

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

ROBERT BYERS, *Applicant*

vs.

**SONSRAY MACHINERY, L.C.C.; GREAT AMERICAN ALLIANCE COMPANY,
adjusted by INNOVATIVE RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ14364236
Redding District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks removal in response to the June 10, 2024 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a senior mechanic from June 1, 2012 to June 30, 2019, claims to have sustained industrial injury to his neck, right hand, wrists, fingers, back and knees. The WCJ found that Charles Sonu, M.D., was not disqualified as the Qualified Medical Evaluator (QME), and that the QME was available for cross-examination.

Applicant contends that his unrebutted trial testimony that no physical examination took place should be relied upon to disqualify the QME, and that the issue of the adequacy of the QME evaluation was timely raised.

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

We have considered the Petition for Removal, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will treat the petition as one seeking reconsideration, and applying the removal standard, deny the petition.

FACTS

Applicant claimed injury to his neck, right hand, wrists, fingers, back and knees while employed as a senior mechanic by defendant Sonsray Machinery from June 1, 2012 to June 30, 2019.

The parties selected Charles M. Sonu, M.D., to act as the QME in orthopedic surgery. Dr. Sonu evaluated applicant on February 7, 2023, and issued a report on March 9, 2023. (Ex. 1, Report of QME Charles Sonu, M.D., dated February 7, 2023.)

On April 1, 2024, applicant filed a Declaration of Readiness to Proceed to Hearing (DOR), averring that the QME failed to perform an appropriate physical examination of applicant, that the QME would not schedule a deposition during normal business hours, and that the QME should be disqualified as a result.

On May 30, 2024, the parties proceeded to trial on the issues of the disqualification of the QME and the alleged unavailability of the QME for deposition. The WCJ heard applicant's testimony, and ordered the matter submitted for decision.

On June 10, 2024, the WCJ issued her Findings of Fact, determining that Dr. Sonu was not disqualified as the QME, and that the QME was not unavailable for cross-examination. The WCJ's Opinion on Decision noted the QME's detailed physical findings in the February 7, 2023 report, as well as the attestations of the QME that he had personally accomplished a physical examination of the applicant. (Opinion on Decision, p. 3.) The WCJ further noted that applicant did not promptly raise the issue of the adequacy of the examination, waiting more than one year to offer any objection to the evaluation, as set forth in his April 1, 2024 DOR. With respect to the availability of the QME for deposition, the WCJ noted that applicant had the burden of proving unavailability of the QME but had offered no evidence in support of that contention. (*Id.* at p. 4.)

Applicant's Petition for Removal observes that applicant's un rebutted trial testimony was that the QME did not perform a physical examination of the applicant, and that applicant timely raised the issue in his deposition testimony offered on January 3, 2024, less than one year from the date of the QME evaluation. (Petition, at 7:4.)

Defendant's Answer endorses the WCJ's Report and Recommendation on Petition for Removal.

The WCJ's Report notes that applicant did not offer his deposition testimony into evidence, and thus the first mention of the issue of the adequacy of the QME evaluation was applicant's

DOR filed April 1, 2024. (Report, at p. 3.) The WCJ also notes that in evaluating whether the reporting of the QME or the applicant's testimony was the more credible version of events, the WCJ found the QME reporting to be more credible based on the QME's very specific physical findings and the physician's attestations set forth under penalty of perjury that he had actually examined applicant. (Report, at p. 3.) Accordingly, the WCJ recommends we deny applicant's Petition.

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar 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 decisions.

Here, the WCJ's decision includes a finding of employment. This is a final order subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order determining the issue of whether the QME should be disqualified. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*, 5 Cal.App.5th 658, 662.)

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 substantial 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).)

Applicant contends the WCJ erred by not relying on applicant's trial testimony that QME Dr. Sonu failed to perform a physical examination of applicant as part of his QME evaluation. (Petition, at p. 4:7.) The WCJ's Opinion on Decision explains, however, that the WCJ was persuaded that the specific physical descriptions and findings of the QME reflected a physical examination of the applicant. The WCJ also found the attestations required by section 4628 included the QME's affirmation that he had personally conducted the examination of the applicant to be persuasive. Thus, based on a review of the entire record, the WCJ was not persuaded that the QME should be disqualified. However, as this interim conclusion as to replacement of Dr. Sonu is not a final finding, it does not foreclose further discovery on the issue. Accordingly, we are not persuaded that the WCJ's analysis was in error, or that applicant has established that he will suffer irreparable harm as a result of the WCJ's decision declining to disqualify the QME.

We also observe that in raising the issue of the availability of the QME for deposition, applicant bears the burden of proof. (Lab. Code, §§ 3202.5; 5705.) Applicant offers no persuasive evidence of the unavailability of QME for deposition and cites to no authority for the proposition that such deposition must take place during "normal" business hours. We therefore concur with the WCJ's decision declining to find the QME unavailable for deposition.

We note, however, that in evaluating applicant's contentions regarding the adequacy of the physical examination by the QME, no party has raised these issues directly with Dr. Sonu. To the extent that the QME remains available for deposition, all parties retain the right to depose the QME, and should the evidence adduced therein so indicate, applicant may renew his objection to the adequacy and weight accorded to the QME's reporting.

In summary, the WCJ's June 10, 2024 Findings of Fact contain both final and non-final orders. We will therefore treat applicant's petition as one seeking reconsideration, but because the issue challenged is an interlocutory order, we will apply the removal standard to our analysis. Based on the current evidentiary record, we are not persuaded that the WCJ erred in her conclusions. However, all parties retain the right to depose the QME, and applicant may renew his objections to the adequacy of the medical-legal evaluation performed by Dr. Sonu should the evidence adduced at deposition so warrant. We will deny the petition, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 26, 2024

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

**ROBERT BYERS
NYMAN TURKISH
LLARENA, MURDOCK, LOPEZ & AZIZAD
LENAHAN, SLATER, PEARSE & MAJERNIK**

SAR/abs

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