TIMELINESS OF REPORTING

- Is a party entitled to a replacement panel per AD Rule 31.5(a)(12) if the QME does not timely issue a supplemental report?
  - AD Rule 38(i)
    - Timeframe for supplemental reports is 60 days from the request.

TIMELINESS OF REPORTING

- Corrado v. Aquafine Corp. (June 24, 2016, ADJ9150447, ADJ9150446)[2016 Cal. Wrk. Comp. P.D. LEXIS 318]
  - AD Rule 31.5(a)(12) only mandates a replacement panel if a QME violates section 4062.5 and AD Rule 38.
  - LC section 139.2(j), referenced in section 4062.5, only provides a timeframe for the initial formal medical evaluation (30 days with limited exceptions).
  - No required timeframe for supplemental reports in sections 4062.5 or 139.2

TIMELINESS OF REPORTING

- The WCJ has the discretion to order a replacement QME panel for good cause where a supplemental report is not timely issued.
- Factors to consider in determining whether to order a replacement panel for a late supplemental report:
  - The length of delay caused by the late report.
  - The amount of prejudice caused by the delay in issuing the supplemental report versus the amount of prejudice caused by restarting the QME process.

TIMELINESS OF REPORTING

- What efforts, if any, have been made to remedy the late reporting.
- Case specific factual reasons that justify replacing or keeping the current QME, including whether a party may have waived its objection.
- The constitutional mandate to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4.)

DEPOSITION WITHIN 120 DAYS

- AD Rule 35.5(f): “Unless the Appeals Board or a Workers’ Compensation Administrative Law Judge orders otherwise or the parties agree otherwise, whenever a party is legally entitled to depose the evaluator, the evaluator shall make himself or herself available for deposition within at least one hundred twenty (120) days of the notice of deposition…”

DEPOSITION WITHIN 120 DAYS

- Is a party entitled to a replacement panel based on the QME's unavailability for a deposition within 120 days of the notice of the deposition?
  - Short answer – NO.
  - Sanchez v. Employ Bridge aka Select Staffing (July 17, 2019, ADJ10250786)[2019 Cal. Wrk. Comp. P.D. LEXIS 254]
    - The WCJ ordered a replacement QME panel based on the QME's lack of preparedness at deposition – deemed "unavailable" under AD Rule 35.5(f).
    - The Appeals Board granted removal and rescinded the decision. Decision stated that failure to be available for deposition within 120 days of the notice of deposition is not one of the enumerated reasons for a replacement panel in AD Rule 31.5(a).
  - See also Yonge v. Los Angeles Community College Dist. (September 4, 2019, ADJ11230683, ADJ11233335) [2019 Cal. Wrk. Comp. P.D. LEXIS 326].

REPORTING NOT SUBSTANTIAL EVIDENCE

- Is a party entitled to a replacement QME panel if the QME's opinions are not substantial evidence?
  - *Short answer – NO.*
  - *De Petro v. Napacabs/Italiente, Inc.* (May 29, 2018, ADJ9854681) [2018 Cal. Wrk. Comp. P.D. LEXIS 281]
    - Orthopedic QME refused to issue a P&S report until defendant authorized spinal surgery. Surgery had been non-certified by UR, which was upheld by IMR.

REPORTING NOT SUBSTANTIAL EVIDENCE

- The WCJ found the QME's reports were not substantial evidence and ordered a replacement QME panel.
- The Appeals Board opined that although decisions must be supported by substantial evidence, AD Rule 31.5(a) does not provide for a replacement panel due to a QME's opinions not constituting substantial evidence.
  - Parties must develop the record with the existing QME. Noted that the QME's refusal to address permanent impairment until specific treatment is provided is an "incorrect legal theory."

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- LC section 4062.3(g): “Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.”
  - See also AD Rule 35(k).

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- Alvarez v. WCAB (2010) 187 Cal.App.4th 575 [75 Cal.Comp.Cases 817]
  - The Court of Appeal held that section 4062.3(g) expressly prohibits ex parte communications with a panel QME.
  - Does not matter who initiated the ex parte communication.
  - The Court noted that an ex parte communication “may be so insignificant and inconsequential that any resulting repercussion would be unreasonable.”

