

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

LETICIA ALVARADO, *Applicant*

vs.

COMMUNITY ACTION PARTNERSHIP OF KERN; CYPRESS INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY; and BOYS & GIRLS CLUBS OF BAKERSFIELD; ILLINOIS MIDWEST INSURANCE AGENCY, LLC, on behalf of STATE NATIONAL INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ10884845, ADJ11424770, & ADJ11977769

Bakersfield District Office

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration of the Rulings and Orders Admitting Evidence and the Findings of Fact and Orders (F&O) of April 2, 2024, wherein the workers' compensation judge (WCJ) invalidated the qualified medical evaluator (QME) panel in psychology; denied defendant's petition to bar a reportedly pending examination with the panel QME; and gave the parties thirty days to discuss the potential use of an Agreed Medical Evaluator (AME), and failing such agreement, permitting either participating party to request a panel of QME nominees in the field of psychiatry. Applicant contends that further development of the medical-legal record in case ADJ10884845 is necessary to determine if applicant injured her psyche as a result of the specific industrial injury of July 12, 2016, and that she is in need of a QME panel in general surgery to determine if weight loss treatment is necessary and appropriate medical treatment.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be dismissed or alternatively denied.

Applicant has also filed a Motion to File a Supplemental Pleading and Response, dated May 6, 2024. Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964 (Cal. Code Regs., tit. 8, § 10964), we have granted the request and have reviewed the Supplemental Pleading contained therein.

For the reasons discussed below, we will deny the Petition for Reconsideration and return this matter to the WCJ for further proceedings.

FACTS

Applicant is involved in three cases of claimed industrial injury and the cases were consolidated for trial on February 22, 2023. (2/22/23 Minutes of Hearing, Summary of Evidence, and Consolidation Order, p. 2.) In case ADJ10884845, applicant claimed a specific industrial injury to her back, lower extremities, and internal due to a slip and fall while working for defendant Community Action Partnership of Kern as a teacher's assistant on July 12, 2016. In case ADJ11424770, applicant claimed to have sustained a cumulative industrial injury to her lumbar spine, internal organs, and psyche while employed during the period from October 20, 2013, to July 12, 2016, by defendant Community Action Partnership of Kern. In case ADJ11977769, defendant Community Action Partnership of Kern filed an Application for Adjudication of Claim (Application) claiming that applicant sustained a cumulative industrial injury to her back while employed during the period from August 22, 2016, to February 6, 2019, by defendant Boys & Girls Clubs of Bakersfield.

Following the hearing on February 22, 2023, the WCJ made the following relevant findings. The WCJ found that applicant sustained a specific industrial injury to her lumbar spine and claims to have sustained injury to her internal organs and psyche while employed on July 12, 2016, as a teacher's assistant by defendant Community Action Partnership of Kern. (4/20/23 Joint Findings of Fact, Award, & Orders (FA&O), p. 4.) Applicant was not shown to have sustained injury to her internal organs on July 12, 2016, or as a compensable consequence of the specific industrial injury to her lumbar spine on that date. (4/20/23 FA&O, p. 5.) Further development of the medical-legal record is needed to determine if applicant sustained injury to her psyche at the time of her specific industrial injury of July 12, 2016, or as a compensable consequence thereof. (4/20/23 FA&O, p. 5.) The WCJ further found that applicant probably did not sustain a cumulative injury to her lumbar spine, internal organs, and psyche during the period from October 20, 2013, to July 12, 2016, while employed by Community Action

Partnership of Kern, and that applicant probably did not sustain a cumulative industrial injury to her back during the period from August 22, 2016 to February 6, 2019, while employed by defendant Boys & Girls Club of Bakersfield. (4/20/23 FA&O, p. 7.)

The WCJ ordered that applicant take nothing in the two cumulative trauma cases, ADJ11424770 and ADJ11977769. (4/20/23 FA&O, p. 9.)

