

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at <http://www.kttlaw.us/memos.html>

RE: GEORGE THE BARTENDER AND THE TRAP FOR THE UNWARY OF LABOR CODE §4062

FROM THE LOBBY BAR AT THE HYATT:

I arrived at the lobby bar early so as to enjoy my first Beefeater's Martini straight-up with two olives in solitude.

I knew before long the bar would explode into a boisterous celebration between George the Bartender's workers' compensation attorney, Ron Summers, and George's primary treating physician, Dr. Nickelsberg, over a recent Court of Appeals' decision confirming the mandatory language of Labor Code §4062.

Fortunately, Kim, the Hyatt's breathtakingly beautiful cocktail waitress, appeared out of nowhere with my cocktail.

However, before taking my first sip, Ron and Dr. Nickelsberg burst into the bar waving a copy of the above referred to Court of Appeal decision in *JCPenney Company v. Workers' Compensation Appeals Board (James Edwards)*, which was certified for publication on July 7, 2009.¹

In the *JCPenney* case, the Court of Appeal confirmed that Labor Code §4062 means exactly what it says: when a party (which is an euphemism for the defendant) fails to object to a determination made by the treating doctor (usually in a PR-2 progress report), said party is legally bound by said determination, at least until the next report issues.²

At this point, I overheard Ron and Dr. Nickelsberg strategizing over how the *JCPenney* case would give them an advantage. Ron told Dr. Nickelsberg that he was going to review all of his open cases in which Dr. Nickelsberg had repeatedly found that the applicant was temporarily totally disabled. If no objection had been filed by the defendant, Ron would use the Court's decision in *JCPenney* to substantiate a further claim of temporary disability benefits.

¹ For those uninformed souls, a Court of Appeal decision that is certified for publication can be cited as precedent. On the other hand, a case that is not certified for publication is a decision that is the law of the case, but not of the land. In other words, you could read it but you can't tell anyone about it.

² The present language of Labor Code §4062 had its genesis in the Margolin Reform Act of 1989, effective for all injuries after January 1, 1990. It has only taken approximately 19 years for a court to finally confirm that Labor Code §4062 means what it clearly says.

I knew from my own files and comments by other defense attorneys that Ron had utilized Dr. Nickelsberg for years as the primary treating physician for all of his admitted industrial injuries. Once Dr. Nickelsberg took over as the primary treating physician, he would issue monthly progress reports (PR-2 reports), not only recommending ongoing treatment (sometimes forever), but also commenting on the applicant's disability status.

It is my impression that the test for Dr. Nickelsberg in assessing an applicant's temporary disability status was two pronged:

- (1) If the applicant is not working, he would be temporarily totally disabled;
- (2) If the applicant is working, he would be temporarily partially disabled.

It had been my experience, as well as the experience of my fellow defense attorneys, that these treatment programs were sometimes endless unless the appropriate Labor Code §4062 objection was issued within 20 days of the receipt of the progress report. Unfortunately, our receipt of the medical report hinges on the receipt by the claims administrator (be it an insurance carrier or a third-party administrator).

With the avalanche of mail cascading into claims administrators on a daily basis, the progress reports of Dr. Nickelsberg and other applicant treating physicians might not be attached to the claims adjustor's file within the 20 day period, or, even if attached, not sent to the defense attorney for objection on a timely basis.

My thought process was suddenly interrupted by Ron and Dr. Nickelsberg talking about the same topic, i.e., that due to the overwhelming amount of business confronting claims administrators, there are very few timely Labor Code §4062 objections.

Ron emphasized to Dr. Nickelsberg that even in cases where there was a Labor Code §4062 objection more often than not these objections would not be valid as they did not meet the 20-day time limit.³

Before Labor Code §4062 was amended, courtesy of SB 899, Labor Code §4062 was very specific in what issues could be objected to:

- (1) The permanent and stationary status of the employee's medical condition. **The objecting party would be objecting to the conclusion of the treating physician that the applicant was temporarily disabled.**

³ Labor Code §4062 provides that if an employee is unrepresented, time is extended to 30 days.

- (2) The employee's preclusion, or likely preclusion, to engage in his or her usual occupation. **Pursuant to the Board's en banc decision on *Weiner* and the abolishment of vocational rehabilitation for injuries prior to January 1, 2004, this objection is now moot.**
- (3) The extent and scope of medical treatment. Pursuant to the Supreme Court decision in *Sandhagen*, this also is now largely a moot issue.
- (4) The existence of new and further disability, or any other medical issue not covered by §4060 and §4061.

