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NEW QME RULES

On February 17, 2009, new rules for obtaining a Qualified Medical Examination were adopted. These rules govern strict procedures and limitations on the ability of a party to request and ultimately obtain a Qualified Medical Examiner who will issue a forensic report for the purpose of resolving disputed medical issues regarding compensability, the nature and extent of permanent disability, temporary disability status, and any other issue presented under Labor Code 4060, 4061 or 4062. The rules now become part of the California Code of Regulations (Cal. Reg.), Title 8.

These regulations include a number of important changes to which we need to pay close and special attention. By way of example, recently an adjuster on a claim that had been denied in its entirety wanted to request a Panel Qualified Medical Examination (QME) rather than proceed to an Agreed Medical Examiner. Under 8 Cal. Reg. §30(d)(3) however, once a claim has been denied in its entirety, only the *employee* may request a panel of Qualified Medical Evaluators (see Labor Code §4060(d) and §4062.1 if applicant is unrepresented, and Labor Code

§4060(c) and §4062.2 if applicant is represented). Our adjuster in this scenario becomes procedurally relegated to a passive role. In many instances, this means the employee may self-procure medical treatment and reports from any physician willing to treat on a lien basis while the adjuster issues objections to the bills based on the fact that the claim is denied. This could lead to a very large exposure when treatment finally ends.

With regard to denials, we would therefore advise that clients have a very strong basis for the denial (this means substantial evidence, as discussed in some of our prior editions). Consideration should then be given to getting the case set for a priority AOE/COE trial so that the compensability issue can be adjudicated and resolved as soon as possible.

The regulations governing Panel QME requests in general begin with 8 Cal. Reg. §30, and lay out the specific requirements for requesting a panel of Qualified Medical Examiners. These requirements differ according to whether the applicant is represented or unrepresented. The regulations also indicate which forms must be

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used. The new forms can also be found at the DWC website noted below.

Whenever an injured worker is not represented by an attorney, and either the employee or the claims administrator requests a QME panel pursuant to Labor Code §4062.1, the request must be submitted using QME Form 105 (Request for QME Panel under Labor Code §4062.1). The claims administrator must provide Form 105 along with the Attachment to Form 105 (“*How to Request a Qualified Medical Evaluator if you do not have an Attorney*”) to the unrepresented employee by means of personal delivery or by first class or certified mailing.

Requests for a QME panel in a represented case with a date of injury on or after January 1, 2005, and for all other cases where represented parties agree to obtain a panel of Qualified Medical Evaluators pursuant to the process in Labor Code §4062.2, must be submitted using QME Form 106 (“*Request for a QME Panel under Labor Code Section 4062.2*”). The regulations then go on to give further requirements when submitting QME Form 106 in represented cases. For example, the party requesting the QME panel must: 1) Identify the disputed issue that requires a comprehensive medical/legal report to be resolved; 2) Attach a copy of the written proposal sent to the opposing party which offered to engage an Agreed Medical Evaluator once the dispute arose; 3) Designate a specialty for the QME panel requested; 4) State the specialty preferred by the opposing party, if known; and 5) State the specialty of the treating physician.

What if the Medical Director were to receive two or more panel selection forms pursuant to Labor Code §4062.2 on the same day for the same case and the forms designate different physician specialties for the QME panel? While exactly how likely or often this is to occur is unknown,

Section 31.1 does establish the process for determining the physician specialty in just this very situation, breaking it down to a 2-part test:

If one of the requests is for the same specialty as that of the treating physician, the panel shall be issued in the specialty of the treating physician, *unless* the Medical Director is persuaded by supporting documentation provided by the requestor for a different specialty that explains the medical basis for the requested specialty. For this purpose, “any relevant documentation” supporting the reason for requesting a different specialty may be submitted. (Note, however, the regulations do not elaborate on what might constitute “relevant documentation”.)

Otherwise, if no party requests a panel in the specialty of the treating physician, the Medical Director shall select a specialty appropriate for the medical issue in dispute and issue a panel in that specialty. Upon request by the Medical Director, the party requesting the panel shall provide additional medical records to assist the Medical Director in determining the appropriate specialty.

Under §31.1 (c), the Medical Director has 30 days to issue a Panel in represented cases or either party may seek an order from a Workers’ Compensation Judge that a QME panel be issued. Any such order shall specify the specialty of the QME panel or the party to be designated to select the specialty. Unfortunately, this rule presently has no pragmatic value. When we recently checked with the DWC Medical Unit on the status of request processing, we were advised that the Unit was about three months behind. As of mid-March they were still processing requests for

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panels from December 2008 on litigated cases. There is nothing in these rules that would seem to require the DWC to move your request to the head of the line once a judicial order issues and the WCAB is sufficiently backlogged in setting conference dates in most cases that this rule would seem to lack any value to the parties.

Under §31.5(a), a request for a replacement for any QME on a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, can be made if that doctor cannot schedule an appointment within 60 days (or within 90 days if agreed upon by the parties).

