C B W M
Cuneo, Black, Ward & Missler
A LAW CORPORATION

THE EDGE

WELCOME TO THE EDGE

Here at Cuneo, Black, Ward & Missler, we pride ourselves on having current legal knowledge and experienced and competent attorneys to provide the quality legal representation our clients expect and deserve. We believe that we have an Edge and we want to share it with you.

"The Edge" will come to you monthly and will be available at our website, www.cbwmlaw.com .

In furtherance of this, we are starting a resource that we are calling "The Edge". We will be bringing you articles about the latest cases, changes in the law and the regulations that govern workers' compensation, advice about best practices as well as firm news. "The Edge" will come to you monthly and will be available at our website, www.cbwmlaw.com.

If you have suggestions for an article, or feedback about anything that you read here, please be sure and let us know at our website.

FIRM NEWS: Please welcome **Steven Sanghera** as the newest attorney in our firm. Steve comes to CBW&M with almost 3 years of workers' compensation defense experience. He graduated from the University of San Diego School of Law in 2005, practiced employment law, and then worked for the public defender in Madera County for 2 years before starting in his career in workers' comp.

NEWS, OPINIONS, AND LEGAL UPDATES

Editor-in-chief:
Richard A. Weyuker

SAVE THE DATE:

For an additional Edge, we are offering a seminar on Thursday, April 30, 2015 at the Marriott Hotel on Folsom Boulevard in Rancho Cordova. We will start at 8:00 AM with breakfast (and caffeine if you need it).

This will be one of many seminars to explore the intersection between law and medicine in workers' compensation. We will have a couple of great doctors who will speak on panels with our attorneys to address these issues. In addition, we will have a case law update to ensure that you stay current on the legal challenges that you face. Look for our announcement in the mail/e-mail and posted on our website, and be sure to RSVP. We look forward to seeing you there!

REQUESTING A PANEL IN A DENIED CASE

By Laura K. Lachman

In a denied represented case, the parties no longer have to send notification to the other side that a medical legal evaluation is being requested. In the recent panel decision of *Bahena v. Charles Virzi Construction*, 2014 Cal. Wrk. Comp. P.D. LEXIS 638, the Workers' Compensation Appeals Board upheld the Judge's decision that applicant could request a Panel QME evaluation under Labor Code section 4060(c) based on defendant's denial letter.

The Board held that once a denial letter is issued, if a medical legal evaluation is desired to determine compensability, there is no purpose served by holding up that process until one party sends a letter to the other party indicating its intent to request a medical legal evaluation. The changes enacted by Senate Bill 863 were meant to streamline the process of obtaining a comprehensive evaluation in denied represented cases and make them more in line with the requirements in unrepresented cases. Allowing either party to request a comprehensive medical legal evaluation 10 days after the denial letter was issued would achieve this goal.

As a reminder, the Board has previously held in *Messele v. Pitco Foods, Inc*. (2011) 76 Cal.Comp.Cases 956 (en banc) that the 10 days start the day after the letter was issued and is extended by 5 days for mailing if mailed within California (or 10 days for mailing in the case of out of state defendants or injured workers). Thus, applying the decision in *Messele*, in denied represented cases, either party may request a Panel QME list from the Medical Unit on the 16th day after the denial letter was issued.

A QME OR AME IS NEEDED BEFORE FILING A DOR ON PERMANENT DISABILITY

By Kirsten N. Hale

Filing a Declaration of Readiness to Proceed (DOR) to a Mandatory Settlement Conference (MSC) based on a primary treater's P&S report is a rather common practice on both sides of the workers' compensation bar. However, Labor Code §4061(i) states that no dispute over the existence or extent of permanent impairment may be the subject of a DOR unless there has been a medical evaluation by a treating physician **and** an AME or QME evaluation.

A WCAB Panel recently addressed the practice in *Jacquez v. Andres Management Inc.*, 2014 Cal. Wrk. Comp LEXIS 574, in which it adopted the WCJ's Report & Recommendation on Petition for Removal. In the underlying case, defendants had filed a DOR for an MSC prior to serving the primary treater's P&S report on the applicant. The WCJ had taken the case off calendar, surmised that meaningful negotiation of settlement could not have taken place if defendants filed the DOR prior to serving the P&S report, and commented that the filing of the DOR prior to an AME/QME evaluation violated 4061(i).

