

QME FALL ZOOMINAR SERIES

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UPCOMING SESSIONS



- 11/17/21 - HEADS AND TAILS ON PERMANENT IMPAIRMENT RATINGS
- THANKSGIVING WEEK - NO ZOOMINAR
- 12/01/21 - THE “ANYTHING GOES” RULES OF APPORTIONMENT
- 12/08/21 - STATS/TRENDS/AND DISTURBING FACTS IN CA. WORK COMP
- 12/15/21 - YOUR FINAL REPORT IS TERRIBLE AND YOU SHOULD NOT SIGN IT
- SPRING ZOOMINAR SERIES -
 - 3X PER MONTH DWC APPROVED CEU DISCUSSION
 - 1X PER MONTH *QME PRACTICE BUILDING SUCCESS* SERIES - NO CE CREDITS!
- Today's (11/10/21) Discussion - **TRUTH & LIES IN THE FACE TO FACE EVALUATION**

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- 1983 - UC Santa Cruz: BA Cell Biology
- 1988 - Palmer West College of Chiropractic - DC
- 1995 - Qualified Medical Evaluator
- 2011 - DWC Continuing Education Provider
- 2013 - State Bar Board of Legal Specialization Workers Compensation Law Continuing Education Provider
- 2018 - President - QME Data Works Virtual QME Office
- 2021 - President - California Chiropractic Evaluators

TRUTH & LIES IN THE FACE TO FACE EVALUATION



TRUTH AND ACCURACY IN:

- **HISTORY OF INJURY**
 - RELEVANT MEDICAL HISTORY
 - ADL LIMITATIONS
 - PHYSICAL EXAM
-
- QME - OPINIONS & CONCLUSIONS OF THE REPORT:
 - CAUSATION (**AOE/COE**)
 - PERMANENT IMPAIRMENT
 - APPORTIONMENT
 - NEED FOR FUTURE MEDICAL CARE
 - WORK RESTRICTION RECOMMENDATIONS

TRUTH & LIES IN THE FACE TO FACE EVALUATION



- TRUTH AND ACCURACY IN:
 - HISTORY OF INJURY - **AOE/COE**
 - The QME Toolkit:
 1. **THE PROBLEM WITH FRAUD IN COMPENSATION CLAIMS**
 - **AMA GUIDES - Chapter 18 Malingering**
 - **False Imputation - Pathology vs. Causation**
 - **2017 RAND STUDY - Fraud in CT Claims**
 2. **BURDEN OF PROOF FOR INDUSTRIAL INJURY**
 - **LC 3600**
 - **LC 3202.5**
 - **LC 5705**
 3. **“VERIFIABILITY OF DETAILS”**
 4. **EAMS CASE INFORMATION SEARCH**
 5. **BACKGROUND SEARCH**

TRUTH AND LIES IN THE FACE TO FACE EVALUATION



- **TOOL #1:** Understand, and be Comfortable with the Potential for Fraud in Workers Compensation Claims
- **FRAUD, THE DENIED CLAIM, AND THE LC4060 EVALUATION**
 - AMA GUIDES 5TH EDITION - Chapter 18
 - 2017 RAND STUDY

TRUTH & LIES IN THE FACE TO FACE EVALUATION



18.7 Malingering

Malingering is conscious deception for the purpose of gain. While most authorities declare that malingering is quite uncommon, there appear to be few data regarding its frequency. Fishbain et al reviewed literature suggesting that malingering is present in 1.25% to 10.4% of individuals with chronic pain; however, they found serious flaws with the methodology and concluded that no conclusions could be drawn from the data.⁶²

THE QME'S CRYSTAL BALL

- AMA Guides Chapter 18



Other fields provide some limits regarding the prevalence of malingering. In individuals with unexplained intractable diarrhea, 14% had positive stool examinations for laxatives, although all had denied use of laxatives.⁶³ Among 333 people who claimed compensation for noise-induced hearing loss, the incidence of exaggeration on hearing tests (as determined by cortical evoked response audiometry) was 17.7%.⁶⁴ Weintraub cites studies showing that 20% to 46% of people consider purposeful misrepresentation of compensation claims to be acceptable behavior.⁶⁵

TRUTH AND LIES IN THE FACE TO FACE EVALUATION



- MALINGERING VS. FALSE IMPUTATION

- **Malingering**: The intentional (conscious) production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs
- **False Imputation**: Attributing bona fide symptoms, or a bona fide medical condition to an alternative cause (i.e. industrial injury). Thus, the symptoms are real - it is the *cause* of the symptoms that is in question.

