CASE LAW UPDATE

- Is treatment provided by an MPN doctor subject to UR/IMR? *Parrent v. WCAB (Pacific Bell Telephone Co.), 82 CCC 155.*
  - Yes. The Supreme Court denied review.
  - Facts: MPN physician requested authorization for two prescription topical creams. Employer submitted request through UR. UR certified one of the two creams.
  - Administrative judge found the employee’s participation in the MPN did not preclude the ER from referring the treatment recommendations to UR.
  - Argument being made is that MPNs have their own internal IMR process, which is a “separate vehicle” aside from IMR for employers to provide care for injuries (i.e., second and third opinions)
CASE LAW UPDATE

  - Yes. So long as the evidence supports a finding that applicant would be left with a complete denial of benefits should the case be fully adjudicated.
    - Similar to a Thomas finding: “serious and good faith issues” that would defeat the applicant’s entitlement to all benefits.
  - The voucher is only owed in post-1/1/13 DOI cases if there is PPD and the employer has not offered work to the injured worker.
  - Use in denied cases with strong evidence to support denial.
  - More judicial scrutiny.

CASE LAW UPDATE

- Is treatment recommended by a secondary treating physician subject to UR? (Lopez v. City and County of San Francisco, 2016 Cal. Wrk. Comp. P.D. LEXIS 206)
  - Yes.
  - Facts: STP requested disc replacement surgery. Defendant did not timely perform UR of the requested treatment on the argument that secondary treating physicians have no rights to submit requests for authorization. WCAB found defendant did not meet mandatory UR requirements and they retained jurisdiction to determine medical necessity.
    - WCAB panel reasoned that there is no express requirement in the Code or Regs that an RFA only be submitted by a PTP.
**CASE LAW UPDATE**

- **Are you entitled to a new panel if the PQME requests $1,000 in “deposition preparation fees” at least 11 days prior to a deposition?** *(Chaides v. The Kroger Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 143)*
  - Not necessarily. The WCAB issued a split-panel decision ruling that the decision to replace a PQME must be weighed against the goal of promoting timely resolution of claims (avoiding doctor shopping, increase in costs of litigation and delays).
  - Even though the requirements as provided by the PQME were inappropriate under CCP §2034.450(a) (allowing for fees at the commencement of the depo) and inappropriate under the Med-Legal Fee Schedule ($250.00 per hour), the applicant had seen the PQME many times, he had issued several supplemental reports, and was on the verge of finalizing opinions when his deposition was set. Therefore, a new panel was inappropriate.

**CASE LAW UPDATE**

- **Is a party entitled to a replacement panel when the opposing side sends a letter to a PQME in face of an objection to that letter?** *(Lopez Castaneda v. Forever 21, 2016 Cal. Wrk. Comp. P.D. LEXIS 565)*
  - Yes.
  - Facts: Defendant sent the PQME a letter referencing portions of applicant’s deposition testimony after applicant had timely objected to the references. However, transcript was part of documents agreed to be provided to PQME.
  - Split-panel decision concluded that the letter discussing applicant’s deposition testimony constituted non-medical information which as subject to applicant’s objection and since applicant timely objected, defendant was prohibited from sending it under Labor Code §4062.3(b) without first obtaining an order from a WCJ.
  - However, dissenting opinion from Commissioner Razo was that letter itself was not non-medical information subject to objection as the deposition transcript itself was previously sent by joint agreement.
  - Did WCAB rule on correct issue? Was the letter “communication” or “information”?
    - **Practice Tip:** If an objection arises to your proposed correspondence, safest bet is to file a DOR to have the issue heard and ruled upon.
CASE LAW UPDATE

- Does a defense attorney have an obligation to send the RFA to the claims administrator? (Czech v. Bank of America, 81 CCC 856)
  - Yes.
  - Facts: 2/10/16 applicant filed a DOR for an Expedited Hearing claiming that defendant failed to authorize treatment. Defendant filed a timely objection indicating defendant had not received the RFA. On 3/1/16, applicant’s attorney faxed a copy of both the medical report and the RFA to the defendant’s attorney. Defendant did not forward this to the claims examiner or UR company.
  - Expedited Hearing took place where it was ruled no timely UR was conducted and the treatment was ruled reasonable and necessary and was to be authorized.
  - Court held that even though Regulation §9792.9.1 indicates that an RFA is deemed received by the claims administrator or UR organization, the panel concluded that a defendant’s attorney has a continuing affirmative duty to conduct a good faith investigation of the claim and provide benefits when due, which includes taking active steps to obtain the missing RFA and send it to their client for a review of the RFA.

