WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AMELIA MENDOZA, ***Applicant,*** **vs.** **HUNTINGTON HOSPITAL, Permissibly Self-Insured; and SEDGWICK CLAIMS MANAGEMENT SERVICES, INC. (Adjusting Agent),** ***Defendant(s).***	**Case Nos. ADJ6820138** **ADJ6820197** **OPINION AND DECISION AFTER REMOVAL AND ORDER ADMITTING DOCUMENTARY EVIDENCE (EN BANC)**

We granted the petition for removal filed by applicant, Amelia Mendoza, by and through her Guardian Ad Litem and Trustee, Rafael Mendoza. Thereafter, to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision[1] on the issues of: (1) whether Administrative Director (AD) Rule 30(d)(3)[2] is invalid because it is inconsistent with Labor Code sections 4060(c), 4062.2, and 5402(b);[3] and (2) if it is invalid, whether sections 4062 and 4062.2 place any time limits on when a defendant may commence the process for obtaining a section 4060 report on compensability.

As relevant here, Rule 30(d)(3) provides that "[w]henever an injury or illness claim of an employee has been denied entirely by the [defendant], *only the employee* may request a panel of

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[1] En banc decisions of the Appeals Board (Lab. Code, § 115) are binding precedent on all Appeals Board panels and workers' compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5] (*Garcia*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

[2] Cal. Code Regs., tit. 8, § 30(d)(3).

[3] All further statutory references are to the Labor Code unless otherwise specified.

Qualified Medical Evaluators as provided in … sections 4060(c) and 4062.2." (Emphasis added.) Therefore, if Rule 30(d)(3) is valid, it would prevent a defendant that has already denied industrial injury from subsequently obtaining a qualified medical evaluator (QME) panel on the issue of compensability, i.e., medical causation, unless the Workers' Compensation Appeals Board (WCAB) later orders the Medical Director of the Division of Workers' Compensation (DWC) to issue a QME panel.[4]

We hold that AD Rule 30(d)(3) is invalid because it conflicts with sections 4060(c) and 4062.2 and exceeds the scope of section 5402(b). Neither section 4060 nor section 4062.2 provides that "only the employee may request" a QME panel after an employer has denied the compensability of a claimed injury. To the contrary, those sections when read together specifically provide that "either party" may make a QME panel request "at any time" after the filing of a claim form. Furthermore, nothing in section 5402(b) provides that a defendant must request a QME panel before it denies liability for an injury, even if that denial is based on medical causation grounds.

We also hold that: (1) the time limits of section 4062(a) for objecting to a treating physician's medical determination do not apply when the injury has been entirely denied by the defendant; and (2) section 4062.2 does not establish timelines for initiating or completing the process for obtaining a medical-legal report on compensability.

I. BACKGROUND

Based on the documentary evidence and the balance of the record, the relevant history is as follows.[5]

Applicant worked as a patient case associate for Huntington Hospital (Huntington). On April 12, 2009, she allegedly suffered an industrial injury to her head, face and arms when an

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[4] It is the Medical Director who is responsible for issuing QME panels. (Lab. Code, § 139.2(h)(1); see also §§ 4061(d), 4062(a), 4062.1(b).)

[5] In granting applicant's petition for removal we concurrently issued a 15-day notice of intention to admit into evidence 17 exhibits appended to the petition and two exhibits appended to the answer for the limited purpose of determining the petition. The 15 days have elapsed and no timely objection has been filed. Accordingly, we will admit those exhibits in evidence for that limited purpose.

infectious disease patient in the pediatric unit bit her and slashed her with sharp fingernails. On April 14, 2009, she allegedly was attacked again by the same patient.

On April 12, 2009, applicant was seen for an "[a]brasion" or "scratch l[ef]t arm" at Huntington's Emergency Department. She was discharged to "home" for "self care" with instructions to "go to employee health this week for a recheck."

On April 20, 2009, applicant went to an industrial medical clinic for a recheck but she could not be seen at that time. About two and one-half hours later, she collapsed into a comatose state while eating at a restaurant. Since that time, her condition has not changed. She has been diagnosed as having had an intracerebral hemorrhage with severe neurological damage. She has minimal brain stem function and she has consistently been unresponsive to any stimuli.