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Post Employment Claims

2017 RAND - Bringing Postemployment Claims Back in to the System

Although not all postemployment claims are CT claims, many are, for the reasons discussed previously, and such claims are “typically denied” by employers according to some experienced participants in the California workers’ compensation system.⁸⁵ One study suggests that employers deny about 88 percent of postemployment CT claims, compared with 46 percent for CT claims filed during the employee’s tenure.⁸⁶ By way of comparison, only about 6 percent of non-CT claims are disputed.⁸⁷ Such denials might be related to the absence of an immediately obvious connection between the claimed injury and the former employment; to the difficulties inherent in establishing, in the early stages of a claim in which substantial medical evidence has not yet been accumulated, that the injury arose out of the employment and occurred in the course of the employment; or even to many employers’ general reluctance to acknowledge the underlying medical validity of CT injuries. Whatever the reason, the employer’s decision to deny

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- **TOOL #2:**
 - **Understand The Burden of Proof of Establishing Industrial Injury**
 - LC 3600 - “Preponderance of the Evidence”
 - LC 3202.5 - “...all parties must meet evidentiary burden of proof”
 - LC 5705 - “...burden of proof rests with the party holding the affirmative of the issue”

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- LC 3600
- (10) Except for psychiatric injuries governed by [subdivision \(e\) of Section 3208.3](#) , where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid **unless the employee demonstrates by a preponderance of the evidence** that one or more of the following conditions apply:

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- LC 3202.5
- 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.

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• LC 5705

The burden of proof **rests upon the party or lien claimant holding the affirmative of the issue**. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:

- (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer.
- (b) Intoxication of an employee causing his or her injury.
- (c) Willful misconduct of an employee causing his or her injury.
- (d) Aggravation of disability by unreasonable conduct of the employee.
- (e) Prejudice to the employer by failure of the employee to give notice, as required by Sections 5400 and 5401.

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- TOOL #3: Understand the Examinee's **Communication Strategy**
- “THE VERIFIABILITY APPROACH”
 - **Exploiting Liars' Verbal Strategies by Examining the “Verifiability of Details”**
 - Applying the Verifiability Approach to Insurance Claims Settings
 - The Verifiability Approach
 - When Is an Accident Not an Accident?
 - The Unwitnessed Incident
 - Telephone Lies
 - Smiles When Lying

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- THE VERIFIABILITY APPROACH

- **Exploiting Liars' Verbal Strategies by Examining the "Verifiability of Details"**
- Journal of Legal and Criminologic Psychology - September 2014
- Distinguishing truth from lies is a difficult task. Reviews of more than a hundred deception experiments have shown that nonverbal and verbal cues to deceit are typically faint and unreliable.
- One explanation why cues to deceit are faint and unreliable is that liars **cannot take their credibility for granted** and therefore, they attempt to make an honest impression.
- Truth tellers and liars have DIFFERENT communication strategies.

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Different Communication Strategies:

- Liars control their behavior and speech and attempt to display behaviors, and say things that they **BELIEVE** give an honest impression, and avoid behaviors and speech that they **BELIEVE** raise suspicion....
- When they succeed in their attempts, it blurs the behavioral and speech differences between liars and truth tellers, and consequently, decreases the ability to distinguish between them.

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- THE VERIFIABILITY APPROACH

- Liars' Strategy:

1. Liars are inclined to mention sufficient details to provide a convincing false account
2. Liars try to avoid mentioning those details that can potentially be verified by the interviewer
3. As solution to (1) and (2), the liars provide many *non-verifiable details*.

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- WHAT IS A “VERIFIABLE DETAIL?”
 1. The detail describes an activity with an identifiable person.
 - “Who were you working with at the time of the injury?”
 2. The detail describes an activity that has been witnessed by an identifiable person.
 - “Was the injury witnessed by anyone?” “Do you have a statement from the witness?”
 3. The detail describes an activity that may have been documented or recorded through technology.
 - “Do you have any photos, recordings, videos, emails, text messages, letters, papers, notes, forms, claim forms, etc.?”

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- **OBTAINING THE HISTORY OF INJURY USING THE VERIFIABILITY APPROACH:**
 - Mrs. Jones, I would like for you to tell me how the injury occurred and, I'd like to have you give me as many details as you can remember. I want you to know that I am going to be checking to verify the accuracy of those details, so I want you to provide me with as many details as possible that can be verified.
 - Check for details that 1) could potentially be verified, or 2) cannot be verified.

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- **OBTAINING THE HISTORY OF INJURY USING THE VERIFIABILITY APPROACH:**
 - “Describe in as much detail as possible how you developed the symptoms that you ascribe to a cumulative trauma injury with ABC employer.”
 - Liars are inclined to mention sufficient details to provide a convincing false account
 - Liars try to avoid mentioning those details that can potentially be verified by the interviewer
 - As a solution, the liars provide many *non-verifiable* details

TRUTH AND LIES IN THE FACE TO FACE EVALUATION



- QME ACCURATE OPINIONS AND CONCLUSIONS ON AOE/COE INDUSTRIAL CAUSATION:
 - **Tool #1:** Understand the Nature of Compensation Claims
 - **Tool #2:** Understand the Burden of Proof
 - **Tool #3:** Understand the Verifiability Approach in Obtaining the Medical History
 - Provide your Opinion based on “Reasonable Medical Probability” and support your opinion with relevant facts.