

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD LYNN, *Applicant*

vs.

**CONTRA COSTA ELECTRIC;
AMERICAN CASUALTY COMPANY OF READING, PA, *Defendants***

**Adjudication Number: ADJ14547470
Oakland District Office**

**OPINION AND
DECISION AFTER
RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued by a workers' compensation arbitrator (WCA) on January 13, 2021, wherein the WCA found that applicant, who claimed industrial injury on September 6, 2018 to his back arising out of and in the course of employment (AOE/COE) with defendant, was not entitled to an examination with a Qualified Medical Evaluator (QME) specializing in either the field of orthopedic or occupational medicine. Applicant contends that the WCA erred by relying upon Section 48 Article 13 of the Alternate Dispute Resolution (ADR) agreement to deny applicant the right to a medical legal evaluation to rebut the carrier's denial of his claim.

We received an Answer from defendant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCA, which recommends that we deny reconsideration.

On November 11, 2024, we ordered this matter to a Status Conference with a designated officer of the Appeals Board. Thereafter, the parties entered into a stipulation dated November 22, 2024 in order to admit into evidence joint exhibits X and Y, which we accept and admit as part of the evidentiary proceedings for our review and consideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will admit joint exhibits X and Y, rescind the F&O, and return the matter to the arbitrator for further proceedings consistent with this opinion.

I.

PROCEDURAL HISTORY

Applicant, while employed by defendant, claims to have sustained injury arising out of and in the course of his employment (AOE/COE) on September 6, 2018 to his back, chest, neck and head. Defendant denied the industrial injury on February 8, 2019, and claimed the affirmative defense of post-termination per Labor Code¹ section 3600(a)(10).

Applicant was a member of the National Electrical Contractors Association (NECA) and the Local Union of the International Brotherhood of Electrical Workers (IBEW). A collective bargaining agreement, as authorized by section 3201.5, was in effect for those employees who sustained injuries during their employment with an employer in California. Pursuant to the Rules of the NECA/IBEW Workers' Compensation Trust Alternative Disputes Resolution Program (the ADR Program), after applicant claimed injury, he was provided with an occupational medicine QME panel which included Peter Yip, M.D., David Suchard, M.D., and Patricia Wiggins, M.D. Applicant scheduled an examination with Dr. Wiggins to occur on May 8, 2019. However, applicant did not attend the examination.

According to Petitioner, the parties were referred to a mediation, which was held on August 2, 2019, on the sole issue of whether applicant's claim was barred per section 3600(a)(10), but the parties were unable to resolve the matter.

The matter was thereafter set for trial, which took place on October 22, 2019 with the WCA listing the issue to be decided as whether or not applicant's claim is barred because of the provisions of section 3600(a)(10). Evidence was received, including several medical reports regarding applicant from Kaiser Permanente facilities in Oakland and Vacaville.

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

On November 8, 2019, the WCA issued a Findings and Order (F&O) as follows:

FINDINGS OF FACT

1. Applicant, Richard Lynn, was employed by Contra Costa Electric on September 6, 2018 and claims to have sustained an injury arising out of and in the course of his employment on that date.
2. At the time of the claimed injury Contra Costa Electric was insured for Workers' Compensation by American Casualty Company of Reading, PA.
3. Applicant's claim for workers compensation benefits as a result of the claimed injury are not barred by the provisions of California Labor Code Section 3600 (a)(10).

ORDER

Applicant is hereby ordered to contact the Ombudsman for the NECA/IBEW Compensation Trust ADR Program within 20 days of receipt of this order requesting that his claim for injury be re-opened so that he may pursue his claim of injury.

(F&O, 11/8/2019.)

These findings were not appealed and thereafter became final.

The matter was set for another arbitration hearing on October 14, 2020 before the WCA. Per the Transcript of Proceedings (Transcript), the issue at this hearing was applicant's entitlement to a QME in the field of orthopedics or occupational medicine.

(Transcript, 10/14/2020, p. 5.)

At that hearing, applicant testified that he made an appointment to see QME Dr. Wiggins, but did not attend because he "believed that the appointment was cancelled because the defendant advised that they were dropping the claim." He testified that he attempted to contact (ombudsman) Richard Robyn to apply for another hearing, and that Mr. Robyn expressed frustration that applicant had not turned in the proper form for filing regarding an evaluation with an orthopedic or occupational QME. Applicant further testified he received a letter saying they would look at scheduling applicant for another evaluation. (Transcript, p. 9-10.)

Defense counsel questioned applicant relative to the timeline regarding his claim and request to see a QME physician. The matter was continued to December 8, 2020 in order for applicant's counsel to be able to review the evidence relative to defendant's questioning. Such evidence was offered to the WCA by the parties, including applicant's medical records from Kaiser

Permanente, email correspondence regarding applicant's claim, and various correspondence. (Transcript, 12/08/2020, pp. 4-6.)

