ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at http://www.kttlaw.us/memos.html

RE: GEORGE THE BARTENDER AND THE NEW PANEL QME REGULATIONS

FROM THE LOBBY BAR AT THE HYATT:

Nothing could beat the solitude of the lobby bar at the Hyatt, especially since my Beefeater martinis, straight up, with two olives were being brought to me by Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

Ron Summers, George the Bartender's workers' compensation attorney, was engaged in what appeared to be a very serious conference with George's treating physicians, Dr. Nickelsberg and Dr. Ratbar.

Noticing the direction of my gaze and my look of curiosity, George told me that this **"conference"** had been going on for quite some time. Dr. Nickelsberg and Dr. Ratbar were trying to figure out how to beat the panel QME system which had been set up by the Division of Workers' Compensation (DWC) Medical Unit pursuant to the authorization of Labor Code §4062.2, courtesy of the SB 899 reforms.

My interest was piqued at the mention of somebody trying to beat the QME panel system. From my experience, the panel system is objective, fair and fairly straightforward as regulated by the Administrative Director.

Walking over to join the conference between Messrs. Summers, Ratbar and Nickelsberg, I signaled George to set up a round of drinks and joined the discussion.

In thanking me for his cocktail, Ron explained to me that both Dr. Ratbar and Dr. Nickelsberg applied and were accepted to the State panel by the Medical Unit in their respective specialties.

Therefore, I wanted to know what was the problem?

At this point, Dr. Ratbar broke in and told me that the State panel system included three physicians on every panel. As the panel QME system for injuries on or after 1/1/05 was the only game in town for physicians wanting to maintain a QME practice, the competition was fierce.

I knew that the medical-legal/QME business of both Dr. Ratbar and Dr. Nickelsberg (as well as QMEs for both the defense and applicants) had dropped off considerably as the panel QME system is made up of physicians selected at random from the QME list.

As if they could both read my thoughts, Dr. Ratbar and Dr. Nickelsberg complained that they both came up infrequently on panels as they were competing against many physicians who had also qualified to be selected as QME panel physicians.

Dr. Nickelsberg told me that prior to the State panel QME system becoming effective on January 1, 2005, he was assured of an ongoing volume of business as he was used exclusively by Ron and other applicant attorneys in Los Angeles and Orange County.

While I outwardly sympathized with Dr. Nickelsberg I knew that one of the reasons for the reform law was that

a designated number of so-called QMEs were used over and over again by the Applicants' Bar setting up if not an actual financial conflict, then a perceived one.

I reminded myself that the same could be said for the defense and that the panel QME system in which panel physicians were selected at random[1] by the Administrative Director ensured that physicians would not consider they were being **"hired"** by either the defense or applicant.

My thought process was interrupted by Ron telling Dr. Nickelsberg and Dr. Ratbar that he had found a way to ensure that their names would appear on more panels. Ron explained that in reviewing the Labor Code provisions pertaining to panel QMEs and also the Administrative Rules, he concluded that all panel QMEs were required to complete their reports and serve them on the parties within 30 days from the QME examination.

Ron explained that few QMEs, in his opinion, will make this deadline and that when a QME report is late he would simply request another panel, then another panel, then another panel–until he received a panel with the names of Dr. Nickelsberg and/or Dr. Ratbar.

Ron hastily added that he would, of course, wait for the service of the late QME report to see whether or not it was in his favor as he would not be requesting another panel if he liked the QME report.

Both Dr. Ratbar and Dr. Nickelsberg broke into big smiles at Ron's words, but their enjoyment was short-lived when I advised them as to the new amended Rules of the Administrative Director regarding panel QMEs, which became effective on February 17, 2009.

I advised a crestfallen Ron as to new Administrative Rule 31.5(a)(12) which provides in relevant part as follows:

> **"A replacement QME to a panel. . . shall be selected at random by the Medical Director and provided upon request whenever any of the following occurs: . . . The evaluator failed to meet the deadlines specified in Labor Code §4062.5 and §38 (medical evaluation time frames) of Title 8 of the California Code of Regulations and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report." (emphasis added)**

I told Ron that even before the above Rule became effective the Appeals Board saw through the facade of a party waiting to see whether or not they actually liked the report before objecting and "shopping" for a second bite of the apple or a second QME panel.

