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QUARTERLY REVIEW

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A Legal Update for the Claims Professional

Successfully Obtaining A Replacement QME Panel

By Laura Mendivel, Esq. Orange Office

The need to replace a physician on a PQME list is occurring more and more frequently. A replacement panel involves the replacement of at least one and possibly three qualified evaluators (as distinguished from a second panel, which involves an entirely new list of qualified evaluators).

Title 8, CCR section 31.5 sets forth the legal criteria for requesting a replacement of one or all of the names on a panel, although this section distinguishes between the represented and unrepresented employee.

For unrepresented employees, a replacement QME on a panel is required to be issued if any one of the following conditions exist:

- A QME on the panel issued does not practice in the specialty requested by the employee;
- A QME on the panel issued cannot schedule an examination of the employee within 60 days of the employee's request;
- The employee has changed his/her residence address in the geographic area in which the panel was requested;
- A physician on the QME panel issued is a member of the same group practice (as defined by Labor Code section 139.3) as another QME on the panel; or,
- The QME is unavailable pursuant to Title 8, CCR section 33.

CCR section 31.5(b) et. seq. notes that *either* party may request a replacement QME if any of the following conditions occur:

- The employee's primary treating physician (as set forth in CCR section 9785) is on the panel;
- The claims administrator (or if none, the employer) and the employee agree to the issuance of a new panel in the geographic area of the employee's workplace;
- The Medical Director, upon written request, finds good cause that a replacement QME is appropriate for reasons related to the medical nature of the injury (for purposes of this condition, "good cause" is defined as documented medical or psychological impairment); or,
- The Medical Director (again upon written request) determines, after a review of all appropriate medical records, that the specialty chosen by the injured worker is medically or otherwise inappropriate for the injury to be evaluated.

Additionally, either party may request a replacement QME for any violation of 8 CCR section 34. Section 34(a) requires that when an unrepresented employee makes the appointment with the QME, the QME *shall complete an appointment notification form by submitting the form in section 110*. The completed form *must be postmarked or faxed* to the employee and the claims administrator (or if none, the employer) within 5 working days from the date the appointment was made. In fact, violation of this section constitutes grounds for denying the particular physician's reappointment as a PQME!

Section 34(b) requires the PQME to conduct the evaluation only at the medical office listed on the panel selection form.

Section 34(c) requires the PQME to note within the appointment notification whether a Certified Interpreter is required and if so, the PQME must specify the language. Note, however, that this subsection requires that *the party who is to pay the costs of the interpreter (i.e., defendant in almost all scenarios) must make the actual arrangements for the interpreter to be present at the evaluation*.

Assuming that a replacement PQME is available upon any of the forgoing conditions, the Medical Unit will issue the replacement without the need to request an order from the WCAB. Pursuant to 8 CCR section 31.5(c), any such replacement QME shall be selected at random.

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Quarterly Review

This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and labor law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

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NEW CASE NOTES

Aaron Hemmings, Esq., Branch Manager, Central Coast Office

No Ex Parte Communication with QME? The 2nd District Court of Appeal ruled in *Carlos Alvarez v. WCAB B218847* that a party was entitled to a new panel of QMEs under Labor Code section 4062.3(f) when the QME called opposing counsel regarding documentation supplied by that opposing party, overturning the WCAB. PQME Dr. Donald Miller testified in his deposition that he reviewed over 600 pages of records sent by the defendant and formulated his opinions in part due to his recollection of reviewing a particular document which he could not locate. Dr. Miller contacted the defense attorney attending the deposition and asked him for another copy of the document. The defense attorney wrote to opposing counsel the same day about the call, stating Dr. Miller initiated the call and that it was less than a minute. The WCAB did not find that an ex parte communication occurred on the basis it was the QME who initiated the communication and that nothing of substance was discussed. However, the 2nd District Court of Appeal concluded that there was no exception to the clear statutory language of Labor Code section 4062.3(f) that prohibits ex-parte communication between a party and a PQME or AME, and that whether the communication prejudiced either side was irrelevant.

