

KEGEL, TOBIN & TRUCE  
INTER - OFFICE MEMORANDUM

**TO:** ALL ATTORNEYS/CLIENTS

**FROM:** JOE TRUCE

**DATE:** October 31, 2003

**RE:** **FAILURE OF PRIMARY TREATING PHYSICIAN (IN THIS CASE DR. STEVEN NAGELBERG) TO INCORPORATE THE REPORT OF A SECONDARY PHYSICIAN CAN LEAD TO A SUCCESSFUL PETITION FOR CHANGE OF PHYSICIAN**

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In the case of David Torres I filed a Petition for Change of Primary Treating Physician from Dr. Steven Nagelberg, as Dr. Nagelberg failed to incorporate and/or comment on the report of one of the applicant's secondary physicians, Dr. Joe Lopez with the offices of Dr. Alfred Bloch.

In serious orthopedic cases, Dr. Nagelberg quite frequently utilizes the offices of Dr. Alfred Bloch as a secondary treating psychiatrist and invariably, Dr. Bloch will designate one of his psychologists (in this case Dr. Joe Lopez) to administer psychotherapy. Thereupon we are bombarded not only by reports from Dr. Nagelberg's office but also from Dr. Bloch's psychologist - in this case Dr. Joe Lopez, Ph.D.

On August 5, 2003 the Administrative Director granted our Petition for Change of Physician noting as follows:

**"Section 9785(e)(4) provides that a primary treating physician 'shall be responsible for obtaining all of the reports of secondary physicians and shall incorporate, or comment upon the opinions of the other physicians in the primary treating physician's report...'"**

The Administrative Director went on to observe:

**"The designated primary treating physician is primarily responsible for managing the care of an injured worker. Section 9785(a)(1). It is therefore incumbent upon a primary treating physician to obtain and either comment on or incorporate the reports of all secondary physicians..."**

MEMO TO ALL ATTORNEYS/CLIENTS

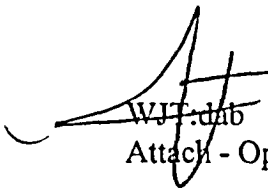
**RE: BARRIER OF PRIMARY TREATING PHYSICIAN**

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In granting our Petition for Change of Primary Treating Physician, the Administrative Director found that Dr. Nagelberg had failed to incorporate specific reports of Dr. Lopez in his own progress reports.

Since most applicant's treatment facilities operate on a volume basis, the so-called primary treating physician almost never comments on physicians to whom the applicant is referred to in other specialties and therefore in these type of cases we should certainly consider filing a Petition for Change of Physician pursuant to Administrative Rule 9786.

 WJT:dab

Attach - Opinion and Order Granting Petition for Change of Physician

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STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF WORKERS' COMPENSATION  
BEFORE THE ADMINISTRATIVE DIRECTOR

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DAVID TORRES,  
Employee,  
  
v.  
  
ROYAL & SUNALLIANCE,  
Claims Administrator.

WCAB Case No. MON 242409

**AD Case No. 9786-7912**

OPINION AND ORDER  
GRANTING PETITION  
FOR CHANGE OF PRIMARY  
TREATING PHYSICIAN

The Claims Administrator, Royal & SunAlliance (hereafter "Petitioner"), seeks an order from the Administrative Director requiring the Employee, David Torres, to select a new primary treating physician from a panel provided by the Petitioner. Petitioner alleges that the Employee's present primary treating physician, Steven Nagelberg, M.D., has failed to comply with the reporting requirements set forth in California Code of Regulations, Title 8, section 9785.<sup>1</sup>

Both the Employee, through counsel, and Dr. Nagelberg, through a representative, have filed timely, verified responses to the Petition for Change of Primary Treating Physician.

Labor Code section 4061.5 requires the primary treating physician to render opinions on all medical issues necessary to determine the employee's eligibility for compensation in compliance with regulations promulgated by the Administrative Director. Section 9785(d), provides that the primary treating physician's medical opinions on issues that impact upon the employee's compensation eligibility must be reported "in the manner prescribed in subsections (e), (f) and (g) of this section."

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<sup>1</sup> Unless otherwise noted, all citations are from Title 8 of the California Code of Regulations.

1 Labor Code section 4603 and its implementing regulation, Section 9786, vest the  
2 Administrative Director with authority to grant a petition for change of treating physician  
3 upon a showing of good cause. Good cause includes, but is not limited to, a clear showing  
4 evidenced by documentation that the treating physician has failed to comply with the  
5 physician reporting requirements set forth in Section 9785.