CASE LAW UPDATE

- Do you need a PTP to address all allegations prior to obtaining panels in different specialties? (Vera v. Monsanto Co., 2016 Cal. Wrk. Comp. P.D. LEXIS 360)
  - No.
  - Facts: Applicant sustained back injury and was last seen by the PTP four years ago. Applicant had continuing complaints regarding neurological symptoms and sexual dysfunction. WCAB found that although generally parties should obtain opinion of PTP prior to seeking additional qualified medical evaluator panels for different body parts, a PTP’s opinion is not mandatory. Both parties are free to seek the opinions of the PTP if they wish to evaluate additional symptoms.
CASE LAW UPDATE

What is a “violent act” for recover PD for psychiatric injuries under SB863 Reforms? (Larsen v. Securitas Security Services, 81 CCC 770)

- Panel said a “violent act” is not limited to criminal or quasi-criminal activity and may include other acts that are characterized by either strong physical force, extreme or intense force, or are vehemently or passionately threatening.
- Facts: Applicant, security guard was in the middle of a walking patrol. Apparently, a car struck her from behind, she hit the back of her head so hard when she was hit by the car, at one point she had a thought that she was going to die. However, she does not recall seeing the car and she lost consciousness. She was taken by ambulance to the ER and was kept in the emergency room for observation. She developed headaches and dizziness as well as memory problems.

CASE LAW UPDATE

What is a “good faith personnel action”? (Ferrell v. County of Riverside, 81 CCC 943)

- Facts: An entire department of the County was eliminated due to budgetary concerns and all employees from that department were transferred to different departments with new probationary periods and the need to share limited resources.
- Panel ruled that this was not a “personnel action” and was rather a general working condition.
  - “Personnel action” is not intended to cover all actions by any level of personnel or all happenings in workplace. But, it is instead to include conduct by management including, but not limited to, transfers, demotions, layoffs, and certain disciplinary actions.
  - Distinction drawn between “stressful working condition” v. “personnel action” where the latter is directed towards an individual employee and involves his/her “employment status.”
What is a “sudden and extraordinary” event? (Dreher v. Alliance Residential, 2016 Cal. Wk. Comp. P.D. LEXIS 421)

- When an injury is caused by an “uncommon, unusual or totally unexpected event.”
- Facts: In this case, applicant, a live-in maintenance supervisor, was employed for less than 6 months at the time of injury. He was walking from one walkway to another and the surface went from rough to slick, causing him to fall, sustaining orthopedic injuries. Applicant also alleged a psych injury, claiming the change in surface and subsequent fall “surprised” him and was a “sudden and extraordinary” event. Court ruled that applicant failed to meet burden of proof event allowing him to recover psych PD.

When is an injured worker entitled to multiple panels? (Parker v. DSC Logistics, 2016 Cal. Wk. Comp. P.D. LEXIS 402)

- Think claim form! The panel found that the date of filing of claim form determines when injury claims must be considered by a medical-legal evaluator.
  - A QME is required to address all contested medical issues arising from all dates of injury report on one or more claim forms filed prior to the initial qualified medical evaluation.
  - In new cases filed by claim form after the initial qualified medical evaluation, the employee is not required to return to the original evaluator, even when the injuries involve same body parts and same parties (Navarro v. City of Montebello (2014) 79 CCC 418 (en banc)).
- Facts: Applicant had claimed injuries in 2009, 2014, and 2003-2004 CT. He was seen by a QME per §4060 on 1/9/15 for the 2014 DOI. He was not allowed another QME to address the other DOIs.
- CAUTION! Watch out for applicants who file a claim form late to try to obtain another panel. Evaluate case for potential SOL defense.
CASE LAW UPDATE

• Is a report obtained by an applicant, at their own expense, for the sole purpose of rebutting the opinions of a QME admissible? (*Batten v. WCAB, 2016 Cal. Wrk. Comp. P.D. LEXIS 315*)
  - No.
  - Facts: Applicant sustained compensable injuries to the jaw, shoulders, knees, neck, and low back. Psych was also claimed. Psych QME found psych non-industrially related. Applicant obtained their own qualified expert who found psych injury compensable. At Trial, both reports were offered by the respective parties. WCALJ accepted applicant’s consultant report, rejecting the QME’s reporting. Board found consultant report inadmissible.
  - The court held that an applicant may consult with a doctor at their own expense, in the course of seeking medical treatment and said report shall be admissible. However, neither Labor Code §§4061(i) nor 4605 permit the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of a QME on compensability.

