

# DWC 20<sup>th</sup> Annual Conference Top Tips for Trial - Post SB863



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## 1. List of Top Tips - Post SB863

1. Mailbox Rule - What's the Triggering Event?
2. It's All About Service
3. Don't be Dazed by the Days
4. What's a Doctor to do?
5. Beyond Valdez
6. Spotting the UR Issues
7. When is an DWC Form RFA considered "complete"?
8. Making sure the UR decision is valid



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## 1. Mailbox Rule



Has SB863 annihilated the WCAB en banc decision of *Messele v. Pitco Foods, Inc; California Insurance Company*, (2011) 76 CCC 956?

The "+5 days for mailing" mailbox rule applies when the triggering event is **service** of a document.

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# 1. Mailbox Rule



**CCP 1013(a)** “+ 5 days for mailing” rule applies to documents served by **mail only**.

Rule is “+2 days” if service is:

- by **fax** CCP 1013(e), and
- by **email** CCP 1010.6(a)(4).

**§ CCR 10507** “+ 5 days for mailing” rule applies to documents served by **mail, fax or email**.

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# 1. Mailbox Rule

## Issue #1:

### Post SB863 - LC 4062.2(b):

Either party may request a QME panel, “no earlier than the first working date that is at least 10 days > date of **mailing**” of either:

- request for med eval per LC 4060 or
- objection per LC 4061/4062



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# 1. Mailbox Rule

## Issue #1:

### Post SB863 - LC 4062.2(b):

Does the “+ 5 day for mailing rule” apply to this revised SB863 time period for requesting a QME Panel from the medical unit?



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# 1. Mailbox Rule

## Issue #2:

### Post SB863 - LC 4062.2(c):

“Within 10 days of **assignment** of the panel... each party may strike one name from the panel.”

Does the “+ 5 days for mailing rule” apply?

**Hint:** What is the action that triggers the time period? (The **assignment** of a QME panel? Or **service** of a document?)



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See *Alvarado v. WCAB* (2007) 72 CCC 1142.

## 2. It's All About Service

... and speaking of **service**...

### Service of Documents– 10601:

“Where documents are to be offered into evidence, copies shall be served on all adverse parties **no later than the mandatory settlement conference**, unless a satisfactory showing is made that the documents were not available for service by that time.”



\*\*\*\*\***IMPORTANT**\*\*\*\*\*

**Service does NOT = Filing does NOT = Offer into Evidence**

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## 3. Don't be Dazed by the Days



In general, be mindful of the distinction between **calendar** day, **business** day and **working** day for calculation of mandatory time frames.

**8 CCR 9792.9(c)(5)** states “For purposes of this section “normal **business** day” means a **business** day as defined in Labor Code section 4600.4 and Civil Code section 9.”

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### 3. Don't be Dazed by the Days



The term **working** day is often used throughout SB863 & the new regs...

See **NEW Post SB863 LC 4062.2(b)** at slide #7.

Is the term **working** day interchangeable with **business** day?

Parties have argued that **working** day is interchangeable with **calendar** day, based on the definition of “**workday**” provided in LC 500(a) as any consecutive 24-hour period commencing at the same time each **calendar** day.

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### 4. What a doctor to do?

AMEs and Panel QMEs will no longer be used to determine MT issues...

**LC 4062.2.(f):** Parties can agree to an AME at anytime... “except as to issues subject to the IMR” per **LC 4610.5**.



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## 4. What a doctor to do?

See **Reg 35.5(g)(2)**: “For any evaluation performed on or after 7.1.13, pursuant to **LC 4061**, and regardless of the DOI, an AME or QME shall NOT provide an opinion on any disputed medical treatment issue, but **shall provide an opinion about whether the injured worker will need future medical care** to cure or relieve the effects of an industrial injury.” (Emphasis added.)



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## 5. Beyond Valdez



The DCA in *Valdez v. WCAB*. (2012) 77 CCC 506 held IWs are entitled to medical reports at their own expense per **LC 4605** and **LC 4064(d)**.

Supreme Court granted review on 10.10.12. BUT final decision has not yet issued.

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## 5. Beyond Valdez



### Post SB863 - LC 4064(d):

“However, no party is prohibited from obtaining any medical evaluation or consultation at the party’s own expense.”

