KEGEL, TOBIN & TRUCE

INTER-OFFICE MEMORANDUM

To: ALL ATTORNEYS AND CLIENTS

From: W. Joseph Truce

Date: February 10, 2005

Subject: DOES THE BOARD'S EN BANC DECISION IN WILLETTE APPLY TO REPRESENTED APPLICANTS?

Please refer to my prior memorandum on the all important en banc decision of the Board in **Willette v. State Compensation Insurance Fund** 69 CCC 1298 (2004), in which the Board ruled that applicants' can no longer immediately file for an expedited hearing if they disagree with a denial of treatment by reason of the utilization review process pursuant to Labor Code § 4610.

In **Willette**, the Board explicitly held that Mr. Willette, who was unrepresented at the time, could not immediately file for an expedited hearing after a timely UR denial of his PTP's treatment request. Instead, his **only remedy** was to go through the provisions of Labor Code § 4062 and obtain a panel QME report. Once the panel QME report has been obtained, then he may file a DOR if the panel report does not resolve the dispute.

Although the decision in **Willette** clearly applied both to represented and unrepresented injured workers, applicants' attorneys still contended that since Mr. Willette was unrepresented, the decision only applied to unrepresented injured workers.

In a panel decision entitled **Shearson v. St. Paul Insurance Company** 32 CWCR 318 (Oct 2004), the Board quickly dispelled this assumption and ruled that its en banc decision in **Willette** applied both to represented as well as unrepresented applicants.

Therefore, if our client timely denies a treatment recommendation pursuant to Labor Code § 4610, that decision is **final** unless the applicants and/or applicants' attorney goes through the provisions of Labor Code § 4062 and obtains either a report by an Agreed Medical Examiner or a panel QME per Labor Code § 4062.2[1].

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[1]The date of injury in Shearson was in 2003. However, the panel decision held Labor Code section 4062.2 was the proper procedure to follow for UR disputes. This is contrary to the statutory language of 4062.2 (applies only to injuries after 1/1/2005) and the Board's February 2005 en banc decision in Simi v. Sav-Max Foods, Inc. (old 4061 & 4062 procedures for pre-2005 dates of injury). Thus, there may be further litigation as to whether AME/Panel QME under 4062.2 or the AME/QME system under old 4062 is the proper procedure to resolve UR disputes.

I would imagine that most applicants' attorneys will not challenge treatment recommendations by way of Labor Code § 4062, as the shoe is now on the other foot. Everyone should recall how we scrambled to get out our written objection within the twenty days, as mandated by Labor Code § 4062 and now applicants' attorneys will have to meet the same time limits. In my opinion, this simply is not going to happen. Once the twenty days for objection expires, the utilization review decision is final and cannot be overturned. **Another victory for the defense.**

WJT