

Kegel, Tobin & Truce

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS AND CLIENTS

FROM: W. JOSEPH TRUCE

DATE: September 8, 2005

RE: CAN THE APPLICANT'S ATTORNEY TAKE THE
DEPOSITION OF THE UTILIZATION REVIEW
PHYSICIAN?

No, says the Appeals Board in a panel decision entitled *Irene Aguilar v. Worker's Compensation Appeals Board, State of California/Employment Development Department*, 70 Cal. Comp. Cases 885.

In *Aguilar*, the parties selected two Agreed Medical Examiners to evaluate the applicant's injuries in this admitted case.

The defendant initially authorized medical treatment pursuant to Labor Code Section 4600. However, defendants eventually denied applicant's request for additional physical therapy treatments based on the opinion of the Utilization Review physician, Dr. Patricia Pegram, who held that the "requested treatment was not within the ACOEM guidelines . . ."

Instead of utilizing the Labor Code Section 4662 procedure to rebut the UR decision pursuant to the Board's *en banc* in *Willette v. Au Electric Corporation* (2004), 69 Cal. Comp. Cases 1298, the applicant's attorney "served Dr. Pegram with a subpoena requesting that she appear for deposition and produce the documents she relied on in formulating her opinions. . . ."

Defendants filed a motion to quash the deposition subpoena which was denied at a Mandatory Settlement Conference on November 29, 2004.

Defendant then filed a petition for removal contending that "the ordered deposition creates an unreasonable hardship; (2) supplemental reports prepared by the Utilization Review doctor are not allowed under Labor Code Section 4610, and (3) the procedure for challenging the denial of medical authorization is to obtain reports pursuant to Labor Code Section 4062 which in this case would be the Agreed Medical Examiners previously selected by the parties."

Memo to All Attorneys and Clients
September 1, 2005
Page 2

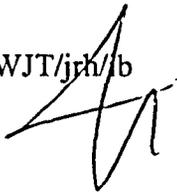
In his answer to the petition for removal, the Workers' Compensation judge contended that the *en banc* decision in Willette was not binding as the applicant in Willette was not represented and the case at bench involved a represented injured worker.

However, the Board held that: "Our conclusion in Willette concerning the rationalization of disputes and the Utilization Review process of Labor Code Section 4061 was not limited to cases involving unrepresented applicants. Labor Code Section 4610 contains no language limiting its application only to unrepresented applicants. . . ."

In reversing the decision of the WCJ, the Board held that the applicant's attorney must follow the procedures in Willette and stated in relevant part as follows:

"Because Labor Code Section 4610 applies to this case, supplemental reports by the Utilization Review doctor are not permitted. As such, a supplemental report by the Utilization Review doctor in the form of a deposition is also not permitted. Because there is no legal basis for the deposition of defendant's Utilization Review doctor, it is unreasonable to burden defendant's Utilization Review process by ordering her deposition. . . ."

WJT/jch/b

A handwritten signature in black ink, appearing to be 'WJT/jch/b', written over the typed initials.