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- Suon v. California Dairies (2018) 83 Cal.Comp.Cases 1803 (en banc)
  - Section 4062.3(g) specifies that the aggrieved party "may elect to terminate" the QME if there is an ex parte communication by the other party.
  - "If the aggrieved party wishes to elect to terminate the evaluation due to an ex parte communication, the aggrieved party must exercise its right to seek a new evaluation within a reasonable time following discovery of the prohibited communication. Conduct by the aggrieved party that is inconsistent with an election to terminate the evaluation may be construed as forgoing its right to terminate the evaluation and seek a new QME."
  - "Inaction by the aggrieved party following discovery of the ex parte communication is in effect an election to proceed with the QME."

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- The Alvarez decision noted the statutory exception to ex parte communications for “oral or written communications by the employee or, if the employee is deceased, the employee’s dependent, in the course of the examination or at the request of the evaluator in connection with the examination” in section 4062.3(i).
- Is a collateral interview by the QME with the employee’s spouse a prohibited ex parte communication?

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- Phipps v. Frito-Lay (March 20, 2019, ADJ9323388, ADJ9392268) [2019 Cal. Wrk. Comp. P.D. LEXIS 108]
  - Employee claimed two specific injuries to multiple parts including to the head and psyche.
  - The neuropsychological QME interviewed the employee‘s wife during the evaluation about changes in his behavior and memory since the injuries. The wife also gave the QME her personal notes about these issues.
  - The WCJ found that the employee’s wife engaged in ex parte communication with the QME.

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- The Appeals Board opined that "in certain circumstances, it may be appropriate for the medical-legal evaluator to interview the person most knowledgeable about the employee to supplement the employee's history and symptoms as reported by the employee during the examination."
- The WCJ's decision was rescinded and the matter returned to clarify whether the QME believed an interview with the wife was necessary to properly evaluate the employee.
  - Also returned to address whether the wife's disclosure of her notes violated section 4062.3(b) and if so, the appropriate remedy per Suon.

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- Trujillo v. TIC-The Industrial Co. (March 11, 2019, ADJ8531754) [2019 Cal. Wrk. Comp. P.D. LEXIS 90]
  - Employee claimed injury to multiple parts including to the head and psyche.
  - The neuropsychological AME interviewed the employee‘s wife by phone during the employee‘s evaluation about changes in his behavior since the injury.
  - The WCJ found that there was no impermissible ex parte communication with the AME.

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- The Appeals Board again opined that “in certain circumstances, it may be appropriate for the medical-legal evaluator to interview the person most knowledgeable about the employee to supplement the employee’s history and symptoms as reported by the employee during the examination.”
  - Decision further held that the wife is not a “party” per WCAB Rule 10301(dd).

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- The WCJ's decision was rescinded and the matter returned to the trial level to address whether the employee's provision of medical records to the AME at his deposition violated section 4062.3(c) [parties must agree on what information to provide to an AME].
  - Implied that the analysis in Suon is also applicable to a violation of section 4062.3(c).

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- Dollemore v. Wayne Perry, Inc. (November 9, 2018, ADJ10452831) [2018 Cal. Wrk. Comp. P.D. LEXIS 528]
  - The represented employee was evaluated by the QME on 5/18/2017.
  - After receipt of the QME's report, the employee emailed the QME's office on 8/3/2017 (without copying defendant) questioning the lack of an add-on impairment rating for pain.
  - The WCJ found the email communication impermissible and struck all of the QME's reports.

EX PARTE COMMUNICATION WITH AN AME/QME PER LC SECTION 4062.3

- The Appeals Board also found the employee's email was ex parte, but returned the matter to the trial level to address whether defendant elected to terminate the evaluation within a reasonable time or engaged in conduct inconsistent with an election to terminate the evaluation per Suon.
  - The decision also noted that only those reports by the QME issued after the ex parte communication need be stricken from the record if a new QME panel is issued.
    - See also Valdez v. Workers' Comp. Appeals Bd. (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209] [the Labor Code favors the admissibility of medical reports in workers' compensation proceedings].