The Board's panel decision which is an Order of Removal and Decision After Removal is reported in the California Workers' Compensation Reporter: ***Teytud v. Clean Innovation Corporation***, ADJ 3371087, September 30, 2008 and is cited at 36 CWCR 283.[2]

---

[1] Both Dr. Ratbar and Dr. Nickelsberg hate the phrase: "selected at random."

[2] Anyone requesting a copy of the *Teytud* case should make the request by email.

In ***Teytud*** the Board addressed the very problem of a party objecting to a panel QME report after the report had been served, on the basis of timeliness. Consistent with the new Rules of the Administrative Director regarding QMEs, the Board held as follows:

> **"A party should not be allowed to receive a late report before deciding whether to object to it. To allow that would premit the party to engage in 'blatant doctor shopping.' A party desiring to object to an untimely QME report must do so promptly in order that another report can be obtained to resolve the disputed medical issues as quickly as possible. . . ."**[3]

There have been many such questions and issues raised by the workers' compensation community on all sides of the spectrum. Acting Administrative Director Carrie Nevans has heard these complaints and has addressed these issues in her Amended Rules and Regulations with Respect to Panel QMEs effective February 17, 2009.

Most of the modifications made by Ms. Nevans concerned timeliness of examinations, depositions, reports, etc.

By contrast Agreed Medical Examiners continue to set medical examinations anywhere six months to a year in advance and the same can be said for depositions.

However Ms. Nevans has resolved this issue by Administrative Rule with respect to panel QMEs as follows:

1. AD Rule 31, entitled QME Panel Selection, provides in subsection (c), "Any physician who has served as a primary treating physician or secondary physician and who has provided treatment to the employee in accordance with Section 9785. . . shall not perform a QME evaluation on that employee." **When making a request for a panel QME we want to review our file and advise the Medical Unit as to the name or names of the applicant's primary treating physician and/or secondary treating physicians.**

2. AD Rule 31.5(2) provides that if a QME "cannot schedule an examination for the employee within 60 days of the initial request . . ." then we can request a replacement QME who **can** provide an examination date within the 60-day period.

3. AD Rule 31.7, entitled Obtaining Additional QME Panel in A Different Specialty, provides in subsection (b) as follows: "Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means: . . . The AME or QME selected advises the parties . . . that a new evaluator in another specialty is needed to evaluate one or more remaining disputed medical conditions . . ." This **new Rule will greatly help to speed up resolution of our cases as previously we needed either an order from a Workers' Compensation Judge or agreement between the parties to obtain a second panel.**

---

[3]A Board panel decision (such as the decision referred to above) reported in the *California Workers' Compensation Reporter (CWCR)* is a proper cite authority, especially as an indication of contemporaneous interpretation and application of workers' compensation laws. *Griffith v. WCAB* (1989), 20 Cal. App. 3d 1260; 54 CCC 145.

4. AD Rule 34, entitled Appointment Notification Cancellation, provides in subsection (b) that the QME "shall schedule an appointment . . . which shall be conducted only at the medical office listed on the panel section form." (emphasis added) **This rule addresses the problem of QMEs who travel from office to office.**

5. AD Rule 35, entitled Exchange of Information and Ex Parte Communications, provides that the claims administrator shall provide the selected panel QME with "all records prepared or maintained by the employee's treating physician or physicians, other medical records including any previous treatment records . . . or information, which are relevant to determination of the medical issues in dispute."

6. AD 35(a)(3) provides for the first time that "A letter outlining the issues that the evaluator is requested to address the evaluation, which shall be served on the opposing party no less than 20 days in advance of the evaluation."(emphasis added) This letter has come to be known as the so-called **"advocacy letter,"** which has traditionally been sent to panel QMEs by the respective attorneys representing the applicant and the defendant. However, one of the changes in this Rule is that the word "QME" is crossed out and replaced by the word "evaluator" meaning advocacy letters are now permitted for AMEs as well as QMEs.