On June 1, 2010, SCIF attorney filed a successful Petition for Rehearing and Request for Depublication of the decision. SCIF's arguments go to the very heart of the original, administrative purpose of the California workers' compensation system which favors a more informal system that was intended to provide "*substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character*".

Defense counsel asserted that the court's decision was misguided when it found that "prejudice" was not a consideration, and pointed to the increased costs and delays that would result. Further, the defense points out that the QME's action was in response to an agreement between the parties. The court's decision to rehear the case based on these arguments will further define whether we are to continue moving towards an increasingly formal, legal system.

Interpreter Fees. The WCAB issued a panel decision in *Villegas v. Campos Tacos ADJ908115* holding that interpreters are entitled to compensation for time spent at hearings despite the finding against the Applicant that he was not an employee. The WCJ denied the lien claim, but the WCAB reversed and found that the lien claimant was entitled to compensation for her time at hearings, depositions and other settings deemed necessary by the Administrative Director. The commissioners based their decision upon Labor Code section 5811(b), which states that qualified interpreters may collect fees that are reasonably, actually, and necessarily incurred per the fee schedule.

WCAB Clarifies Roles of Physician, Rater and WCJ. The roles of the WCJ, physicians, and the DEU were clarified in an en banc decision in *Blackledge v. Bank of America ADJ1735018*. The WCAB concluded that a physician's role is to assess the applicant's whole person impairment, the WCJ's role is to frame the rating instructions, and the DEU rater's role is to issue a recommended permanent disability rating based solely on the WCJ's instructions. However, the WCJ is not bound by the DEU's disability rating per se, but the rating must be based upon substantial medical evidence. Moreover, there must be no ex parte communication between the WCJ and the rater.

Quote of the Quarter

"Seeking the assistance of the rater should occur infrequently and under no circumstances should the WCJ abdicate responsibility for the comprehensive assessment of the employee's WPI(s) to the rater under the guise of asking for the rater's expert assistance."

From the WCAB's En Banc Decision in *Blackledge v. Bank of America and Ace Insurance Company*
June 3, 2010

CASE OF THE QUARTER: The Demise of the Dreaded Rule 30?

Amelia Mendoza v. Huntington Hospital (En Banc) (June 2010)

By Ted Richards, Esq., Managing Shareholder, Sacramento Office

It has been dubbed the Dreaded Rule 30. It is a trap for the unwary and despised by defendants and their attorneys. It has its own six page article in the December 2009 update to the Workers' Compensation Laws of California, 2010 Edition (the Blue Book). However, its reign of terror appears to have ended. On June 3, 2010, the WCAB ruled, en banc, that Administrative Director (AD) Rule 30(d)(3) is invalid, and suggested that a similar fate awaits AD Rule 30(d)(4).

Rule 30(d)(3) provides that: "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...." The rule clearly created a quandary for defendants during the 90-day presumption period of Labor Code section 5402, particularly in light of liability under section 5402 for up to \$10,000 in medical care prior to denial of a claim.

For example, when a defendant has a legitimate factual or legal basis to deny a case, there is an incentive to deny the case as early as possible to cut off section 5402 medical liability. However, under Rule 30(d)(3), if such a denial occurs too early and the factual defense fails, the defendant faces a situation where it has no medical-legal recourse available to rebut a PTP's opinion on causation. Prior to the demise of Rule 30(d)(3), the safest course when a reasonable basis for denial existed was to request a panel as soon as possible during the section 5402 presumption period and promptly follow the panel request with a denial. Such a course no longer appears necessary.

In its decision in *Amelia Mendoza v. Huntington Hospital* (en banc) (June 2010), the WCAB held that AD Rule 30(d)(3) is invalid because it is inconsistent with Labor Code sections 4060(c), 4062.2, and 5402(b). The WCAB ruled that sections 4062 and 4062.2, when read together, provide that **either party** may make a QME panel request **at any time** after the filing of the claim form. The WCAB also noted that forcing a defendant to obtain an order from the WCAB compelling the Medical Director to issue a QME panel on compensability, which was defendant's recourse under Rule 30, could significantly delay resolution of claims.

