



**MENDOZA V. HUNTINGTON HOSPITAL (JUNE 3, 2010) (WCAB En Banc)**

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In a decision favorable to employers, the WCAB en banc affirmed the WCJ's finding that defendant may obtain a QME Panel after previously denying the claim within the 90 days to decide the issue of compensability. The WCAB held that AD Rule 30 was flawed and interpreted as inconsistent with applicable sections of the Labor Code. Mendoza affords the right to defendant to request a panel at any time to assist in resolving the issue of compensability.

The WCAB issued its en banc decision holding Rule 30 (d)(3) invalid as it is inconsistent with Labor Code section 4060 (c), 4062.2 and 5402(b). The decision holds that either party may request a QME at any time after the claim is filed, regardless of whether the claim has been previously denied.

The DWC adopted Rule 30 in February 2009. Rule 30 (d)(3) provides that whenever a claim has been denied entirely, "only the employee" may request a QME Panel. One rationale for this rule is that, once the claim has been denied, the defendant no longer needs to gather information on the issue of compensability. As a result, Rule 30 (d)(3) had been placing employers in a position to tentatively decide to request a QME even when their decision of denial had been based on a "factual dispute," so as not to be left out of the QME process.

Labor Code sections 4060 (c), 4062.2 provide that "either party" may request a QME panel at any time after filing of the claim form. The decision points out that the Labor Code sections do not place a time limit on when the defendant may begin the process to obtain a report on the compensability issue. As a matter of statutory construction, the Labor Code "trumps" or "wins out" over the AD Rule where the two are in conflict and are found to be inconsistent with one another.

The WCAB pointed out that Rule 30 (d)(3) exceeded the scope of LC 5402(b) as it effectively requires a defendant to obtain a QME report on compensability within the 90 day investigation period, which is not required by Section 5402(b). The WCAB pointed out that requiring the defendant to initiate the QME process before denying the claim, or go through the "rather lengthy process" of obtaining an Order directing the Medical Director to issue a panel, imposes a burden on defendant which is inconsistent with the statutes. It has been widely held by the workers compensation community that it may take many months to obtain an AME or QME report. The decision levels the playing field and adds fairness to enable the defendant to reach correct decisions on compensability and to be able later to obtain a QME report.

The *Mendoza* decision does not extend the 90 days within which to make a compensability decision. Once a decision on compensability is made, this does not preclude evidence gathering to document facts to support a denial. The decision also does not change the requirement that the employer use due diligence and good faith in investigating facts to reach the decision. Proper practice still includes obtaining a 4060 compensability report to obtain substantial medical evidence to challenge a report from a treating physician indicating a disputed condition is industrial. *Mendoza* means that the defendant no longer is required to request a QME panel prior to issuing a denial to insure that a QME report may be obtained at a later date.