Applicant's claim forms for both alleged injuries were timely denied by Huntington's claims administrator, Sedgwick Claims Management Services, Inc. (Sedgwick). In denying the April 12, 2009 injury claim, Sedgwick alleged that its investigation did not support the claim of injury and there were no medical reports supporting the claim. In denying the April 14, 2009 injury claim, Sedgwick alleged that applicant did not work that day.

Applicant designated Arthur Lipper, M.D., as her treating physician. Dr. Lipper authored two reports finding the injury industrial, including a report of August 27, 2009.

The Report on Petition for Removal (Report) of the workers' compensation administrative law judge (WCJ), Judge Ralph Zamudio, states that applicant's attorneys served Dr. Lipper's August 27, 2009 report on Sedgwick at an incorrect P.O. Box address.

On October 13, 2009, applicant's husband was deposed by defendant's counsel. Judge Zamudio's Report indicates that Dr. Lipper's August 27, 2009 report was personally served on defense counsel at that time. The Report further reflects that at the deposition defendant's attorney immediately objected to Dr. Lipper's opinion on industrial causation and began the medical-legal process under sections 4060 and 4062.2 by proposing an agreed medical evaluator (AME).

A priority conference on industrial injury was held before Judge Zamudio on October 21, 2009. Applicant argued that the matter should be set for trial on the threshold issues of industrial

injury and employment. Applicant asserted that, under AD Rule 30(d)(3), defendant was not entitled to a panel QME report because it did not obtain one within the 90-day period for denying liability under section 5402(b). Defendant responded that not only did it dispute medical causation, but it also disputed injury on non-medical grounds because: (1) the April 12, 2009 incident did not cause applicant to lose time from work and did not involve treatment beyond first-aid and, therefore, there was no "injury" under sections 3208.1(a) and 5401(a); and (2) applicant was not working on April 14, 2009. Further, defendant said that it had not yet requested a QME panel from the Medical Director only because it had proposed an AME on October 13, 2009 and the 10-day waiting period of section 4062.2(b) had not yet lapsed.

At the October 21, 2009 hearing, Judge Zamudio granted a continuance over applicant's attorney's objection. Judge Zamudio concluded that defendant had timely denied applicant's April 12 and 14, 2009 injury claims and, therefore, the injuries were not presumptively compensable under section 5402(b). Also, Judge Zamudio concluded that because applicant's attorneys served Dr. Lipper's report(s) on Sedgwick at an incorrect address, defendant timely commenced the AME/QME panel process at the October 13, 2009 deposition. Judge Zamudio determined that unless the parties reach agreement on an AME, defendant is entitled under sections 4060 and 4062.2 to obtain a QME panel from the Medical Director on the issue of compensability.[6]

Applicant filed a timely petition requesting that the Appeals Board remove this matter to itself under section 5310 and WCAB Rule 10843. (Cal. Code Regs. tit. 8, § 10843.) Applicant's petition contends that Judge Zamudio should have set these matters for trial because: (1) AD Rule 30(d)(3) provides that "only the employee may request" a panel QME where injury has been denied; and (2) Dr. Lipper found her claims to be compensable and defendant did not timely object to Dr. Lipper's report within 20 days of receipt, as required by section 4062. Applicant further contends there is substantial evidence that applicant's injuries are industrially caused and,

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[6] In a supplemental pleading, defendant alleges that, on October 27, 2009, it asked the Medical Director to issue a panel of QMEs in internal medicine and that, on February 25, 2010, a panel was issued. We accept defendant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10848.) The issuance of a QME panel does not change the posture of the case because applicant is challenging defendant's *right* to obtain a panel.

therefore, defendant should be sanctioned for a bad-faith denial of her injury claims. Defendant filed an answer.

Judge Zamudio's Report recommended denial of the petition. In his Report, Judge Zamudio states that Rule 30(d)(3) is "wholly inconsistent with the statutory scheme set forth in … sections 4060 and 4062.2" and that Rule 30(d)(3)'s "attempt to invoke or apply a presumption of compensability under … section 5402 where none exists … clearly ignore[s] the plain language of [the] statute." Judge Zamudio further states that "[s]uch [an] unsupported regulatory limitation on an employer's access to medical-legal evidence is … unenforceable, and a denial of due process."