Section 38(a) sets a 30-day time frame for the doctor to issue his or her report, unless the doctor timely requests an extension from the Medical Director (which the regulations spell out the requirements for). Failure by the doctor to issue a timely report results in a party's being allowed to disregard the report, avoid liability for paying for it, and to request a replacement QME or panel. However, under §31.5(a)(12), the late report must be objected to prior to the date the evaluator served the report, and the party requesting a replacement must attach to the request a copy of the objection to the untimely report. Note that the parties may also waive the tardiness of the report and the right to obtain a new doctor by doing so in writing or by signing and returning to the Medical Director either QME Form 113 (Notice of Denial of Request For Time Extension) or QME Form 116 (Notice of Late QME/AME Report – No Extension Requested).

Close attention to time frames and deadlines cannot be underscored enough with respect to the new QME regulations. Note that under Section 30(d)(1), once a claim form has been filed, the claims adjuster (or, if none, the employer), has only 90 days to request a QME Panel for a Labor

Code Section 4060 evaluation for purposes of deciding whether or not to accept or deny the claim. However, the request must be accompanied by proof of compliance with the requirements of Labor Code §4062.1 (if applicant is unrepresented) or §4062.2 (if applicant is represented).

Imagine a scenario where, even assuming an adjuster receives a claim form right away (let alone when the employer sits on it for several weeks before tendering it to the claims adjuster); the adjuster then goes through the process required by, say, Labor Code §4062.2 in a represented case, prior to being allowed to request a panel, which takes at least 10 days, then submits the request for a QME Panel; if the Medical Director then fails to issue a panel within 30 days, then the adjuster must request a WCJ to issue an order for a Panel to be issued, and the hope that a panel is issued thereafter within the timeframes hopefully ordered by the WCJ; and then, once a panel is received, there is the selection process which takes at least another 10 days; then, an appointment is rarely scheduled *immediately*; then, following the appointment, if the doctor fails to issue the report in 30 days, the adjuster must object to the report, and request a new panel or QME pursuant to the regulations. All of this must be done and the adjuster must deny the claim, if at all, within 90 days of submission of the claim form by the applicant! And in such a situation, how does the adjuster even get a WCJ to order a Panel. By walk-through *ex parte*? By filing and serving a DOR and waiting ten days first? These are questions that we can expect to see haunting and frustrating claims adjusters and defense attorneys in the months or perhaps years to come.

The new rules can be found at Title 8 (Industrial Relations) of the California Code of Regulations (8. Cal. Reg.), beginning with Division 1

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(Department of Industrial Relations), Chapter 1 (Division of Workers' Compensation – Qualified Medical Evaluator Regulations), Article 1. You can also find them via the DWC website at: www.dir.ca.gov/dwc/DWCPropRegs/QME_regulations/QME_regulations.htm

There is a link on that page for a “clean copy” of the regulations, as well as a link for a copy of the regulations with editing marks showing added new language and deleted language. For the former, click the link next to “Clean copy of final regulations,” and for the latter, click “Final text of regulations.”

Article by Stephen T. Gargaro, McDermott & Clawson, Los Angeles County office

WCAB To Reconsider Almaraz/Guzman

On Monday April 6th the WCAB, in a very unusual move, granted State Fund's Petition for Reconsideration After Reconsideration and agreed to reconsider its controversial decision in the *Almaraz* and *Guzman* cases (see our March 2009 newsletter for detailed analysis of these decisions). Petitions for Reconsideration After Reconsideration are available to a party newly aggrieved by a Decision After Reconsideration (namely, the party that did not complain about the trial level decision). In addition, on its own motion, the WCAB granted reconsideration of its decision in *Ogilvie*, a WCAB *en banc* decision which gave guidance to parties wishing to rebut the future earning capacity adjustment of the rating schedule.

Officially, the WCAB stated it wanted to give interested parties the opportunity to file *amicus*, or “friend of the court” briefs. Unofficially, they may be reacting to the large-scale reaction to these decisions, including attempted political pressure from various sources.

It is important to bear in mind, however, that as of the date this goes to press, there has been no Stay Order issued on the previous decisions, meaning that WCAB trial judges are still bound by those decisions. Stay informed with future editions of *Legal Briefs* to keep updated on this developing story.

New Outpatient Hospital and Surgery Fees

The Division of Workers' Compensation has posted an adjustment to the outpatient hospital departments and ambulatory surgical centers section of the Official Medical Fee Schedule (OMFS) to conform to changes in the Medicare payment system as required by Labor Code section 5307.1.

The effective date of the changes is March 1, 2009. Title 8, California Code of Regulations section 9789.31 is adjusted to conform to the Centers for Medicare and Medicaid Services' (CMS) 2009 hospital outpatient prospective payment system (HOPPS) correction notice to the final rule of Nov. 18, 2008, published on Jan. 26, 2009, in the Federal Register. CMS' correction notice fixes technical errors that appeared in the CMS final rule published in the Federal Register on Nov. 18, 2008. This change supersedes the adjustment to 8 CCR section 9789.31 made by the Order of the acting administrative director dated Jan. 26, 2009. The adjustments are online at: <http://www.dir.ca.gov/DWC/OMFS9904.htm>.

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