

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

EVANGELINA RAMIREZ, *Applicant*

vs.

**IHSS - CALIFORNIA DEPT. OF SOCIAL SERVICES,
legally uninsured, administered by
YORK RISK SERVICES GROUP, INC., *Defendants***

**Adjudication Numbers: ADJ12634125; ADJ12634126
Salinas District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on May 10, 2024 by a workers' compensation administrative law judge (WCJ) in which the WCJ found that reporting Qualified Medical Evaluator (QME) Henry Domeniconi, D.C., selected from a panel in the specialty of chiropractic, was unable to provide a substantive medical evaluation and report regarding all of the orthopedic medical-legal issues in dispute. The WCJ Ordered the parties to attempt to reach an agreement for the use of an Agreed Medical Evaluator (AME), and further found that if they were unable to reach such agreement, ordered the Medical Director to issue a replacement panel in the specialty of orthopedic surgery.

Applicant contends that the WCJ exceeded her authority when issuing the F&O that orthopedic surgery was the more appropriate specialty for the replacement panel, as neither party raised specialty as an issue for decision at trial, and that the evidence fails to justify a change in the medical specialty initially requested by applicant.

We received an Answer from defendant.

We received a Report and Recommendation (Report) from the WCJ, which recommends denial of the Petition for Reconsideration (Petition).

We have considered the allegations in the Petition, the Answer, and the contents of the WCJ's Report. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, and, as our Decision After Reconsideration, we will amend the May 10, 2024

Findings and Order, issue a finding and order that applicant is entitled to a replacement panel in the specialty of chiropractic, and otherwise affirm the findings of the WCJ.

FACTUAL BACKGROUND

Applicant, while employed by defendant on August 31, 2018, sustained injury arising out of and in the course of employment to her left foot and left ankle, and claims to have sustained injury to in the form of hypertension and psyche as a compensable consequence. Applicant also claims to have sustained a cumulative trauma injury to her back, right shoulder, left hip, right knee, hypertension, and psyche, during the period July 29, 2018 through July 29, 2019.

While unrepresented, applicant requested, and was provided, a panel QME in the specialty of chiropractic, who examined applicant on August 15, 2019 and issued a medical report dated September 14, 2019. (Ex. A1, Report, PQME Henry Domeniconi, D.C.)

Thereafter, Dr. Domeniconi issued seven additional reports, and was cross-examined on two occasions, the final time occurring on October 25, 2023. (Ex. A10, Transcript of the cross-examination of PQME Henry Domeniconi, D.C.)

On October 26, 2023, applicant filed a declaration of readiness (DOR) to proceed on the sole issue of discovery, requesting a replacement QME or regular physician for Dr. Domeniconi based upon the assertion that the QME “has demonstrated incapability or unwillingness to provide full investigation of applicant’s claims and reach conclusions that meet standard of substantial medical evidence.” (DOR, October 26, 2023.)

A trial was held on March 13, 2024, listing the sole issue of “whether a replacement of QME, Dr. Henry Domeniconi is necessary.

On May 10, 2024, the WCJ issued Findings of Fact and an Order (F&O) in which it was found that a replacement QME panel from the DWC medical unit was needed due to Henry Domeniconi, D.C.’s inability to provide a substantive medical evaluation and report. The WCJ further found that the specialty of orthopedic surgery (MOS) versus chiropractic would be the more appropriate specialty for the replacement medical-legal evaluator, and ordered the parties to either agree on an Agreed Medical Evaluator (AME), and if unable to do so, ordered the Medical Unit to provide such a panel.

Applicant thereafter filed his Petition for Reconsideration, disputing the finding of the WCJ changing the specialty of the QME from chiropractic to orthopedic surgery as the more appropriate specialty.

DISCUSSION

Applicant's Petition solely challenges the finding and order of the WCJ that while a replacement QME for Dr. Domeniconi is necessary, the specialty of orthopedic surgery would be the more appropriate specialty for the replacement medical-legal evaluator

This finding and order does not involve a threshold issue. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See, *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decision.

Here, the WCJ's decision includes findings regarding employment, as well as injury to parts of the body, both threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is

not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, we are persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Applicant claims that the WCJ exceeded her authority by ordering a replacement panel for chiropractic QME Domenico in a different specialty; to wit, orthopedic surgery, as a specialty dispute had never been raised by either party. Applicant further asserts that due process would mandate that the parties be placed on notice as to an issue that would be decided and provided an opportunity to be heard and present evidence.

In addition, petitioner contends that the WCJ relied upon an incorrect standard in determining the QME specialty to be selected for the replacement QME panel.

We agree as to both propositions.

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant..." (*Id.* at p. 158.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal.572, "the commission...must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Here, it does not appear that either party raised a dispute as to the appropriate specialty for a replacement QME. As such, we agree there was no meaningful opportunity to address the issue by the parties.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues.

However, while a change of specialty could be ordered after the parties are provided notice of the issue being raised and an opportunity to be heard, we need not reach any further findings in

that regard, as no good cause exists for a change in the QME specialty based upon the existing record.

