

GRANCELL + LBOVITZ + STANDER + REUBENS AND THOMAS

QUARTERLY REVIEW

Fourth Quarter 2011

www.grancell-law.com

A Legal Update for the Claims Professional

Messele: How to Obtain a Proper Panel of QMEs and an Admissible Report

By Kimberly Dyess, Esq., Branch Managing Attorney, San Diego Office

With the development of utilization review and defendant's inability to challenge medical treatment through Labor Code §4062 based on the decision in *State Comp. Ins. Fund v. WCAB (Sandhagen)* 44 Cal. 4th 230, parties are turning with ever-increasing frequency to requesting a panel of qualified medical examiners to resolve their disputes. In order to reduce the amount of litigation over panel requests and proper panel issuance, the parties need to follow the applicable labor code sections, regulations and case law closely to ensure a timely and admissible report. In addition, employers and claims administrators need to take strategic advantage of both the statutory principles and the loopholes to those principles to further their position in a given case.

The first step is to confirm whether either party has the legal right to request a panel. Under Labor Code §4062(a), if an injured employee is represented by an attorney, the parties have 20 days to object to a medical determination by the treating physician concerning any medical issue not covered by sections 4060 or 4061 and not subject to the provisions of utilization review under section 4610. Labor Code §4062.2(b) specifies how to go about making that objection and states, in part: "Either party may commence the selection process for an agreed medical evaluator by making a written request naming at least one proposed physician to be the evaluator. The parties shall seek agreement with the other party on the physician . . . If no agreement is reached within 10 days of the first written proposal that names a proposed agreed medical evaluator . . . either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. . ."

First, then, you need a valid objection pursuant to Labor Code §4062 and that objection must list the name of at least one potential AME. Second, as we are now well aware from the recently decided case of *Messele v. Pitco Foods, Inc.* (2011) 76 CCC 956 (en banc), both parties must wait 10 days from the date of that letter plus five calendar days pursuant to Code of Civ. Proc. §1013(a) before requesting the panel of QMEs by the process further noted in §4062.2. As noted above, the Medical Unit may still issue a panel upon receipt of QME Form 106 and the associated documentation, but failing to properly comply with this procedure will invalidate the panel and allow the other party to seek a replacement panel.

The *Messele* case sheds light upon the fact that there are specific procedural hurdles that must be cleared in order to avoid invalidating a panel and that, in the case of a panel request, form over substance may determine whether either party can escape from a panel perceived as negative for its side. For example, Labor Code §4062.2(c) specifies that "within 10 days of assignment of the panel by the administrative director, the parties shall confer and attempt to agree upon an agreed medical evaluator selected from the panel. If the parties have not agreed on a medical evaluator from the panel by the 10th day after assignment of the panel, each party may then strike one name from the panel . . ." How many times have you received a panel and immediately received a strike from applicant's attorney, without waiting 10 days after assignment of the panel? While we don't have case law to confirm the penalty for an early strike, we can deduce that the strike was invalid and, therefore, the stricken physician is, technically, still a possible candidate for the panel QME examination.

That section of the Code goes on to state "If a party fails to exercise the right to strike a name from the panel within three working days of gaining the right to do so, the other party may select any physician who remains on the panel to serve as the medical evaluator." This sentence only serves to confirm that a party must wait until it gains the right to strike before doing so. Therefore, if your opposition strikes a name prior to gaining the right to do so (i.e. 10 days after assignment of the panel) and does not strike (or re-strike) within the three calendar days following that right, you gain the right to schedule an examination with any physician remaining on that panel – including the one that was improperly struck by applicant's attorney.

INSIDE THIS ISSUE

Messele: Obtaining a Proper Panel of QMEs and an Admissible Report	1
The Regulatory Corner – More Tips on Avoiding Delays at the DWC Medical Unit	2
Case Notes	3
Appellate Case of the Quarter – Valdez Update	4
Our Success Stories from the Trenches	5

Continued on Page 2

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.

**Copyright © 2011
Grancell, Lebovitz,
Stander, Reubens
and Thomas,
A Professional
Corporation**

www.grancell-law.com

Editor

*Peggy Sugarman, MS,
MAOP, PhD (candidate)
Director of Training &
Organizational
Development*

psugarman@grancell-law.com

The above are just a few of the procedural avenues for obtaining the panel QME of your choice. It is helpful to review 8 CCR §30, et seq. For example, did you know that CCR §31.5(a)(2) allows for a replacement QME to a panel if a QME on the panel issued cannot schedule an examination for the employee within 60 days of the initial request for an appointment? Therefore, if you have gained the right to schedule the appointment and do not have any defense-oriented physicians on the panel you have received, a QME who cannot provide an appointment within 60 days paves the way for you to request a replacement panel.

