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**STATE OF CALIFORNIA**  
**DIVISION OF WORKERS' COMPENSATION**

Case No. MON

*Applicant,*

vs.

*Defendant.*

**PETITION TO EXCLUDE  
DEPOSITION AND DEFENSE  
MEDICAL REPORT**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Applicant, by and through its attorney hereby Petitions the WCAB to exclude the described defense medical reports on the grounds that they fail to meet various mandatory requirements, more fully set forth in the attached Points and Authorities.

**FACTS**

The applicant is not native to the United States, was born in Jalisco, Mexico, and did not arrive in the United States until 1977, at the age of 26, and does **not** speak English, or does so with great difficulty and with a **very limited** vocabulary.

The defendants have always been aware that the applicant requires an English language interpreter, and even supplied one for his deposition on June 4, 2002.

The defense psychiatric medical examination conducted by **Dr. James O'Brien**, on **September 3, 2002**, was not done in accordance with legally recognized and mandated

1 codes and rules. The interpreter listed, **Oscar Andrade**, is not now, nor has he ever been,  
2 certified in the Spanish Language, either as a medical interpreter or in any other  
3 classification.

4 The doctor's reports are admissible.

5 **Dr. O'Brien** did not have a certified Spanish interpreter present at his examination.

6 Thus, it is clear that the **mandatory** rules set forth in the attached Points and  
7 Authorities, must be followed and this defense medical report is inadmissible, for any  
8 purpose.

9 In his inadmissible report of June 11, 2002, **Dr. O'Brien** refers to an earlier  
10 examination of April 12, 2001, and a report of April 24, 2001. This office has **never**  
11 been served with this report and, as such, it is not admissible.

12 The defendants had Mr. Macias examined by an orthopedist, **Dr. Timothy K. Ross**,  
13 on April 17, 2001, and he issued a report of that date.

14 There was **no interpreter** provided at this examination, as may be seen by even a  
15 cursory review of the sparse 7 page report. Since it is clear that Mr. Macias is in need of  
16 an interpreter, and as none was provided, the orthopedic report is not admissible for any  
17 purpose.

18 It is interesting to note that Dr. Ross states, on page 1 of his report:

19 "A total of fifty minutes of my time was required for the purposes (*sic*) of  
20 interviewing and evaluating this **Spanish-speaking** patient.. "  
21

22 Based upon the law, as set forth in great detail in the attached Points and  
23 Authorities, together with the fact that the reports addressed failed to meet the mandatory  
24 requirements of the law, they are not admissible for any purpose, whatsoever. This  
25 includes the availability of defense counsel examining the applicant based upon information  
26 derived from the inadmissible reports (fruit of the poisonous tree Doctrine).

27 What is important to note, is the fact that the defense medical examinations are not  
28 subject to cross-examination, at trial, as are the applicant reports. For, at trial, the  
defense medical reports, if admissible, are evidence pursuant to 8 C.C.R. §10606,

whereas the applicant is present to qualify and be examined regarding the applicant medical report(s) (see Points and Authorities addressing this issue).

DATED: July 8, 2003

LEE R. ALBERT

## POINTS AND AUTHORITIES

The law requires that, in this case, **all** defense medical reports, **not** be admitted into evidence. The Legislature has set **mandatory** requirements for medical examinations, *set by the defense*, where there is a need for a foreign language interpreter. In addition to legislation, the **Industrial Medical Council** has set forth requirements vis-a-vis qualified medical examinations where an interpreter is required or present.

The applicant, in this case, **does not** readily or proficiently speak English, if at all. The employer and the carrier are aware of the need for having a foreign language interpreter to assist the applicant in **defense** medical examinations.

### 1. LABOR CODE AND CALIFORNIA CODE OF REGULATIONS

A “**qualified interpreter**” is required where, at a **defense** medical examination, the employee does not speak English, **or does not speak it proficiently**. *Labor Code §4600*<sup>1</sup>.

A “**qualified interpreter**” is defined as “a language interpreter certified, or deemed certified, pursuant to” the Government Code. *Labor Code §4600; 8 CCR §9795.1*<sup>2</sup> (See, inter alia, *Labor Code §5811*)<sup>3</sup>.

