



LAW OFFICES
of
McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

July 2010

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SOME NEWS YOU CAN USE

Rule 30 is Dead; Long Live the New Rule

In an *en banc* decision that binds all trial judges, the WCAB has ruled that the dreaded Administrative Director Rule 30(d)(3) is invalid, and that a defendant may request and receive a proposed QME panel on a previously denied case. Rule 30(d)(3) read: "Whenever an injury or illness claim of an employee has been denied entirely by the claims administrator, or if none by the employer, only the employee may request a panel of Qualified Medical Evaluators, as provided in Labor Code sections 4060(d) and 4062.1 if unrepresented, or as provided in Labor Code sections 4060(c) and 4062.2 if represented."

Regular readers of our *Legal Briefs* will recall that our March, 2010 edition was focused on a work-around to Rule 30(d)(3). Now, with the newly rendered decision in *Amelia Mendoza vs. Huntington Hospital, et.al.* (June 3rd, 2010), ADJ6820138 and ADJ6820197, the WCAB has declared that troublesome rule invalid. Said the WCAB: "We hold that AD Rule 30(d)(3) is invalid because it conflicts with sections 4060(c)

and 4062.2 and exceeds the scope of section 5402(b). Neither section 4060 nor section 4062 provides that "only the employee may request" a QME panel after an employer has denied the compensability of a claimed injury. To the contrary, those sections when read together specifically provide that "either party" may make a QME panel request "at any time" after the filing of a claim form. Furthermore, nothing in section 5402(b) provides that a defendant must request a QME panel before it denies liability for an injury, even if that denial is based on medical causation grounds."

Not only may you request a Panel Qualified Medical Examination after previously denying the case, there is no time limit within which you must do so. "We also hold that: (1) the time limits of section 4062(a) for objecting to a treating physician's medical determination do not apply when the injury has been entirely denied by the defendant; and (2) section 4062.2 does not establish timelines for initiating or completing the process for obtaining a medical-legal report on compensability."

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In contested cases, we always recommend a second line of defense. Thus, in those cases where a denial has issued on legal grounds, we still would like to have a medical opinion which might place a cap on otherwise limitless liability being imposed by a carefully selected, self-procured treating physician working for the applicant. At the same time, in those cases where causation can only be determined by carefully considered medical opinion, an independent analysis is a must. We applaud this WCAB decision.

Claims Down, Costs Up

The number of insured California Workers' Compensation claims fell more than 5 percent in 2007, but big jumps in the average incurred cost of Temporary Disability and minor Permanent Disability claims resulted in a \$138 million increase in total incurred benefits, \$104 million of which was due to higher medical costs, according to the California Workers' Compensation Institute.

Is This the Party to Whom I Am Speaking?

As you may be aware, Labor Code 4062.3 prohibits *ex parte* communications with a Panel QME or AME. The issue, however, is whether this applies to ALL communications of any sort (including clerical subjects) or whether the communication has to be substantive to violate the statute. Violation of the statute invalidates the panel or the report.

According to the Second District Court of Appeal in its original ruling in the case of *Alvarez vs. WCAB* ANY *ex parte* communication may be sufficient. The Court said that prejudice to a party or lack of prejudice was not a consideration. Thus, where the Panel QME called the defense attorney to advise that a certain record was missing and would have to be re-sent, the applicant was entitled to a new panel. According to such reasoning, even calling the

doctor's office to ask when a report would be ready might be sufficient to violate the statute. The same would be true of the doctor's office calling you to find out where the records are for an upcoming exam.

Happily, the 2nd DCA has now vacated its own published decision and will rehear the case. The defendant (SCIF) is arguing (correctly, we believe) that the statute needs to be interpreted in the light of the entire statutory scheme, which is designed to be an informal (compared to civil litigation) system designed to promote substantial justice. Communications which promote efficiency and which do not prejudice a party should not be considered a violation. Stay tuned for future developments on this significant argument.

No Cost of Living Adjustments for 2011

Based on recently released numbers from the U.S. Department of Labor, the state average weekly wage (SAWW) declined from \$984.83 to \$979.90 in the 12 months ending March 31, 2010. This means there will be no change in minimum and maximum temporary total disability (TTD) and permanent total disability (PTD) rates for 2011 work injuries.

This also means annual cost-of-living adjustments to life pension and PTD payments on existing claims with injury dates on or after Jan. 1, 2003, will not apply in January 2011, and the maximum rate for death benefit installment payments, which are paid in the same manner and amount as TTD, will also remain unchanged.

The COLA Wars Continue

While we are on the subject of SAWW and the Cost of Living Adjustment (COLA) which would have taken place this January had not the State Average Weekly Wage declined, it is interesting to note that a new battle front has developed.

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The 3rd District Court of Appeal granted an employers' petition for a writ of review of a Workers' Compensation Appeals Board ruling that the claimant's permanent total disability award should feature cost-of-living adjustments dating back to Jan. 1, 2004. The effect of such a decision is to cause the Cost of Living adjustments to be calculated retroactively, no matter when the injured worker actually was declared to have reached Maximum Medical Improvement and no matter when a Life Pension would be scheduled to begin. The WCAB explained that it made the decision pursuant to the 6th District Court of Appeal's ruling in a similar case, *Duncan v. WCAB*, Court of Appeal Case H034040. The new case is *Allied Waste Industries v. WCAB* (Rojas), Court of Appeal case number C064914.

We cannot predict when the Supreme Court will issue a decision in *Duncan*, but whenever it comes, it will put to rest a significant dispute that will impact every life pension calculation for injuries on or after January 1, 2003. For now we assume our clients will be calculating those pensions on a more conservative interpretation of LC 4659(c). For further information see our article "The Cola Wars" in the July 2009 issue of the McDermott & Clawson, LLP *Legal Briefs* Newsletter.

State of the State Litigation

"If you don't get a lawyer that knows the law, then get the one that knows the judge." – anonymous

Nearly half of all indemnity claims closed and resolved in Southern California since 2000 have involved an attorney, with Los Angeles and Orange Counties recording the highest attorney involvement rates in the region according to new CWCI figures.

However, this really is not too much different than the statewide figures. From 2000 – 2008 the CWCI study period the data showed that statewide, 271,677 (43.8 percent) of the closed and resolved indemnity claims involved an applicant attorney, a defense attorney, or both.

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](#) at (714) 288-1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of:

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