



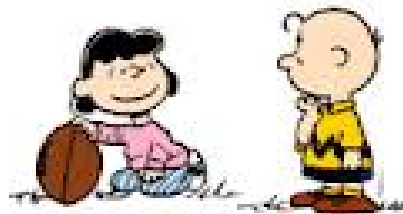
**How Did That Happen?
Top 10 Litigation Tips by Jamie
Spitzer
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Judge – Anaheim DWC**

**2020 DWC EDUCATIONAL
CONFERENCE**

Disclaimer

This material and the opinions expressed are my own and do not represent the position of the DIR, the DWC, the WCAB or any Judge within DWC.

This presentation is not intended to be used as legal advice and each case or circumstance is unique. The outcome is dependent on its own set of facts.



Peanuts

Top 10 Litigation Tips

Topics covered:

1. Replacement & Additional Panel QME & Other issues re: QMEs.
2. Proper Courtroom Behavior.
3. New WCAB Rules - 5710 Deposition Attorney Fees & Joinder of Parties.
4. Denying the Case for lack of medical evidence.
6. Filing the Declaration of Readiness to Proceed.
7. Orders from the judge.
8. Petitions for Reconsideration v. Petitions for Removal

Tip #1 - Requests for Panel QME (Initial, 2nd or Replacement)

- Labor Code section 4062.1 Unrepresented Request for QME Panel. **QME form 105**
- Title 8, CCR section 31.7 Additional Panel Request for Represented and Unrepresented – **QME form 31.7**
- Title 8, CCR section 31.5 Replacement Panel Request – **QME form 31.5.**

www.dir.ca.gov/dwc/forms.html

QME Issues – Tip #1

Second Panel QME or Replacement Panel QME – if needed just agree to this by written agreement and follow QME Regulations section 31.7.

Must show good cause for a Panel QME in a different specialty. Examples of good cause:

Tip #1(a) – Need to show good cause for 2nd Panel

→Medical report (AME/QME/treater) commenting that need a different specialty.

→Applicant has complaints documented in treating physician medical report. See *Morales v. Robert Half International, Inc.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 200.

→Documented complaints over a period of time may be enough to obtain 2nd Panel in different specialty. See *Vera v. Monsanto Company*, 2016 Cal. Wrk. Comp. P.D. LEXIS 360

→There must be a record made to show good cause for additional panels to issue. *Polanco Hernandez v. Imperative Personnel, Inc.*, 2018 Cal. Work. Comp. P.D. LEXIS 317.

Second/Additional Panel Requests

- Since it's a disputed issue, should go before WCJ if it is validity of the Panel. QME Rule 31.1.
- The WCJ has jurisdiction to determine the validity of Panel QMEs and whether additional evaluations are reasonable and necessary to resolved disputed issues. See QME Rule section 32.6 and Rodriguez v. Mercury Insurance Services LLC, 2013 Cal. Wrk. Comp. P.D. LEXIS 623.
- Specialty designations – QME Rule 31.5 (a)(10) - the Medical Director resolves these issues. See QME Rule 31.1(b).
- WCJ may also issue an order if the Medical Unit cannot issue a QME panel in a **represented** case within 30 calendars days of receiving the request.

Tip #2: If all else fails, file a DOR and request a Status Conference or MSC

- May file a DOR for Status Conference to get an order or if there is a discovery dispute.
- Tip #2(a) - It helps to file a petition at the time of filing the DOR. Whether it's a Petition for Additional QME or Motion to Strike QME panel.

Serve and Verify Petitions

- Remember to serve the petition on all parties – WCAB Rule 10625;
- Verify the petition. WCAB Rule 10510(d);
- Attach any necessary document i.e. letter trying to agree to 2nd or replacement panel. Letters supporting basis to strike the QME Panel(s).

Tip #3 – Failing to agree does cause delay. Multiple Replacement Panel QME gone wrong.

- *Acevedo v. FMF Reliable Caregivers*, 2013 Cal. Wrk. Comp. P.D. LEXIS 3 and
- *Campbell v. City of Red Bluff Fire Dept.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 314; 4 Panels of QMEs issued starting in June 2017.
- Issue as to validity of prior panels tried by WCJ.
- 1st & 2nd QMEs that remained after strikes occurred could not schedule exam within 60 days.
- 3rd Panel issued but it was improperly issued as an New Panel rather than a Replacement Panel so it had a QME name which was part of a prior panel.
- 4th Panel issued – Applicant evaluated by QME, issue of proper QME tried and WCAB eventually found the 4th panel invalid.

Multiple Replacement QME Panels

- During this time, Applicant (Mr. Campbell) passed away.
- WCAB found all 4 panels invalid and stated that the Appeals Board has a constitutional mandate to “accomplish substantial justice in all cases expeditiously, inexpensively and without incumbrance of any character.” (Cal. Const., art. XIV, section 4)
- WCAB gave parties 10 days to agree upon an AME otherwise WCJ is to appoint a regular physician pursuant to Labor Code section 5701.

Tip #4: Don't UR the request by the QME/AME to obtain diagnostic testing!

- An AME/QME report is a medical – legal report not a treating physician.
- Utilization review applies to medical treatment recommendations. See Labor Code section 4610.
- AME/QME's fall under Labor Code section 4060, 4061 or 4062.
- Also in most cases the AME/QME letter has language that states: “please contact defendant for authorization of any testing needed to complete your exam.”

Tip #5: How to behave in the courtroom

DO:

Know your case.

Be civil to opposing counsel.

Speak to the judge directly.

Be respectful to the judge even when disagreeing.