VIOLATIONS OF SECTION 4062.3(b)

- LC section 4062.3(b): “Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.”

VIOLATIONS OF SECTION 4062.3(b)

- Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal.Comp.Cases 136 (en banc)
  - Distinguished between “information” and “communication” under section 4062.3, and defined “information” as follows:
    - ‘Information,’ as that term is used in section 4062.3, constitutes (1) records prepared or maintained by the employee’s treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.

VIOLATIONS OF SECTION 4062.3(b)

- Suon v. California Dairies (2018) 83 Cal.Comp.Cases 1803 (en banc)
  - No specific remedy for violating section 4062.3(b).
  - Not entitled to a replacement QME panel for a violation of this section per the LC.
  - Outlines 6 factors for the trier of fact to consider in determining the appropriate remedy, if any, for a violation of this section.

VIOLATIONS OF SECTION 4062.3(b)

- Follow-up to Suon: Juarez v. EB Design, Inc. (2018) 84 Cal.Comp.Cases 238
  - WCAB Rule 10507 for mailing does not apply to 20 days for service of information, but applies to the 10 days to object to non-medical records proposed to be provided to the QME.

GOING BEYOND SECTIONS 4062.1/4062.2

- LC section 4062.2(a)
  - “Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.”
- LC section 4064(d)
  - [N]o party is prohibited from obtaining any medical evaluation or consultation at the party’s own expense . . . . All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2.

GOING BEYOND SECTIONS 4062.1/4062.2

- LC section 4605
  - “Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation…”

GOING BEYOND SECTIONS 4062.1/4062.2

- Batten v. WCAB (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]
  - “Neither section [4605 or 4061(i)] permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert’s opinion.”

GOING BEYOND SECTIONS 4062.1/4062.2

- Parties must follow the procedure in section 4062.2 to obtain a comprehensive medical evaluation where the employee is represented.
- A party can obtain a medical evaluation or consultation at the party's own expense per section 4064(d).
- Employee can provide a consulting or attending physician at his/her own expense, but the resulting report cannot be the sole basis for an award per section 4605.

GOING BEYOND SECTIONS 4062.1/4062.2

- Report obtained from a physician who is retained solely to rebut the QME's opinion is not admissible per Batten.
  - See e.g. Davis v. City of Modesto (November 20, 2018, ADJ9467074, ADJ9468922) [2018 Cal. Wrk. Comp. P.D. LEXIS 546]

GOING BEYOND SECTIONS 4062.1/4062.2

- See also Valdez v. Workers' Comp. Appeals Bd. (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209] [the Labor Code favors the admissibility of medical reports in workers' compensation proceedings].
- LC section 5701
  - "The appeals board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the timebooks and payroll of the employer to be examined by any member of the board or a workers' compensation judge appointed by the appeals board. The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician. The testimony so taken and the results of any inspection or examination shall be reported to the appeals board for its consideration."

GOING BEYOND SECTIONS 4062.1/4062.2

- Campbell v. City of Redbluff Fire Dept. (August 16, 2019, ADJ10856280) [2019 Cal. Wrk. Comp. P.D. LEXIS 314]
  - Four QME panels issued over 3 months.
  - The Appeals Board issued a decision invalidating all 4 panels. In lieu of returning to the panel process, the parties were ordered to agree to an AME within 15 days or the WCJ could appoint a physician per section 5701.

DWC – Proposed QME Emergency Regulation in Response to COVID-19

§ 78 QME Emergency Regulation in Response to COVID-19:

- (a) During the period that this emergency regulation is in effect a QME, AME, or other medical-legal evaluation may be performed and remunerated as follows:
  - (1) A QME or AME may reschedule in-person medical-legal appointments currently calendared. When a currently calendared in-person medical-legal appointment is rescheduled, the physician shall reschedule the evaluation to take place within 90 days after the date that both the statewide stay-at-home order limiting travel outside one's home, and any similar local order in the jurisdiction where the injured worker resides or the visit will occur, if applicable, are lifted; or

