State: Calif.
Judge Expedites Hearing in QME Certification Dispute: Top [2017-10-25]

Medical providers who say the Division of Workers' Compensation used underground regulations to summarily deny their recertification as qualified medical evaluators won't have to wait for the New Year to get their day in court.


Nicholas Roxborough

Los Angeles County Superior Court Judge James C. Chalfant on Tuesday approved a request to move the hearing on the providers' request for an injunction to Dec. 9, from Jan. 11. If Chalfant grants the injunction, the DWC would be required to reinstate the providers' QME certifications, according to their attorney, Nicholas Roxborough.

"It would require everybody who is a named plaintiff to be reinstated until they get a hearing," said Roxborough, who is co-managing partner of Roxborough, Pomerance, Nye & Adreani in Los Angeles. "And anyone who is similarly situated would probably be able to join in our lawsuit."

DWC spokeswoman Erika Monterroza said the agency can't comment on the pending litigation.

Drs. Timothy Howard and Benjamin Simon, and chiropractor Meera Jani, claim the division denied their requests to be recertified as QMEs this summer based on allegations that they didn't satisfy the requirements to bills for comprehensive medical-legal evaluations involving extraordinary circumstances.

The providers allege in their complaint filed Sept. 26 that the DWC changed its interpretation of the complexity factors needed to justify the use of billing code ML 104 without going through the formal rule-making process, effectively enacting an underground regulation. And they claim the division didn't give them a hearing before it denied their recertification as QMEs, which they say is required by the Labor Code.

Suzanne Honor-Vangerov said in a declaration filed Monday in support of the plaintiffs' request for the injunction that ML 104 requires the satisfaction of at least one of three criteria set forth in the fee schedule.

Honor-Vangerov helped draft the latest amendments to the medical-legal fee schedule when she managed the DWC's Medical Unit in 2006 and now acts as a consultant to QMEs regarding the fee schedule through her work as president of Honor System Consulting.

She said one justification for using ML 104 is when the parties requesting the evaluation agree that the case involves extraordinary circumstances. Another is when the parties request that the QME address medical causation.

She said DWC attorney Winslow West in 2016 adopted new and different criteria for the medical causation complexity factor. And she has seen "countless letters" from the DWC denying reappointment of QMEs based on the new interpretation.

Honor-Vangerov said the DWC since 2016 has determined that the medical causation complexity factor is applicable only on contested claims where causation is in question, or on denied claims. The division also requires that written requests expressly state that medical causation is an "issue" that the QME needs to address.

"But these additional requirements do not exist in the med-legal fee schedule, nor were they intended to be included," she said. "The 'medical causation' complexity factor does not require a contested or denied claim, or that the party's written request use specific words, according to its language or intent. In reality, parties often request that the QME address 'AOE/COE' or 'arising out of/course of employment,' or use other words, all of which still mean to address 'medical causation.'"

She said the additional requirements the division has created for QMEs to satisfy the medical causation standard constitute what is known as "underground regulations," or rules that have been adopted without a public hearing or comment period as required by the California Administrative Procedure Act.

Honor-Vangerov also said that once a QME satisfies the requirement to bill using ML 104, the provider can also bill for time spent preparing an evaluation report. But she says the division "recently capitalized upon an obvious drafting mistake" to impose a different rule limiting reimbursement for report preparation to only those cases in which the parties agree that extraordinary circumstances are involved.

When the fee schedule was amended in 2006, she says, a line break was "accidentally deleted," opening the door to the interpretation that report preparation is compensable only for extraordinary circumstances.

"I saw this drafting mistake immediately in 2006 and corrected it in my fee schedule tutorial course, and publicized this error publicly in my presentations," she said. "I have told Mr. West that I disagree with his new rule, which was never sanctioned under the APA procedures. I told everyone I could at the DWC about this drafting mistake, but it never got corrected. Thus, the DWC's 'prior agreement' requirement for billing report preparation time is another unlawful 'underground regulation' that the DWC is enforcing against QMEs to deny their reappointment under billing errors alleged against the QMEs."

Another example of an alleged underground rule is the prohibition on using the medical causation complexity factor, and the complexity factor for psychiatric or psychological evaluations, in the same QME evaluation, according to Honor-Vangerov. She says the clear language of the fee schedule allows these factors to be used simultaneously to justify the use of ML 104.

"Somewhere along the way, Mr. West and/or the DWC decided to add new rules and criteria to the fee schedule that haven't been sanctioned through the APA public comment and scrutiny procedures," she said. "Mr. West is applying rules that simply don't exist."

Honor-Vangerov also noted a distinct change in the division's approach to disciplining QMEs that occurred sometime last year. She says that during her tenure at the DWC, the agency didn't deny reappointment or revoke licenses over billing errors; it resolved disputes informally through correspondence and outreach to the providers.

