

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: August 18, 2003

RE: TIMELINESS OF LABOR CODE §4062 OBJECTION

In cases where the injured employee is represented, Labor Code §4062 provides that we have 20 days (plus 5 for mailing) to object to the report of the primary treating physician. Moreover, Labor Code §4062 provides that there are four issues on which we can make a Labor Code §4062 objection and we can presumably only go through the AME/QME process if we object to one of the four enumerated issues. Therefore, simply an objection to the determinations of the primary treating physician would not be sufficient, as no specific issue has been identified with respect to our objection.

Therefore, I am enclosing a copy of our form Labor Code §4062 objection letter which enumerates the four medical issues as contained in Labor Code §4062.

Although this issue has not been the subject of appellate review, the board in the case of Comer v. Safeway, Inc. 31 CWCR 182 has addressed the troublesome issue as to the timeliness of a Labor Code §4062 objection.

Pursuant to Administrative Rule 9785, the primary treating physician has the **responsibility and legal obligation** to report to the claims administrator - not to the defense attorney. Since the primary treating physician is usually selected by the applicant's attorney, the applicant's attorney also gets a copy. In many cases our client does not forward the report of the primary treating physician to our offices until the statutory time to object of 20 days has elapsed. Most applicant's attorneys take the position that since the report of the primary treating physician was sent to our client they have no obligation to serve this report on us. Therefore, the question arises as to when the 20 days to object starts, i.e. when the PTP report is served on the claims administrator or on the defense attorney in represented cases. In Comer, a panel of the Appeals Board came to the rescue of the defendant as follows:

“The panel held that defendant's objection to the PTP's report within 20 days after its receipt by its counsel was timely even though the objection was made 32 days after the report was apparently sent to defendant's claims representative...”

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In finding for the defendant, the Board noted the WCAB Rule 10501 provides as follows:

“...service shall be made on all attorneys or agents of record unless the party or lien claimant is unrepresented, in which event service shall be made on the party or lien claimant.”

However, in so holding the Board observed that there was no conclusive evidence that the report of the primary treating physician was also served on the claims administrator.

Therefore, although the Board saved the defendant in the Comer case by allowing them to obtain a Labor Code §4062 QME Report, we should not count on the Board being so generous in the future. Therefore I would recommend we continually emphasize to our clients that the reports of the primary treating physician should be immediately forwarded to our offices for review as to whether or not a Labor Code §4062 objection is appropriate.

A handwritten signature, possibly 'A', is written in the center of the page.

WJT:dab

Attach - Labor Code §4062 form objection letter

4063
KEGEL, TOBIN & TRUCE

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

PLEASE REPLY TO:

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2535 KETTNER BLVD., #281
SAN DIEGO, CA 91201-1250
TELEPHONE (619) 696-0906

RE:

WCAB NO:

FILE NO:

D.O.I. :

Dear

The defendant respectfully objects to the medical determinations being made by the treating physician concerning:

The permanent and stationary status of the employee's medical condition

The employee's preclusion or likely preclusion to engage in his or her usual occupation

The extent and scope of medical treatment

The existence of new and further disability

We hereby seek your agreement for utilization of an Agreed Medical Examiner pursuant to the Labor Code.

In this regard we would suggest the following:

We will agree to an extension and ask you to indicate your concurrence in the space provided below, returning a copy of this letter to our office before ____.

"We agree to extend the period for agreement to an AME for twenty (20) additional days."

print name

signature

date

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Re:

[] We will not agree to extend the period for agreement to an A.M.E. Please respond within ten(10) days of the date of this letter.

Very truly yours,

KEGEL, TOBIN & TRUCE

By: _____