After granting removal and issuing our notice of intention to admit documentary evidence, we invited DWC to file a brief on whether Rule 30(d)(3) is invalid because it is inconsistent with sections 4060(c), 4062.2, and 5402(b). DWC did file a brief, which we will discuss later in the opinion.[7]

Notwithstanding DWC's arguments to the contrary, we agree with Judge Zamudio that AD Rule 30(d)(3) is invalid because it is inconsistent with sections 4060(c), 4062.2, and 5402(b). We also agree with his implicit determination that defendant was diligent in commencing the panel QME process. Accordingly, we will affirm his denial of applicant's request for a trial setting and affirm his decision to allow defendant to obtain a panel QME on the issue of compensability.

II. DISCUSSION

A. AD Rule 30(d)(3) Is Invalid Because It Conflicts with Sections 4060(c) and 4062.2 and Exceeds the Scope of Section 5402(b)

Applicant's principal contention is that Judge Zamudio erred in allowing defendant to request a QME panel because AD Rule 30(d)(3) provides that "only the employee may request" a QME panel where injury has been denied.

Rule 30(d)(3) does provide that "[w]henever an injury or illness claim of an employee has been denied entirely by the [defendant], *only the employee* may request a panel of Qualified Medical Evaluators" on the issue of compensability under section 4060. (Emphasis added.)

[7] We gave applicant and defendant time to file replies to DWC's brief, but no timely replies were received.

Nevertheless, Judge Zamudio correctly concluded that Rule 30(d)(3) is invalid because it is inconsistent with sections 4060(c) and 4062.2 and it exceeds the scope of section 5402(b).

1. Determining the Validity of Administrative Director Regulations

The WCAB has exclusive original jurisdiction to determine the validity of regulations adopted by the AD. (Lab. Code, § 5300(f); *Boughner v. Comp USA, Inc.* (2008) 73 Cal.Comp.Cases 854, 859 (Appeals Board en banc) writ den. sub nom. *Boughner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 770; see also Gov. Code, § 11351(c) [the Administrative Procedures Act (APA) provisions for Superior Court review of agency regulations "shall not apply to" DWC].)

In considering the validity of a regulation enacted by the AD, "our task is to inquire into the legality of the ... regulation, not its wisdom." (*Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1014; accord: *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040.) Thus, we are "limited to determining whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute." (*State Farm*, 32 Cal.4th at p. 1040 [quoting from *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411] (internal citations and quotation marks omitted).) "Although in determining whether … regulations are reasonably necessary to effectuate the statutory purpose we will not intervene in the absence of an arbitrary or capricious decision, 'we need not make such a determination *if the regulations transgress statutory power*.' " (*Cal. Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11-12 [quoting from *Morris v. Williams* (1967) 67 Cal.2d 733, 749 (emphasis added).)

With regard to this latter point, we are guided by two of the central provisions of the administrative rule-making provisions of the APA (Gov. Code, § 11340 et seq.), to which the AD is subject.[8]

[8] The APA makes every regulation subject to its rulemaking provisions unless expressly exempted by statute. (Gov. Code, § 11346.) By statute, DWC is exempted only from the APA's provision regarding Superior Court review of agency regulations. (Gov. Code, § 11351(c).)

Government Code section 11342.2 provides that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute." Therefore, it has been said that "[w]hen a statute confers upon a state agency the authority to adopt regulations …, the agency's regulations must be consistent, not in conflict with the statute" (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 679) and that "[a] regulation that is inconsistent with the statute it seeks to implement is invalid." (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269.) No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419.)

Government Code section 11342.1 provides that "[e]ach regulation adopted, to be effective, shall be within the scope of authority conferred.").) Thus, it has been said that "administrative regulations which exceed the scope of the enabling statute are invalid and have no force or life" (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 680) and that "[a]dministrative regulations that … enlarge [a statute's] scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Cal. Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11.)