An interpreter is **required** when the applicant does not speak English or at least, lacks proficiency in the English language such that he feels more comfortable with one in attendance. *8 CCR §9795.3(a)*<sup>4</sup>.

Injuries sustained after January 1, 1994 require **certified interpreters** at **defense medical** examinations in order to guarantee the proficiency of the medical reporting. Pamela Foust, *Lien Claims in Workers’ Compensation Cases*, Third Edition, 1999, p. 120<sup>5</sup>.

Proficiency re the medical report is important because the medical-legal evaluation of the doctor *is* the testimony of the doctor which is presented as evidence, and the report is based on his evaluation of the applicant.

In order to ensure *meaningful communication* with the applicant, and thereby render a report reliable, *certified interpreters are required* just as they are for all judicial

proceedings. **Ibid.**, p. 223<sup>6</sup>.

## **2. GOVERNMENT CODE**

The Government Code has adopted standards for interpreters which apply to workers' compensation claims. ***Labor Code §4600; 8 CCR §9795.1.***

The Government Code discusses "language assistance" regarding oral or written interpretations translating into English a language other than English, **where a party or witness *cannot speak or understand* English or who *can do so only with difficulty*.** ***Gov.C. §11435.05***<sup>7</sup>.

When an applicant is being examined by a **defense selected physician** it is of the utmost importance that the injured party understand all that is asked. Quite frequently a doctor will use words which are not in the daily vocabulary of the ordinary person; this, when coupled with the fact that the person being examined does not speak English, or can do so only with difficulty, reflects the necessity for an certified interpreter. When the examination is a **psychiatric evaluation**, it is likewise important that a certified interpreter assist with all **written documentation**. The reasons for this are apparent, and need not be expounded.

An interpreter used in a defense medical examination **must be certified** in accordance with ***Gov.C. §11435.55(b)***, **there are no exceptions**. See, also, ***Gov.C. §11435.20(b)***<sup>8</sup>.

The requirements to become certified in a foreign language are very specific, and may be found in ***Gov.C. §68562(a) - (g)***<sup>9</sup>. The requirements may also be found, together with a complete list of interpreters, certified and decertified, on the Internet, at the following<sup>10</sup>:

***1. cps.ca.gov/resources\_directories/interpreters/master\_listing\_database.asp***

***2. courtinf.ca.gov/programs/courtinterpreters/certinterp6***

***3. courtinf.ca.gov/programs/courtinterpreters/ctintdb,***

as well as other cites recognized by the Judicial Council, the State Personnel Board, and the State Controller<sup>11</sup>. As one can see, this area of law is **extensively regulated**, due to the

serious nature of the consequences should a foreign language interpreter not be certified.

### **3. INDUSTRIAL MEDICAL COUNSEL**

In 1997 the Industrial Medical Council published its second edition of the *Physician's Guide to Medical Practice in the California Workers' Compensation System* (the Guide). The "Guide was prepared by the Industrial Medical Council (IMC) to inform the medical community about important laws, regulations and procedures concerning the California workers' compensation system<sup>12</sup>".

It is clear that the medical-legal evaluation is evidence in a legal dispute. Thus, certain rules are established which **must be followed** to ensure the integrity and efficacy of the report. The standards and requirements set out by the IMC reflect these concerns. The Guide has been incorporated into the Labor Code. See, ***Labor Code §4628***.

The legal requirements for a medical-legal evaluation (variously referred to as the QME examination) is set out in Chapter 6, pages 91-108 of The Guide. Specifically, the following is relevant concerning the issue at bar:

a. "The physician who signs the report must be the only person who examines the injured employee or participates in the non-clerical preparation of the report... The physician who signs any medical-legal report must personally take a thorough history... In some cases, the physician may have an assistant make an initial outline of the patient's history... However, the physician must review the excerpts and outline with the patient and make any necessary additional inquiries... ***The name, qualifications, and role of any people involved in making outlines or excerpts, in performing diagnostic tests, or in drafting the report, must be disclosed in the report.***" Guide, page 94.

