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What is "Substantial Evidence," and Why Do I Need It?

In our last edition of *Legal Briefs* we examined burdens of proof, taking a hard look at who has to prove what in a litigated workers' compensation case. In this issue we take a look at what constitutes sufficient evidence to sustain your burden of proof on a disputed issue.

There are many kinds of evidence which can be used to support your burden of proof, and a listing of the most common types can be found in Labor Code Sections 5701, 5702, and 5703 as well as in the Administrative Director's rules 10600-10634. These include such items as testimony, written medical reports and records, business records, benefit payout records, formal ratings and, of course, stipulations of the parties agreeing to any facts in the case.

In some cases the California Evidence Code places special burdens on your attorney to *qualify* evidence for admissibility before a judge may allow its use. Sometimes referred to as "foundational," these requirements vary

depending on the specific type of evidence to be introduced. Your attorney should discuss these special requirements with you in advance of a pending trial.

Although on occasion proffered evidence is excluded all together, it is much more common that, after submission, some evidence is heavily discounted or ignored because the judge feels the evidence is not *substantial*. *Substantial evidence* is a legal term of art that has been the subject of hundreds of pages of verbose discussion in appellate and published WCAB decisions. The concept is very important to adjusters and counsel alike, as substantial evidence is an essential requirement for meeting your burden of proof and prevailing on a disputed issue.

Labor Code Section 5952 requires that any decision of a WCAB judge be supported not just by any evidence, but by "substantial evidence." Lack of substantial evidence is one of the enumerated bases for filing a Petition for

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Reconsideration. However, the labor code itself does not define the term, and so we need to look for guidance to the case law for definition to help determine whether the evidence we have in any given instance will be considered sufficient.

The term “substantial evidence” means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Insurance Co. of North America v WCAB* (Kemp) (1981) 46 CCC 913.

Some types of evidence have special requirements that must be met in order for the evidence to be considered substantial. In part, this can be tied to the foundational requirements referred to above. In other instances, statutory and case law provides special litmus tests that must be passed to make the evidence substantial.

Take, for example, medical opinions. A doctor may make statements such as “in all fairness, the disability should be apportioned equally to all three injuries.” Or, she might offer, “It is possible that the applicant’s obesity is currently contributing to her slow recovery, and I therefore recommend a weight loss program.” Such opinions will not be considered substantial evidence on apportionment or need for treatment because a doctor is required to couch opinions in terms of “reasonable medical probability” and to back the opinion up by using other evidence in the case or evidence based, nationally recognized studies and authority. *Escobedo v Marshall’s*, (2005), 70 CCC 604. Absent this requirement, the report is not substantial evidence and cannot support an award on these issues.

In addition, a medical opinion must be based on accurate facts and correct legal theories (although

we believe it best that doctors focus on medical issues and leave legal theory to the lawyers and judges). A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, incorrect legal theories, or on surmise, speculation, conjecture, or guess. *Heggin v WCAB* (1971) 36 CCC 93.

Notwithstanding the above, you may have noticed that, based on these tests, there can be admissible, opposing evidence on an issue, *all* of which meets the test of substantiality under the law. In that instance, the party with the *preponderance* of the evidence should prevail. This does not mean the *most* evidence or the longest medical report. It does mean evidence that, when weighed with that opposed to it, has *more convincing force* and the greater probability of truth. LC § 3202.5 The test is the relative convincing force of the evidence rather than the number of witnesses or reports on the issue.

When reviewing the decision of a WCAB judge on reconsideration or appeal, the WCAB or the Court of Appeal must test for substantiality in light of the entire record. The court may not simply isolate evidence that supports or disproves (a conclusion) and ignore other relevant facts which rebut or explain the supporting evidence. The entire record must be examined. *Garza v. WCAB* (1970) 35 CCC 145.

So, there you have it. The first question is, do I have the burden of producing evidence on the issue? If so, is the evidence I have going to be considered “substantial evidence?” When examined as part of the entire record, does my evidence make sense, and does it seem to have the more convincing ring of truth when compared to evidence opposing it? Your counsel should be a valuable resource in considering this appraisal

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of your evidence. A hard look at these questions, coupled with realistic answers, will give you a solid feel for your chances of prevailing on any issue, which in turn will provide greater accuracy in gauging your potential exposure and the settlement value of any litigated case.

Article by Howard Stevens, Orange

From the Courthouse

The applicant's bar has dubbed April 6, 2007 "Black Friday." That was the day the WCAB reversed itself and overturned earlier *en banc* decisions which, when taken together, virtually guaranteed that almost every case with a date of injury prior to 1/1/05 would be rated under the more liberal and expensive pre-SB 899 rating system. After the initial decisions in January 2007 – both on 4-3 votes – the term of Commissioner Merle Rabine ended and the governor appointed Alfonso Moresi, a former insurance defense attorney, as an Appeals Board commissioner. When the issue came back before the WCAB a second time on a petition for reconsideration, Commissioner Moresi provided the swing vote in the opposite direction from Mr. Rabine.

The cases are *Joseph Baglione v. Hertz Car Sales, AIG, and Cambridge Integrated Services*, 72 CCC 86 (January 2007) and 72 CCC (advance posting 4/6/07) and the *Josh Pendergrass v. Duggan Plumbing, State Compensation Insurance* 72 CCC 95 and 72 CCC (advance posting 4/6/07). As *en banc* decisions, all WCAB judges are obligated to follow the opinions unless they are reversed by the Court of Appeal on some future date.

In the *Baglione* case, the Appeals Board reversed its prior decision, holding that in order for the 1997 Permanent Disability Rating Schedule to apply to a pre-Jan. 1, 2005 injury claim under Labor Code §4660(d), the existence of permanent

disability must be indicated in either a pre-2005 comprehensive medical-legal report or a pre-2005 report from a treating physician.

In the *Pendergrass* case, the Appeals Board reversed its prior *en banc* decision and held that if the last payment of temporary disability indemnity was made for any period of temporary disability ending after Jan. 1, 2005, then the new SB-899 Permanent Disability Rating Schedule applies to determine the extent of permanent disability, pursuant to Labor Code §4660(d), because Labor Code §4061 requires the employer to provide the injured worker with a notice regarding permanent disability together with the last payment of temporary disability indemnity. The earlier decision, now reversed, held that the duty arose with the first payment of Temporary Disability, rather than the last.

Got Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call Howard Stevens at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of [McDermott & Clawson, LLP](#) [Howard Stevens](#) (Orange office), Editor

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