CASE LAW UPDATE

• Is it proper to file a DOR when both parties request panels in different specialties and there is a dispute as to which one is correct? (*Portner v. Costco, 2016 Cal. Wrk. Comp. P.D. LEXIS 499*)
  - No. Panel specialty disputes “shall be resolved” by the Medical Director per Reg §31.5(a)(10).
  - Facts: Applicant sustained a knee injury. Parties simultaneously requested panels: Defendant=orthopedic surgery, Applicant=physical medicine and rehabilitation. Defendant filed DOR for an MSC and matter was set for Trial. WCALJ found that the panel in orthopedic surgery was the proper specialty. Applicant filed a Petition for Removal, which was granted.
  - Parties cannot bypass the requirement that QME specialty disputes “shall be resolved” by the Medical Director, regardless of the reality that an Expedited Trial would be quicker (allowable per LC §5502(b)(3)) and appeal of the Medical Director’s determination would ultimately have to be resolved by the WCJ.
Panel QMEs and Ex Parte Communication (Vasquez v. Providence Saint Joseph Medical Center (panel decision: [Order dismissing; Petition for Reconsideration and Denying Petition for Reconsideration] (December 2016) 44 CWCR 269.)

**Issue:** There was a claim that the QME was disqualified for failure to provide a supplemental report within 60 days per 8 CCR 38.

**Holding:** You don’t get a replacement panel simply because a request for a supplemental report is late.

The board will exercise its discretion by considering:

1. The length of the delay;
2. The prejudice of the party subject to the delay;
3. The efforts made to remedy the delay;
4. The specific facts, including a potential for waiver of the objecting party and
5. The constitutional mandate for expeditious determination of the controversy.

**CASE LAW UPDATE**

Panel QMEs and Ex Parte Communication (Vasquez)

**Facts:**
- PQME timely served the initial report.
- There was a request for a supplemental report by the Defendant that was ignored.
- Then there was a request by AA.
- There was a request for the supplemental report by the defense.
- Various things were sent to the doctor.
- Doctor responded to the applicant’s request but never responded to the defendant’s initial request.
- Defendant moved to disqualify and replace the PQME.
- Judge refused to replace the PQME.
- The WCAB looked at LC 4062.5 that requires the initial report to be provided within 30 days. That is a statutory requirement. But there is no statutory requirement for the Board Rule 28.
- There is a strong argument that Defendants waived their right to request a replacement panel when they didn’t ask for it after the first request and they communicated with the PQME again.
CASE LAW UPDATE

- Panel QMEs and Ex Parte Communication (Gallardo v. AT&T Mobility Services (Panel Decision after Reconsideration) (44 CWCR 282 (December 2016)).

  1. An order denying a request for a replacement panel for a late supplemental PQME report is discretionary.

  2. An ex parte communication from a party requesting the status of a supplemental report is not a prohibited communication justifying a replacement PQME panel. (Applicant liked this QME and called him 5 times trying to get the report.)

  3. The PQME did not identify a third party (E-DATA) had reviewed and summarized the medical records.

  4. A report from a PQME is inadmissible because the QME did not disclose the involvement of a third-party records review service as required under LC §4628.

CASE LAW UPDATE

- Information v. Communication (Maxham v. CA Dept. of Corrections 2017 Cal.Wrk.Comp. LEXIS 6 (en banc)).

  - En banc unanimous decision.

  - Applicant wrote an extensive advocacy letter and defendant issued an objection to that letter. Applicant sent the letter to the doctor anyway. That is where the conflict occurred.

  - Advocacy letters are not prohibited, but if you are referencing information that you did not previously serve and give AA an opportunity to object to, then the advocacy letter may be inappropriate.

  - An advocacy letter may contain information that the other side needs an opportunity to object to.