How not to behave in the courtroom:

DON'T:

- Talk over each other or yell.
- Use inappropriate gestures or non-verbal communication.
- Call each other names or trade insults.
- Make racial, religious, sexual orientation, sexual harassing statements.
- Answer your cell phone or surf the internet while discussing the case with the judge.

Tip #5(a) – Consider The Rules of Professional Conduct

- Rule 8.4.1 – Prohibited Discrimination, Harassment and Retaliation.
- (a) In representing a client, . . . A lawyer shall not:
(1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.

Rules of Professional Conduct

- Rule 3.3 – Candor toward the Tribunal
- (a) A lawyer shall not:
 - (1) knowingly make a false statement of fact or law to a tribunal
...
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to be directly adverse to the position of the client.
 - (3) offer evidence that the lawyer knows to be false.
- Business & Professions Code section 6068 (d) – reiterates this by stating an attorney shall “employ . . . Those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

Rule 3.4 – Fairness to Opposing Party and Counsel

- A lawyer shall not: (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligations exists;

Tip #6: New WCAB Rules re: Joinder of Parties & 5710 fees

- WCAB Rule 10382 – Joinder of Parties.
- Cannot join a party until 10 days after service of either a petition for joinder filed by a party or a notice of intention to order joinder issued by a WCJ, unless the party to be joined waives its right to this notice period.
- If an objection is received within 10 days of service of a petition for joinder or a NOI to join, the WCJ shall consider the objection before joining the party.

Labor Code section 5710 and new WCAB Rule 10547.

- Cannot file a 5710 petition until after at least 30 days from a written demand is served on Defendant.
- Petition must state the name of attorney who attend the deposition and the state bar number.
- If the failure to promptly make good faith payments was the result of bad faith actions or tactics, the WCAB may impose monetary sanctions and allow reasonable attorney fees and costs under LC section 5813 and WCAB Rule 10421.
Sanction amount not less than \$500.00

Tip #7: Denying a case for lack of medical evidence/substantial medical evidence.

- Consider Labor Code section 4060 (c) and (d) – When compensability of an injury is at issue after the filing of a claim form . . . And the employee is represented by an attorney, a medical evaluation shall be obtained pursuant to Labor Code section 4062.2.
- If the employee is not represented, then the employer provides the information to the employee so they may request a medical evaluation pursuant to Labor Code section 4062.1. .
- Also consider Title 8, Cal Code of Regs. section 9812(g)(3)

CCR section 9812(g)(3), (4)

→Unrepresented Applicant and the delay in accepting the injury is related to a medical issue, send the notice that either the IW has 10 day to request Panel QME or Defendant has the right to submit the form. AND – if the panel issues then IW must choose a QME from the list and arrange the appointment or if they do not, then Defendant may choose the QME and arrange the appointment.

→If represented, then the notice says to contact their attorney

Tip #8: Should I file a Declaration of Readiness to Proceed?

- The declaration section of the DOR says:
- “Declarant states under penalty of perjury that (1) he or she is presently ready to proceed to hearing on the issues below and has made the following specific, genuine, good faith efforts to resolve the dispute(s) listed below and (2) unless a status or priority conference is requested, I have completed discovery on the issues listed above, and that all medical reports in my possession or control have been filed and served as required by applicable rules.”

This declaration means what it says:

- You have obtained your medical evidence and the case is ready to set for Trial. If PD is an issue, for example then the filing party has a medical report that is based upon substantial evidence including apportionment.
- If TTD is at issue, you have documentation to support the TTD claim including support regarding the earnings rate. Defendants – this means a wage statement.
- If it's a Lien Conference requested, then Bill Reviews are completed if reasonable value is an issue or medical reports that defeat the LC's case have been served if the LC is a physician.

Tip #9 - Orders

- NOI issues – If you object to the NOI, please file that with the WCJ/WCAB.
- Otherwise an order will issue.
- Orders that state “without prejudice” or have self destruct clauses only need an objection.
- Please do not file a Petition for Removal or Reconsideration to those orders.

Tip #10: Reconsideration vs Removal

With either type of petition:

→Be specific as to what error occurred and cite to the Minutes of Hearing, Summary of Evidence by page and line number i.e. Summary of Evidence, 7-30-19 Trial 8:30 a.m. session at 6:11 to 6:20.

→Reference the document by exhibit number or letter and the page of the exhibit. i.e. Exhibit A, Report of Dr. Jack Anderson, 11-24-2019 at p 21.

WCAB Rule 10945.

Removal v. Recon

- Sometimes it is difficult to tell if you should file a Petition for Removal vs. Petition for Reconsideration.
 - Tips: Removals deal with interim orders
i.e. Orders that relate to venue, discovery – depositions, medical evaluations, Panel QME issues, Subpoenas, etc . .
 - Standard on removal is very high.
 - Must show substantial prejudice or irreparable harm will occur; and
 - Reconsideration is not an adequate remedy after the issuance of a final order, decision or award.
- WCAB Rule 10955 (a).

Final orders vs. Interim orders

Examples of final orders –

Order Approving C&R;

Award on Stipulation with Request for Award;

Order Dismissing Case/Application;

Order Dismissing Lien;

Findings & Awards or Findings & Orders after Trial including Expedited Hearing issues such as TTD, earnings etc.

If it's a clerical, mathematical or procedural error, please let the WCJ know right away. We may correct those without the need to file a Petition for Reconsideration. WCAB Rule 10966.

Difference between Removal & Reconsideration for the judge

- WCJ retains Jurisdiction when a Removal is filed. WCAB Rule 10955(e).
- However, once a Recon is filed and 15 days elapse (for the WCJ to rescind, modify or amend decision or answer the recon), WCJ no longer has jurisdiction and cannot issue any orders in the case until the Appeals Board denies, dismisses or issues a decision after reconsideration. WCAB Rule 10961