The Workers' Compensation Newsletter

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News / Articles

Court of Appeal Nixes WCAB's "Grant for Further Study"

By: Aleah McGraw, Associate Attorney, LFLM - San Francisco

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Full Article

Advocacy Letters: Strategies For Eliciting A "Winning" Report

By: Dr. Ron Heredia, Good Mood Legal
Mark Turner, Partner, LFLM - Sacramento

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2023 CAAA Conferences: What Are Applicant's Attorneys Saying?

By: Nathaly Martinez, Associate Attorney, LFLM - Sacramento

Twice a year, the California Applicants' Attorneys Association has a conference to discuss everything from changes in Workers' Compensation Law, to developing new strategies to increase recoveries for their clients. The 2023 Winter CAAA and Summer conferences were no exception; this year's conferences covered a range of topics including expediting medical treatment, strategies to obtain QME panel lists in their preferred specialties, increasing permanent disability, and pursuing penalties.

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Advocacy Letters: Strategies For Eliciting A “Winning” Report

A carefully crafted advocacy letter will make an impactful first impression. Often, an advocacy letter is one of the first communications between an attorney or adjuster and the medical expert. Many advocacy letters submitted to medical experts are "form letters" lacking specific details and information from a medical standpoint. As a result, medical experts are left to submit reports that do not address specific details of the claim and pertinent medical information. This leads to delays, supplemental report requests, depositions, re-evaluations, unnecessary costs, etc. A “winning” advocacy letter should provide detailed expectations and specific instructions for the medical expert to address during their examination and in their report that includes information about the history of the applicant’s symptoms, their life-history, their observations of the applicant, results of diagnostic tests, the doctor’s review of records and collateral sources of information. Of course, there are important legal ramifications to consider when crafting an advocacy letter, as well, and a savvy practitioner should do as much to advocate for their position within the confines of the law.

A carefully crafted advocacy letter will guide the doctor toward taking a complete and comprehensive history of the applicant’s symptoms or complaints at the time of the exam that includes information about their frequency, intensity, duration, onset and course over time. Without this data in the report, the doctor will likely not provide a complete qualitative history of the claimant's symptoms. The doctor also should be asked to discuss in their report a complete history of the claimant’s symptom of sleep problems, if applicable, including a baseline with information about sleep behaviors prior to and following the reported work injury. Quite clearly, without information about the applicant’s baseline sleep behavior, it will be impossible to know if any sleep problems reported at the time of the doctor’s examination were not normal and longstanding and/or if those problems were caused by any industrial events.

In addition to the above, it is imperative that an advocacy letter instruct the medical expert to provide a complete life history of the applicant in their report. The WCAB has said that a medical report is not substantial medical evidence if it is not based on an “adequate medical history.” In this regard, it is reasonable and necessary to ask that the expert provide a report that includes information about the applicant’s family of origin, educational background, work history, a thorough accounting of the work injury, a history of any significant medical and/or legal problems, a history of medication/substance use, military background and marital history. As we know, applicant’s answers to these questions can have all sorts of ramifications; for example, they can lead to new sources for subpoenaed records, or increase non-industrial apportionment.

With regard to the doctor’s face-to-face encounter with the applicant, advocacy letters should ask the medical expert to write a report that includes information about their observations of the applicant’s behaviors. Specifically, experts should be asked to describe the applicant’s mood at the time of the exam as well as any observed physical problems. Further, the expert should be asked to describe the applicant’s appearance, their demeanor, their interactions with the examiner and any office staff, and whether they were accompanied by family members or friends. The presence of one or more positive “Waddell’s Signs” can help reinforce a conclusion that an applicant is malingering or exaggerating symptoms, increasing the effectiveness of surveillance which contradicts the applicant’s claims. Moreover, with regard to psych claims, mental health experts should be asked to provide a discussion in their report of the results of their Mental Status Examination (MSE) that includes their observations of the applicant’s signs or behaviors in the areas of mood, memory, concentration, insight and judgment. Mental health experts should be instructed to state in their report the specific tasks used during their MSE to assess mood, memory, concentration, insight and judgment.

With regard to diagnostic tests, a “winning” advocacy letter will ask the doctor to include in their report the names and results of diagnostic tests administered to the applicant. When the medical expert is a mental health practitioner, it is imperative that they are asked to include the results of each test in their report in the forms of numbers produced by the test scoring. The expert should be asked to include in their battery of tests a Minnesota Multiphasic Personality Inventory (MMPI), since that test is well known as an effective instrument in detecting psychopathology and providing meaningful information about an individual’s test-taking attitudes and credibility.