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## 5. Beyond Valdez



### Post SB863 - LC 4605:

An IW, at their own expense, may obtain report from “a consulting or any attending physicians whom he or she desires.” Any such report “**shall not be the sole basis of an award of compensation.**” A QME or PTP “shall address any report procured by 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.” (Emphasis added.)

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## 6. Utilization Review (UR) Overview

**Step 1:** Valid Request: Doctor must submit and sign **“complete”** DWC Form RFA

**Step 2:** Deferral of UR if Claims administrator/ specialist (CS) claims “liability disputed.”

**Step 3:** UR Decision: Make sure it is valid.

**Step 4:** Invalid UR: issue is determined by WCAB

**Step 5:** Valid UR: CS to notify parties of decision and that IW may appeal to IMR



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## 7. UR Process & “Complete” RFA



**NEW Reg 9792.9.1 (a):** Drs must use DWC Form RFA found in **Reg 9785.5** to request MT, and **not a narrative request.**

Can be found at:

<http://www.dir.ca.gov/dwc/DWCPropRegs/IMR/IMRFormRFAClean.pdf>

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## 7. UR Process & “Complete” RFA



**NEW Reg 9792.6.1(t)** “Request for Authorization”–  
(RFA) means a written request for a specific course of proposed medical treatment. A RFA must be set forth on a “DWC Form RFA,” completed by a **treating physician**, as contained in **Reg 9785.5**.  
The form must be signed by the physician and may be mailed, faxed or e-mailed.”

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## 7. UR Process & “Complete” RFA



**NEW Reg 9792.6.1 (t):**  
For purposes of this section, **“completed,”** means that information specific to the request has been provided by the requesting treating physician for **all mandatory fields** indicated on the DWC Form RFA.”

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## 7. UR Process & “Complete” RFA

**Instructions: The DWC Form RFA must contain all the information needed to substantiate the request for authorization.**

- List the diagnosis, the ICD Code, and the procedure requested (per CPT/HCPCS code).
- As applicable, include the frequency, duration, quantity, facility, etc. Reference to specific guidelines used to support treatment should also be included.
- For surgery requests, attach or include full surgery orders, pre- and post-operative orders (if known).

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## 7. UR Process & “Complete” RFA

**Instructions: The DWC Form RFA must contain all the information needed to substantiate the request for authorization.**

- If request is to continue a treatment plan or therapy, please attach documentation for functional improvement, if applicable.
- For requested medical treatment that is: (a) inconsistent with the Medical Treatment Utilization Schedule (MTUS) found at California Code of Regulations, title 8, section 9792.20, et seq.; or (b) for a condition or injury not addressed by the MTUS, include scientifically based evidence published in peer-reviewed, nationally recognized journals to recommend specific medical treatment or diagnostic services:

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## 7. UR Process & “Complete” RFA

UR time period is not triggered until  
“complete” RFA received by CS.

What is CS’s obligation if DWC Form  
RFA is not complete?

**Reg 9792.9.1(c)(2)** CS may treat the  
form as complete or return it to Dr.  
marked “not complete” w/in 5  
business days from receipt.



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## 8. UR Process - Valid Decision



*SCIF v. WCAB (Sandhagen)*, (2009) 74 CCC  
835 (3<sup>rd</sup> DCA) (CA S. Ct.)

If UR untimely, report is invalid and  
inadmissible as evidence.

Expedited Hearing appropriate venue to  
determine validity of UR decision.

See *Corona v. Los Aptos*, ADJ380850 (2011)  
2011 CWC PD LEXIS 156 and subsequent  
decision issued on 9.5.2012.

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## 8. UR Process - Valid Decision

**In general, non-compliance with regulations may result in determination that UR decision is invalid.**

***Becerra v. Jack's Bindery*, (9/11/12) 2012 Cal Wrk Comp PD LEXIS 451, Violation of Reg 9292.9(b)(4) – CS failed to timely send UR denial to PTP.**



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## 8. UR Process - Valid Decision



***Academy of Arts College v. WCAB (Zedd)*, (2011) 76 CCC 352**

Defendant must follow all requirements for a proper UR determination or UR decision will not be valid. (Denial signed by nurse, not licensed physician as required by LC 4610(e) & 8 CCR 9792.7(b)(1).)