The required elements of a medical-legal report are set forth, in outline form, on page 98. Specifically, the report must "Disclose the name and qualifications of anyone who assisted in report".

1 Inasmuch as we are here discussing the use of a **certified foreign language**  
2 **interpreter**, the IMC gets **more specific** regarding the entire examination process:

3 a. “Your report must disclose the name, qualifications, and roles of other  
4 individuals who participated in the evaluation.” Guide, page 107.

5 If the name and qualification of the interpreter is not included then it stands to reason  
6 the report is faulty. A violation of these rules and guides can result in the suspension or  
7 termination of the doctor as a Qualified Medical Evaluator. **Labor Code §4628<sup>13</sup>**.

#### 8 **4. ST. CLAIR**

9 In his *California Workers’ Compensation Law and Practice*, Sixth Edition, Sheldon  
10 St. Clair discusses this very issue at §19:220, page 19-71, stating ”Your report must disclose  
11 the name and qualification, and roles of other individuals who participated in the  
12 examination by: *Taking and outlining the medical history.* ... Administering diagnostic  
13 studies.” (Emphasis in original)

14 Interestingly, St. Clair sets out the one caveat most defense doctors ignore:

15 “Violation of this provision can result in your suspension or termination as a  
16 Qualified Medical Examiner. (Labor Code §139.3, 8 CCR §4628).”

#### 17 **CONCLUSION**

18 It is clear that if a certified medical interpreter is not present, and the doctor and  
19 applicant do not share a common language to any significant extent, it simply will not be  
20 possible for the doctor to produce a report which is capable of proving disputed medical  
21 issues. He will not be able to take a history of the injury and the patient’s complaints in  
22 accordance with **Labor Code** §4628 and **8 CCR** §10606.

23 In addition, if there was an interpreter present assisting the physician, and the name  
24 and qualifications of the person in not set out as mandated, the report is not admissible in any  
25 proceeding.

26 The doctor(s), subject to this Motion, did not have a certified interpreter to assist in  
27  
28

1 the doctor's examination, or if one was present, was not identified as required and, therefore,  
2 the medical report is not admissible.

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## 4 Endnotes

5 1.

6 **Labor Code** §4600 states, in part pertinent, Where at the request of the employer, the employer's  
7 insurer, the administrative director, the appeals board, a workers' compensation judge, an employee  
8 submits to examination by a physician *and the employee does not proficiently speak or understand*  
9 the English language, he or she *shall* be entitled to the services of a qualified interpreter in accordance  
10 with conditions and a fee schedule prescribed by the administrative director. These services shall be  
provided by the employer. For purposes of this section, "**qualified interpreter**" means a language  
interpreter **certified**, or deemed certified, pursuant to Article 8 (commencing with Section 11435.05)  
of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or Section 68566 of, the Government Code.

11 The salient portions of this section of **Labor Code** §4600, vis-a-vis this Motion have to do with the  
12 necessity that there be a 'certified interpreter' in attendance for a defense medical examination. This  
13 language is **mandatory** since it commands that the interpreter "shall" be present. See, also, **Labor**  
**Code** §15: "'Shall' is mandatory.. "

14 2.

15 §9795.1 Definitions. As used in this article: (a) "Certified" means an interpreter who is certified in  
16 accordance with subdivision (e) of Section 11513 of the Government Code or Section 68562 of the  
Government Code.

17 3.

18 §5811(b) It shall be the responsibility of any party producing a witness requiring an interpreter to  
19 arrange for the presence of a qualified interpreter. A qualified interpreter is a language interpreter  
20 who is certified, or deemed certified, pursuant to Article 8 (commencing with Section 11435.05) of  
Chapter 4.5 of Part 1 of Division 3 of Title 2, of Section 68566, of the Government Code

21 ...

A qualified interpreter may render services during the following:

22 ...

23 (3) During those setting which the administrative director determines are reasonable necessary to  
ascertain the validity or extent of injury to an employee who cannot communicate in English.

24 4.

