Lister, Martin, Thompson & Secia's

WORKERS' COMPENSATION COMMENTARY

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REBUTTING THE TREATING DOCTOR'S PRESUMPTION

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Rumors are rampant in the industry about the elimination of the treating physician's presumption in exchange for a whole basket of concessions from the employers and insurers. I believe this will happen and it's just too darn bad that those insurers pushing the reforms in 1994 didn't pay attention to the admonitions of attorneys on both sides of the practice not to enact it in the first place. They figured that if the attorneys opposed it that meant that it had to be good for the defendant. Well, now that they see the cost of that code section, they are going to have to pay a dear price for its removal. It will still be worth it. While it's still here, we have to deal with it and it will remain in force for injuries incurred between 1-1-94 and the date of its removal so once again, on to a discussion of this topic. This month I asked Bill Rawson who serves "of counsel" to our firm to provide our clients with some guidance in this thorny area of law.

John Martin

In the December 1996 issue of our newsletter, we discussed the case of *Minniear v Mt. San Antonio Community College District (1996) 61 CCC 1055* and the WCAB's interpretation of the treating doctor's presumption under Labor Code §4062.9. The *Minniear* case indicated that the statutory presumption which was given to the treating physician's report could be rebutted by medical evidence that was more probative, more thorough and more authoritative than the opinion expressed in the treating doctor's report.

Inasmuch as there have been many cases addressing the treating physician's presumption since *Minniear*, it is now time to revisit the issue.

Citing the language in Labor Code §4062.9 that indicated the presumption could only be rebutted by medical opinion, the Board indicated in *Minniear* that lay testimony, even if credible, could not rebut the presumption. They also stated that the mere passage of time did not render a more recent QME report to be more credible. Finally, to rebut the treating physician's report it was not merely enough to say that it was perfunctory or not as comprehensive as the QME report, specific defects in the physician's report must be pointed out.

The first reported case in which it was found that the treating physician's presumption was rebutted by a preponderance of the evidence is *Gibson v WCAB (1996) 61 CCC 1247*. In that case, the Board denied review of the decision in which the presumption was found to have been rebutted because of the treater's inaccurate history of the applicant's injury. In comparing the report of the QME to that of the treater, the report of the QME was found to have been based upon objective medical findings and based upon an accurate history of applicant's injury.

In *Boyd v WCAB (1997) 62 CCC 498*, the Board upheld the workers' compensation judge's finding that the QME had properly rebutted the treating physician's report. The treating physician had issued a P&S report indicating that the applicant should be restricted from sitting or standing for more than 20 minutes, not lift more than 10 lbs. and required

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that he lie down every two hours. The defendant's QME imposed work restrictions of no heavy work and no prolonged weight bearing. In finding that the QME properly rebutted the treating physician's report, the workers' compensation judge found that the QME report was more thorough, correct, internally consistent and consistent with the applicant's testimony at trial. He found that the report of the treater was conclusionary and unjustified as to his work restrictions.

Although it is noted that the workers' compensation judge relied in part on the applicant's testimony, (in seeming contradiction to the *Minniear* holding that the treating doctor's presumption could not be rebutted by lay testimony), the judge was actually relying on the QME's findings based upon the complaints rendered by the applicant, making a medical finding upon the applicant's testimony. However, this represents an inroad for applicant's testimony to play a part in the rebuttal of the treating physician's report.

The treating physician's presumption was dealt with in several other cases in 1997. In *California Compensation Insurance v WCAB (1997) 62 CCC 961* the Board held that the presumption of Labor Code §4062.9 could be waived if not raised at the Mandatory Settlement Conference or at trial and that the presumption could not be raised for the first time upon reconsideration.

In *Vidal v WCAB (1997) 62 CCC 723* the Board held that the presumption only applies to accepted injuries. In *Wall v WCAB (1997) 62 CCC 754* the Board determined that Section 4062.9 does not apply to pre-1994 injuries.

In *California Pacific Medical Center v WCAB (1997) 62 CCC 1188* the Board held that the treating physician's presumption does not apply to a specialist's evaluation, where there was no evidence that the treating physician requested the specialist's consultation.

In *Bud of California, Presidium, Inc. v WCAB (Diaz) (1997) 62 CCC 1262* the Board upheld the use of the applicant's testimony as to his pre-injury condition and pre-injury work capacity in finding that the treating physician's report was effectively rebutted.

The willingness to use applicant's testimony in rebutting the treating physician's presumption was further used in *Teledyne Ryan Aeronautical v WCAB (1997) 62 CCC 832.* In that case the applicant incurred continuous trauma injury to both upper extremities. The treating physician's report rated 8% permanent disability while applicant's QME provided a report that was rated at 22½% permanent disability. The workers' compensation judge found that the treater's report was effectively rebutted and found that in order, "To accurately assess the conclusions reached by a reporting physician, the Board should consider the injured workers' account of symptoms and work restrictions…" It is noted that the Board did not rest its decision on the testimony of the lay witness but on the report of the QME whose work restrictions were consistent with the applicant's testimony.

This case shows the Board's willingness to consider applicant's testimony in rebutting the treating physician's report particularly in light of the fact that the QME report herein contained some factual inconsistencies. However, there are several cases in which the Board has sustained the presumption of the treating physician's report.

In *Republic Indemnity Company of America v WCAB (1996) 62 CCC 101*, the Board found that the treating physician's report was more credible in that it was closer in time to the actual events and the QME relied upon an inaccurate history. In *Saragosa v WCAB (1997) 62 CCC 750*, a three-sentence report of the treater was entitled to the presumption even though it did not comply with the Rules of Practice and Procedure since there was no evidence of inaccuracy.

In *Lippincott v WCAB (1997) 62 CCC 1301*, it was found to be insufficient evidence to rebut the presumption since the treater had per-

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formed many tests and diagnostic studies while the QME did not perform any tests or review any results of tests and only saw the applicant once.

Thus it appears that the Board will be willing to use applicant's testimony to the extent that it supports the findings of the QME. In the cases in which this has been pivotal to date, this has favored the applicant.

Although the WCAB in *Minniear* had indicated that the mere chronology of the reports was not sufficient to rebut the treating physician's report, in practice, often times the more recent QME report is found to relate a more accurate description and therefore is deemed more persuasive.

It appears now that the Workers' Compensation Appeals Board, in determining whether a QME sufficiently rebuts the treating physician's report, will address the report as a whole and will find that it sufficiently rebuts the treating physician's report when it is more accurate.

In this assessment the Board will look to the lay testimony, the chronology, the comprehensive nature of the report and the greater accuracy of one report over the other. Specific critiques of either report, including whether they are factually consistent or accurate, and consistent with applicant's testimony will be issues to be considered.

Thus, whether one is presenting a treating physician's report or a QME report it is essential to insure that:

1. The doctor bases his opinion on an accurate history;
2. That he addresses the issues set forth in 8 Cal. Code Reg. §10606;
3. That comment is made in the report concerning the shortcomings found in the treating doctor's report and;
4. That due consideration is given to the applicant's statement regarding his injury, his condition and his disability. Should there be any material change in applicant's condition since the time of the report, the change in condition should be addressed by supplemental reporting which emphasizes the importance of the change.

If the applicant provides a demonstrably false history to the treating physician or the QME, it is essential that it be established that the doctor was furnished with evidence to consider in evaluating the true status and took that evidence into consideration in expressing his opinion.

Next Month:
Making TTD and VR go away.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.