

WORKERS' COMPENSATION

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presents

2023 Spring Education Conference

MCLE: 6 Hours

Legal Specialization: 6 Hours in Workers' Compensation Specialization

Panel Wars

Saturday, May 20, 2023

3:05 p.m. – 4:05 p.m.

Speakers:

Presiding Judge Robert Rassp – Los Angeles

Judge Clint Feddersen – Van Nuys

Conference Reference Materials

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2023 California Lawyers Association

“PANEL WARS!!!!”

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PANEL WARS!!

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PANEL WARS!!

When can a party initiate the panel QME process?

Bina Brar v. County of Fresno, (2021) 86 Cal. Comp. Cases 430
2021 Cal. Wrk. Comp. P.D. LEXIS 36

PANEL WARS!!

When can a party initiate the panel QME process?

Bina Brar v. County of Fresno, (2021) 86 Cal. Comp. Cases 430

2021 Cal. Wrk. Comp. P.D. LEXIS 36

- LC 4060 dispute over compensability
- CT through July 8, 2020, AA sent initiating docs, demand for treatment to E/R and CA.
- On July 9, 2020, AA sent dispute letter to CA wanting med-legal evals in ortho and dental AMEs or if none then QMEs
- On July 24, 2020 AA requested QME panel in pain management
- On July 27, 2020 DWC Med Unit sent list, AA strikes Doc #1
- On July 30, 2020 Defendant issued denial of injury letter

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When can a party initiate the panel QME process?

Bina Brar v. County of Fresno, (2021) 86 Cal. Comp. Cases 430
2021 Cal. Wrk. Comp. P.D. LEXIS 36

- Also on 7/30/2020 DA conditionally strikes Doc #2
- DA objects to panel due to no dispute since none existed until the claim was denied on 7/30/2020, and files a DOR for EH
- Trial WCJ and Appeals Board on Removal indicated that AA's letter to E/R and CA 7/9/2020 was sufficient to trigger the ten-day period in which to request a compensability panel under LC 4060.

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When can a party initiate the panel QME process?

Bina Brar v. County of Fresno, (2021) 86 Cal. Comp. Cases 430
2021 Cal. Wrk. Comp. P.D. LEXIS 36

- LC 4060(c) states that a med-legal exam on compensability can occur **at any time after the filing of a claim form**
- LC 4062.2(b) says “No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to LC 4061 or 4062, **either party may request the assignment of a three-member panel of QMEs to conduct a comprehensive med-legal evaluation...**”

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When can a party initiate the panel QME process?

Bina Brar v. County of Fresno, (2021) 86 Cal. Comp. Cases 430

2021 Cal. Wrk. Comp. P.D. LEXIS 36

- With the “mailbox rule” [8 CCR 10605(a)(1)] the requesting party may request a panel on the 15th day from the mailing date of a written request for an evaluation.
- Here, AA sent Defendant a letter requesting a med-legal exam on July 9, 2020 and waited ten days plus five for mailing within CA before initiating the QME process on July 24, 2020
- There does not have to be a dispute in order to get a compensability QME panel.

PANEL WARS!!

Do I have to go to the DWC Medical Unit If I Object To
A Chiropractic Panel and Want an Orthopedic Surgery
Panel?

*Porcello v. State of California Dept. of Corrections and Rehabilitation
(2020) 85 Cal. Comp. Cases 327 (NPD)*

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Do I have to go to the DWC Medical Unit If I Object To A Chiropractic Panel and Want an Orthopedic Surgery Panel?

- No, the WCAB Panel held that the a party can file a DOR with the WCAB and request a WCJ to determine the proper medical specialty of a QME panel. The WCJ may send the issue to the DWC Medical Unit if the judge wants to but it is not required.
- Parties do not need to go to DWC Medical Unit first for disputes over the medical specialty of a selected QME panel.
- A chiropractor is a QME and has the knowledge, skills, and abilities to determine disputed medical issues under LC 4060, 4061, and 4062 since medical treatment issues are subject to UR and IMR.

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My client (and I) do not like chiropractors and object to them being on a QME panel. Can I request an orthopedic surgeon instead?

Carmen Rojo v. K&M Meat Company 2019 Cal. Wrk. Comp. P.D. LEXIS 333.

PANEL WARS!!

My client (and I) do not like chiropractors and object to them being on a QME panel. Can I request an orthopedic surgeon instead?

- No. Here, AA obtained a QME in chiro who examined the IW, issued a report and said the IW should be referred to an orthopedic surgeon for further evaluation and treatment. DA requested additional panel in ortho and AA objected.
- Appeals Board reversed WCJ and said the chiro never requested an ortho QME panel nor was there a disputed med-legal issue that was outside of his scope of practice and clinical competency as a chiropractor. Need for surgery and medication can be determined by UR/IMR process.