Did you know that 8 CCR §34 governs cancellation of appointments and the requirement of an appointment notification form by the QME? If your QME does not send that form within 5 business days of the date the appointment was made, you are entitled to a replacement panel QME. And what if your panel QME reschedules the appointment because he or she didn't get the records prior to the evaluation or "soon enough" in his or her opinion to evaluate the claimant? Section 34 governs cancellation timeframes and §34(g) specifies that "failure to receive relevant medical records, as provided in section 35 ... and section 4062.3 ... prior to a scheduled appointment *shall not constitute good cause under this section for the evaluator to cancel the appointment*" (emphasis added). Again, you are entitled to a replacement panel.

Certainly, to prevent a claim of laches or unclean hands in asserting your defenses to any given panel, you want to ensure that your objections are timely and you aren't simply awaiting review of the report before moving forward with your remedies. However, in following the rule of "form over substance" that seems to be enumerated in the *Messele* decision, the lesson here is to use the Code to your strategic advantage when faced with a less-than-desirable panel of QMEs. In addition, to preserve a beneficial panel, it is important to follow the rules and ensure that your selected QME does, as well.

The Regulatory Corner

More Tips on Avoiding Delays with the DWC Medical Unit

By Peggy Sugarman, Director of Training & Organizational Development

The DWC Medical Unit was once a separate rule-making entity known as the Industrial Medical Council (IMC). A creature of the 1989 Margolin-Bill Greene Workers' Compensation Reform Act, the IMC was created so that physicians could address the medical components of the workers' compensation system, from overseeing the training and work product of our Qualified Medical Evaluators to supplying the parties with appropriate physicians to address disputed medical issues. The IMC was technically eliminated in 2004 with the passage of SB 899 (Poochigian) and its functions transferred to the Division of Workers' Compensation under the Administrative Director's regulatory authority, now known as the Medical Unit.

With this transfer came a huge increase in the Administrative Director's workload to provide physicians or physician panels to the public to resolve disputed medical issues. While hiring freezes have hampered the DWC's ability to respond promptly to the public's requests for panel and second opinion physicians, you can avoid delays that are the result of problems with the paperwork and documentation. Here are a few tips to keep in mind:

The Spinal Surgery Second Opinion Process

The *Cervantes* decision clarified the procedure for obtaining a spinal surgery second opinion via Labor Code section 4062(b). The UR process must be completed within 10 days of receipt of the treating physician's report. Where the UR reviewer does not certify the request for authorization for surgery, the employer must file the Objection to Treating Physician's Recommendation for Spinal Surgery (DWC Form 233) with the Administrative Director also within 10 days of receipt of the treating physician's report. The regulations further require that you include a copy of the treating physician's report that requests authorization for the surgery.

Continued on Page 3

The problem is that the development of the regulations and the form predate the *Cervantes* decision and have not yet been updated to reflect what the Medical Unit needs to assign a second opinion surgeon: documentation of timely UR compliance. Without this documentation, the Medical Unit has no way of knowing whether the proper procedures have been followed per *Cervantes*. While I anticipate that the AD's office will be addressing this in a rulemaking or other communication, you can ensure a prompt response and assignment of a Second Opinion surgeon by including a copy of the timely UR denial/non-certification along with the Form 233 and the treating physician's request for authorization for spinal surgery report.

Obtaining a Replacement QME, QME Panel, or Additional QME Panel

There are a number of reasons to request a replacement QME, a replacement panel of QMEs, or an additional QME Panel. If one of the reasons enumerated in 8 CCR §§ 31.5 or 31.7 apply, you need to make sure that you file all of the documentation necessary to show the Medical Unit that your request is valid. Here are a few tips to remember:

1. Never Submit the Form without Supporting Documentation

In all cases, provide a cover letter explaining the situation, with a copy to applicant's counsel as appropriate. If there are agreements between you and applicant's counsel, state it in the cover letter providing dates and conversations, copies of supporting letters, etc. wherever possible. Other supporting documentation may be required, depending on the reason. Check CCR § 31.5 to make sure that you are supplying the correct information.

2. Requesting a Replacement QME on a Panel in Represented Cases

If the initial panel list contains names that should not be there in the first place, you should immediately request a Replacement QME to be added to that panel prior to the "striking" process. CCR § 31.5(b) tolls the time required for the parties to strike a QME from the list until the replacement is issued by the Medical Unit. (For example, the physician is the applicant's PTP, or where the physician is in the wrong specialty requested by the party who has the legal right to select the specialty; any of the other reasons that might apply under CCR § 31.5[a]).