At the December 8, 2020 hearing, applicant acknowledged on cross-examination that there was no evidence to contradict the fact that he did not contact the Ombudsman between the time he received Mr. Robyn's December 13, 2019 email and applicant's subsequent response on May 7, 2020, but that he is sure that he tried to do so. (Transcript, pp. 13-15.) He was also unable to confirm that he had any evidence to support his contention that the defendants cancelled applicant's appointment with Dr. Wiggins. (Transcript, p. 19.) He acknowledged and attributed his difficulties complying with the ADR procedures due to stress. (Transcript, p. 22.)

Claims adjuster Amanda Nashert testified that she did not cancel the examination with Dr. Wiggins, and further that she never set an examination with another QME, Dr. Suchard, as was alleged by applicant. (Transcript, p. 24.) She acknowledged under cross-examination that in May 2020 she had objected to applicant undergoing a QME with an orthopedist, because she had the right to do so. (Transcript, pp. 28-29.)

The matter thereafter stood submitted, and on January 13, 2021, the WCA issued his Opinion and Order finding that applicant was not entitled to an examination with a QME specializing in either the field of orthopedic or occupational medicine.

It is from this finding and order that applicant seeks reconsideration.

II.

Petitioner alleges the WCA erred in his reliance of Section 48 Article 13 of the rules of the NECA/IBEW in denying applicant the right to an examination by a QME.

In his petition, applicant asserts as follows:

In his Findings and Order Commissioner Moresi relied upon Section 48 Article 13 of the rules of the NECA/IBEW which govern the QME process. The applicable section allows the injured worker 30 days from the issuance of a panel to select an evaluating physician. Thereafter the worker is responsible for attending the exam within 60 days. According to Commissioner Moresi, applicant failed to comply with Section 48 Article 13 when he did not appear for the exam with Dr. Wiggins on 5/8/2019. Based on applicant's failure to comply within the ADR rules, Commissioner Moresi denied applicant's request for an evaluation with Dr. Wiggins.

At the time of the 5/8/2019 evaluation with Dr. Wiggins, Applicant was unrepresented. Applicant testified that after selecting Dr. Wiggins as his

evaluator, he reconsidered his selection and decided to instead schedule with Dr. Suchard. For that reason, Applicant did not appear at the 5/8/2019 evaluation. Labor Code §5708 requires that the Appeals Board operate in a manner that is calculated to ascertain the substantial rights of the parties and carry out justly the spirit of the workers' compensation law. Justice mandates that Applicant be allowed an evaluation to rebut the carrier's denial.

Section 48 Article 13 does not set forth the ramifications for failure to comply with the terms of the section. As noted in the Summary of Material Facts, Applicant's claim was denied by the carrier. Commissioner Moresi's determination that applicant is not entitled to a medical legal evaluation to rebut the carrier's denial is tantamount to a dismissal of applicant's claim.

(Petition, pp. 4-5.)

Petitioner is correct that the aforementioned section relied upon by the WCA in denying applicant the right to an examination by a QME does not set forth a forfeiture of the right to same.

Section 48 Article 13 reads as follows:

Section 48. Notwithstanding any provision in these Rules or the law to the contrary the procedure for obtaining a second medical opinion arising from a dispute over a Qualified Medical Evaluator's (QME) and/or the treating physician's findings/lack of findings or a dispute over denial of industrial causation of injury shall be as follows:

a. The party disputing the QME's and/or treating physician's findings/lack of findings or the denial shall contact the Ombudsman and describe the nature of the dispute within thirty (30) days of receipt of the QME's and/or treating physician's report containing the findings/lack of findings or written denial that are the subject of the objection(s). The Ombudsman shall, upon request, assist in the completion of a Request For Qualified Medical Evaluator. The Request For Qualified Medical Evaluator shall be filed within thirty (30) days of receipt of the report containing the findings/lack of findings or written denial that are the subject of the objection(s).

b. If the injured worker disputes the QME's and/or treating physician's findings/lack of findings or seeks a medical opinion on the issue of industrial causation, the Trust or its designee shall within ten (10) days of receipt of the QME request provide a panel of three certified QME physicians, to the injured worker. The injured worker shall thereupon within thirty (30) days select a physician from the panel to prepare a medical evaluation on all related issues in dispute. The injured worker shall be responsible for making an appointment with the selected QME within sixty (60) days or as soon as reasonably possible, and shall immediately notify the TRUST of the QME selected, and the date and time of the appointment.

c. If the insurer disputes the QME's and/or treating physician's findings/lack of findings, the insurer shall select a QME within thirty (30) days of receipt of the QME's and/or treating physician's report and set the QME appointment within sixty (60) days or as soon as reasonably possible at a location located in reasonable proximity to the zip code of the injured worker's California residence, and notify the injured worker and the Trust of the QME selected, date, time and location. If the insurer seeks a medical

opinion on the issue of industrial causation, the employer/insurer shall select a QME within a reasonable proximity to the zip code of the injured worker's residence. The insurer shall be responsible for making an appointment with the QME as soon as reasonably possible, and shall immediately notify the Trust and the injured worker of the QME selected, the date and time of the appointment. The QME selected by the insurer to determine issues of causation shall be subject to the time constraints governing claim denial.