Accordingly, "any … regulation promulgated by the [Administrative] Director of the Division of Workers' Compensation in contradiction to the Workers' Compensation Act is invalid. … [A]dministrative regulations may not contravene terms of statutes under which they are adopted." (*Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*) (1999) 76 Cal.App.4th 513, 519 [64 Cal.Comp.Cases 1350].)

2. AD Rule 30(d)(3) Is Inconsistent with Sections 4060(c) and 4062.2

Rule 30(d)(3) provides that once compensability has been denied by the employer – implicitly, *timely* denied under section 5402(b) – then "only the employee may request" a QME panel. But neither section 4060 nor section 4062.2 provides that "only the employee may request" a QME panel after injury has been denied. In fact, when read together

those sections specifically provide that "either party" may make a QME panel request "at any time" after the filing of the claim form.

Section 4060 applies "to disputes over the compensability of any injury." (Lab. Code, § 4060(a).) It establishes two tracks for obtaining a comprehensive medical evaluation on the issue of compensability: one when the employee is represented by an attorney and another when the employee is not. (Lab. Code, § 4060(c) & (d).) Here, applicant has an attorney so the represented track of section 4060(c) applies.

Section 4060(c) provides:

> "If a medical evaluation is required to determine compensability *at any time* after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2." (Emphasis added.)

In turn, section 4062.2 states in relevant part:

> "If *either party requests* a medical evaluation *pursuant to Section 4060* …, *either party* may commence the selection process for an agreed medical evaluator by making a written request naming at least one proposed physician to be the evaluator. The parties shall seek agreement with the other party on the physician, who need not be a qualified medical evaluator, to prepare a report resolving the disputed issue. If no agreement is reached within 10 days of the first written proposal that names a proposed agreed medical evaluator, or any additional time not to exceed 20 days agreed to by the parties, *either party* may request the assignment [by the Medical Director] of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation." (Lab. Code, § 4062.2(b) (emphasis added).)

Thus, nothing in section 4060(c) states that in represented cases "only the employee" may request a QME panel after injury has been denied. Moreover, section 4060(c) specifically provides that the section 4062.2 procedure for medical evaluations on compensability may be undertaken "at any time" after a claim form has been filed.

Also, section 4062.2(b) expressly provides that "*either party*" may request a QME panel after the time to agree on an AME has expired. Although section 4062.2 sets out certain timelines that apply *after a party has initiated the section 4060 compensability evaluation procedure*, it does not establish deadlines for initiating that procedure.

Therefore, when read together, sections 4060 and 4062.2 establish that "either party" may request a QME panel "at any time." As a result, Rule 30(d)(3)'s limitation that "only the employee" may request a QME panel when compensability has been denied conflicts with the language of sections 4060 and 4062.2.[9]

3. AD Rule 30(d)(3) Exceeds the Scope of Section 5402(b)

In relevant part, section 5402(b) states: "If liability is not rejected within 90 days after the date the claim form is filed …, the [claimed] injury shall be presumed compensable … . The presumption … is rebuttable only by evidence discovered subsequent to the 90-day period."

Here, it is undisputed that defendant timely denied applicant's injury claims within 90 days of its receipt of applicant's claim forms. Therefore, under section 5402(b), applicant's claim is *not* presumed to be compensable.

As observed by Judge Zamudio in his Report, section 5402(b) must be construed in accordance with its plain language.

For example, in *Honeywell v. Workers' Comp. Appeals Bd.* (*Wagner*) (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97] (*Wagner*), the Supreme Court said that it "cannot ignore th[e] plain statutory language" of section 5402(b), which is "not ambiguous [and] unequivocally gives the employer 90 days from 'the date the claim form is filed' [to deny liability]." (*Wagner*, 35 Cal.4th at pp. 33, 35 [70 Cal.Comp.Cases at pp. 103, 104].) Therefore, absent a basis for estoppel, an employer's notice or knowledge of an injury or the assertion of an injury is not sufficient to trigger the 90-day period even if the employer breaches its duty to give the employee a claim form. (*Wagner*, 35 Cal.4th at pp. 35-36 [70 Cal.Comp.Cases at pp. 104-105].) The Court emphasized that "a plain-language reading of the statute [does not] deny [an employee] coverage for his claim;

