



WORKERS' COMPENSATION COMMENTARY



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Court of Appeal Requires AME/QME Proposal Instead of New P.T.P. Election

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A well established practice of applicants' attorneys designed to prolong payment of indemnity, continue the administration of medical treatment and provide a presumption to their choice of treating doctor crashed and burned recently. On May 18, 2000 the California Court of Appeal rendered a decision in the case of *Tenet/Centinel Hospital v WCAB (Rushing)* (2000 Daily Journal D.A.R. 5251) We are proud to say that this was achieved by David Lister of this office.

The scenario was quite familiar for many years. A treating physician would indicate that an individual's condition had reached a permanent and stationary standpoint and that in the future, provision should be made for medical treatment for exacerbations or flare-ups. The applicant would then immediately elect a new treating physician based upon that stated opinion and that new physician would indicate that the applicant was in need of medical treatment at that point. That doctor would then administer same, frequently prescribe the payment of indemnity and ultimately find the applicant's condition to be permanent and stationary with greater factors of disability. The presumption attendant to the report of the "primary treating physician" would be claimed and this resulted in many

a protracted battle at the WCAB attempting to establish who the P.T.P. is.

When Carolyn Rushing injured her right knee in July of 1995 she came under the care of Dr. Glousman who operated on her knee twice and ultimately found her condition permanent and stationary in January of 1998. In his report under "future medical care" he specified that, "provisions should be made for future medical care." He explained that she would have flare ups of her symptoms and would then need to see doctors in the future, have anti-inflammatory medication and possible physical therapy. He also indicated that the applicant might also require knee surgery at a later date. No ongoing treatment was recommended and no future appointments were made.

At the time, the applicant was in proper. She objected to the treating doctor's permanent disability findings and was furnished a panel. She did not select from that panel but instead chose to engage the services of a lawyer who immediately sent her to Dr. Stokes who took over as the alleged primary treating doctor.

When the case came to hearing, the judge ruled that Stokes was the primary treating physician because Rushing could change treating doctors when future medical care was warranted. The Workers' Compensation Ap-

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peals Board agreed with the trial judge.

The Petition for Writ of Review was then filed on behalf of the hospital. The Court of Appeal specified that Labor Code §9785 governs in this circumstance where the primary treating physician had discharged the employee from treatment. A change of physicians may be made under circumstances where in conjunction with a determination that an employee's condition is permanent and stationary the doctor recommends continuing medical treatment or "further medical treatment" not "future" treatment. The Court defined these terms in detail indicating that in essence, unless a doctor indicates that a patient requires ongoing doctor involved medical treatment then she has been effectively discharged from treatment if only "future treatment" is recommended.

The proper means then to secure current medical treatment or a determination that continuing treatment is necessary is for the objecting party to propose the use of an Agreed Medical Examiner as specified in Labor Code §§4061 and 4062. If the parties fail to reach agreement, then, the services of a Qualified Medical Evaluator should be secured to express an opinion on the subject that may then be adjudicated at the WCAB.

This is a very useful decision from the perspective of the defense community, particularly if the conservative treating physicians are properly schooled in the terminology to use in connection with an assessment of the need for medical treatment beyond the permanent and stationary date. It will also encourage faster movement by the applicants' attorneys to avoid being placed in this position.

Of course, the best solution for all of this nonsense is to eliminate the presumption attendant to the report of the treating physician. For a considerable period of time into the future, however, even after its elimination, it will still pertain to a great number of cases in the pipeline.

So, what steps should defendants take now, beyond schooling the doctors? For starters, all litigated cases in which there has been a change of treating doctors after a P&S report from the defense treater should be immediately reviewed. If the finding on the doctor's report concerning future medical matches the *Rushing court's* criteria, an immediate request for a hearing may be appropriate. Obviously, this must be approached on a case by case basis but the applicant's P.T.P. might have his report excluded and treatment and/or medico-legal charges dismissed, if Sections 4061/62 are not followed. At the very least, this case presents a wonderful opportunity to obtain some very realistic settlement results in cases where, heretofore, applicant's counsel were rather stingy with concessions since they were asserting the presumption. Good luck!

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.