d. The evaluation report(s) of the QME selected by the injured worker and/or the employer/insurer and the Report(s) of the treating physician(s) shall be the only admissible reports **obtained by the employer or injured worker**.

e. The provisions of California Labor Code sections 4050 through 4056 related to medical examinations and required cooperation by the injured worker are incorporated herein. Whenever the terms administrative director, appeals board or referee are used therein, they shall refer to the Arbitrator, and/or the ADR Program as the context so requires.

f. Neither the employer nor the injured worker shall be liable for any comprehensive medical legal evaluation performed by other than the treating physician either in whole or in part on behalf of the injured worker prior to the filing of a claim form and prior to the time the claim is denied or becomes presumptively compensable. No such report shall be admissible as evidence.

g. **Failure to select and set a QME appointment** within the time limits set forth above shall result in the **termination of a party's right** to a second medical opinion or right to dispute denial of the claim of injury.

h. At any time the parties may agree to use an AME (Agreed Medical Evaluator) to resolve and settle any and all medical and/or industrial causation issues. The report of the AME shall be controlling as to any and all medical and industrial causation issues addressed in the report and no other medical reports shall be considered by an Arbitrator in determining those issues addressed in the AME report; provided, however, the Arbitrator or, the parties by mutual agreement, may request the AME to issue a supplemental report or reports to clarify an issue(s) or address a new issue(s).

(Ex. X, pp.7-8, emphasis added.)

In his Report, the WCA discusses the basis for finding that applicant was no longer able to obtain a QME for his claim. The WCA states, in pertinent part:

The purpose of the "carve out" ADR process is to expedite the process of determining whether a claim is accepted or denied, in this case the claim was originally denied and the applicant did expeditiously adhere to the ADR rules but for reasons known only to him he did not keep the exam with Dr. Wiggins when originally scheduled, did not schedule and exam with Dr. Suchard and when advised following the October 2019 Findings and Award that he could schedule another exam he did nothing until May of 2020.

ADR Rules Article 13 Section 48 sets forth the procedure whereby an applicant can obtain a QME in a disputed case and it also sets out in subsection (g) that a failure to comply with the time limits shall result in the termination of a right

to dispute denial of the claim of injury. Applicant failure to comply with the rules has resulted in his not being able to obtain a QME for this claim and his Petition for Reconsideration should be denied.

(Report, p. 2.)

Thus, the WCA is relying on subsection (g) which results in the termination of a *party's* right to a second medical opinion or to right to rebut a denial of claim of injury, for failure to select and set a QME appointment. First, there was a selected QME and an appointment was set, but applicant failed to attend, making that portion of the agreement inapplicable. Further, this portion of the ADR agreement rules does not abrogate the rights and powers of the WCA to appoint a medical examiner in order to determine whether an industrial injury has occurred. Here the only medical evidence admitted at either of applicant's two hearings are medical reports from Kaiser Permanente, which document some of applicant's medical complaints, however there is no medical-legal reporting indicating whether or not these complaints are industrially related.

As with a workers' compensation administrative law judge (WCJ), an arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [all 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].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges, administrative efficiency at the expense of due process is not permissible." (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers' Comp. Appeals Bd. (Von Ritzhoff)* (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. WorkersComp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is . . . notice and the opportunity to be heard"]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, "a denial of due process renders the appeals board's decision unreasonable..." and therefore vulnerable to a writ of review. (*Von Ritzhoff, supra*, 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

Further, with limited exceptions, arbitrators shall have all of the statutory and regulatory duties and responsibilities of a workers' compensation judge. (Lab. Code, § 5272.)

Section 4.14 of the ADR Agreement states:

4.14 The mediator or arbitrator may in his sole discretion appoint an authorized health care professional to assist in the resolution of any medical issue, the cost to be paid by the insurance carrier, unless voluntarily paid by the employer.

(Ex. Y, p. 4.)

Our system is based on medical evidence. (*Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]; (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.)

Here, we believe that exercise of the WCA's discretion to effectuate substantial justice is warranted in order to appoint such a health care professional under section 4.14, if the parties are

unable to agree upon an Agreed Medical Evaluator (AME) as set forth in Section 47 Article 13 (h).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that joint exhibits X and Y are admitted into evidence.

IT IS FURTHER ORDERED that the Findings and Order issued by the WCA on January 13, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 17, 2025

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

**RICHARD LYNN
ALFONSO MORESI, ARBITRATOR
BOXER & GERSON
CHOU LAW**

LAS/kl

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