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[9] Our conclusion that "either party" in a represented case may request a QME panel from the Medical Director "at any time" is consonant with the statutory scheme for non-represented cases. Section 4060(d) specifically declares that "[i]f a medical evaluation is required to determine compensability *at any time* after the claim form is filed … [*e*]*ither* party may request a comprehensive medical evaluation to determine compensability." (Emphasis added.) Moreover, in a non-represented case, section 4060(d) steers the parties into section 4062.1, which similarly provides, "[i]f *either party* requests a medical evaluation pursuant to Section 4060 …, *either party* may submit the form prescribed by the administrative director requesting the medical director to assign a panel of three qualified medical evaluators … ." (Lab. Code, § 4062.1(b) (emphasis added).)

it merely denies him the benefit of a *presumption* of compensability, leaving him free to prove in the ordinary manner his injury's industrial causation." (*Wagner*, 35 Cal.4th at p. 35 [70 Cal.Comp.Cases at p. 104] (Court's italics).)

Also, in *Rodriguez v. Workers' Comp. Appeals Bd.* (1994) 30 Cal.App.4th 1425 [59 Cal.Comp.Cases 857] (*Rodriguez*), the Court of Appeal construed section 5402(b) to mean that an employer need only "reject" a claim within 90 days to avoid the presumption of compensability; a notice of rejection to the employee need not be mailed or received within the 90 days. The Court said it was "required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' " (*Rodriguez*, 30 Cal.App.4th at p. 1432 [59 Cal.Comp.Cases at p. 861].) The Court then observed, "We think the Legislature is well aware of the distinction between the rejection of a claim and the giving of notice to the claimant that there has been such a rejection. The rejection is the decision by the person or entity to whom the claim has been filed or submitted that the claim will not be honored. Such a rejection does not require any participation on the part of the claimant after the claimant has filed or submitted the claim." (*Rodriguez*, 30 Cal.App.4th at p. 1432 [59 Cal.Comp.Cases at p. 862].) Although "[t]he wise practitioner will take steps to ensure that the employee/claimant has been notified of the rejection within the 90-day period …, it is the rejection which must occur within the 90-day period, not the receipt of notice of that rejection." (*Rodriguez*, 30 Cal.App.4th at p. 1433 [59 Cal.Comp.Cases at p. 862].)

Similarly, to avoid a presumption of compensability, the plain language of section 5402(b) merely requires a defendant to "reject[]" liability within 90 days of receipt of the claim form. Contrary to applicant's assertion, the plain terms of section 5402(b) do not compel the defendant to *commence* the panel QME process within the 90 days, let alone complete that process.

Accordingly, by providing that that "only the employee may request" a QME panel on the issue of the compensability once injury has been denied, Rule 30(d)(3) exceeds the scope of section 5402(b). It is only where a defendant *fails* to timely reject liability that the presumption of compensability is triggered. Thus, it is only where there has been an *untimely* denial that a

defendant is precluded from rebutting the presumption by evidence that could have been obtained had it exercised reasonable diligence in investigating the claim within the 90 days. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Welcher*) (1995) 37 Cal.App.4th 675, 683-684 [60 Cal.Comp.Cases 717, 723].)

4. DWC's Arguments Do Not Demonstrate that Rule 30(d)(3) Is Valid

In response to our invitation, DWC filed a brief arguing that Rule 30(d)(3) is valid. We will address DWC's principal arguments.

DWC argues that Rule 30(d)(3) is consistent with sections 4060 and 4062.2 because it merely requires the employer, which controls its claims investigation, to decide whether to initiate the compensability evaluation procedure established by those sections before it denies the claim. As we will discuss below, the Legislature has enacted other statutory provisions to impel defendants to promptly investigate claims. But neither section 4060 nor section 4062.2 requires an employer to request a QME panel *before* it denies an injury claim. Instead, sections 4060(c) and 4062.2 allow "either party" to request a QME panel "at any time" after the filing of the claim form.