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (2) A QME or AME may provide a record review and injured worker electronic interview summary report. The physician may interview the injured worker either by telephone or by any form of video conferencing. Once the statewide stay-at-home order, and any similar local order in the jurisdiction where the visit will occur, are lifted, the QME may then schedule a face-to-face evaluation taking all necessary precautions.
  - (A) The QME or AME shall schedule the electronic interview appointment by sending notice of the appointment with the information necessary for the injured worker to make the telephone call or initiate the videoconferencing for the appointment. The notice shall contain all the information ordinarily provided by the form 110 in addition to the information to complete the telephone or videoconference connection. The notice of electronic interview shall be transmitted in the manner required by 8 CCR section 34(a). Upon service of the notice of electronic interview, the parties to the action shall provide the QME or AME with the records for review at least 10 days prior to the scheduled appointment and in accordance with the provisions of Labor Code section 4062.3.

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (3) A QME or AME may complete a medical-legal evaluation through telehealth when a physical examination is not necessary and all of the following conditions are met:
  - (A) The injured worker is not required to travel outside of their immediate household to accomplish the telehealth evaluation; and
  - (B) There is a medical issue in dispute which involves whether or not the injury is AOE/COE (Arising Out of Employment / Course of Employment), or the physician is asked to address the termination of an injured worker's indemnity benefit payments or address a dispute regarding work restrictions; and

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (C) There is agreement in writing to the telehealth evaluation by the injured worker, the carrier or employer, and the QME. Agreement to the telehealth evaluation cannot be unreasonably denied. If a party to the action believes that agreement to the telehealth evaluation has been unreasonably denied under this section, they may file an objection with the Workers' Compensation Appeals Board, along with a Declaration of Readiness to Proceed to set the matter for a hearing;
- (D) The telehealth visit under the circumstances is consistent with appropriate and ethical medical practice, as determined by the QME; and
- (E) The QME attests that the evaluation does not require a physical exam.

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (4) For purposes of evaluations pursuant to subdivision (3) of this emergency regulation, telehealth means remote visits via video-conferencing, video-calling, or similar such technology that allows each party to see the other via a video connection.

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (b) During the time this regulation is in effect, section 31.3 (e) of title 8 of the California Code of Regulations, is suspended and the following is effective:
  - (1) If a party with the legal right to schedule an appointment with a QME is unable to obtain an appointment with a selected QME within 90 days of the date of the appointment request, that party may waive the right to a replacement QME in order to accept an appointment that is no more than 120 days after the date of the party's initial appointment request. When the selected QME is unable to schedule the evaluation within 120 days of the date of that party's initial appointment request, either party may report the unavailability of the QME and the Medical Director shall issue a replacement pursuant to section 31.5 of title 8 of the California Code of Regulations upon request, unless both parties agree in writing to waive the 120-day time limit for scheduling the initial evaluation.

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (c) During the time this regulation is in effect, all of the time periods enumerated in section 38 of title 8 of the California Code of Regulations are extended by a period of 15 days.
- (d) During the time this regulation is in effect, section 34(b) of title 8 of the California Code of Regulations is suspended and the following is effective:
  - The QME shall schedule an appointment for the first comprehensive medical-legal evaluation which shall be conducted at a medical office listed on the panel selection form or any office listed with the Medical Director provided there is agreement by the parties. Any subsequent evaluation appointments may be performed at another medical office of the selected QME if it is listed with the Medical Director and is within a reasonable geographic distance from the injured worker's residence.

DWC – Proposed QME Emergency Regulation in Response to COVID-19

- (e) Upon the lifting or termination of Governor Gavin Newsom's Executive Order N-33-20, and when there is no longer any statewide stay-at-home order, or any similar local applicable order in the jurisdiction, QME evaluations may take place under the provisions of the non-emergency QME regulations and the parties may comply with all timeframes, billing and reporting requirements under the non-emergency regulations.
- (f) Nothing in this emergency regulation is intended to encourage or to authorize any individual, group, or business to violate any provision of Governor Gavin Newsom's Executive Order N-33-20 and related stay-at-home and social distancing protocols, or any similar such orders applicable in local jurisdictions.