6 Petitioner contends that Dr. Nagelberg has failed to comply with the reporting  
7 requirements of Section 9785(e)(4) by failing to incorporate or comment upon the opinion of  
8 secondary physicians in his own primary treating physician reports.

9 Where a petition for change of physician is premised on an allegation of inadequate  
10 reporting, Section 9786(c) mandates that a petitioner furnish documentation that it notified the  
11 treating physician in writing of the *complete* reporting requirements of Section 9785 *prior to*  
12 the physician's failure to properly report. The record indicates that Petitioner advised Dr.  
13 Nagelberg of the reporting requirements of Section 9785 by correspondence dated August 5,  
14 2002. Thus, Dr. Nagelberg's reporting will be evaluated prospectively from that date.

15 Section 9785(e)(4) provides that a primary treating physician "shall be responsible for  
16 obtaining all of the reports of secondary physicians and shall incorporate, or comment upon  
17 the opinions of the other physicians in the primary treating physician's report...." The  
18 designated primary treating physician is primarily responsible for managing the care of an  
19 injured worker. Section 9785(a)(1). It is therefore incumbent upon a primary treating  
20 physician to obtain and either comment on or incorporate the reports of all secondary  
21 physicians.

22 The record reflects that the Employee was receiving treatment from, among others,  
23 secondary physician Joe Lopez, Ph.D. The record further indicates that Dr. Lopez was treating  
24 the Employee for a "major depressive disorder," and "pain disorder." Following the August 5,  
25 2002 notice, Dr. Lopez submitted two reports to Petitioner entitled "Attending Physician's  
26 Report," dated August 7, 2002 and September 5, 2002 respectively.

27 Following Dr. Lopez's August 7, 2002 and September 5, 2002 reports, Dr. Nagelberg  
28 issued two progress reports on October 24, 2002 and on October 25, 2002. In the October 24,

1 2002, Dr. Nagelberg acknowledges the treatment being provided by Dr. Lopez, stating in his  
2 report that the Employee is being treated by "Dr. Lopez for psychological treatment." Aside  
3 from the above comment in the October 24, 2002 progress report, there is no indication in the  
4 record that Dr. Nagelberg ever commented upon or incorporated the August 7, 2002 and  
5 September 5, 2002 reports of Dr. Lopez in his own progress reports.

6 Section 9785(e)(4) expressly requires the primary treating physician to obtain the  
7 reports of a secondary physician and either affirmatively accept or otherwise address the  
8 medical opinions expressed therein. There is no indication in the record that Dr. Nagelberg  
9 took any action to comply with the regulation's mandate in regard to Dr. Lopez's August and  
10 September 2002 reports. Good cause therefore exists to grant the petition under Section  
11 9785(e)(4).

12 Therefore, Petitioner has established good cause to grant its petition in view of Dr.  
13 Nagelberg's failure to comment upon or incorporate the reports of Dr. Lopez pursuant to  
14 Section 9785(e)(4).<sup>2</sup> Accordingly,

15 **IT IS ORDERED** that the petition filed in this case is **GRANTED**. The Employee is  
16 directed to select a new primary treating physician from the panel of five alternative  
17 physicians provided by the Petitioner.

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20 RICHARD P. GANNON  
21 Administrative Director

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27 <sup>2</sup> Both the Employee's counsel and Dr. Nagelberg argue that one of the physicians in the physician panel provided  
28 by Petitioner is not within a reasonable geographical area because the office is located approximately 24 miles  
from the Employee's home. Based on the specific facts of this case and the record submitted, the Administrative  
Director is not persuaded that this warrants an order that Petitioner provide a new panel of alternative physicians.

1 Service by mail to the following parties on:

*August 5, 2003 RV*

2 W. Joseph Truce, Esq.  
3 Kegel, Tobin & Truce  
4 330 Golden Shore Drive, Suite 150  
5 Long Beach, CA 90802

6 Steven Nagelberg, M.D.  
7 7770 Imperial Highway, Suite D  
8 Downey, CA 90242

9 Richard Felton, Esq.  
10 Gordon, Edelstein, Krepack, et al.  
11 3580 Wilshire Blvd., Suite 1800  
12 Los Angeles, CA 90010

13 By: MK/kl

14 **NOTE:**

15 Pursuant to Title 8, California Code of Regulations, Section 9787, the employee/employee's attorney or  
16 the claims administrator may file an APPEAL from this Decision and Order within thirty (30) days from  
17 the service by mail date noted above. The Appeal should be filed with the district office of the Workers'  
18 Compensation Appeals Board having venue, with copies served on all parties and the Administrative  
19 Director.