7. AD 35(a)(5) provides that "Non-medical records, including films and videotapes, which are relevant to the determination of medical issue(s) in dispute, after compliance with subdivision 35(c) Title 8 of the California Code of Regulations." **The old IMC or Industrial Medical Council Rule[4] 35(c) referred only to unrepresented applicants but the new Rule 35(c) mandates as follows:**

   "At least twenty (20) days before the information is to be provided to the evaluator, the party providing such medical and non-medical reports and information shall serve it on the opposing party. . . . In both unrepresented and represented cases the claims administrator shall attach a log to the front of the records and information being sent to the opposing party that identifies each record or other information to be sent to the evaluator and lists each item in the order it is attached to or appears on the log. In a represented case, the injured worker's attorney shall do the same for any records or other information to be sent to the evaluator directly from the attorney's office, if any. The claims administrator . . . shall include a cover letter or other document when providing such information to the employee which will clearly and conspicuously include the following language: 'Please look carefully at the enclosed information. It may be used by the doctor who is evaluating your medical condition as it relates to your workers' compensation claim. If you do not want the doctor to see this information, you must let me know within ten days.'" (emphasis added)

8. Rule 35(d) then provides: "If the opposing party objects within ten days to any non-medical records . . . those records and that information will not be provided to the evaluator unless so ordered by Workers' Compensation Administrative Law Judge." **This section has been changed slightly so as to make it clear that the remedy for an applicant's attorney's objection to showing videotapes to the panel QME is for the defense attorney or defendant to file a Declaration of Readiness to Proceed to obtain an Order from a Workers' Compensation Judge to show these records to the panel QME.**

[4]Although the Industrial Medical Council (IMC) was formally abolished by the Legislature as of January 1, 2004, the new Labor Code still refers to Rules governing panel QMEs as IMC Rules. However, each Rule indicates that the IMC has been eliminated. Confusing? You bet!

9. Rule 35(f) provides that either party "may use discovery to establish the accuracy or authenticity of non-medical records or information prior to the evaluation." **This Rule is also new and the fact that it is now on the books allows us to argue to a Workers' Compensation Judge that if the applicant's attorney had any objection or questions about the authenticity of the surveillance films he could have engaged in discovery. Although this was always obvious, this is now down in black and white.**

10. Rule 35.5(c) provides "The evaluator shall address all contested medical issues arising from all injuries reported on one or more claim forms. . . The reporting evaluator shall attempt to address each question raised by each party in the issue cover letter sent to the evaluator. . ."(emphasis added) **A similar Rule and/or Labor Code section has been in effect since the commencement of the QME system as of January 1, 1990. However this Rule gives us a choice of which QME system we want to utilize if we have an applicant who sustained injuries prior and subsequent to January 1, 2005. For example if we have an applicant who sustained an injury in 2004 and also 2006, we can theoretically select our own QME for the injury in 2004 and the selected QME would be required to report on the 2006 injury also. The reverse, of course, is also true as a panel QME selected to report on the 2006 injury would also be obligated by this Rule to report on all injuries including the 2004 injury.**

11. Rule 35.5(f) requires a panel QME to make themselves available for deposition in at least 120 days and that the "deposition shall be held at the location at which the evaluation examination was performed. . . " **The obvious intent of this Rule is to prevent a doctor examining an applicant in San Diego but requiring a deposition to go forward in his and/or her Los Angeles office.**

12. Rule 35.5(g) mandates that the selected panel QME "provides an opinion . . . consistent with . . . standards of evidence-based medicine set out in Division 1, Chapter 4.5, Subchapter 1, Section 9792.20 et seq. of Title 8 of the California Code of Regulations (Medical Treatment Utilization Schedule)." **Very important: In our panel QME letter we want to remind the panel QME that this Rule obligates them to provide an opinion pursuant to Labor Code §4600(b) as to whether or not the medical treatment provided to the injured worker is consistent with and complies with the American College of Occupational and Environmental Guidelines (ACOEM).**[5] **This means that we are to emphasize to the panel QME that we do not want his/her opinion as to whether or not the provided treatment is reasonable and that they must advise whether or not the medical treatment program complies with the ACOEM Guidelines.**

