



LAW OFFICES  
of  
McDERMOTT & CLAWSON, LLP

## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

March 2010

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# GETTING A PANEL ON A DENIED CASE

There may be confusion about the effect of Rule 30(d)(3) of the Administrative Director's Rules and Regulations on denied cases. I have heard more than one adjuster express the opinion that he or she was precluded from objecting to the treating doctor's MMI report because the case was denied. Some attorneys have expressed a similar opinion. Reportedly, even a judge from a District Office in the Los Angeles area made a representation to a seminar audience that would seem to misinterpret the rule. We wanted to take this opportunity to closely examine the rule and the statute to which it refers, to see if we can shed some light on what the rule covers, and what it does not.

Here is the text of the Admin. Rule: 30(d)(3): "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."

As has been widely discussed, Rule 30(d)(3) would preclude the defendant from requesting and obtaining a Panel Qualified Medical Evaluation if the case is denied before the panel request is submitted. In some cases, a way around this prohibition might be to keep the case under investigation and not issue a denial until after the panel request is submitted. This strategy, however, can expose a defendant to up to \$10,000 in medical treatment costs prior to the issuance of the denial.

Is there an alternative? Once a case is denied, is the defendant precluded from *ever* obtaining a panel QME? We don't think so. Take another careful look at the wording of the rule. It says that only an employee may request a panel "**as provided in...Labor Code sections...4060(c) and 4062.2 if represented.**" To fully understand what this means, we have to backtrack and read Labor Code §4060(c), which states: "If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, **a medical evaluation to determine compensability** shall be obtained only by the procedure provided in Section 4062.2."

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Nothing we see in Rule 30(d)(3) refers to any code sections other than 4060(c) and 4060(d) and those code sections only address the situation where a doctor's opinion is being used to determine compensability of a claim. In fact, Labor Code §4060 only applies to cases and examinations where there is a medical question as to injury AOE/COE.

On the other hand, Labor Code §4062 is still alive and well, and begins with these words: "(a) If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061..." Any "issues not covered" leaves a wide assortment of potential issues other than the compensability of a medical condition, and would include such things as MMI status (or lack of it) of the injured worker. We believe, therefore, that while the defendant is precluded from requesting a panel examination early in a denied case, there is still the availability of issuing an objection under LC §4062 at an appropriate time during the ensuing medical treatment. If done properly, a request for assignment of a QME panel should be honored by the DWC. Such a request must include, as an attachment, the objection letter pursuant to LC 4062 and that letter must state with specificity the issue(s) to which objection is being rendered.

At this point we have been asked, when the panel issues and a doctor is selected, may the doctor comment on medical compensability? We say "Yes." This is because of another helpful statute, Labor Code §4062(c) which provides:

"The medical evaluation shall address *all* contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's initial appointment with the medical evaluator." Thus, even though the

dispute is raised pursuant to some other issue, if medical compensability (as opposed to a statutory defense) remains in issue, it would appear the panel QME will have to comment on that issue as well.

We admit we have seen no binding case law on this issue, we did discuss the subject with certain respected judges locally and it would appear the majority would hold with our argument in this regard. While rule (30(d)(3) does limit our options on previously denied cases, we do see the potential for obtaining a QME panel at an appropriate time.

*Article by Howard Stevens, Orange Office*

### **Correction to Our December 2010 Newsletter**

We get emails from our readers, and often they serve to either share differing opinions or further expand the discussions in our newsletter. One such letter came from the DWC Legal Unit, pointing out an error regarding the spinal surgery second opinion process. The little article, referencing the *Cervantes* case, incorrectly referenced the AME/QME process under LC 4062.1 and 4062.2. Clearly that is incorrect. The reference should have been to the process specified in LC 4062(b).

### **Are They Shouting "Ogilvie!" at You?**

Not so fast! Threatening to "Ogilvie" a permanent disability rating (it's amazing how fast new verbs are created in our business) is today's fashionable ploy to get you to increase a settlement offer. The WCAB Commissioners beg to differ, however, on taking a diversion from the PDRS so easily.

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In a series of recent WCAB Panel Decisions after Reconsideration, trial judges who dished out increased ratings under the *Ogilvie* decision were admonished to take another look, noting that all factors representing the post-injury loss of earnings had to be considered. It was not a given that all post-injury earnings losses are because of the injury. What about the weak job market? How motivated was the worker to return to work, and how hard did he or she try? What other circumstances impacted the situation? The injured worker has the burden of proof to show that the scheduled rating does not accurately reflect the loss of earnings as a direct result of the industrial injury, and the judge must indicate in the opinion all evidence relied upon when applying an *Ogilvie* formula to increase a rating.

For more discussion about the *Ogilvie* decision, see our September 2009 Newsletter article about *Ogilvie I* and *II*. The cases referenced here, which are not binding case law in and of themselves, are *Bertha Garcia vs. Patrick Hinrichsen*, ADJ 6721939, *John Shini vs. Pacific Coast Auto Body*, ADJ2079252, and *Steven Bowden vs. Sunray Termite Control*, ADJ4536632.

## Need Assistance with Training?

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We have worked with numerous carriers, brokers, and third party administrators 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.

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