At this point, Ron was excitedly telling Dr. Nickelsberg that he was confident he would find in a majority of his pending cases that the defendant had not objected to one of Dr. Nickelsberg's Labor Code §4062 reports.

Therefore, even though a subsequent QME or AME had found the applicant to be permanent and stationary months previous to their exam, the failure to object meant that temporary disability, as a matter of law, would continue up to the QME and/or AME examination date.

In the *JCPenny* case this was exactly the problem facing the defendant employer. In attempting to claim credit for an overpayment of temporary disability pursuant to the opinion of an agreed medical examiner, defendants were denied credit as they had failed to properly serve Labor Code §4062 objections on the applicant and/or applicant's attorney.

TIME LIMITS WERE BROUGHT TO US COURTESY OF THE MARGOLIN REFORM ACT OF 1989

Prior to January 1, 1990, our industry was not concerned by, nor felt any type of pressure with respect to statutory time limits.

There were no Mandatory Settlement Conferences cutting off discovery, and in many cases discovery remained open forever. Suspect or delayed cases did not have to be denied within 90 days from receipt of the claim form, or ever, nor was there any requirement to object to the reports of the treating physicians.

The State Audit Unit was not even a distant memory.

All of this changed with the 1989 Margolin Reform Act, which brought us not only Labor Code §5402 and the 90 day requirement to accept or deny claims, but also mandated that discovery would close on the date of the first conference, which was christened the "Mandatory Settlement Conference."

Moreover, the parties were required to complete Pre-Trial Conference Statements listing stipulations, issues, exhibits and witnesses, and were legally bound by this document. If exhibits

and witnesses were not listed, the exhibits would not be admitted into evidence and the witnesses would not be allowed to testify.

We were also introduced to the time limits of Labor Code §4062, which mandated a time limit for objecting to the report of the treating physician.

Why, you might ask?

The reforms passed by the legislature in 1989 had a two-fold purpose:

- (1) To reduce litigation. In fact, the new reform law separated claims into represented and unrepresented applicants and gave certain incentives for injured employees to stay on the unrepresented track.
- (2) To eliminate the need for multiple medical-legal physicians, the legislature cloaked the applicant's primary treating physician with the responsibility of making determinations on all medical issues and limiting utilization of medical-legal physicians (which were now called QMEs) to reporting only if the appropriate objection were made within the time limits as clearly expressed in Labor Code §4062. Apparently the Legislature could not understand why treating doctors could not resolve all issues without argument as the phrase "treating doctor" conjured up images of Dr. Welby and Dr. Kildare. However on the defense side of the equation we knew that most times we got Dr. Seuss.

SELECTIVE ENFORCEMENT

Before the Margolin Reform Act, opposing parties would select their own medical-legal physicians. More often than not, the parties, facing trial, would decide to take the matter off calendar and go out to an Agreed Medical Examiner.

However, one of the purposes of the Margolin Reform Act was to do away with this multiplicity of physicians, and, therefore, the original version of Labor Code §4062 precluded just this type of activity as follows:

"The objecting party shall notify the other party in writing of the objection within twenty days of the receipt of the report... These time limits may be extended for good cause by mutual agreement. If the employee is represented by an attorney, [the party shall seek agreement with the other party on a physician who need not be a Qualified Medical Evaluator (the AME, or Agreed Medical Examiner), to prepare a report resolving the disputed issue.] If no agreement is reached within ten days, [or any additional time not to exceed twenty days agreed upon by the parties, the parties may not later select an Agreed Medical Evaluator.]" (Emphasis added)

I ask you, can anything be clearer?

If the parties do not agree on a doctor within the above period they can never again go to an AME. Right? Wrong!

My first simplistic and naive reading of this section was that the parties were absolutely precluded from going to an AME at trial.

Therefore, in this rather innocent state of mind, I appeared at trial shortly after this section became law, and after the applicant's attorney and the judge suggested that I agree to an AME, I responded that this was precluded by law, based upon the precise wording as contained in Labor Code §4062.

The fact that all attorneys in the room immediately broke out laughing as well as the judge slapping his leg with tears running down his face in merriment, introduced me to the concept that this part of Labor Code §4062 was going to be **universally ignored!**

This anomaly has now been cured by the fact that the current version of Labor Code §4062 contains no such prohibition.