In effect, the ruling allows the defendant to deny a claim as soon as it has reasonable grounds to do so, and still obtain a panel QME at a later time when the case so warrants. This result is consistent with due process and provides the defendant with the necessary tools to investigate compensability and act upon that investigation within the time frame of section 5402, without risking a presumption of compensability or losing the ability to complete medical discovery.

The sequel to the *Mendoza* case will no doubt involve the validity of AD Rule 30(d)(4). If the 90-day period under section 5402 has expired without a denial, Rule 30(d)(4) requires a finding and decision from a workers' compensation judge (1) that the section 5402 presumption has been rebutted and (2) that a QME panel should issue on compensability. Only then will the Medical Director issue a panel. In footnote 11 of *Mendoza*, the WCAB acknowledged that AD Rule 30(d)(4) was not at issue in that case, but noted that the rule appears to place a defendant in a Catch-22 situation where the defendant cannot obtain a panel QME on industrial causation unless it rebuts the 5402 presumption but cannot rebut the presumption unless it obtains a panel QME on industrial causation. It appears that the WCAB is inviting a challenge of Rule 30(d)(4).

LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

AB 1606 (Berryhill) would extend workers' compensation death benefits to dependant children of deceased firefighters or law enforcement officers until the age of 19 so long as the child was in high school. This bill was written in response to the situation that occurred to the family of deceased police officer Sgt. Howie Stevenson, a Ceres police officer who was shot and killed while responding to a call from a liquor store in 2005. His dependant family found their benefits cut in half when their minor child turned 18 but was still in high school and living at home. The bill is now before the Senate Labor & Industrial Relations Committee.

Large increases in the employer assessments prompted the bipartisan **AB 2423**, a proposal to eliminate the state's exemption from the public-hearing process and require public input prior to implementing the DIR budget. In this spot bill, the legislature indicated its intent to "require the Department of Industrial Relations to convene an advisory committee consisting of employers, injured workers, doctors, and other stakeholders when setting the assessments and surcharges in compliance with Sections 62.5 and 62.6 of the Labor Code. Whether this discussion will continue is uncertain. As of May 5, 2010, the authors cancelled a hearing scheduled in front of the Assembly Insurance Committee.

Legislative News - continued from page 3

AB 1994 (Skinner) would create a rebuttable presumption of compensability for hospital workers who provide direct patient care regarding certain blood-borne infectious diseases, musculoskeletal injuries (MSDs), MRSA, and H1N1 virus. Sponsored by the California Nurse's Association, the proponents cited a four-fold increase in hospital patients infected with methicillin-resistant staphylococcus aureus (MRSA) along with the rise in viruses and MSDs in this profession as the underlying rationale for this bill. As most causation presumptions affect public entities, this bill would extend presumptions into the private sector. This bill is currently held in Assembly Appropriations and faces stiff opposition from both public and private employers.

AB 933 (Fong) would require that physicians performing utilization review in California workers' compensation cases be licensed in this state. The bill is set to be heard in the Senate Labor and Industrial Relations Committee on June 23, 2010.

The Things We Did Last Quarter . . .

GLSR&T's **Greater Los Angeles Office** added two **Take Nothings** to the firm's record of aggressive defense. In a case with multiple employers and three potential CT claims, **Todd Taylor** succeeded in getting applicant to elect against a co-defendant – all while waiting for the scheduled trial to begin. This was a case where the unprepared co-defendant failed to cross-examine the AMEs that would likely have put the largest portion of the 47% permanent disability on our client. Not wanting to go to trial where their failures would be highlighted, the co-defendant finally decided to stipulate to the medical records that showed one, very long CT case in which they had the last injurious exposure. **Estimated Reimbursement for our client: \$123,587.**

Art Shahnazarian, also in the **Los Angeles** office, obtained a **Take Nothing** using the affirmative post-termination defense under Labor Code section 3600(a)(10). Applicant had received a notice of layoff after which he filed a claim for injuries to his foot and toe using a date of injury prior to the notice. At trial, Art successfully convinced the judge that the employer did not know of the injury prior to issuing the lay-off notice, based on a preponderance of evidence. **Estimated Savings: \$34,000.**