3. Requesting an Entirely New QME Panel in Represented Cases

In most instances, replacement of an entire panel is at the discretion of the Medical Director and must be supported by documentation. However, where you have received the panel and each side has struck one of them, and you *then* find that there is a reason to reject the remaining QME as listed in CCR 31.5(a), the entire panel must be replaced according to CCR § 31.5(c).

When requesting replacement of the entire panel due to issues with the selected QME after each party has struck one, check the third box under Name of QME/QMEs to replace that says "Entire Panel List", check the applicable reason box and also box #17 that refers specifically to CCR § 31.5(c). That lets the Medical Unit know that this is a represented case, that each party has struck one of them, and that none of the prior QMEs can be on the new list.

In your documentation, provide the name of the offending QME and any other documentation to support your request. (For example: *Dr. Jackson was asked to schedule the appointment on June 15, 2011 but was not able to provide an appointment time until after October 1, 2011.*) While not important to a particular case, the DWC Medical Unit believes that they need the name of the specific offending QME so that they can perform other disciplinary actions if necessary and appropriate.

4. Requesting a Replacement QME or QME Panel in Unrepresented Cases

In these cases, you can review the panel provided to the injured worker and check to make sure that none of the physicians provided to the worker should be replaced (conflict of interest, can't schedule timely appointments, same medical group). CCR § 31.5(b) tolls the time for an unrepresented injured worker to select a QME and schedule an appointment until such time as the QME panel or replacement QME is issued by the DWC Medical Director

NEW CASE NOTES

By Amy Vanderwood, Esq., Greater Los Angeles Office

Equal Protection Clause & TTD Benefits to Undocumented Applicants

Kudos to our Orange County colleague, Jesse Peck, who's Petition for Reconsideration in the case of *Cubedo v. Leemar Enterprises, Inc.* (ADJ 70114882) 2011 Cal. Wrk. Comp. PD Lexis 356, was recently granted. The WCAB rescinded the Judge's decision on the award of TTD to an undocumented applicant finding that the decision was not supported by substantial

Continued on Page 4

evidence. Defendants successfully argued that the Equal Protection Clause of the 14th Amendment was violated by the Judge's award of TTD to an undocumented applicant when the employer offered modified work but was unable to continue working due to her immigration status.

The WCAB agreed with Defendants and stated that even though in 2002 the California Legislature found that a person's immigration status was not relevant for the purposes of extending the "protection, rights, and remedies available under state law," this protection does not apply when reinstatement of the applicant's employment would violate federal law.

In reaching its decision, the WCAB cited to the case of *Del Taco v. WCAB* (200) Cal. App. 4th 1437 [65 CCC 342], which held that while immigration status was not relevant to TTD benefits, it was relevant in whether an applicant could be awarded VR benefits when the applicant is unable to return to the workforce due the immigration status.

The WCAB, using the analysis in *Del Taco*, found that while the applicant in *Cubedo* could be entitled to TTD benefits, if the employer had issued a valid modified work offer which the applicant was unable to accept due to her immigration status, Defendants would not be liable for any TTD benefits. Ultimately, the matter was remanded to the trial level for further proceedings to determine what, if any, periods of TTD there were.

APPELLATE CASE OF THE QUARTER: *Valdez v. Warehouse Demo Serv.* (2011) 76 CCC 665 (En Banc)

By Jerry Rempel, Esq., Branch Managing Attorney, Chico Office

Holding: *Where there is a valid MPN, medical reports from physicians outside of the MPN are not admissible.*

Facts: Applicant was initially treated for an admitted industrial injury with a doctor in defendant's valid MPN, and as soon as applicant retained counsel, he sent his client to a doctor outside of the valid MPN as if it didn't even exist. Applicant filed for an Expedited Hearing on the issue of TTD benefits. Defendant objected to the admissibility of the medical reports from the doctors outside of the MPN. The WCJ deferred the issues relating to the MPN, as "not relating to temporary disability." The WCJ relied on the non-MPN doctor's reports and found that applicant was entitled to TTD benefits. Defendant filed for reconsideration, and the WCAB found in defendant's favor in its en banc decision of April 20, 2011. Applicant, being newly aggrieved, filed for reconsideration of this opinion, and on September 27, 2011, issued a second opinion affirming the prior April 20, 2011 opinion.