25 §9795.3(a). Fees for Interpreters. Fees for services performed by a qualified interpreter, where the  
26 employee does not proficiently speak or understand the English language, shall be paid by the claims  
27 administrator for any of the following events: (1) An examination by a physician to which an injured  
employee submits at the request of the claims administrator, the administrative director, or the appeals



1 board.

2 5.

3 “Effective as to injuries claimed or sustained after January 1, 1994, it is required that **interpreters**  
4 **on medical examinations be certified in order to guarantee their proficiency.** However, for  
5 cases involving injuries prior to this date, no such requirement existed. Unfortunately, the lack of  
6 regulation in this area in the past may have resulted in medical reports that either did not constitute  
substantial evidence or contained a material false and inaccurate history due to errors committed by  
unqualified interpreters.” §3.7 (1).

7 6.

8 “An interpreter is not required unless the applicant does not speak English or, at least, lack  
9 proficiency in the English language such that he *feels more comfortable* testifying in his natural  
language. Occasionally, even though the applicant will testify in English, an interpreter is present to  
act as a “back-up” in case his services are needed.”

10 7.

11 §11435.05. As used in this article, "language assistance" means oral interpretation or written  
12 translation into English of a language other than English or of English into another language for a  
party or witness who cannot speak or understand English or who can do so only with difficulty.

13 8.

14 §11435.20(b). If a party or the party’s witness does not proficiently speak or understand English  
15 and before commencement of the hearing or medical examination requests language assistance, an  
16 agency subject to the language assistance requirement of this article shall provide the party or  
witness an interpreter.

17 9.

18 §68562. (a) The Judicial Council shall designate the languages for which certification programs shall  
19 be established under subdivision (b). The language designations shall be based on (1) the courts' needs  
as determined by the language and interpreter use and need studies under Section 68563, (2) the  
20 language needs of non-English-speaking persons in the courts, and (3) other information the Judicial  
Council deems relevant. (b) By July 1, 1996, the Judicial Council shall approve one or more entities  
21 to certify Spanish language interpreters and interpreters for as many other languages designated under  
subdivision (a) as practicable by that date. The Judicial Council may give provisional approval to an  
22 entity to examine interpreters and establish a list of recommended court interpreters pending final  
approval of one or more certification entities. Certification entities may include educational  
23 institutions, testing organizations, joint powers agencies, or public agencies. The Judicial Council shall  
adopt and publish guidelines, standards, and procedures to determine which certification entities will  
24 be approved to test and certify interpreters. (c) The Judicial Council shall develop and implement  
procedures to administer the list of recommended court interpreters previously established by the  
25 State Personnel Board and the list established by an entity provisionally approved under subdivision  
26 (b). The Judicial Council shall develop procedures and standards for certifying without reexamination  
27

1 interpreters on the list of recommended court interpreters (1) previously established by the State  
2 Personnel Board, or (2) established by an entity provisionally approved under subdivision (b).  
3 Certification of these interpreters shall be based on criteria determined by the Judicial Council, such  
4 as recent interpreting experience, performance in court or at administrative hearings, training, and  
5 continuing education. (d) The Judicial Council shall adopt standards and requirements for interpreter  
6 proficiency, continuing education, certification renewal, and discipline. The Judicial Council shall  
7 adopt standards of professional conduct for court interpreters. (e) The Judicial Council shall adopt  
8 programs for interpreter recruiting, training, and continuing education and evaluation to ensure that  
9 an adequate number of interpreters is available and that they interpret competently. (f) The Judicial  
10 Council shall establish guidelines for fees or shall set and charge fees for applications to take the court  
11 interpreter examinations, for renewal of certifications, for certification of interpreters on the list of  
12 recommended court interpreters, for maintaining interpreters on the recommended list until January  
13 1, 1996, and for other functions and services provided under this article. All fees and other revenues  
14 received by the Judicial Council under this article shall be transferred promptly to the Controller, and  
15 shall be placed in the Court Interpreters' Fund, which is hereby created, the moneys in which shall be  
16 available to carry out the purposes of this article upon appropriation by the Legislature. (g) Each  
17 superior and municipal court may adopt local rules to impose additional requirements, standards,  
18 examinations, and programs as necessary for equity or to recognize local conditions.

