

CHECKLIST for SUBSTANTIAL EVIDENCE 2013

Marjory Harris © 2013

ITEM	SOURCE/CITE
<p>Technicalities Relating to Form</p> <p>The first place to look for errors in reporting:</p> <p>8 CCR 10606</p> <p>Labor Code §4628</p> <p><i>AMA Guides</i>, 5th edition, Ch. 2.6, pp. 21-22</p>	<p>Rule 10606</p> <p>Labor Code §4628</p> <p>Chapter 2.6 of the <i>AMA</i>. See too Robert G. Rassp, <i>The Lawyer's Guide to the AMA Guides and California Workers' Compensation</i> (LexisNexis Matthew Bender).</p>
<p>Compliance with <i>Escobedo</i></p> <p>This case summarizes the substantial evidence rules for all issues, not just apportionment</p>	<p>See entire en banc decision</p>
<p>1. Reasonable medical probability: check for words to that affect. Ask doctor if he/she can give the opinion with "reasonable medical probability"</p>	<p><i>McAllister</i></p>
<p>2. Is opinion based on:</p> <p style="padding-left: 40px;">a. facts that are still germane</p> <p style="padding-left: 40px;">b. on adequate medical histories or examinations</p> <p style="padding-left: 40px;">c. on correct legal theories</p>	
<p>3. Test the opinion to determine if based on surmise, speculation, conjecture, or guess</p>	
<p>4. Reasoning behind opinion vs conclusion: What was given as "how" and "why"? The absence of any explanation is a red flag. How and why applies to everything, not just apportionment.</p>	
<p>Science</p> <p>Check medical resources: Google the condition or go to specific sites</p>	<p>best medical research sites</p>
<p>Logical Fallacies</p> <p>Learn to recognize and question the forensic evaluator's errors of reasoning</p>	<ul style="list-style-type: none"> • Logical Fallacies • Fallacy Files • Wikipedia's List of Fallacies • Fallacies • Skeptics' Guide to Logical Fallacies • Rhetological Fallacies

See "Substantial Evidence and Science, Law and Logic" by Marjory Harris, Esq.

VR Expert Reports & Testimony

Under revised Labor Code §5703(i) (see sidebar), vocational evidence is following in the footsteps of medical evidence: written reports rather than live testimony, except for good cause. The wording of the statute, like much of SB 863, leaves questions for the WCAB and appellate courts. Can you cross examine the other side's expert? Probably best to take a deposition or try to get a report from your own expert responding to their expert.

Make sure the vocational report is substantial evidence and relies on substantial evidence. The same "how" and "why" and other rules apply. Does the report rely on documented restrictions from substantial evidence reports? Does it rely on respected sources of data? Is it logical? Use the substantial evidence checklist for what you send the expert and when you review their report. Review the cases on the A-Z page. Reports that are based on the injured worker's subjective complaints and self-reporting of pain and fatigue without any admissible medical evidence to back up the complaints are not persuasive. Make sure you have that evidence and also that the vocational expert's report is updated to include any later admissible medical reports that may be used to attack it.

Advise the expert to avoid anything illogical like recommending jobs that require drug tests for workers taking prescription opiates, or jobs requiring frequent use of a computer when substantial and admissible medical evidence restricts use of hands.

Remember that you need to establish too that "vocational expert evidence is otherwise admissible" as stated in Labor Code §5703 (sidebar).

(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.

(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).

(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).