KEGEL, TOBIN & TRUCE

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS AND CLIENTS

FROM: W. JOSEPH TRUCE

DATE: FEBRUARY 7, 2005

RE: **CAN I STILL OBTAIN MY LABOR CODE §4062 DEFENSE EXAM FOR INJURIES PRIOR TO JANUARY 1, 2005?**

In its en banc decision in **Marilyn Simi v. Sav-Max Foods, Inc.**; Springfield Insurance Company, SAC 323226, the Appeals Board has answered this question with a resounding "yes."

This issue was raised after the passage of **Senate Bill 899** which enacted Labor Code §4062.2 as follows:

> **"Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section . . . "**

The section goes on to note that after failure to agree to an Agreed Medical Examiner, "either party may request the assignment of a three-member panel of Qualified Medical Evaluators to conduct a comprehensive medical evaluation . . . "

As the new Labor Code §4062.2 presumably replaced the **"old"** Labor Code §4062, some applicants' attorneys had been claiming that defendants presently have only two choices, i.e., agree to an AME or request a panel from the Administrative Director pursuant to the newly enacted Labor Code §4062.2.

The obvious problem, of course, is that the Administrative Director has yet to promulgate rules and regulations regarding newly enacted Labor Code §4062.2 - much less put together a panel for litigated cases.

This left us with the choice of either accepting the opinion of the applicants' attorneys' appointed treating physician or going to an applicant oriented Agreed Medical Examiner.

Fortunately, the Board has now addressed this issue in the **Simi** case as follows:

The Board noted that from 1991 through the year 2003, Labor Code §4061 and 4062, "provided an established procedure for resolving medical-legal disputes in workers' compensation cases . . . "

The Board went on to note that there is no question that under Labor Code §4062, as it existed prior to the enactment of Senate Bill 899, "there is no question that defendant in this case would have been entitled to a defense QME in rebuttal to the treating physician's recommendation . . . "

The Board went on to note the dilemma created by Senate Bill 899 as follows:

> **"However, subdivision (a) of 4062.2 provides that the statute applies to injured workers who are represented by attorneys and his disputes arise out of injuries or claimed injuries occurring on or after January 1, 2005. Thus, the legislature created a new procedure for obtaining medical-legal reports for injuries on or after January 1, 2005, but it did not retain any procedure for injuries before January 1, 2005 . . . "**

The Board, in noting this problem, declared as follows:

> **"Therefore, we hold that for injuries occurring prior to January 1, 2005, §4062, as it existed before its amendment by SB899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees . . . "**

Footnote #7 in its decision contains another important finding. The applicant's attorney has argued in this case that the defendant was required to use the same QME that it had utilized pursuant to Labor Code §4060, (to determine whether or not the case was compensable in the first place). The Board declared that there is nothing in Labor Code §4060, (as there is in Labor Code §4061 and 4062) requiring defendants to return to the same physician.

As this decision was filed on February 1, 2005, we do not yet have an official cite.

WJT:dhh