19 10.

20 "Interpreters are certified as either a Court Interpreter or an Administrative Hearing Interpreter, or  
21 both, for their overall competence in consecutive and simultaneous interpretation and in slight  
22 translation, by the State Personnel Board which has delegated the task of formulating and  
23 administering the exam to Cooperative Personnel Services. This agency publishes a book, a copy  
24 of which may be ordered, listing the names and addresses of all certified interpreters from 1979 to  
25 the present. Supplements are issued on a regular basis as additional interpreters become certified.  
26 Interpreters who are neither certified, nor deemed certified in accordance with the Government Code,  
27 may not interpret in official proceedings before the WCAB." *Lien Claims in Workers' Compensation Cases* §6.2(c).

28 See, **Government Code** §§11513: 68566. Cooperative Personnel Service is located at 191 Lathrop  
Way, Suite A, Sacramento, CA 95815 <www.cps.ca.gov>.

11. 29

30 §68566. A natural person who either (1) holds a valid certificate as a certified court interpreter issued  
31 by a certification entity approved by the Judicial Council, or (2) until January 1, 1996, is named and  
32 maintained on the list of recommended court interpreters previously established by the State  
33 Personnel Board or established by an entity provisionally approved under subdivision (b) of Section  
34 68562, shall be designated a "certified court interpreter." No other person or entity shall use the title  
35 "certified court interpreter" or represent that he or she or it is certified to interpret in or for the courts.

1 12.  
2 Preamble to the 1994 edition, in part pertinent.

3 13.  
4 **“Responsibilities of physician signing medical-legal report.** (b)...[A]nd shall disclose the name  
5 and qualifications of each person who performed any service in connection with the report.. . (e)  
6 Failure to comply with the requirements of this section shall make the report inadmissible as  
7 evidence... (h) Knowing failure to comply with the requirements of this section shall subject the  
8 physician to contempt pursuant to the judicial powers vested in the appeals board”  
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## Section 752. When Interpreter Required.

(a) When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.

### ADMINISTRATIVE OFFICE OF THE COURTS

Effective January 1, 1993, the Judicial Council assumed responsibility for certifying and registering court interpreters and for developing a comprehensive program to ensure an available and competent pool of qualified interpreters.

### Registered Interpreters

Interpreters of languages for which there is no state certifying examination are called “registered interpreters of non-designated languages.” They must pass an English proficiency examination covering basic vocabulary, grammar, word usage, reading comprehension, and comprehension of materials about rule 984.4 of the California Rules of Court and sections 18 and 18.1 of the Standards of Judicial Administration. They also must submit an application to register with the council, attend an orientation workshop, and meet the renewal requirements developed for certified court interpreters. In addition, in 1998 the council approved a new rule of court establishing a code of professional conduct for court interpreters.

### GOVERNMENT CODE

**11435.20.** (a) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in English.

**11435.35.** (a) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of **certified medical examination interpreters** it has determined **meet the minimum standards in interpreting skills and linguistic abilities** in languages designated pursuant to Section **11435.40.** (b) Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to Section **11435.30** shall be deemed certified for purposes of this section.

**11435.55.** (a) An interpreter used in a hearing shall be certified pursuant to Section **11435.30.** However, if an interpreter certified pursuant to Section **11435.30** cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and use another interpreter. (b) An interpreter used in a medical examination shall be certified pursuant to Section **11435.35.** However, if an interpreter certified pursuant to Section **11435.35** cannot be present at the medical examination, the physician provisionally may use another interpreter if that fact is noted in the record of the medical evaluation.

**68560.** The Legislature finds and declares that:

(e) The Legislature recognizes that the number of non-English-speaking persons in California is increasing, and recognizes the need to provide equal justice under the law to all California citizens and residents and to provide for their special needs in their relations with the judicial and administrative law system.

(f) Competent interpreter services in the courts and judicial and administrative agencies should be provided through programs to recruit, train, test, certify, and evaluate interpreters. Continuing education and evaluation would also help ensure adequate interpreter services to the courts.

