



# WORKERS' COMPENSATION COMMENTARY



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## COURT OF APPEAL DECISION REAFFIRMS RUSHING, AND DISAPPOINTS APPLICANT ATTORNEYS

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In JUNE 2000 we issued a "special edition" of the workers' compensation commentary discussing the pivotal decision of the Court of Appeal in the case of *Rushing v. Tenent/Centinela* (2000) 80 Cal. App. 4<sup>th</sup> 1041, a decision argued and won by David Lister of this office.

We are pleased to advise our clients that Mr. Lister was recently engaged to argue a PTP case before the Court of Appeal, on behalf of the Los Angeles Unified School District, and once again prevailed. See *Gaytan v. L.A.U.S.D.*, (2003) 31 CWCR 131.

In between these hearings before the Court of Appeal, the Administrative Director attempted to blunt the impact of the original *Rushing* decision by promulgating a rule making it easier for an injured worker to choose the primary treating physician after achieving permanent and stationary status, without following statutes and case law.

You will recall that the basic rule established by the Court of Appeal in the *Rushing* case was that if the primary treating physician declared an injured employee's condition permanent and stationary without the need for ongoing medical care and merely prescribed the need for future medical care in the event of an exacerbation, the employee no longer had a right to choose a new PTP.

The *Rushing* Court made it clear that if that circumstance prevailed, the injured

employee was required, if represented, to follow the Labor Code Section 4061 and 4062 rules, by proposing an AME then using a QME if the AME proposal was rejected. If the applicant's QME specified that the employee was in need of ongoing medical treatment then a determination had to be made as to whether or not that was the case.

That holding apparently did not sit well with the Administration of the Division of Industrial Accidents and therefore along with all of the other "reforms" enacted into law under AB749, the Administrative Director sought to provide for the need for medical treatment if determined to be in need of medical treatment by the QME without the WCAB having to make that determination. This rule was not at issue in *Gaytan*; Applicant did not argue the rule's applicability, presumably because the *Gaytan* case arose before the effective date of the rule.

As Mr. Lister pointed out in his article in the Workers' Compensation Tour Book 2003, it is our opinion that the WCAB cannot circumvent the dictates of the Court of Appeal. A workers' compensation judge has to make a determination as to whether the initial treating physician or the QME was correct in regard to the need for medical treatment. The Court of Appeal very forcefully reaffirmed the judge's duty and obligation to decide the dispute.

In the case of *Gaytan v. WCAB* (Los Angeles Unified School District) the employee

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did exactly what the new regulations theoretically permitted. The employee had been released without a finding of permanent disability or a need for further medical treatment by the primary treating physician. When Mr. Gaytan engaged the services of an attorney, that attorney objected to the findings of the PTP, proposed an AME and when that was rejected sought an opinion from a QME. The QME found the need for further medical treatment. The employee immediately nominated that physician to be the PTP and treatment commenced. The defendant objected to this and the parties litigated the issue at the WCAB. The trial judge agreed with the defendant and declined to award permanent disability benefits, and denied the claim for reimbursement of self-procured treatment. The Appeals Board agreed with the workers' compensation judge and a petition for writ of review was taken to the Court of Appeal by applicant's attorney.

Applicant Gaytan argued that having initially followed the Rushing holding and complied with Sections 4061 and 4062, he should be able to seamlessly morph the QME into a PTP after the initial report. At oral argument before the Court of Appeal, Gaytan's attorney candidly admitted that getting control of treatment is very important to applicants since it almost always leads to a higher permanent disability award. Quality of treatment was totally absent from applicant's argument. The Court was not impressed with the argument.

The entire case can be boiled down to one pithy phrase contained in the opinion of the DCA: "...the court ... resolve disputes, ... not reporting physicians." The Court indicated that the only proper method for designating a new primary treating physician under the circumstances of Gaytan was for the challenging applicant to obtain a credible report

from a QME and then proceed to the Workers' Compensation Appeals Board to get a determination from the judge as to whether or not there was indeed a need for further medical treatment. If the QME's opinion overcame the presumptively correct opinion of the initial treating physician, the QME would then be determined to be the primary treating physician. If the initial PTP's presumption prevails at trial, the award will follow that doctor's medical opinion.

As almost every practitioner in the workers' compensation appeal predicted, the presumption of correctness afforded to the report of the treating doctor has created a big mess. It has cost far more money than it has ever saved and we are very fortunate that it is, in large measure, on its way to extinction. At the Court of Appeal hearing, the Presiding Justice, on behalf of the Court, commented how happy the Court is that the PTP law was repealed. The Court viewed the statutory scheme as complex, convoluted and confusing. We are going to have to deal with it, however, until the dates of injury prior to 2003 work their way through the system and figure out some means of dealing with employees who will have injuries both before and after the application of the presumption and in some of the those cases the presumption will attach to all injuries and in others it will not - more work for claims staffs, lawyers and courts.

It is almost a futile task for an employer to rely on a presumption of an initial treating physician. In the first place, whereas treating physicians selected by applicant's counsel are extremely knowledgeable forensic physicians who know how to write a credible and complete report, by and large the primary treating physicians who the defendants are relying upon are clinic doctors. They quite frankly are not very good at writing reports.

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For that reason, the presumption is of dubious value to defendants in many cases, and a good QME report from the applicant will generally overcome the presumption (even though it did not in Gaytan). Secondly, because of the ability of the applicant to choose a treating physician at the drop of a hat, it is very simple for the system to be manipulated by an applicant if she wants to avoid having to rely upon a QME.

Under that scenario, the primary treating physician has released the individual without a need for current medical treatment but with a finding that the individual may be in need of future medical treatment with exacerbations. The employee, disappointed with the lack of a significant permanent disability finding then seeks an examination with the treating doctor on the grounds of a claimed exacerbation. In most cases, the initial treating doctor will accommodate the patient and provide some medication or perhaps a brief course of therapy. As soon as that has occurred, the employee then can nominate a new treating doctor and that new doctor can continue and expand on the treatment and will assume the PTP role.

Because of all of these weaknesses, a defendant, most of the time, is better off trying to reach an agreement with applicant's counsel for an agreed medical examiner or obtain an opinion from the strongest defense QME that can be utilized if the employee has followed the above scenario and elected a new primary treating physician.

This is an unfortunately thorny issue that is going away no time soon and in our view, has contributed to many of the ongoing abuses in the medical treatment area. Hopefully the next time the legislature decides that they are going to implement such a radical "reform" it is hoped that they might at least seek counsel from practitioners in the workers' compensation field and contemplate the poten-

tial ramifications of their legislation.

Next issue: The California Supreme Court rules on whether TTD is payable for medical treatment during the workday.

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