination procedures
- Credibility of Applicant

Other Considerations in Depositions of Physicians

- Establish qualifications and certifications (establishes credibility)
 - Determine bias (whose side is he or she on? Objectivity?)
 - Discredit or confirm the validity of the expert opinion
 - Determine whether the theory of the case can be supported by the expert's calculations
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The Good, The Bad, & the Ugly

Where does your report fit in?



Good Report? What's that?

- A complete history is taken of the applicant and reviewed by the evaluating physician AND is clearly and completely summarized and contained in the body of the report.
- A complete records review BY THE EVALUATING PHYSICIAN is completely summarized and contained in the body of the report.
- A cogent and well-supported discussion of apportionment (based on valid, measurable grounds) is in the report. Reasonable medical probability goes beyond speculation. Conclusions must be justified by references to the record.
- Does not contain errors in BAD or UGLY reports (discussed below)

Bad report? What's that?

- Some records reviewed, but by history, not all relevant records are available for review (but the report is still completed and served containing a determination of all the issues). Rule 35(i) requires issuance of the report but a notation that the records were not received.
- Incomplete report (see above).
- No physical examination findings or measurements are outlined in the report.
- Other evaluations required for which the QME is not qualified to perform are not identified in the report. (Rule 31.7(b))

Ugly report? What's that?

- No records review
- No face to face time identified
- No 139.5 declaration
- Not signed under penalty of perjury, OR
- No signature at all
- No proof of service
- Report is late without time extension request (could get reported to the AD or Medical Director—see Rule 38)

Legal Requirements for Med-Legal Reports

- Summary form (see LC sec. 4062.3(i))
- Date of report (if different from exam) (Rule 35.5(b))
- List of information received (LC sec. 4062.3(d))
 - Information received from the parties
 - Information reviewed in preparation of the report
 - Information relied upon in the formulation of the medical opinion.
- Apportionment determination (Rules 4663 & 4664)
- Records review
 - A medical report is not substantial evidence unless there is a review of all relevant records (Kyles v. WCAB 52 CCC 479)
- All contested medical issues addressed (Rule 35.5(c))

Pitfalls to Avoid

- Ex parte communications with any party (in violation of Rule 35/LC sec. 4062.3(e), (f))
- Failure to issue report timely (Rule 38(a))
- Failure to request an extension of time with the AD (Rule 38(c))
- Failure to be available for deposition (in violation of Rule 35.5)

Additional Considerations

- Do you require an interpreter to take an adequate history?
- Are there additional evaluations required before you can make a complete determination of all the relevant issues?
- Did you review the medical records yourself?
- Did you review and sign your report?
 - (Avoid the “Dictated but not read” problem)

Fin