SHOULD WE OBJECT TO EVERY REPORT BY THE TREATING PHYSICIAN PURSUANT TO LABOR CODE §4062?

The short answer is yes.

Labor Code §4062 is crystal clear on this issue, and has been ever since its inception, for injuries after January 1, 1990.

The only astonishing thing about the Court of Appeal decision in *JCPenney* is that it has taken 19 years to say so.

Even after we have objected pursuant to Labor Code §4062 and requested a QME, or have agreed to go to an AME (perish the thought), Labor Code §4062 and the Court of Appeal decision in *JCPenney* compel us to object to each and every treating report should we disagree with the determinations of the treating physician.

HOW DO WE ENSURE THAT OUR LABOR CODE §4062 OBJECTION IS TIMELY?

Due to the tremendous volume of daily mail, press of business, vacations, turnover, etcetera, claims administrators cannot always forward to us reports of treating physicians within 20 days of receipt.

Therefore, upon receipt of a litigated file to this firm, we make it a practice to advise the treating physician and/or primary treating physician not only as to our representation of the defendant,

but also request that we be placed on the mailing list and/or proof of service list of said treating physician.

We do this by letter to the primary treating physician and confirming phone call, and it is our experience that the treating physicians are only too glad to do so, as I assume the rationale is that the more people who have notice of the reports, the sooner they get paid.

By this procedure, we receive the report of the treating physician within the same time frame as the claims administrator, giving us sufficient time to make a determination as to whether or not a Labor Code §4062 objection is appropriate.

NON-REPORTING BY A PRIMARY TREATING PHYSICIAN

In the *JCPenney* case, the Court noted that the defendant's liability for providing temporary disability pursuant to a non-objected-to report by a treating physician is not limitless, but only extends to the date of the next report by the treating physician.

However, what do we do if the treating physician does not report again? Do we have to pay temporary disability forever or until the primary treating physician finally reports?

The answer is no, as we then go to the whip pursuant to Administrative Rule 9786 or the Administrative Rule outlining defendant's remedy called a Petition for Change of Primary Treating Physician.

THINKING OUTSIDE THE BOX

This actually comes under the heading of a shameless commercial announcement for our firm.

Ted Hanf, a partner in our Los Angeles office, and I conduct seminars for our clients (approximately two to two and a half hours) called "**Thinking Outside the Box.**"

"Thinking Outside the Box" highlights defense issues and strategies that are seldom employed. We use the four corners of the box to implement our strategy of **IET: Investigate, Evaluate and Terminate.**

The box has four corners:

- (1) The **proper** application of **prospective** and **retrospective** Utilization Review pursuant to Labor Code §4610.
- (2) Doing away with our liability for unnecessary pharmaceuticals and durable goods pursuant to Labor Code §4600.2.

- (3) Proper application of the pre-designation of physicians pursuant to Labor Code §4600 as amended by SB 899.
- (4) The effectiveness of a Petition for Change of Primary Treating Physician pursuant to Administrative Rule 9786.

The Court of Appeal decision in *JCPenney* has emphasized the importance of the Petition for Change of Primary Treating Physician (PTP) pursuant to Administrative Rule 9786. This Administrative Rule allows for a change of physicians to an employer-designated treating doctor if the applicant's designated PTP⁴ commits two or more reporting violations pursuant to Administrative Rule 9785.

These petitions are rather straightforward and are not filed with the Appeals Board, but with the Administrative Director, with appropriate copies to the applicant and/or the applicant's attorney as well as the applicant's primary treating physician. However, the Administrative Director does demand that a defendant cross all of its t's and dot all of its i's, and also demonstrate that a copy of Administrative Rule 9785, setting forth the reporting requirements of the primary treating physician, was previously sent to the PTP.⁵

DISCLAIMER:

With the exception of myself, George the Bartender and Kim, all characters at the lobby bar are fictional, as well as the story. However, the story line is not. As the *JCPenney* decision was certified for publication, the California Applicants' Attorneys Association will make sure that all members are aware of a defendant's potential liability for failure to timely object to the report of the primary treating physician.

Make mine a double, George.

-Joe Truce

⁴ I always love that phrase, as the employee almost never designates his primary treating physician, but is told who to select by his attorney.

⁵ The requirement of sending the Administrative Rule 9785 notice to the primary treating physician is sacrosanct in the mind of the Administrative Director, and this must be the current version, as Administrative Rule 9785 changes from year to year.