Meanwhile in the **Inland Empire**, an automotive detailer didn't quite think through all of the details when he claimed that he fell seven feet off of a truck and sustained multiple sprains of his shoulders and spine. When **Alexis Orlando** received the file, an AME had already found the claim industrial and that applicant was in need of extensive medical treatment. Alexis launched an investigation in which she found that the applicant had had multiple disciplinary issues and was close to being fired when the "accident" occurred. Further, she located a witness who said that he saw the applicant climb down from the truck and lie down on the ground. Based on the investigation, the WCJ agreed that the accident had been faked, resulting in a **Take Nothing** for the applicant. **Estimated savings: \$75,000.**

Managing Shareholder Kathleen Roberts of the **San Jose** office achieved a **Take Nothing** in a case in which an agricultural worker was injured in a car accident going home from work. The legal issue was whether the claim was compensable based on the "going and coming" or "special mission" rules. In this case, Kathleen was able to show that the two fields in which the applicant worked were contiguous and that the applicant would not have needed a vehicle to move between them. Thus, there was no need – nor implied requirement – for personal transportation at this work site. **Estimated Savings: \$75,000.**

Kathleen Roberts continued to flex her legal acumen as she obtained another amazing win for her client. The applicant, a packer/production worker in the food industry, claimed that he had struck and injured his shoulder on a vegetable dryer. Because there had been considerable controversy over whether the incident had occurred, the claim had been denied. At trial, Ms. Roberts was able to demonstrate using the prior medical records that applicant's shoulder complaints not only pre-dated the incident but were exactly the same after the date of the reported injury. Despite the finding that applicant's credible testimony established that the incident occurred, the WCJ also found that it was not sufficient to warrant a finding of industrial causation and issued a **Take Nothing** for the applicant. **Estimated Savings: \$50,000.**

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GLSR&T is certified by the California Department of Insurance as a continuing education provider.

THE REGULATORY CORNER: Utilization Review

By Peggy Sugarman, GLSR&T Training Director

The Division of Workers' Compensation held an open forum on April 8, 2010 to allow stakeholders to voice concerns about and suggest improvements to the DWC's utilization review regulations. Attendees included physicians, utilization review companies, claims professionals, attorneys and injured workers. The proactive move on the part of the regulators set a positive tone for this interactive discourse where multiple views were welcomed and considered.

One of the major issues plaguing claims administrators is the various formats that constitute a "Request for Authorization" (RFA). The UR regulations define it as a written request for a "specific course of treatment" that can be either in a physician's first report of injury, a PR-2, or in a narrative form that contains the same information as the PR-2 so long as the form is clearly marked as a request for treatment. But administrators still must contend with hand-written prescriptions and requests from medical suppliers that are technically not a "RFA" but still require some action.

More frustrating for claims administrators is when RFAs do not contain all of the information that would be necessary to determine medical necessity. Because only a physician can deny a treatment request, the additional costs for a physician denial are incurred that gets them absolutely nowhere. Finally, the issue of treatment requests for a disputed body part continues to be a problem. Clarification that UR can be deferred pending resolution of the causation issue would be welcome.

The next steps are unclear at this point as the DWC synthesizes the public comments. As one medical director pointed out, adding another form to an overburdened system won't change physician behavior. But by creating customized networks, some administrators are reducing or eliminating the need for utilization review. Zenith's Medical Director, Bernice Peplowski reported extremely positive results using this strategy at the CWCI annual meeting in March, 2010.

GLSR&T IN THE COMMUNITY! Did you know . . .