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My client (and I) do not like chiropractors and object to them being on a QME panel. Can I request an orthopedic surgeon instead?

- Also see *Maria Resendiz v. Tambro, Inc.* (2019) Cal. Wrk. Comp. P.D. LEXIS 325. AA requested and got chiro QME panel, DA filed for replacement on the grounds IW was getting injectable meds and needed elbow surgery which were beyond the scope of practice of a chiro. Med Unit agreed and issued an ortho panel. Appeals Board reversed WCJ and ordered the chiro and denied the ortho panel. QME cannot comment on treatment that is subject to UR and per 8 CCR 35.5(g)(2).

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What happens if AA and DA strike the same QME from a panel?

Vincent Unto v. Dromy International Investment Corporation 87 Cal. Comp. Cases 233 (NPD)

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What happens if AA and DA strike the same QME from a panel?

- Ortho panel issued on 8/14/2020; DA struck Dr. Rogachefsky on 8/24/2020, AA struck Dr. Rogachefsky on 8/28/2020, AA chose Dr. Meier and scheduled QME appointment with Dr. Meier on 12/11/2020. DA filed DOR for EH.
- WCJ and Appeals Board panel said AA can chose between the two remaining doctors listed on the QME panel and had to make appointment within the 10 days. LC 4062.2(c) and 4062.2(d) apply.
- Ordering a replacement panel would taint the process by allowing the second striker to get a new panel by striking the same doctor and essentially striking an entire panel and getting a new one each time.
- DA wanted to replace the entire panel and WCJ said there is nothing in the law that allows that.

PANEL WARS!!

What are the grounds for a replacement QME panel?

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What are the grounds for a replacement QME panel?

- “If there are fifty ways to leave your lover, there are 16 ways to replace a QME panel...” 8 CCR 31.5:
 - QME on panel isn't a specialist
 - Appointment cannot be made w/in 90/120 days
 - IW changed address prior to exam date
 - Selected QME is in same group practice as other QME
 - QME is unavailable under Rule 33
 - QME who previously examined the IW is no longer available
 - QME is or has been a treating physician for the IW
 - E/E and E/R agree to issue QME panel in geographic area of E/R

PANEL WARS!!

What are the grounds for a replacement QME panel?

- “If there are fifty ways to leave your lover, there are 16 ways to replace a QME panel...” 8 CCR 31.5:
 - DWC Med Director upon written request says there is good cause for a different specialty
 - DWC after reviewing DFR, PR-2 that a different specialty is appropriate
 - QME violated Rule 34 [notification of appointment requirements]
 - QME failed to meet deadlines of Rule 38 and LC 4062.5 prior to service of the report on the parties
 - QME has a disqualifying conflict of interest per Rule 41.5
 - AD issued order under 10164(c) to replace QME due to insufficient report
 - QME has an ex-parte communication or refuses to do a re-exam
 - QME panel was listed >24 months ago and is stale

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Can an IW audio or video record a QME examination?

Ramon Camacho v. Southeast Personnel Leasing 2020 Cal. Wrk. Comp.
P.D. LEXIS 312

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Can an IW audio or video record a QME examination?

- Yes – an IW may attend a QME examination with a court reporter, audio recorder, or a witness
- CCP 2032.150(a) permits a party “to record steno-graphically or by audio technology any words spoken to or by the examinee during any phase of the examination.”
- A court reporter may transcribe the entire evaluation and document the start and stop times of the QME’s face to face time with the IW.
- Applicant’s attorney may attend the evaluation with him
- See also *Rafael Rodriguez v. Waste Management Collection & Recycling* 2018 Cal. Wrk. Comp. P.D. LEXIS 408

PANEL WARS!!

If a QME has been replaced for one of the 16 reasons but the QME issues a report, can the report be sent to the new QME for review?

Celia Cervantes v. Pacific American Fish Company 2021 Cal. Wrk. Comp.
P.D. LEXIS 93

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If a QME has been replaced for one of the 16 reasons but the QME issues a report, can the report be sent to the new QME for review?

- Maybe – Here, WCAB said rheumatologist QME report can be sent to new QME in rheumatology because the first report was not replaced because of ex-parte communications or deemed inadmissible for any other reason. The prior QME report was information relevant to medical determination under LC 4062.3(a)(2). See also *Palmore v. State of CA* 2023 Cal. Wrk. Comp. P.D. LEXIS 13 [untimely QME report was sent to new QME over DA's objection]. As long as the report was obtained per LC 4062.2, 4064(d), 5703(a), and 5708

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Can a QME or AME delegate medical records review
to someone else?