What can you do to move a case if you are relying on the treating physician? In an unrepresented case, you can pay the PD you owe, send a *Reynolds* notice and a notice that applicant may request a QME panel, and close your file.

In a represented case, if applicant's attorney does not request a panel, wait until the application has been on file for a year and file a petition to dismiss.

Warning: If you file a DOR requesting a Status Conference instead of an MSC and the issue is permanent disability, you have the same problem that the defendant had in *Jacquez*. If you list an issue other than PD, but in fact the issue is PD, you are lying to the Court.

If you have suggestions for an article, or feedback about anything that you read here, please be sure and let us know at our website, www.cbwmlaw.com .

EXPEDITED HEARINGS ON DISPUTED BODY PARTS IN ACCEPTED CASES

By Christopher M. Wagner

Jesus Mendoza Sanchez was injured in a motor vehicle accident on 7/12/07 while working as a rental car driver/washer. On 6/5/10 the parties stipulated to injury to right elbow, forearm, little finger and shoulder and also to the neck. Mr. Sanchez subsequently amended his claim to include allegations of injury to the cardiovascular system (hypertension) and the kidneys (diabetes), both of which were denied by the defendant.

On 7/2/14 applicant filed for an Expedited Hearing on the issue of entitlement to medical treatment for the kidneys and defendant timely objected.

After an Expedited Hearing, the WCJ issued a Findings & Award which held that the Panel QME opinion was substantial medical evidence and awarded medical care for the kidneys. Defendant filed a Petition for Reconsideration.

On reconsideration, the Board held that the WCJ did not err in determining compensability of diabetes at an Expedited Hearing: "entitlement to medical treatment for a disputed body part is an appropriate issue for Expedited Hearing and determining the compensability of the disputed body part is inherent in deciding the medical treatment issue." The opinion cites 8 Cal. Code Regs. 10252(b), however this is a typo as it meant to reference 8 Cal. Code Regs. 10552(b) which states that "An expedited hearing may be set upon request where injury to ***any part or parts of the body*** is accepted as compensable by the employer and the issues include medical treatment or temporary disability for a disputed body part or parts." [*Emphasis added*.]

The defendant argued that an Expedited Hearing cannot be set where there is no request for treatment authorization. However, pursuant to Labor Code §5502, expedited hearings are permitted on issues of entitlement to medical care except for treatment issues determined per Labor Code §§4610 (Utilization Review) and 4610.5 (Independent Medical Review). In this case, the WCJ did not address specific treatment requests which are subject to Utilization Review and Independent Medical Review but rather made a general medical treatment award for the kidneys and thus was not inconsistent with Labor Code §§4610 and 4610.5.

The decision highlights the fact that a trial on injury AOE/COE on a disputed body part can be held at an Expedited Hearing where any part of body has been accepted when medical treatment or temporary disability are in dispute.

PRACTICE TIPS

ONE IN A SERIES OF ARTICLES TO HELP WITH DAY TO DAY ISSUES FACING ADJUSTERS AND EMPLOYERS

RESPONDING TO SUBPOENAS

If you receive a subpoena for your records, what do you do?

- Check the date for response. You have 20 days to respond if service is by mail; 15 days if by personal service. If they give you less or don't give you a specific date, it's not a valid subpoena and you don't have to respond except to object in writing. (CCP 2020.410)
- Check for a Notice to Consumer. If there isn't one, it isn't a valid subpoena and you don't have to respond except to object in writing. (CCP 1985.3)
- Check for the Affidavit of Issuing Party. This tells you what records that they want and why. If it isn't there then you don't have to respond except to object in writing. (CCP 1987.5) If there is an Affidavit, then check to see what they are asking for. If the subpoena is vague, overbroad, calls for production of records that are protected by a privilege or that are someone else's records, then you must file a Petition to Quash. (CCP 1987.1)

If you want to file a Petition to Quash, remember that you must file prior to the production date listed on the subpoena.

When responding to the subpoena, never provide privileged documents. Be sure and omit anything that is protected by the attorney-client privilege. Before producing any investigation report, film, etc., ask your attorney first. You should prepare a privilege log of any documents that you hold back. (CCP 2031.240)