In addition to the above, medical experts should be told in the form of an advocacy letter that it is expected they review every record sent to them prior to their exam. Advocacy letters should include a statement letting the doctor know that if they find that the applicant does not meet the threshold for any diagnosis, they should state as such in their report. Also included in a letter to the expert should be a statement instructing the doctor to disclose in their report, any collateral sources of information in the form of interviews with the patient’s friends, relatives and/or business associates (when necessary).

While formulating and drafting an advocacy letter with a winning strategy is the first step, the next hurdle is getting that advocacy letter past opposing counsel. As we know, under Labor Code 4062.3, “information” that an opposing party wishes to provide to an evaluator must be served on the opposing side 20 days before it is provided to the evaluator. During this waiting period, the opposing party has ten days object to elements of the cover letter and request it be removed. Obviously, an advocacy letter must stride the line between presentation of the facts and outright advocacy. Citations to specific information within the medical reporting or transcripts provided can help guide an evaluator to the pertinent elements of oftentimes voluminous subpoenaed records or materials, without risking unfairly biasing or prejudicing them. It is also important to provide references to specific case law, such as the Escobedo decision, or City of Jackson v. Rice when asking an evaluator to address apportionment. Ensuring the evaluator is basing their opinion on an appropriate understanding of a legal theory is essential to ensure the report is substantial medical evidence.

In summary, if you want to make a lasting “first impression” upon the medical expert, draft a "winning" advocacy letter that includes the information discussed above. This first impression will demonstrate for the medical expert that the letter’s author is not interested in a medical report that does not constitute substantial medical evidence. Ultimately, this approach will help to expedite claims and avoid unnecessary delays and costs.

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2023 CAAA Conferences: What Are Applicant's Attorneys Saying?

Twice a year, the California Applicants' Attorneys Association has a conference to discuss everything from changes in Workers' Compensation Law, to developing new strategies to increase recoveries for their clients. The 2023 Winter CAAA and Summer conferences were no exception; this year's conferences covered a range of topics including expediting medical treatment, strategies to obtain QME panel lists in their preferred specialties, increasing permanent disability, and pursuing penalties.

1) Medical Discovery - Securing Authorization for Treating Physicians, Consulting Physicians, and Additional QMEs

Following a work injury, the first medical treatment an applicant receives is typically at an occupational medicine clinic, at the behest of the employer. As occupational medicine is conservative in nature, applicant's attorneys were urged to immediately transfer the care of their clients to more liberal doctors within the employer's medical provider network (MPN), the idea being that these more liberal doctors will request treatment plans that will prolong the time for recovery, thereby delaying an immediate return to work, and increasing defendants' costs.

Continuing the conference's focus on medical treatment, one panel discussion dealt primarily with the growing dissatisfaction with the delivery of medical care from the employer's MPN. Namely, applicant attorneys viewed MPN doctors as underestimating applicant's injury for fear of being blackballed by the defense and therefore producing biased reports. Much discussion centered on strategies to secure treatment outside of MPNs, and on shifting the burden of providing medical treatment back on the defense. It was suggested that a written demand letter be sent to the defense so they can identify, provide, schedule, and send the medical records to the primary treating physician. One of the suggested methods was through the Medical Access Assistant (MAA), a requirement of all MPNs under CCR section 9767.5(h)(1). The timeframes in section 9767.5 set forth tight deadlines for complying with MAA requests. In the near future, we can expect an increase in expedited hearings in situations where immediate action is not taken in response to their demand letter.

There was also a dissatisfaction among the conference panelists with the perceived significant delay between applicant's date of injury and the first medical treatment consult. The delay was in large part viewed as an issue arising from claims examiners who failed to authorize treatment timely. To incentivize the provision of immediate care, it was suggested that Applicant's attorney should pursue penalties. Obviously, we should treat every request for treatment quickly and within the allotted timeframes, even though it may not always be possible. However, we can expect applicants' attorneys to be much more aggressive with authorization of treatment, changes of treaters, or requests for medical access assistant information, as petitions for penalties will likely follow even small delays in treatment. As a reminder, claims examiners have five business days from first receipt of the request for treatment authorization, unless additional reasonable medical information is needed to make the decision. If more information is needed, the additional reasonable medical information must be requested by the fifth business day from the date of the request. In addition, section 9767(f) calls for the first treatment under the MPN to be "available within 3 business days of…notice to an MPN medical access assistant that treatment is needed."

When treatment authorizations are set for an expedited hearing, the WCAB Judges have found that the DOR is notice itself of the treatment request, and an argument for lack of notice cannot be upheld. Under these circumstances, applicants' attorneys were urged to seek penalties in expedited hearings and to not miss this opportunity. We should expect a renewed fervor in applicant's attorneys utilizing these provisions and their tight time windows to either treat outside the MPN where allowed, or to obtain penalties on delayed treatment benefits.