In case ADJ10884845, the WCJ awarded further medical treatment and permanent partial disability on the specific injury but noted that the award was preliminary pending further development of the medical-legal record regarding applicant's claim of injury to her psyche. (4/20/23 FA&O, p. 8.) Additionally, the WCJ ordered that applicant's motion for a discovery order instructing the Administrative Director's Medical Unit to issue new panels of Qualified Medical Evaluator nominees was granted in part and denied in part. The motion was granted with respect to a new panel of nominees in the field of psychiatry and denied with respect to a new panel of nominees in the field of general surgery. The WCJ's Order stated that "Applicant's attorney is instructed to provide this Discovery Order to the Administrative Director' Medical Unit within thirty days of its finality." (4/20/23 FA&O, p. 9.)

In response, applicant filed a Petition to Reopen her cases on May 9, 2023. Applicant contended that the WCJ left out an exhibit at the last trial date, that the WCJ failed to explain why applicant did not sustain industrial injury to her internal organs, and failed to discuss the determination of permanent disability or the vocational experts' reports.

Thereafter, on May 31, 2023, the WCJ issued a Notice of Intention (NIT) to partially grant and partially deny applicant's Petition to Reopen, absent objection showing good cause. Defendant filed an objection to this NIT on June 1, 2023, and on June 2, 2023, the WCJ rescinded the NIT, pending further hearing.

On September 18, 2023, defendant filed a Motion to Stay the Deposition of PQME Dr. Martin Krell. Dr. Krell was the PQME in neurological surgery and his deposition was scheduled for November 13, 2023.

The case returned to trial on December 21, 2023, and was submitted for decision on January 19, 2024. On January 31, 2024, the WCJ issued Findings and Orders (F&O) in which the WCJ admitted additional evidence into the record; found in relevant part that applicant's Petition to Reopen was filed more than five years from the specific industrial injury of July 12, 2016;

denied the Petition to Reopen; and denied defendant's petition for a discovery order staying a further deposition of Dr. Martin Krell. (1/31/24 F&O, pp. 2-3.)

On January 9, 2024, and again on January 24, 2024, defendant Community Action Partnership of Kern filed a Declaration of Readiness (DOR) to proceed to Expedited Hearing and objected to the validity of applicant's request for a psychiatry panel. (DOR, p. 1.)

On January 30, 2024, defendant Community Action Partnership of Kern requested an order staying the upcoming PQME evaluation by Dr. Micah Hoffman until the issues listed in the DOR were resolved.

The case returned to trial on March 14, 2024. The issue for trial was the validity of QME panel #3397632. On April 2, 2024, the WCJ issued various findings and orders regarding the admission of evidence and restated its earlier findings in ADJ10884845 that applicant had sustained industrial injury to her back from the specific injury of July 12, 2016, and that she did not sustain a specific injury to her internal organs, nor did she sustain a cumulative injury in either ADJ11424770 or ADJ11977769. (4/2/24 Rulings & Orders Admitting Evidence; Findings of Fact and Orders (F&O), p. 4.) The WCJ further found that the Findings of Fact, Award & Orders of April 20, 2023, including the discovery order for a new panel of QME nominees in the field of psychiatry was final on May 26, 2023; that applicant's attorney failed to comply with the discovery order of April 20, 2023, requiring service of the instruction to the Administrative Director's Medical Unit to issue a new panel of QME nominees in the field of psychiatry within the time allowed or since then; and that QME panel #3397632 was not obtained in compliance with the discovery order of April 20, 2023. (4/2/24 F&O, p. 4.)

The WCJ ordered the QME panel invalidated; denied defendant's petition for a stay of an examination with Dr. Michael Hoffman, reportedly scheduled for March 14, 2024, and allowed applicant and defendant thirty days from the date of the Orders to discuss the potential use of an AME in the field of psychiatry. If the participating parties cannot agree on an AME, the order permitted either participating party to request that the Administrative Director's Medical Unit issue a panel of QME nominees in the field of psychiatry. (4/2/24 F&O, pp. 4-5.)