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## 8. UR Process - Valid Decision

What if UR decision is invalid?

**Reg 9792.9.1(g)** Mandates that if UR is delayed due to missing information from the doctor, the CS must document the attempts by the CS or the reviewer to obtain the information.

**Is violation of this regulation a basis for determining a UR decision invalid?**



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# HOW TO SPEAK WORKERS' COMPENSATION FLUENTLY

By: The Honorable  
Judge Rados



The workers compensation system has a language of its own. In order to understand it one needs to be familiar with a multitude of acronyms. Commonly used acronyms in this system are listed below with their definitions.

Understanding some of these acronyms and the way parties in the system use it is like understanding a text message from a teenager.



We all need to remember that although those of us who work in this system can speak the workers' compensation language fluently, the injured worker cannot.

**Clear communication** is crucial in this system. Get in the habit of getting rid of acronyms and speaking in full sentences.



## Acronyms most commonly used

- **SB899:** Senate bill number 899 which reformed the worker's compensation system in 2004, effective (in parts) as of 1/1/2005.
- **SB863:** Senate bill number 863 which reformed the worker's compensation system in 2012 effective (in parts) as of 1/1/2013.
- **DWC 1:** Claim form filed by an injured worker

## Acronyms most commonly used

- **PTP:** primary treating physician
- **UR:** Utilization review
- **IMR:** Independent medical review
- **TTD:** total temporary disability
- **PTD:** partial temporary disability or permanent total disability

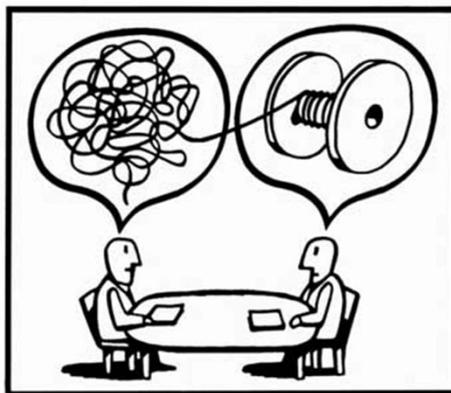
## Acronyms most commonly used

- **PD:** permanent disability
- **PQME:** panel qualified medical evaluator
- **AME:** agreed medical evaluator
- **DOR:** declaration of readiness to proceed
- **PTC:** pre-trial conference

## Acronyms most commonly used

- **MSC:** mandatory settlement conference
- **OTOC:** order taking off calendar
- **F&A:** Findings and Award
- **R&R:** Report and Recommendation

## Translate the following sentences





### **Translate the following sentences**

1. The DWC1 was filed by the applicant on 1/1/13. Applicant has a designated PTP whose request for treatment has been forwarded to UR. UR has denied the request and the applicant is now asking for an IMR. Applicant has been evaluated by a PQME and the case is ready to be set for trial so that the judge can issue an F&A.



### **Translate the following sentences**

2. According to 4602 if you apply Valdez you get 5803.5 exceptions which could be Ogilvied.

## **Translate the following sentences**

3. I am filing a DOR to obtain an MSC. At the MSC, as long as the judge does not OTOC the hearing, I will get the matter set for trial. An F&A should issue promptly after trial.

## **HOW TO LITIGATE WHEN NEW LAWS GO INTO EFFECT**





## **HOW TO LITIGATE WHEN NEW LAWS GO INTO EFFECT**

1. Read the new law
2. Try to understand legislative intent
3. Be prepared for different interpretations of the law by Judges and the Appeals Board.
4. Be more flexible and more patient as all us work through the changes and get accustomed to it.



## **HOW TO LITIGATE WHEN NEW LAWS GO INTO EFFECT**

5. Stay on top of the new cases.
6. Do not be too afraid to admit you do not understand.
7. Be prepared for hourly changes in case law.
8. Pay attention to the interplay between Rules & Regulations and the Labor Code.
9. Separate the forest from the trees.
10. Compromise, compromise, compromise!!!!!!

**REMEMBER:** In few years this  
will all change!