DWC asserts that "once an employer has [denied] all liability for the entire claim …, there no longer exists any need ***by the employer*** to obtain a medical/legal evaluation on compensability." (DWC's emphasis.) Yet, section 5402(b) gives a defendant 90 days from the employer's receipt of the claim form to deny injury. One basis for a timely denial is that *the applicant has not presented any medical evidence to support industrial causation.* In this regard, it is the employee's burden to prove industrial causation, not the defendant's burden to disprove causation. (Lab. Code, §§ 3202.5, 5705.) Similarly, another basis for a timely denial is that *the applicant's medical evidence on industrial causation is not legally substantial*, e.g., the medical opinion is not predicated on reasonable medical probability; the medical opinion is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess; or the medical opinion does not set forth the facts and reasoning behind its conclusions. (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).) A further basis for a timely denial is that, even if the applicant

has presented a medical opinion that might constitute substantial evidence on industrial causation, *the defendant cannot determine compensability without an evaluation on medical causation*. Yet, under all these scenarios, Rule 30(d)(3) would prevent a defendant that timely denies injury from later obtaining a QME panel from the Medical Director, unless the defendant undertakes the rather lengthy process of obtaining a WCAB order directing the Medical Director to issue a panel.[10] Moreover, even if a defendant undertakes this process, there is no guarantee that the WCAB will issue such an order.

DWC also contends that employers are administratively mandated to conduct a good faith investigation before denying any claim (Cal. Code Regs., tit. 8, § 10109(b)) and that Rule 30(d)(3) merely "assumes the employer has determined, based on a reasonable investigation, there is a valid basis to deny the entire claim without need for a medical/legal evaluation on compensability." Yet, given that Rule 30(d)(3) is inconsistent with statute, DWC cannot use another regulation to justify the adoption of Rule 30(d)(3), even if that other regulation is valid and proper.

DWC further claims that Rule 30(d)(3) is justified because the WCAB can ultimately order the Medical Director to issue a QME panel on compensability. Yet, nothing in sections 4060, 4062.2, or 5402(b) requires a defendant that has timely denied injury to obtain such an order before it can obtain a panel QME to address medical causation. Moreover, forcing a defendant to obtain such an order can significantly delay the resolution of claims.[11]

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[10] Of course, a defendant cannot simply go out and obtain an admissible medical evaluation on its own because section 4060(c) states that "a medical evaluation to determine compensability *shall be obtained only by the procedure provided in Section 4062.2*" (emphasis added) and section 4062.2(a) states that "[w]henever a comprehensive medical evaluation is required to resolve any dispute …, and the employee is represented by an attorney, *the evaluation shall be obtained only as provided in this section*" (emphasis added). (See also *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (Appeals Board significant panel decision) (because section 4060(c) requires that medical disputes over compensability must be resolved solely through the procedure established by section 4062.2, an evaluation regarding compensability may not be obtained pursuant to section 4064(d) – and, if obtained, it is not admissible).)

[11] DWC suggests that the WCAB may order the Medical Director to issue a QME panel on compensability if the WCAB determines that "the presumption of compensability has been rebutted (Lab. Code, § 5402(b); Cal. Code Regs., tit. 8, § 30(d)(4))." Although the validity of AD Rule 30(d)(4) is not now before us, we observe that Rule 30(d)(4) appears to place a defendant in a Catch-22 situation. That is, it cannot obtain a panel QME on industrial causation unless it rebuts the section 5402(b) presumption, but it cannot rebut the section 5402(b) presumption unless it obtains a panel QME on industrial causation.

Therefore, for all the reasons above, the provision of Rule 30(d)(3) that "only the employee may request" a panel QME in an injury denied case is invalid because it is inconsistent with sections 4060, 4062.2, and 5402(b). Accordingly, Judge Zamudio properly determined that defendant could commence the section 4060(c)/4062.2 process for obtaining a panel QME on industrial causation in a represented case, even though defendant did not initiate that process within 90 days of the employer's receipt of the claim form.

B. The Time Limits of Section 4062(a) for Objecting to a Treating Physician's Medical Determination Do Not Apply When Injury Has Been Entirely Denied by the Defendant

Applicant argues that defendant is not entitled to a section 4060 report on compensability because it allegedly did not timely object to Dr. Lipper's finding of industrial causation within 20 days of its receipt of his August 27, 2009 report, as required by section 4062. We reject this argument.