Administrative Director (AD) Rule 31.7(b) provides for an additional QME panel in another specialty as follows in relevant part:

...

(b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:

(1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or

(2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or

(3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators;

(Cal. Code Regs. tit. 8, §31.7.)

The fact that “the chiropractor chosen was unable to provide full investigation of Applicant’s claims and reach conclusions that meet the standard of substantial medical evidence”, as stated by the WCJ in her report, does not establish that all chiropractors are incapable of doing so. (Report, p. 6.)

The party first requesting a QME panel has the legal right to designate the panel specialty pursuant to section 4062.2(b). (See also Cal. Code Regs., tit. 8, § 30.5 ["Medical Director shall utilize in the QME panel selection process the type of specialist(s) indicated by the requestor"].) In this case that party was the applicant. The opposing party may submit a written request for a

replacement QME panel in another specialty to the Medical Director on the basis that the chosen specialty "is medically or otherwise inappropriate for the disputed medical issue(s)" pursuant to AD Rule 31.5(a)(10). (Cal. Code Regs., tit. 8, § 31.5(a)(10).) Either party may appeal the Medical Director's decision regarding the appropriateness of the panel specialty to a WCJ as provided in AD Rule 31.1(b). (Cal. Code Regs., tit. 8, § 31.1(b).)

While the defendant did not object to the specialty, the WCJ nevertheless made a determination in this case that not only was a replacement panel necessary, but that an orthopedic surgery replacement panel was more appropriate in this case on the basis that "It is speculative and may result in further delay, to simply replace the PQME with another in the same specialty, specifically where it is uncertain whether the incapability is due to a lack of understanding specifically attributed to this practitioner or an overall need for more specialized experience." (Ibid., p. 6)

In Ramirez v. Jaguar Farm Labor Contracting, Inc. (2018) 84 Cal.Comp.Cases 56 [2018 Cal. Wrk. Comp. P.D. LEXIS 442]¹ the Appeals Board analyzed whether a chiropractic panel was an appropriate panel specialty as follows:

It is acknowledged that a chiropractor may not perform surgery or prescribe medications. However, this does not preclude a chiropractor from acting as a QME. QMEs are expressly required to "[r]efrain from treating or soliciting to provide medical treatment, medical supplies or medical devices to the injured worker." (Cal. Code Regs., tit. 8, § 41(a)(4).) A chiropractic QME may not provide treatment to an injured worker while also acting as the QME and thus, applicant's specific treatment needs are not relevant to whether chiropractic is a medically appropriate specialty in this matter.

Further, Chiropractors are qualified to evaluate industrial injuries, even if there is a possibility that surgery and prescription medication may become necessary. For example, a chiropractor might evaluate injuries even if the future medical treatment may involve surgery and prescriptions. (*Ramirez, supra.*) A chiropractor can also defer the determination of the type of modalities of treatment to the appropriate medical specialists.

The possibility that an orthopedic examiner might be more knowledgeable and have more training than a chiropractor is not the test for appropriate selection of specialty. The test is not

¹ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).) Here, we refer to *Ramirez* because it considered a similar issue.

whether an orthopedic QME is more appropriate than a chiropractic QME but whether the chiropractic panel is medically or otherwise inappropriate. Even if the claim involves multiple body parts, a chiropractic QME is qualified to evaluate the claim because all QMEs, including chiropractors, must pass a QME Competency Examination. There is no distinction between a chiropractor and an orthopedic surgeon within the exam. All QMEs must complete a course of instruction in disability evaluation report writing.² (Cal. Code Regs., tit. 8, § 11.5; *Hernandez v. Café Rio Mexican Grill*, 2022 Cal. Wrk. Comp. P.D. LEXIS 225.)³

Applicant requested, and was provided a QME in the specialty of chiropractic. We can glean no good cause upon the existing record to change that specialty.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will amend to find that applicant is entitled to a replacement QME in the specialty of chiropractic, issue an order to that effect, and affirm the WCJ as to the other findings of fact.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings of Fact and Order dated May 10, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order dated May 10, 2024 is **AFFIRMED**, except that it is **AMENDED** as follows:

JOINT FINDINGS OF FACT:

8. Based upon the finding of Henry Domeniconi's inability to provide a substantive medical evaluation and report, applicant is entitled to a replacement QME panel for Panel #2420585, in the specialty of chiropractic (DCH).

² See, also, Cal. Code Regs., tit. 8 § 14(a) "All doctors of chiropractic shall be certified in workers' compensation evaluation by either a California professional chiropractic association, or an accredited California college recognized by the Administrative Director. The certification program shall include instruction in disability evaluation report writing that meets the standards set forth in section 11.5. "

³ The *Hernandez* panel decision also addresses a similar issue.

ORDER:

IT IS ORDERED THAT the Medical Director, Division of Workers' Compensation, issue a replacement QME panel for Panel #2420585, in the specialty of chiropractic (DCH), within a reasonable geographic area of the applicant's residence, zip code 93912.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 12, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**EVANGELINA RAMIREZ
DILLES LAW GROUP
MACINTYRE & WHITE, LLP**

LAS/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*