### © 2002 California Healthcare Interpreters Association.

The fundamental purpose of healthcare interpreters is to facilitate communication between two parties who do not speak the same language and do not share the same culture. Various barriers to cross-cultural communication exist. These include language differences, language complexity, and differences in cultural norms, in addition to organizational or broader systemic barriers facing LEP patients. This section describes roles and strategies available to interpreters within the healthcare encounter to help the parties address these barriers.

## Massachusetts Medical Interpreters Association Eighth Annual National Conference on Medical Interpreting

The term “certified **interpreter**” has been often misused by administrators and other policymakers when describing strategies for access to, and ensuring quality of, health care for non-English speakers. At the same time, many interpreters apply the same label to themselves knowing that it increases their desirability in the eyes of potential employers. Some states have gone so far as to pass legislation requiring that interpreters used in hospital settings be certified. Yet for all practical purposes there is no certification for **medical** interpreters in this country.

Advance the skills of the advanced **interpreter** working toward certification Increase understanding of diverse cultural/linguistic minority groups and what actions will promote quality **medical** interpreting within their communities Examine the cultural and ethical challenges in the **medical** interview and how knowledge of such issues can best be articulated/demonstrated Assist administrators in the effective provision of **interpreter** services Enhance awareness of all stakeholder issues throughout various health care systems

### B) All Tests Are Not Created Equal: A Comparison of Different Interpreter Assessments and Their Applications

This presentation will describe different types of **interpreter** assessments, with a focus on certification **tests**, and examine their applications and uses for interpreters interested in furthering their professional development. There are now not only a multitude of different **tests** available, but also many different claims being made regarding certification, so how

can an **interpreter** or an employer know which **tests** are valid assessments of the **interpreter's** skills and which test will best meet their needs? In proposing answers to those questions, the presentation will address such issues as validity and reliability, the different types of validity and their respective value. Since **Medical** Certification is presently a goal for most healthcare interpreters, that high level assessment will be addressed in particular detail.

## **E) Anatomy of a Medical Assignment**

The **medical** world has myriad words that are unfamiliar to lay people. Many of these words relate to the anatomy of the human body. We will discuss the basics of the human anatomy and will even delve into the intricacies of our structure. You will employ the knowledge you have gained in using the terms appropriately in a model scenario. Finally, there will be a generous questions and answer period.

## **I) Criterion Referenced Testing of Medical Interpreters Using the Federal Court Model**

Criterion Referenced Testing of **medical** interpreters, using the Federal Court **Interpreter** Certification Model will ensure that interpreters have the language proficiency in English and Spanish required, the interpreting techniques and interpreting performance, and the cultural and ethical awareness required to be able to deliver efficient and effective interpreting services in the **medical** setting. Criterion referenced testing involves assuring that a test meets the criterion for performance agreed upon by an expert panel of all stakeholders to ensure that the difficulty level and content of the examination, as well as standards of performance (passing and failing) authentically represent the actual needs of the patients, caregivers, and other participants. The foci will be on the steps required for developing a valid and reliable set of examinations as well as developing an objective rating system that can guarantee systematic and reliable performance scoring. Psychometric principles of language and interpreting proficiency testing will be discussed as they apply to the **medical** interpreting setting.

## **V) Retraining Spanish Interpreters**

Spanish Interpreters need to be paid particular attention to guarantee professional **interpreter** services. Some of the problems that have to be dealt with are: false cognates, spanglish, code switching, and hyperformality, among others. Also, many interpreters have weak Spanish language skills and refresher, vocabulary, syntax and grammar reviews may be necessary.

There are two schools of thought on which mode of interpreting — simultaneous or

consecutive — a **medical interpreter** ought to use when interpreting for a patient and a health care provider. Professionals and scholars have made excellent arguments on both sides of the coin of this polemical issue. However, many still remain at odds with each other. Is one mode actually better than the other? The answer to this question is YES. This presentation will give an overview of the arguments in favor of and against each mode of interpreting, make a case for which one is the “right” mode for **medical** interpreting and discuss various interpreting techniques that assist in preserving doctor-patient dynamics.