

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

PAMELA HESTER, *Applicant*

vs.

SLOAT GARDEN CENTER; REPUBLIC INDEMNITY, *Defendants*

**Adjudication Number: ADJ12396719
Oakland District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Order of April 16, 2024, wherein it was found that "The applicant has not established good cause for an additional panel in Ophthalmology." The decision contains a finding that, while employed on February 15, 2019 as a nursery worker, applicant sustained industrial injury to her head and neck and claims injury to the brain, eyes, and in the forms of cognitive dysfunction, headaches, and dizziness.

Applicant contends that the WCJ erred in denying her request for an additional panel in ophthalmology and in not ruling upon her request for a new panel in neurology. We have received an Answer from defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). In the Report, the WCJ admits error in not ruling upon applicant's request for a new panel in neurology, and requests that the case be sent back to the trial level for the WCJ to make a ruling upon that issue in the first instance.

We will grant reconsideration, rescind the WCJ's decision and issue a new decision finding entitlement to an additional panel in ophthalmology. As requested by the WCJ in the Report, we will defer the issue of entitlement to a new panel in neurology so that the WCJ can rule upon that issue in the first instance.

Preliminarily we note that a decision issued by the WCAB 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. Although the decision here contains a finding that is final (injury to the head and neck), applicant's Petition only challenges the non-final order regarding discovery. Since orders pertaining to discovery are not a final orders, these issues are subject to the removal standard rather than the reconsideration standard. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658 [81 Cal.Comp.Cases 1122].)

Applicant in this matter claims industrial injury to the eyes. Applicant was evaluated by optometrist Cynthia Huang, OD who diagnosed applicant with numerous eye issues but was "unable to state causation of [applicant's] symptoms and visual findings as [she] did not see [applicant] prior to the injury." (June 2, 2021 report at p. 4.) At her August 20, 2021 deposition, Dr. Huang testified that many conditions could have a neurological or optometric/ophthalmological dimension. She did not clarify her opinions on medical causation. It appears that Dr. Huang is somewhat unfamiliar with forensic medicine, at least when it comes to workers' compensation. She testified that she had never had her deposition taken before (August 20, 2021 deposition at p. 4), and was unfamiliar with the AMA Guides or the concept of medical probability (August 20, 2021 deposition at pp. 18-19.)

Even utilizing the removal standard, we believe that applicant is entitled to an additional panel in ophthalmology. "Discovery is permissible if the requested information is 'not privileged,' 'is relevant to the subject matter involved in the pending action,' and 'appears reasonably calculated to lead to the discovery of admissible evidence.' [Citations.] 'In *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal. 3d 161, 173, it was stated: "... the relevance of the subject matter standard must be reasonably applied; in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery [citation].'" (*Ameri-Medical Corp. v. Workers' Comp. Appeals Bd. (Lizzi)* (1996) 42 Cal.App.4th 1260, 1287 [61 Cal.Comp.Cases 149].)

Administrative Rule 31.7 states that a party is entitled to a panel in an additional medical specialty upon a showing of good cause. Given the liberal policies in favor of discovery, good cause was plainly shown here, where applicant has documented diagnoses and a medical professional has already stated that they are unable to opine on causation. Although the WCJ cited

to the panel decision of *Salcido v. Waste Management Collection and Recycling* (2024) 2024 Cal. Wrk. Comp. P.D. LEXIS 63 (Appeals Bd. panel) for the proposition that good cause is shown when a primary treating physician incorporates the report of a secondary treating physician and a party objects to the report, or when an existing QME states that there are issues beyond their expertise, the *Salcido* panel explicitly noted that “the above procedure is not the only way to establish good cause for additional panels” (*Salcido* at p. 63, *7, fn. 1.)

Applicant would be significantly prejudiced if she were not allowed discovery to meet her burden of proof on the issue of industrial causation of her purported eyes injury. We therefore make a finding and issue an order that applicant is entitled to an additional panel in the specialty of ophthalmology. As noted above, we will defer the issue of applicant’s request for a new panel in neurology, so that the WCJ can make a determination in the first instance.

We take no position on the ultimate resolution of any of these issues.

For the foregoing reasons,

IT IS ORDERED that Applicant’s Petition for Reconsideration of the Findings of Fact and Order of April 16, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings of Fact and Order of April 16, 2024 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Pamela Hester, Applicant, age 65 on the date of injury, while employed on February 15, 2019, as a nursery worker at Sloat Garden Centers in Danville, CA, sustained injury arising out of and in the course of employment to the head and neck, and claims to have sustained injury arising out of and in the course of employment to her brain, cognitive functioning, headaches, eyes, and dizziness.

2. The applicant has established good cause for an additional panel in Ophthalmology.

3. All other outstanding issues, including the issue of entitlement of a new panel in neurology, are deferred, with jurisdiction reserved.

ORDER

It is ORDERED that a new qualified medical evaluator panel in the specialty of ophthalmology be issued based on applicant's residential zip code 94519.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 24, 2024

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

**PAMELA HESTER
FETTNER & LEMON
FINNEGAN, MARKS, DESMOND & JONES**

DW/oo

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