Felicia Sonnier v. Los Angeles Unified School District 2021 Cal. Wrk.
Comp. P.D. LEXIS 263

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Can a QME or AME delegate medical records review to someone else?

- Nope, unless the QME reviews the summary and discloses who summarized them. This QME violated the anti-ghostwriting statute LC 4628 “to insure that medical-legal doctors who signed the report had actually examined the injured worker and had prepared the evaluation.”
- LC 4628(a)(2) requires a QME to review and summarize prior medical records
- This was discovered during the QME’s depo where he admitted he didn’t know who summarized some of the records and what that person’s qualifications were.

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Can a QME be replaced due to an ethics violation?

Hilda Pratcher v. County of Los Angeles 2021 Cal. Wrk. Comp. P.D. LEXIS
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Can a QME be replaced due to an ethics violation?

- Yes. During a re-examination on April 19, 2019, the QME in orthopedic surgery said to the IW “I like my women thick.” The trial judge found the IW’s testimony about this credible and is entitled to a replacement panel. The QME violated 8 CCR 41 by engaging in conduct that was “unethical, unprofessional, inappropriate, discriminatory, and biased.”
- See also: *Skider v. Luxor Cab Co. Inc.* 2014 Cal. Wrk. Comp. P.D. Lexis 627; *Rios v. El Monte USD* 2016 Cal. Wrk. Comp. P.D. LEXIS 501; *Crane v. State of CA High Desert State Prison* 2016 Cal. Wrk. Comp. P.D. LEXIS 179; *Beecham c. Swift Transportation Services LLC* 2017 Cal. Wrk. Comp. P.D. LEXIS 555

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Is there grounds to replace a QME if the doctor only does QME examinations on a Saturday?

Padilla v. Workers' Compensation Appeals Board (2019) 85 Cal. Comp. Cases 146 (writ denied)

PANEL WARS!!

Is there grounds to replace a QME if the doctor only does QME examinations on a Saturday?

- Rule 31.5 lists 16 grounds for replacing a QME and scheduling a Saturday QME exam is not one of them. Rule 31.2 allows the DA to schedule the QME exam if the IW does not within ten days of selecting the QME. Some IWs want a Saturday appointment so it doesn't interfere with work. People observing the Sabbath may have a good reason to object but this is not the case here. If the AA observes Sabbath, that doesn't count since the IW can call the attorney on Monday.

PANEL WARS!!

Can a party unilaterally withdraw from an agreement to use an AME in a case per LC 4062.2(f)?

*John Dzambik v. WCAB (Ishaan Enterprise, Inc.) 87 Cal. Comp. Cases 773
(writ denied)*

or

Castorena v. Mark One Corporation 2014 Cal. Wrk. Comp. P.D. LEXIS 643; and Yarborough v. S. Glazer's Wine & Spirits 2017 Cal. Wrk. Comp. P.D. Lexis 508

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Can a party unilaterally withdraw from an agreement to use an AME in a case per LC 4062.2(f)?

Yes and No! There are conflicting cases on when a party can unilaterally withdraw from an agreement to use an AME in a case. In the *Dzambik* case, parties agreed to AME in neurology and the next day the AA backed out claiming there was no medical dispute under LC 4060, 4061 or 4062 and the injury was accepted. The WCAB enforced the agreement. The other cases came to the opposite result.

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What grounds does a party have to show in order to obtain additional QME panel(s)?

Bautista v. Beauty Box 2022 Cal. Wrk. Comp. P.D. LEXIS 268

PANEL WARS!!

What grounds does a party have to show in order to obtain additional QME panel(s)?

- AA alleged CT to ortho POB, head, sleep disorder, and COVID-19 infection for shipping clerk. Ortho QME testified in his deposition that he would defer to other specialties in neurology and psychiatry.
- There were no prior records of treatment for these conditions, just allegations in the Application.
- “In the absence of additional panels in neurology and psychology, the applicant is prevented from conducting the medical-legal discovery necessary to determine compensability for the claimed injury” citing *Tyler v. WCAB (1997) 56 Cal. App.4th 389* and *McClune v. WCAB (1998) 62 Cal. App.4th 1117*

PANEL WARS!!

What grounds does a party have to show in order to obtain additional QME panel(s)?

- “Deferring to another specialist” appears to constitute good cause for additional QME panel under 8 CCR 32.6 “where there is a finding that an additional evaluation is reasonable and necessary to resolve disputes under LC 4060, 4061, and 4062.”
- See also, *Teresa Irannejad v. County of Los Angeles* 2021 Cal. Wrk. Comp. P.D. LEXIS 362

PANEL WARS!!