Section 4062(a) specifically provides, "If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues *not covered by Section 4060* …, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented … or within 30 days of receipt of the report if the employee is not represented … ." (Emphasis added.)

Section 4060(a) expressly states: "This section shall apply to disputes over the compensability of any injury."

Section 4060(c) provides, "If a medical evaluation is required to determine compensability …, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2."

Reading these three sections together, the time limitations of section 4062(a) do not apply to a defendant's objection to the treating physician's opinion on compensability because that issue is "covered by Section 4060" and because section 4060(c) directs the parties in a represented case into section 4062.2, not section 4062.

Of course, this is true only where a defendant has not accepted liability for injury to *any* body part because section 4060(a) also specifically provides, "This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer."

C. Section 4062.2 Does Not Establish Timelines for Initiating or Completing the Process for Obtaining a Medical-Legal Report on Compensability

As discussed above, in represented cases, section 4060(c) requires the parties to utilize the procedures of section 4062.2 to obtain an AME or panel QME report on compensability. Yet, section 4062.2 does not mandate that either a defendant or an applicant must initiate or complete this process by any particular time. Section 4062.2 provides, in relevant part:

> "(b) If either party requests a medical evaluation pursuant to Section 4060 ..., either party may commence the selection process for an agreed medical evaluator by making a written request naming at least one proposed physician to be the evaluator. The parties shall seek agreement with the other party on the physician, who need not be a qualified medical evaluator, to prepare a report resolving the disputed issue. If no agreement is reached within 10 days of the first written proposal that names a proposed agreed medical evaluator, or any additional time not to exceed 20 days agreed to by the parties, either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. …
>
> "(c) Within 10 days of assignment of the panel … , the parties shall confer and attempt to agree upon an agreed medical evaluator selected from the panel. If the parties have not agreed on a medical evaluator from the panel by the 10th day after assignment of the panel, each party may then strike one name from the panel. The remaining qualified medical evaluator shall serve as the medical evaluator. …"

Therefore, where a defendant has denied industrial injury under section 5402(b), section 4062.2(b) does not require it to commence the process for obtaining an AME/panel QME compensability report within a specified time. Instead, section 4062.2(b) merely provides that once either party actually *requests* a section 4060 evaluation on compensability, the parties have a limited time within which to *agree on an AME*. Then, if the parties fail to settle on an AME, section 4062.2(b) does not require either party to request a QME panel from the Medical Director within a certain time. Instead, section 4062.2(b) merely provides that once a QME panel has issued the parties have a limited period within which to *mutually consent to an AME from the panel*.

D. Although Rule 30(d)(3) Is Invalid and Sections 4062(a) and 4062.2 Do Not Require a Defendant to Either Object to a Treating Physician's Opinion on Compensability or Request a QME Panel Within any Particular Time, There Are Other Statutory and Regulatory Provisions that Encourage Defendants to Promptly Obtain a Compensability Report

Our conclusions above do not mean that a defendant may reject liability within the 90 days and then simply sit on its hands without consequences.

First, once an applicant has completed discovery (e.g., by obtaining a compensable report from a treating physician) and has made a good faith effort to resolve the issue of industrial injury with the defendant, the applicant may file a declaration of readiness (DOR). (Cal. Code Regs., tit. 8, §§ 10250, 10250.1.) The DOR may request a priority conference on the issue of industrial injury. (Lab. Code, § 5502(c).) A priority conference must be set within 30 days after the filing of the DOR and, if the priority conference does not resolve the dispute, "a trial shall be set as expeditiously as possible, unless good cause is shown why discovery is not complete." (*Id*.) Even if good cause is shown, the WCJ must re-set the matter for a status conference. (*Id*.) If at the status conference the WCJ determines that the defendant has had "sufficient time in which to complete reasonable discovery," the WCJ must close discovery and set the case for trial. (*Id*.; see also § 5502(e)(3).) Therefore, a defendant acts at its peril if it is not diligent in seeking a section 4060 report on compensability.