"Then, suddenly, in 2016, the DWC, through Mr. West, began auditing QMEs and denying QME reapplications by letter, without ever providing a hearing, based solely on the DWC's accusations regarding billing mistakes under the med-legal fee schedule," she said.

The plaintiffs on Monday filed a request for a preliminary injunction, claiming the DWC is required to hold a hearing before it refuses to recertify a QME. They claim the division admits as much by citing authority provided under Labor Code Section 139.2 in denial letters, which allows the agency to discipline QMEs only after a hearing.

They also argue that case law mandates a hearing, and that California recognized the common law doctrine of fair procedure against arbitrary decisions by public and quasi-public organizations.

Howard, an orthopedist in Danville, says he requested a hearing on June 29 after receiving the June 1 letter from the DWC denying his recertification. On Sept. 12, he says he received an order on reconsideration restating the allegations from the original denial letter. He again requested a hearing but has not been given one, according to court filings.

Simon, a cardiologist in Agoura, requested a hearing on Sept. 6 and again on Sept. 26. And Jani, a chiropractor in Rancho Cucamonga, says she also requested a hearing on Sept. 6.

“Not surprisingly, defendants have never given plaintiffs or any QME a hearing before or even after defendants’ denials, because they ‘settle’ all their billing accusations through financial coercion, defamation and threats to cause the QMEs to also lose their entire medical license by copying the California Medical Board on all of defendants’ accusatory statement of issues,” court filings claim.

In support of their argument that the DWC is trying to leverage the Medical Board to force QMEs to agree to a settlement, which requires the providers to repay any difference between what the division says should have been paid and what insurance carriers agreed to pay, the providers filed copies of notices from the DWC showing that the allegations are being forwarded to the board's Central Complaint Unit.

The plaintiffs say the division is engaged in an “inquisitorial witch hunt” that harms providers and injured workers, and serves only to benefit insurers.

Carl Brakensiek, executive vice president of the California Society of Industrial Medicine and Surgery, submitted a declaration in support of the plaintiffs’ request for an injunction. He said the DWC’s enhanced enforcement has resulted in providers under-billing out of a fear that they could be targeted for billing proper amounts. Other providers are resigning as QMEs or refusing to apply for the position in the first place, he said.

“The hostile environment created by DWC against QMEs is discouraging qualified physicians from becoming QMEs,” he wrote. “The number of physicians sitting for the QME examination has dropped precipitously in recent years.”

Diane Worley, director of policy implementation for the California Applicants’ Attorneys Association, said in a declaration supporting the plaintiffs that the division is enforcing onerous requirements on QMEs that could affect rulings on injured workers’ rights to benefits.

The medical-legal fee schedule identifies a reasonable payment for QME reports and evaluations, she said. But in light of the DWC’s enforcement of the new interpretation of the billing rules, some providers have determined “the hassle is no longer worth” continuing to serve as a QME.

“Based on my 30-plus years of experience in the workers’ compensation industry, in many instances, QME reports must necessarily be thorough and complex, in that they need to address, among other issues, both ‘causation’ and ‘apportionment’ of the applicant’s claimed injuries,” Worley wrote. “Indeed, if a QME report is not thorough enough, it often will not constitute ‘substantial medical evidence’ needed to support an award of workers’ compensation benefits to the applicant.”

The declarations filed by Brakensiek and Worley are attached to the request for the preliminary injunction.

Roxborough, who is representing the QMEs, said the DWC's aggressive position regarding recertification comes at a time when the number of evaluators is declining and the demand for exams is increasing, as documented in a recent report delivered to the Commission on Health and Safety and Workers' Compensation.

Frank Neuhauser, a researcher with the University of California, Berkeley, earlier this month completed an analysis of QME trends for the commission that found the number of registered QMEs is down 17% since 2007, while the number of requests for QME panels has increased 87%.

The review also found an increase in the number of requests for a second QME because the original evaluator was not available within 60 days. While still low, the percentage of requests for subsequent panel requests increased from 1%, to 2.8%, in unrepresented cases, and from 0.7%, to 4.7%, in represented cases, with almost all of the increase occurring between 2013 and 2016.

Roxborough said he doesn't know why the division is holding up recertification for some QMEs. He said his requests for a meeting with the DWC have been turned down, and he would not speculate about what may be motivating the agency.

He did, however, question whether the DWC has exceeded its regulatory authority.

"What they're basically saying is (QME) shouldn't have billed that amount and the carriers shouldn't have paid that amount," he said. "Why are they doing the work of the carriers? Is that their role, to be a soldier for the insurance industry and self-insured employers? Even though they paid the bills, you know better and you are trying to get money back for them even though they never expressed any problems with how the doctors billed."