Can a treating physician's report rebut a QME's conclusion?

Sally Losurdo v. United Parcel Service 2021 Cal. Wrk. Comp. P.D. LEXIS 331

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Can a treating physician's report rebut a QME's conclusion?

- Private treating rheumatology report finding industrially related fibromyalgia obtained under LC 4605 and sent to PTP in MPN for review
- Report was not solely intended to rebut a QME in rheumatology who said the IW does not have fibromyalgia
- Rheumatologist was secondary treating physician under 8 CCR 9785(a)(2)
- While acknowledging that self-procured reports cannot be the sole basis for an award of compensation “the clear import of this language is that such reports may provide some basis for an award but not standing alone.”

PANEL WARS!!

When are expert witness fees payable to a medical-legal evaluator for deposition testimony?

Tayros v. City of Greenfield 2023 Cal. Wrk. Comp. P.D. LEXIS 10

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When are expert witness fees payable to a medical-legal evaluator for deposition testimony?

- 8 CCR 9795 says minimum 2 hours at \$455.00 per hour
- WCAB panel incorporated LC 5710, Rule 9795, CCP 2034.430(f) and CCP 2034.450(a)
- CCP 2034.430(f): “In a workers’ compensation case arising under Division 4 (commencing with Section 3201) or Division 4.5 (commencing with section 6100) of the Labor Code, a party desiring to depose any expert on another party’s expert witness list shall pay the fee under this section.”

PANEL WARS!!

When are expert witness fees payable to a medical-legal evaluator for deposition testimony?

- CCP 2034.450(a): “The party taking the deposition of an expert witness shall either accompany the service of the deposition notice with a tender of the expert’s fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition.”
- Here QME had to cancel first ZOOM depo due to connectivity issues (9/27/2021) and Defendant found liable for the depo that did not go forward and for the one that did later (5/19/2022). (DA unhappy about paying for two one-hour prep times)

PANEL WARS!!

Can a party obtain new QME panels if two QMEs issue late supplemental reports?

Martinsen v. H&H Enterprises 2023 Wrk. Comp. P.D. LEXIS 420

PANEL WARS!!

Can a party obtain new QME panels if two QMEs issue late supplemental reports?

- WCAB denied DA request to replace ortho and psychology panel QMEs because both issued late supplemental reports (right hand amputation and psyche component)
- Issuance of replacement panels due to late supplemental reports is discretionary by the judge-
 - How many prior reports were issued?
 - How much delay for resolution of disputed medical facts if discovery starts from scratch with new QMEs?
 - Avoid doctor shopping?

PANEL WARS!!

What if DA and AA disagree on what is being sent to a QME or AME for review?

Maxham v. Calif. Dept. of Corrections and Rehab (2017) 82 Cal. Comp. Cases 136 (WCAB en banc decision)

and

Suon v. California Dairies (2018) 83 Cal. Comp. Cases 1803

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What if DA and AA disagree on what is being sent to a QME or AME for review?

- Counsel needs to read LC 4062.3 and 8 CCR 35 together.
- LC 4062.3(a) refers to “information that is relevant to medical determinations”
 - What does this include and exclude?
 - What is the difference between “information” and “communication?”
 - Can a “communication” include “information?”
 - Maxham = (AME) AA sent 3 AME advocacy letters w/o serving them
 - Suon = QME (DA wanted to send QME psyche report to internal QME for review)

PANEL WARS!!

What if DA and AA disagree on what is being sent to a QME or AME for review?

- 1. Written communications with a QME that is properly served on opposing party is not Ex-Parte Communication
- 2. Information (medical and non-medical records) that a party proposes to send to the QME must be served on opposing party 20 days before it is sent to the QME [parties have to agree what is sent to an AME]
- 3. Medical and non-medical records are treated differently by the Labor Code (LC 4062.3(a)(1) refers to medicals; LC 4062.3(b) says non-medical records can be objected to within a reasonable time and if objected to within 10 days, the records cannot be sent to the QME.

PANEL WARS!!

What if DA and AA disagree on what is being sent to a QME or AME for review?

- 4. Disputes over what is sent to a QME or AME have to be resolved by a judge.
 - Includes witness statements, denial notices, advocacy letters, surveillance videos, psychiatric records, personnel files
 - Parties are required to meet and confer prior to coming to court – in order to comply with Labor Code Section 4062.3(b)
 - WCJ has wide discretion to determine the remedy for a violation of LC 4062.3.

2023 SPECIAL RELEASE ON
CALIFORNIA WORKERS'
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