Here, after receiving Dr. Lipper's August 27, 2009 report, applicant did file a DOR requesting a priority conference in accordance with section 5502(c). At the priority conference, however, the WCJ did not set the matter for trial, implicitly concluding that defendant had established good cause why its discovery was not complete. We agree with the WCJ's implicit determination. Defendant initially denied injury on non-medical grounds. That is, it denied the April 12, 2009 injury claim because allegedly that incident did not cause applicant to lose time from work or involve treatment beyond first-aid and, therefore, there was no "injury" (see Lab. Code, §§ 3208.1(a), 5401(a)). Defendant denied the April 14, 2009 injury claim because applicant allegedly did not work that day. It was not until defendant received Dr. Lipper's August 27, 2009 report that it had any reason to seek a section 4060 report on medical causation. Yet, defendant

did not actually receive that report until applicant's husband's October 13, 2009 deposition, just eight days before the October 21, 2009 hearing. Although applicant's counsel claims he sent Dr. Lipper's report to Sedgwick much earlier, counsel sent it to the wrong P.O. Box even though counsel had already received notice of the correct P.O. Box. Applicant's counsel's assertion that Sedgwick had previously used the other P.O. Box in other cases has absolutely no bearing on what P.O. Box should have been used in this case.

Second, a defendant that delays in obtaining a section 4060 report on compensability may face additional risks beyond the closure of discovery and a quick trial. For one, a defendant that unreasonably delays or refuses to pay compensation may be subject to penalties up to 25% of the amount(s) delayed, up to $10,000. (Lab. Code, § 5814.) For another, if it is determined that the defendant engaged in bad-faith actions or tactics that were frivolous or solely intended to cause unnecessary delay, the defendant may be subject to sanctions of up to $2,500 plus attorney's fees. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561.) Also, a defendant that does not conduct a reasonable and timely investigation upon receiving a claim form may be subject to penalties by the Audit Unit of DWC. (Cal. Code Regs., tit. 8, §§ 10109, 10111.1(c)(6) & (d)(1), 10111.2(b)(1) & (2).) Therefore, a prudent defendant will be diligent in commencing the section 4060 process for obtaining a medical-legal report on industrial causation, at least if there is a reasonable and good faith basis to believe that medical causation may be in doubt.

E. The Issues of Whether Substantial Evidence Exists to Support Applicant's Claim and Whether Defendant Should Be Sanctioned for Bad-Faith Denial Are Not Properly Before Us

Applicant lastly contends that Dr. Lipper's reports constitute substantial evidence that her injuries were industrially caused. Therefore, she requests that the Appeals Board sanction defendant for a bad-faith denial because it had substantial medical evidence to support her claims. To the extent applicant is claiming sanctions for bad-faith actions or tactics occurring at the trial level (see Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561), those issues must first be raised and tried before a WCJ. To the extent she is asserting that defendant should be penalized for a

bad-faith investigation (see Cal. Code Regs., tit. 8, §§ 10109, 10111.1(c)(6) & (d)(1), 10111.2(b)(1) & (2)), that is an issue for DWC's Audit Unit.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board (En Banc), that the Order issued by the workers' compensation administrative law judge (WCJ) on October 21, 2009 is **AFFIRMED**.

IT IS FURTHER ORDERED that Applicant's Exhibits 1 through 17 and Defendant's Exhibits A through B, as identified in the Appeals Board's February 3, 2010 Notice of Intention to Admit Documentary Evidence, are **ADMITTED IN EVIDENCE** for the limited purpose of determining applicant's petition for removal.

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IT IS FURTHER ORDERED that this matter is **REMANDED** to the trial level for all further proceedings and decisions.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
6/03/2010

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS AND ADDRESSES LISTED BELOW:

Rafael Mendoza (as Guardian Ad Litem and Trustee for applicant, Amelia Mendoza)

Glauber/Berenson

Law Offices of Edward T. de la Loza

Suzanne P. Marria, Esq., & Destie Overpeck, Esq., Division of Workers' Compensation - Legal Unit, P.O. Box 420603, Oakland, CA 94142

NPS/br