Charitable contributions and volunteerism are part of GLSR&T's commitment to our local communities. Did you know that GLSR&T has been a supporter of UCLA, specifically, the Wooden Athletic Fund for over 10 years? (<http://www.uclabruins.com/departments/ucla-athletic-fund.html>)

In that spirit, GLSR&T attorneys from all over the state came out in force to support the Association of Workers' Compensation Professionals' Annual Golf Tournament on June 11, 2010 held at the Lincoln Hills Golf Club in Lincoln, CA. In addition to sponsoring "tees", **Hetal Naik** from Sacramento joined **Aaron Hemmings** from Ventura to staff the "watering hole". Players included Sacramento attorneys **Gary Ward** and **Jim Swenson** and Chico's **Medy Beauchane** and **Peter Golden**.

And now that the Golf Tournament is over, **AWCP** is busy putting together its Annual Fall Conference line up, set for October 15, 2010 in Sacramento. Conference Chair **Peggy Sugarman**, Training Director for GLSR&T, has lined up an initial group of presenters that will focus on all aspects of settling cases in today's challenging environment. Preliminary speakers include former Presiding Judge George Mason, now an arbitrator and mediator who will discuss negotiation

strategies and Steven Feinberg, M.D. who will counsel participants on how to reduce the cost of future medical care. For additional conference information, go to: www.awcp.org

GLSR&T's San Diego Branch Manager **Kimberly Dyess**, continues to be active in our community as a presenter. **Kim** gave an entertaining case law update for the **Public Agency Risk Manager's Association (PARMA)** in San Diego on June 18, 2010 and will do so again for a local JPA.

In the north, **Jerry Rempel**, Branch Manager of our Chico office, continues to provide training to various clients on QME regulations, second opinion spinal surgery issues and COLA calculations.

GLSR&T is also proud to announce the election of **Peggy Sugarman, Training Director** to the Board of Directors for the **Insurance Educational Association (IEA)**. IEA is a non-profit organization that has been providing training for insurance professionals since 1876. IEA continues to be the leading resource for professional development and training opportunities in Workers' Compensation, Property Casualty Insurance, Risk Management, Disability Management and Financial Services.

ANNOUNCEMENTS

Managing Shareholder David Chun announces the addition of two attorneys to his team in the Fresno office:

- **Dede J. Agrava** obtained her law degree from San Joaquin College of Law where she was the managing editor of the SJCL Law Review. Prior to joining GLSRT, Ms. Agrava was a principle at a law firm specializing in personal injury and bankruptcy cases. Ms. Agrava also has extensive experience as an insurance claims adjuster. She is a member of the Fresno County Women Lawyers and the Fresno County Bar Association.
- **Jeffrey R. Suggs** graduated from the University of Kansas with a bachelor's degree in journalism where he was later honored as a former student leader. He received his law degree from the San Joaquin College of Law. Mr. Suggs was successful in the field of media sales and account management before he decided to pursue his legal career. He gained his legal experience working for the Fresno District Attorney's Office of Consumer and Environmental Protection where he dealt with civil and criminal environmental violations as well as consumer and real estate fraud.

Branch Manager Jerry Rempel welcomes **Nazanin Emad** to the expanding Chico office. Ms. Emad graduated from the University of California, Davis with a Bachelor of Arts degree in English Literature and obtained her law degree from Empire

College of Law. Ms. Emad brings to GLSR&T extensive workers' compensation legal defense experience from major California firms, most recently from the Law Offices of Hanna, Brophy, MacLean, McAleer and Jenson. Prior to that, she gained experience in various civil arenas including personal injury, aviation law, estate planning and business. She is fluent in the Farsi language.

Managing Shareholder Jeff Stander welcomes **Jessica Mercado** to his team in the greater Los Angeles office. Ms. Mercado received her law degree from the American College of Law in Anaheim, California. Ms. Mercado comes to GLSR&T with prior experience as a workers' compensation attorney representing employers and insurers. Prior to that, she gained extensive experience in the areas of civil litigation and family law as a legal assistant. Ms. Mercado is fluent in the Spanish language.

GLSR&T congratulates the following attorneys who have received their **Workers' Compensation Certified Specialist** designations from the California State Bar Association:

- **Diana Balabanian** – Greater Los Angeles Office
- **Julie Kennedy** – Greater San Francisco Office
- **Liliana Naficy-Royal** – Greater San Francisco Office

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