Applicant filed its Petition for Reconsideration on April 22, 2024, and a Motion to File a Supplemental Petition on May 6, 2024.

DISCUSSION

I.

Applicant first contends that discovery order in the FA&O of April 20, 2023, granting a new panel in psychiatry and denying a general surgery panel was vague and ambiguous and did not consider other issues as to the validity of the insurer's denial of a request for authorization (RFA) for a consultation to a general surgeon. (Petition, p. 1.) Applicant's request for a QME panel in general surgery to consider medically assisted weight loss was considered and rejected as part of the FA&O of April 20, 2023, which became a final decision as no petition for reconsideration was filed thereafter.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).)¹ This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

The Petition in this matter was filed on April 22, 2024, as to the April 2, 2024 Findings and Order, however this date was more than 25 days after the service of the WCJ's April 20, 2023 discovery order and beyond whatever extension of time, if any, the petitioner might have been entitled to under WCAB Rule 10600. Therefore, the contentions raised in the Petition for Reconsideration as to the issues of the vagueness of the WCJ's April 20, 2023 Order denying a general surgery consultation is rejected as untimely.

¹ All further statutory references are to the Labor Code unless otherwise noted.

II.

Applicant also claims that the April 20, 2023 discovery order as to a new QME panel in psychiatry was vague. The order instructs applicant's attorney to provide the discovery order to the Administrative Director's Medical Unit within thirty days of its finality. (4/20/23 FA&O, p. 9.) Applicant did not request a QME panel in psychiatry within the time limit specified in the order. When applicant thereafter requested the panel, defendant objected to the request and filed a DOR requesting an Expedited Hearing to obtain a finding that the panel request was invalid.

The disputed issue of the validity of the QME panel was heard at the trial on March 14, 2024. On April 2, 2024, the WCJ ordered the QME panel #3397632 invalidated; denied defendant's petition for a stay of an examination with Dr. Michael Hoffman; and allowed applicant and defendant thirty days from the date of these Orders to discuss the potential use of an AME in the field of psychiatry, or, in the absence of agreement, permit either party to request the Administrative Director's Medical Unit issue a QME panel in the field of psychiatry. (4/2/24 F&O, pp. 4-5.)

The WCJ's April 2, 2024 Findings of Fact & Order contains several findings of fact and orders; however, applicant's petition for reconsideration only challenges the WCJ's findings relating to applicant's lack of timely compliance with the April 20, 2023 discovery order, and subsequent procurement of the QME panel in psychiatry #3397632. Applicant also raises the failure of the WCJ to rule on whether the insurer's denial of an RFA for a consultation to a general surgeon was valid, also a discovery dispute. As the defendant asserts and the WCJ points out in his Report, applicant's motion for a QME panel in general surgery to consider medically-assisted weight loss was considered and reject as part of the Joint Findings of Fact, Award, & Orders of April 20, 2023. (Answer, p. 6; Report, p. 12.)

Our review of the record discloses no additional evidence offered subsequent to that trial relating to the issue. In addition, the Minutes of Hearing (MOH) from the March 14, 2024 trial indicate that the parties confirmed that the Stipulations and Issues, as listed above, were read correctly. Those issues did not include the issue as to a general surgery QME. (3/14/24 MOH, p. 5.)

Orders relating to discovery disputes are interlocutory orders. 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 [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 has issued.

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 decisions.

Here, the WCJ’s decision includes findings regarding threshold issues, including injury arising out of and in the course of employment. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is 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 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [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, based upon the WCJ’s analysis of the merits of the petitioner’s arguments, we are not persuaded that significant prejudice or

irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy. While the WCJ has made findings invalidating the panel as procured by applicant in this instance, he also left room for either party to request a panel in psychiatry, if they cannot agree upon an AME in this case.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2024

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

**LETICIA ALVARADO
LAW OFFICES OF DAVID KESTNER & ASSOCIATES, APC
MULLEN & FILIPPI, LLP
BRADFORD & BARTHEL, LLP**

JMR/mc

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