13. Rule 38(a) provides "The time frame for an initial or follow-up comprehensive medical-legal evaluation report to be prepared and submitted shall not exceed thirty (30) days after the QME, Agreed Panel QME or AME has seen the employee or otherwise commenced the comprehensive medical-legal procedure. If an evaluator fails to prepare and serve the initial or follow-up comprehensive medical-legal evaluation report within thirty (30) days and the evaluator has failed to obtain approval from the Medical Director for an extension of time pursuant to this section, the employee or the employer may request a QME replacement . . . Neither the employee nor the employer shall have any liability for the payment for the medical evaluation which was not completed within the time frames required . . . " (emphasis added)

[5]Labor Code §4600(b) as amended by Senate Bill 899 required that all treatment comply with the Rules and Regulations of the Administrative Director concerning Utilization Review. The Administrative Director has now adopted the ACOEM Guidelines in full.

Interestingly enough this section applies to Agreed Medical Examiners as well as QMEs and since there are few, if any, AMEs in southern California that submit the reports within thirty (30) days it would appear that we are in line to save an awful lot of money with respect to tardy AME reports.

14. Rule 38(h) provides that the "time frame for supplemental reports shall be no more than sixty (60) days from the date of a written . . . transmitted request to the physician by a party." **I am not sure why a supplemental report should have double the time to be issued but there it is in black and white.**

15. Rule 41(a)(4) provides as follows: "All QMEs, regardless of whether the injured worker is represented by an attorney, shall: Refrain from treating or soliciting to provide medical treatment, medical supplies or medical services to the injured worker." **This Rule represents an important change to the panel QME system. Previously applicants would request panel QMEs who would evaluate the applicant, find that the applicant was temporarily totally disabled and required treatment and would then take over treatment by convincing the applicant that they should be the new primary treating physician.**

This Rule helps resolve an obvious conflict in our system.

16. Rule 45 has been with us for years and is extremely important in the evaluation of cardiovascular injuries and/or disability.

Many specialists in the field of internal medicine (that will end up being panel QMEs) tend to give us liability for a diagnosis of hypertension on the basis of one reading indicating that the applicant has high blood pressure.

The Guidelines for Evaluation of Cardiac Disability were effective as of July 19, 1998 (more than a decade ago) and incredibly are seldom used by the defense industry although these rules are invaluable. These guidelines are 18 pages in length and are not reproduced in the volume we receive each year called the "Workers' Compensation Laws of California" and must be obtained through the Administrative Director.

These guidelines should be furnished to any cardiologist and/or internal specialist who evaluates an applicant for cardiovascular problems. **With respect to hypertension these Guidelines on page 10 would indicate that hypertension is more than simply high blood pressure and "is defined as resting blood pressure over 140/90" and that the "blood pressure must be taken multiple times in both arms in both a supine and in an upright position. It is extremely important to establish that hypertension does exist . . . ." As an industry we have been paying out disability for years for "hypertension" which was misdiagnosed simply because the applicant's blood pressure was elevated once on an examination.**[6]

DISCLAIMER:

Although the above story is a work of fiction as are the characters, the new Rules and Regulations regarding Qualified and Agreed Medical Evaluators are not. These Rules became effective on February 17, 2009 and are

[6]Anyone wishing a copy of the Guidelines for Evaluation of Cardiac Disability should request same by email.

designed to produce objective medical evidence and/or reports that will expedite the providing of benefits to injured workers and lead to an expeditious resolution of the case.

Our responsibility as an industry is to acquaint all panel QMEs (okay AMEs, if you **must**) with their responsibility to comply with these Rules.

For years applicant and defense attorneys have sent form and/or word processor-type letters to medical evaluators and these letters usually had nothing to do with the specific case itself and on the other hand were seldom read.

However, the new Rules and Regulations of the Administrative Director make it crystal clear that each side is to send a letter to the selected medical evaluator not only outlining the issues in **each specific case** but also emphasizing the new Rules which must be followed by each Medical Evaluator.

These new Rules require that a QME **must** address each medical issue submitted in the QME letters, which must be done within thirty days.

Make mine a double, George

– Joe Truce

You may access the New Rules by visiting the links section in our website www.kttlaw.us