  - Note this was an AME.
**CASE LAW UPDATE**

  - Causation of injury and causation of disability are two distinct and separate issues to be addressed by medical providers and determined by Judges. Those are two separate and independent concepts that need to be analyzed completely separately.
  - Applicant was working in conditions where his boots, socks and feet were wet and he had a problem that resulted in a foot amputated due to infection. But he had diabetes and so, per PTP, this was an industrial injury. The PQME said not industrial. Judge felt PTP was more substantial evidence of the two.
  - Causation of Injury: What mechanism of injury caused the injury. If even 1% is industrial, then this person is an injured worker with an industrial injury. He gets full medical treatment and TD; possibly death benefits.
  - On the other hand, causation of disability (i.e. PD) is determined subsequent to an MMI determination and his disability may be related to his non-industrial diabetes.
  - Quote from the Supreme Court (Southcoast case) – even if just a small contribution is the industrial component, then the injury is industrial. – just the crumbs of the pie – causation.

**CASE LAW UPDATE**

  - Remember that, even if a WCJ overturns an IMR decision, the only result is a new IMR review and determination.
  - But a Judge can determine what a **plainly erroneous finding of fact** is and that a plainly erroneous fact includes whether the IMR doctor used the wrong MTUS guidelines.
  - Nickerson case gave the Judges the power to overturn IMR – it empowered more litigation.
  - If you don’t know the MTUS or other guidelines, how do you even know if IMR was invalid?
  - You can’t terminate opioid-based medication without the consideration of effect of that termination of that medication. Under the MTUS, if it is not appropriate to continue the use of opioid medications in a given injury, you still have to consider detox or weaning.
CASE LAW UPDATE

  - Pay interpreter late – interpreter can get a LC 5814 late penalty and general fund can get a fee.
  - "A 25% penalty may be awarded to an interpreter if payment of his or her fees are found to be unreasonably delayed pursuant to LC §5815(a), along with sanctions under LC §5813."
  - Sanctions in this case were $550.
  - There are new Regulations for the Interpreter to file for a lien in various scenarios dependent on the service they are providing:
  - 8 CCR 9795.3 sets the rules regarding fees for interpreter services. There are three options for an interpreter to request payment for fees:
    1. Petition for Determination of Non-IBR Medical-Legal Dispute for services rendered at a medical-legal exam (CCR 10451.1(b)(1)(C).
    2. Petition for Costs for services at a deposition or WCAB proceeding (10451.3).
    3. Lien claim for services rendered at medical treatment appointment (10451.2(c)(2)(B)).

CASE LAW UPDATE

  - Four separate RFAs for treatment related to neck and headaches (admitted body parts).
  - All were timely denied by UR.
  - Defendant only submitted the RFA and the contemporaneous PTP report to UR.
  - No request for additional information was made.
  - My point: maybe additional medical records didn’t need to be reviewed???
  - Sanctions can be imposed for the UR company failing to look at the carrier’s online medical record (failure to fully investigate the case) when they had access to the entire medical record.
  - Defendant said the authority to sanction carrier was the purview of Maximus and the DWC based on the Dubon case, since UR was performed timely.
  - It was about defendant’s failure to review relevant medical records in their possession beyond the RFA and other reports.
  - Court found that they do have the power to award sanctions, even though they remanded to determine whether sanctions would be appropriate if the applicant met the high burden of determining that the carrier willfully failed to comply with the statutory or regulatory requirements when undertaking UR, even if the UR is timely.
  - Forcing the UR doctor to go through the applicant’s medical record online seems like a high burden.
CASE LAW UPDATE

- **Statute of Limitations** *(Nu Square Corporation and Truck Insurance Exchange v. WCAB (Kwok) (Filed 8/11/16) (Certified for publication) 81 Cal Comp Cases 865)*
  
  - Applicant was taken to a nurse infirmary but was never given a claim form so 7 years SOL was tolled.
  
  - Always this argument about not handing out claim forms like they are Tic-Tacs, but look at the facts. There was even medical treatment here. Um – the guy was found off of the ladder, outside, unconscious, with the ladder next to him (he was a restaurant manager and waiter). He received 24-hour medical care. He sustained a brain hemorrhage and continues to be paralyzed from the waist down.
  
  - Owner, who happened to be the brother of the IW, was notified the day after the accident. No evidence was presented to show this telephone call didn’t happen, even though the owner was in Hong Kong and being treated for his own illness.

QUESTIONS?

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