Analysis: Applicant sought reconsideration contending, among other things, that:

1. The plain meaning of Labor Code §4616.6 "inadmissibility of non-MPN reports is limited to the independent medical review appeal."
2. The ruling that §4616.6 is a broad rule of inadmissibility to all proceedings causes mischief, exorbitant costs, and an absurd result.

With respect to these two contentions, the Board stated that it did not predominantly rely on Labor Code §4616.6 to find that medical reports outside of the MPN are inadmissible. They found persuasive the right to change treating physicians within the MPN (§4616.3(b)), the multi-level appeal process to dispute the opinions of MPN physicians regarding diagnosis and treatment (§§ 4616.3(c), 4616.4(b)-(i)), the provisions requiring the PTP to "render opinions on all medical issues necessary to determine the employee's eligibility for compensation" (§4061.5 and 8 CCR §9785(d)), and the provision for resolving disputes regarding TD and PD under §§4061 and 4062. Assuming all of the notice requirements of § 4616.3(a)(b) have been met, the injured worker is free to choose another doctor within the MPN after the initial visit.

The Board cited *Tenet v. WCAB (Rushing)* (2000) 80 Cal. App. 4th 1041, 65 CCC 477, in stating that the proper procedure to follow would be issuing an objection under §§4061 and/or 4062 if there is a dispute (in this case as to TTD) and start the AME/QME process. Nothing in the Labor Code or the Regulations permits the applicant to simply select a PTP outside of the MPN in an effort to obtain a more favorable report. The applicant is, however, free to change PTP's to another doctor within the MPN.

It should be noted that the Legislature gave the right to object to the diagnosis or treatment, by way of choosing a second and even a third physician within the MPN and

Continued on Page 5

ultimately an independent medical review, solely to the employee. The employer has no such remedy for addressing concerns about diagnosis and treatment other than Utilization Review under Labor Code §4610 or the dispute resolution process under Labor Code §4062.

Further, the Administrative Director removed the employer's ability to challenge the employee's selection of the PTP within the MPN via regulation (see 8 CCR §9767.6[f]). This underscores the fact that the process is intended to address the *injured employee's* concerns.

Also, Applicant is asserting that Labor Code §4605 would allow the applicant to procure additional reports at her own expense, and those reports should be admissible. However, as part of SB899, the language contained in Labor Code §§4061 and 4062 states that reports obtained pursuant to those sections (i.e., AME or QME reports) and "*reports of treating physician or physicians shall be the only admissible reports*" has been removed. This leaves §4616.6 as the sole

controlling language with regard to what reports are admissible when a valid MPN is in place.

In addition, the language in Labor Code §§4060, 4061 and 4062 that "*any party may obtain additional reports at their own expense*" has also been removed. Thus, reports obtained at the applicant's own expense under Labor Code §4605 would not be admissible for issues concerning compensation. This is similar to the admissibility of reports under Labor Code §4050. It has long been held that reports under §4050 cannot be used to circumvent the procedure provided by Labor Code §4062.2 (citations omitted). As such, it follows that §4605 cannot be used to circumvent the procedures set forth in §§4616, 4060, 4061, and 4062.

The matter is currently pending before the Second District Court of Appeal, and it remains to be seen whether the Court will grant review. However, pending such a decision, *Valdez* is citable authority and is binding.

OUR SUCCESS STORIES FROM THE TRENCHES . . .

John Costello, Esq. of the **Greater San Francisco** office achieved a **Take Nothing** on a 100% case in which applicant claimed that a stroke resulting in memory loss, weakness and other loss of brain function was caused by the stress of his work as a police dispatcher. In this case, applicant's stroke occurred approximately six months after he retired from his municipal job and in the course of employment with a security firm where he worked as a security guard. Representing the security company, John secured medical opinions from all of the physicians involved in this complex case and deposed the applicant. Applicant, who elected against the police department, testified that his work at the security company was less stressful than his work at the police station. In his opinion on decision, the WCJ found that the applicant's work subsequent to his retirement was "not injurious employment and did not contribute to the stroke", and relied on the QME who found no evidence that applicant's work as a police dispatcher contributed to the stroke. **Estimated Savings: \$1,204,960.**

Managing Shareholder David Chun, Esq. of **Fresno** obtained a **Take Nothing** in a difficult case that involved an applicant who had been determined to be totally disabled for the purposes of Social Security. Applicant, a registered nurse, claimed that she suffered cumulative trauma to her back after experiencing episodes of severe back pain while at work. She sought treatment from her primary care physician after each episode.

