

CHECKLIST for ADMISSIBLE EVIDENCE 2013

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ITEM	SOURCE/CITE
<p>Evidentiary Standard & Burden of Proof</p> <p>Labor Code §3202.5 provides: “All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law.” Preponderance of the evidence” means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.”</p>	<p>Labor Code §3202.5</p> <p>There is also the burden of going forward, which requires a party to refute or explain each item of evidence introduced that damages or discredits his or her position in the action, as a trial progresses. See definition.</p>
<p>Rules of Evidence</p> <p>Labor Code §5708: The Appeals Board “shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.”</p> <p>But privileges do apply: See Evidence Code §910</p>	<p>Labor Code §5708</p> <p>Evidence Code §910</p>
<p>Labor Code §5709: “No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.”</p>	<p>Labor Code §5709</p>
<p>Rebuttable Presumptions</p> <p>Presumptions are not evidence but affect the burden of producing evidence or the burden of proof (see Evidence Code §600 et seq.). You need to establish a factual basis through admissible evidence or at least an inference (“a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.”)</p>	<p>Evidence Code §600 et seq.</p>

Labor Code §5703 was revised by SB 863:

Labor Code §5703

The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:

(a) Reports of attending or examining physicians.

(1) Statements concerning any bill for services are admissible only if made under penalty of perjury that they are true and correct to the best knowledge of the physician.

(2) In addition, reports are admissible under this subdivision only if the physician has further stated in the body of the report that there has not been a violation of Section 139.3 and that the contents of the report are true and correct to the best knowledge of the physician. The statement shall be made under penalty of perjury.

(b) Reports of special investigators appointed by the appeals board or a workers' compensation judge to investigate and report upon any scientific or medical question.

(c) Reports of employers, containing copies of timesheets, book accounts, reports, and other records properly authenticated.

(d) Properly authenticated copies of hospital records of the case of the injured employee.

(e) All publications of the Division of Workers' Compensation.

(f) All official publications of the State of California and United States governments.

(g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon similar issues.

(h) Relevant portions of medical treatment protocols published by medical specialty societies.

To be admissible, the party offering such a protocol or portion of a protocol shall concurrently enter into evidence information regarding how the protocol was developed, and to what extent the protocol is evidence-based, peer-reviewed, and nationally recognized. If a party offers into evidence a portion of a treatment protocol, any other party may offer into evidence additional portions of the protocol. The party offering a protocol, or portion thereof, into evidence shall either make a printed copy of the full protocol available for review and copying, or shall provide

<p>an Internet address at which the entire protocol may be accessed without charge.</p> <p>(i) The medical treatment utilization schedule in effect pursuant to Section 5307.27 or the guidelines in effect pursuant to Section 4604.5.</p> <p>(j) Reports of vocational experts. If vocational expert evidence is otherwise admissible, the evidence shall be produced in the form of written reports. Direct examination of a vocational witness shall not be received at trial except upon a showing of good cause. A continuance may be granted for rebuttal testimony if a report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted into evidence.</p> <p>(1) Statements concerning any bill for services are admissible only if they comply with the requirements applicable to statements concerning bills for services pursuant to subdivision (a).</p> <p>(2) Reports are admissible under this subdivision only if the vocational expert has further stated in the body of the report that the contents of the report are true and correct to the best knowledge of the vocational expert. The statement shall be made in compliance with the requirements applicable to medical reports pursuant to subdivision (a).</p>	
<p>Regulations</p> <p>Rule 10606 states: "The Workers' Compensation Appeals Board favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a trial except upon a showing of good cause...."</p>	<p>8 CCR §10606</p>
<p>Authentication of Documents</p> <p>"Writings" includes surveillance videos, which, like other writings (see Evidence Code §250), must be authenticated. Evidence Code §1401.</p>	<p>Evidence Code §250</p> <p>Evidence Code §1401</p>

<p>Causation Evidence</p> <p>Know the “four elementary principles” the Supreme Court enunciated in <i>Lamb v. WCAB</i> (1974) 11 Cal.3d 274.</p>	<p><i>Lamb v. WCAB</i> (1974) 11 Cal.3d 274</p>
<p>Technicalities</p> <p>What out for statutes other than Labor Code §5703 making medical evidence inadmissible or not a basis for a finding of causation.</p> <p>Labor Code §4605: “Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.”</p> <p>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.”</p>	<p>Labor Code §4605</p> <p>Labor Code §4628</p>
<p>State Bar Rules</p> <p>Is it ethically admissible? See State Bar Rules of Professional Conduct that may affect the presentation of evidence</p>	<p>Rule 3-700; Rule 5-200 Trial Conduct Rule 5-220 Suppression of Evidence.</p>