2) Case Law Review—Selection and Assignment of Panel Qualified Medical Evaluators

After several legislative changes to the panel QME process, including the introduction of the online process, the Legislature hoped that there would be less litigation around the panel QME process. However, getting the right evaluator can make or break a case, and if anything, there has been more litigation around panel QMEs in the years after the changes. In disputed cases, parties often rush to request a panel QME in a desired specialty. However, that rush has led to a rash of recent decisions from the WCAB addressing the proper way to begin the QME process. Special attention to clearly written objection letters is important to prevent any delay in the QME panel process.

Several recent cases have laid the groundwork that proper notice of the disputed issues must be given to trigger the QME panel process. In one such case, *Hazen (Daniel) v. Porterville Unified School District* (2022) 87 Cal. Comp. Cases 932, the WCAB invalidated a panel list when the objection letter failed to list with specificity the disputed issues. The court reasoned that permanent disability notices that have a general disagreement with the findings of a treating physician is simply not enough; the objection letter must put the opposing party "on notice" of a specific finding to which they are objecting. Furthermore, the WCAB in dicta reiterated that the party seeking a Romero replacement panel must follow Labor Code §4062.2, and send a new objection letter before submitting the request.

In a bizarre decision involving the 10 day strike window, the WCAB in *Kowal v. County of LA* (2002) 87 CCC 699, found that an applicant's attorney's untimely panel strike did not prevent him from scheduling an evaluation with the stricken doctor. The Board reasoned that as applicant's attorney's strike was untimely, both parties had the right to schedule an appointment with either of the two remaining physicians on the panel. The court found that applicant properly exercised his right to set an evaluation, even though he set it with the doctor he meant to strike. The court strangely permitted the applicant to benefit from his own delay.

Finally, stemming from the Summer CAAA Conference of June 22nd, panelists discussed several seminal cases involving permanent total disability . The panelists urged attorneys to revisit the holdings of cases like *Ogilvie*, *LeBoeuf*, *Dahl*, and *Montana*. It is no coincidence that all of those cases are in the toolbox of an attorney mounting an argument for 100% permanent total disability. This coincides with a rise in the use of vocational evidence, even in cases where the possibility of a 100% award might not be immediately apparent. It is also important for defense practitioners to be familiar with the holdings of these cases, as we are finding much more occasion in recent years to use or rebut them.

While there was much more discussed at the conferences than included in this article (including a push to raise their hourly rates to $800 per hour), we can distill a general trend from the topics presented. Applicant's attorneys continue to probe for new and renewed methods to control treatment and QME specialties, and, of course, to increase compensation for their clients and themselves. As always, we will continue to quell these tactics whenever we can, and make sure that our clients are ahead of the curve.

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The Board contended that compliance with Labor Code section 5908.5 is impossible, presumably due to staffing shortages at the Reconsideration Unit and budgetary restrictions. However, the Court of Appeal was unsympathetic and is steadfast that the Board cannot ignore the Labor Code.

The Court of Appeal held that the Board's utilization of a boilerplate statement that further study is needed based upon the initial review of the record violates section 5908.5, which requires the Board to state the evidence relied upon and must specify in detail the reasons for the decision.

Therefore, the Board can no longer use "grant-for-study" orders to circumvent Labor Code section 5909, which requires the Board act on a Petition for Reconsideration within 60 days from the date of filing or the petition is deemed to have been denied. However, the Court of Appeal was clear in stating that the Board is not required to issue a final ruling on the merits within 60 days.

Instead, the Board must comply with section 5908.5, which requires it **to state the evidence relied upon and "specify in detail" the reasons for the decision**. So, the Board is no longer allowed to rubber stamp "grant-for-study" orders to buy itself more time to act on Petitions for Reconsideration.

It will be interesting to see how the Board handles this decision. Will they simply let more petitions be deemed to have been denied by not acting upon them within 60 days? We could also see an increase in the number of petitions for reconsideration denied via concurrence with the findings and orders of the trial judge. We do not anticipate this decision will result in final decisions being issued within the 60 day window going forward, as the WCAB themselves have already admitted this is impossible. However, perhaps by eliminating the "grant for study" practice, we can expect the WCAB to be more selective with the cases in which they grant reconsideration, thereby reducing the number of cases requiring a written final decision. In addition, we read the Court of Appeal's decision as prospective and not retroactive; cases in which the WCAB has already granted reconsideration for further study are likely to continue to be slowly meted out by the WCAB over the coming months; but the practice of granting for further study is ended from the date of the decision on. At the very least, the requirement that the WCAB state the evidence and reasons for granting reconsideration will ensure the parties are not left entirely in the dark while waiting for a final decision.

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