

**PQME SHOPPING:
DEFENSE STRATEGIES WHEN APPLICANT LANDS
THE FIRST PUNCH**

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Applicants' attorneys are increasingly manipulating the Qualified Medical Evaluation (QME) panel process in an attempt to increase the level of disability by selecting specialties that are inappropriate to the injury or part of body claimed.

Pursuant to 8 CCR § 31, the party making the initial request for a panel QME list holds the legal right to select the specialty of that panel of physicians. Consequently, applicants' attorneys initiate the request for a panel QME with a specialty designation of their choice as a strategy to maximize the amount and nature of benefits owed to applicants. Defendants are thereby often confronted with a panel of chiropractors or pain management specialists in a case where an orthopedic or neurologic specialist is clearly required.

In response to issuance of such inappropriate panel specialties, defendants are forced to utilize other legal avenues to replace the initial panel QME list with a new panel of physicians in an appropriate specialty. Many times this involves obtaining an Order for a replacement panel directly from a Workers' Compensation Judge (WCJ).

However, in light of the growing disputes in this regard, the Division of Workers' Compensation Medical Unit (Medical Unit) has recently issued new regulations effective February 17, 2009, which may make it easier for defendants (or parties in general) to obtain replacement panel QME lists. The Medical Unit has also issued a new, optional form that allows parties to obtain replacement panels on an expedited basis. (*QME Form 31.5*).

Under the new regulations, there are 16 separate grounds for replacing a panel QME without the need for a WCJ Order in that regard. (8 CCR § 31.5). The 16 separate grounds to replace a panel physician or the entire panel are expressly annotated on QME Form 31.5 – accessible through the link below.

Significantly, the new regulations include two specific provisions that allow defendants to obtain replacement panels in a relatively expeditious fashion where an inappropriate specialty has been chosen. ((8 CCR § 31.5(a)(9); 8 CCR § 31.5(a)(10)).

Pursuant to 8 CCR § 31.5(a)(9), parties may obtain a replacement panel of QME physicians where the Medical Director, upon written request finds **good cause** that a replacement panel is appropriate for reasons related to the medical nature of injury. "Good cause" is defined as "documented medical or psychological impairment." Hence, if defendants can show through documented medical impairment/ reporting that the applicant's injury is orthopedic (or neurological, psychological, internal etc.) in nature, then they may be able to obtain a panel of QME physicians in that corresponding specialty as opposed to the specialty requested by applicant's attorney.

Similarly, pursuant to 8 CCR § 31.5(a)(10), the Medical Director may issue a new panel if it is determined upon review of the medical records that the specialty chosen is inappropriate for the disputed issue(s). In order to obtain a new panel QME list under this subsection, the request for the new panel must be made in writing and transmitted to the Medical Unit with a copy of the Doctor's First Report of Occupational Injury/ Illness and the most recent progress report by the primary treating physician (PR-2 report or narrative report in lieu of same).

Consequently, it appears that in cases where the panel requested is not in the appropriate specialty such as a chiropractic panel issued for a carpal tunnel injury, the Medical Unit will likely issue a new panel so long as medical reporting substantiating the need for a different panel specialty is transmitted to the Medical Unit with the request for the replacement panel. If the Medical Unit declines to issue a replacement, the parties are not precluded from seeking redress before the Workers' Compensation Board.

The Medical Unit has issued a new form so as to make the process of requesting a replacement panel simpler and more user-friendly. The new, optional form was unveiled on May 18, 2010 and can be accessed through the Department of Industrial Relations website, at the following link:

http://www.dir.ca.gov/dwc/FORMS/QMEForms/QMEForm31_5.pdf

Defendants should be able to utilize this new form and obtain *replacement* panels in the appropriate specialties by utilizing the two specific provisions noted above – enumerated on item numbers 9 and 10 of the corresponding panel QME form 31.5.

If the Medical Unit determines that a request for a replacement panel in accordance with the above provisions is valid, the time limit to select and/or strike a name from the panel QME list pursuant to Labor Code §§ 4062.1(c) and 4062.2(c) is tolled until the replacement panel is issued. However, it is recommended that a party utilize its strike against a physician on the original panel in the event the request for a replacement panel is denied.

In an effort to make issuance of panel QME lists more efficient, the Medical Unit also issued a new form for obtaining *additional* QME panels in different specialties. Hence, where an orthopedic panel QME physician (or Agreed Medical Examiner) indicates the need for a psychiatric medical-legal evaluation as well, the parties can move toward obtaining an additional panel QME list in a more expeditious fashion by completing the form accessible through the link below in accordance with 8 CCR § 31.7:

http://www.dir.ca.gov/dwc/FORMS/QMEForms/QMEForm31_7.pdf

The new QME regulations could serve as a useful tool for defendants to replace inappropriate panel specialties with ones that move cases to resolution in a more expeditious and efficient manner – thereby minimizing costs and limiting the nature/ extent of benefits provided.