At trial, both applicant and her son made rather sympathetic witnesses, the son being a disabled vet and applicant being on Social Security disability and "totally disabled" according to Social Security. However, the subpoenaed records from the primary care physician attributed each incident to her non-industrial gardening activities. As a result, he had placed applicant on disability through EDD/SDI instead of reporting it as industrial. When questioned at trial, both applicant and her son testified that applicant never did any gardening and would admit to only one gardening-related incident when she "bent over to pick up a single blade of grass".

Through careful cross-examination of the applicant and her son, submission of subpoenaed records, and medical-legal reports, David successfully undercut applicant's credibility and convinced the workers' compensation judge that her asserted history could not be believed and that applicant's medical-legal reports were not substantial evidence. **Estimated Savings: \$166,000**

Kevin Nguyen, Esq. of the **Riverside** office received a Finding and Order on a claim against the State Compensation Insurance Fund (SCIF) in which the WCJ found that CIGA's liability for payment extended only to covered claims. Because SCIF is considered "other insurance", the WCJ ordered SCIF to reimburse the amount requested and ordered them to continue to pay for all future medical care without contribution from our client. **Savings: \$16,573**

ANNOUNCEMENTS

Managing Shareholder Joanne Thomas, Esq. introduces two new attorneys to her team in the **Inland Empire**:

Kristen Lu, Esq. is a graduate of the University of California, Riverside and earned her Juris Doctorate from Western State University College of Law. While in law school, she was a law clerk in the practice area of family law. As an associate attorney, she has experience in the areas of family law, bankruptcy, civil matters, and workers' compensation defense. Kristen adds fluency in the Vietnamese language to her legal skills.

Vahe Tchoukaderian, Esq. is a graduate of the University of California, Irvine where he majored in Criminology, Law and Society and was a member of the UC Irvine Men's Rowing Team. He earned his Juris Doctorate from Southwestern Law School in Los Angeles. While in school, Vahe served the County of Los Angeles District Attorney's Office as a law clerk and the Los Angeles County Sheriff's Office as a reserve deputy sheriff. His legal career includes experience in workers' compensation law, personal injury, and bankruptcy law. Vahe is fluent in the Armenian language and speaks conversational Turkish.

UPCOMING EVENTS

The Association of Workers' Compensation Professionals is offering a mini-conference on innovative ways to handle liens. GLSR&T's **Peggy Sugarman** co-chairs this conference that features the newly appointed Chair of the WCAB, Ronnie Caplane and WCAB Commissioner Al Moresi. The conference is scheduled for January 27, 2012 in Sacramento. For more information, contact Peggy at psugarman@grancell-law.com or go to the AWCP website at: www.awcp.org

GREATER LOS ANGELES

200 N. Sepulveda, 14TH Floor
El Segundo, CA 90245
(310) 649-4911 • FAX (310) 641-8265
Los Angeles • Marina Del Rey
Van Nuys • Long Beach

ORANGE COUNTY

600 South Main Street, 10th Floor
Orange, CA 92868
(714) 543-9090 • FAX (714) 543-9190
Santa Ana • Anaheim • Long Beach

SAN DIEGO

9191 Towne Centre Drive. Ste. 390
San Diego, CA 92122
(858) 678-9448 • FAX (858) 678-9493
San Diego • Oceanside • Vista
El Centro

INLAND EMPIRE

3801 University Avenue, Ste. 270
Riverside, CA 92501
(951) 778-2514 • FAX (951) 778-9233
Pomona • San Bernardino • Riverside
Palm Springs • Bishop

CENTRAL COAST

6633 Telephone Road, Ste. 215
Ventura, CA 93003
(805) 654-0256 • FAX (805) 654-0339
Oxnard • Goleta • San Luis Obispo

SAN JOSE

6840 Via Del Oro, Ste. 290
San Jose, CA 95119
(408) 224-2689
FAX (408) 224-2698
San Jose • Salinas – Monterey

GREATER SAN FRANCISCO

7250 Redwood Blvd, Ste. 370
Novato, CA 94945
(415) 892-7676
FAX (415) 892-7436
San Francisco • Oakland
Santa Rosa

FRESNO/BAKERSFIELD

7555 N. Palm Ave., Ste. 206
Fresno, CA 93711
(559) 436-8136
FAX (559) 436-8367

CHICO

110 Independence Circle, Ste. 202
Chico, CA 95973
(530) 895-8927
FAX (530) 895-8971
Redding • Marysville • Eureka

SACRAMENTO/ STOCKTON

1455 Response Road, Ste. 185
Sacramento, CA 95815
(916) 922-7390
FAX (916) 922-7392