

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

YENI SAENZ, *Applicant*

vs.

**KELLERMEYER BERGENSONS SERVICES, LLC; ZURICH AMERICAN DALLAS,
*Defendants***

**Adjudication Numbers: ADJ19432813; ADJ19432814
Van Nuys 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) Joint Findings and Order of December 19, 2024, wherein it was found that applicant issued an untimely strike from a qualified medical evaluator (QME) panel and that it was therefore defendant's right to select a QME from the remaining names on the panel. It was thus found that "Applicant's scheduling of a QME appointment with Dr. Patrick S. Hill was improper" and that "The parties are to proceed with Dr. Purab C. Viswanath as the Qualified Medical Evaluator." In these matters, applicant claims in case ADJ19432813 that while employed on February 15, 2024, an industrial injury was sustained to the right ring finger. Additionally, applicant alleges that while employed during a cumulative period ending on March 16, 2024 in case ADJ19432814, applicant sustained industrial injury to the foot.

Applicant contends that the WCJ erred in finding that the parties are to proceed with Dr. Viswanath as QME rather than Dr. Hill. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration and amend the WCJ's decision to reflect that the parties should continue with Dr. Hill as QME.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on January 23, 2025, and 60 days from the date of transmission is March 24, 2025. This decision is issued by or on March 24, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on January 23, 2025 and the case was transmitted to the Appeals Board on January 23, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 23, 2025.

Turning to the merits, Labor Code section 4062.2(c) states in pertinent part:

Within 10 days of assignment of the panel by the administrative director, each party may strike one name from the panel. The remaining qualified medical evaluator shall serve as the medical evaluator. If a party fails to exercise the right to strike a name from the panel within 10 days of assignment of the panel by the administrative director, the other party may select any physician who remains on the panel to serve as the medical evaluator. The administrative director may prescribe the form, the manner, or both, by which the parties shall conduct the selection process.

In this matter, Panel #7719132 was issued on August 6, 2024. Pursuant to Labor Code section 4062.2(c) the parties had 10 statutory days plus 5 days pursuant to WCAB Rule 10605 to strike a name from the panel. Defendants timely struck Dr. John Attenello. The applicant then struck Dr. Purab Viswanath from the panel by letter dated August 22, 2024, which was mailed on August 24, but the applicant concedes that by either measure the strike of Dr. Viswanath was untimely. Nevertheless, the untimely strike was not immediately detected by defendant, and applicant proceeded to schedule an appointment with Dr. Hill. On October 3, 2024 defense counsel sent applicant a letter stating that they discovered that applicant's strike was late and stating that they had canceled applicant's appointment with Dr. Hill because of this late strike and because applicant had allegedly failed to attend a noticed deposition.

While section 4062.2 states that the other party "may" select a QME out of the two remaining panelists when the other party has not issued a timely strike, a party waives this right if it is not exercised within a reasonable time. Pursuant to *Gomez v. Cal. State Univ. Fresno* (2020) 2020 Cal.Wrk.Comp. P.D. LEXIS 297 (Appeals Bd. panel), if the party with the right to select a QME fails to do so within 10 days, either party may schedule an appointment with a remaining QME. As noted in *Kowal v. County of Los Angeles* (2022) 2022 Cal.Wrk.Comp. P.D. LEXIS 109, *10 (Appeals Bd. panel) if a party "does not exercise their exclusive right to schedule an appointment within the ten days after the QME is selected, both parties concurrently hold the legal right to schedule the appointment with the QME once that initial period has expired."

In this case, defendant did not timely exercise its right to appoint a QME having waived the provision of section 4062.2(c) stating that it "may" select a remaining panelist. Although defendant states in its Answer that the issue of waiver was not raised by defendant, Exhibit EE which was admitted without objection expressly states that defendant waived the issue by not acting on the late strike.

Accordingly, we will grant reconsideration, rescind the WCJ's decision and issue a new decision reflecting that the parties should continue with Dr. Hill as QME.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Joint Findings and Order of December 19, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Order of December 19, 2024 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. It is found that Applicant issued an untimely strike from the QME Panel #7719132 of orthopedic surgeons issued by the DWC Medical unit on August 6, 2024.
2. Defendant did not timely select a QME after applicant's untimely strike.
3. Since defendant did not timely exercise its right to select a QME, applicant had the right to schedule an appointment with any remaining QME on the panel. Thus, applicant's appointment with Dr. Patrick S. Hill was proper.

ORDER

The parties are to proceed with Dr. Patrick S. Hill as the Qualified Medical Evaluator from QME Panel #7719132.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT (See attached Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 24, 2025

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

**YENI SAENZ
LEVIN & NALBANDYAN
SATZMAN LAW GROUP**

DW/pm

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

DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I respectfully dissent. I would have denied applicant's Petition for the reasons stated by the WCJ in the Report, which I quote below. I agree with my colleagues with the general proposition that a party may schedule a QME appointment with any remaining panelists after the party with the initial right to do so does not exercise that right. However, here applicant appears to have obfuscated the fact that the strike was untimely. Additionally, it appears that applicant immediately scheduled an appointment with Dr. Hill during the period that defendant had the right to select the QME. I therefore would have affirmed the WCJ.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I **INTRODUCTION**

Date of Injury:	February 15, 2024
Age on DOI:	47
Occupation:	Janitor
Parts of body claimed:	Right ring finger
Identity of Petitioner:	Applicant
Timeliness:	The petition was timely filed on January 10, 2025
Verification:	The petition was verified
Date of Award:	December 19, 2024
Petition's Contention:	Petitioner contends the WCJ erred by: (a) the evidence does not justify the findings of fact #2 and #3.

II **FACTS**

QME Panel Number 7719132 was issued by the DWC Medical Unit on August 6, 2024. The three orthopedic surgeons were Purab C. Viswanath, MD; Patrick S. Hill, MD; and John D. Attenello, MD (Exhibit AA). Defendant struck the name of John D. Attenello by letter dated August 16, 2024 accompanied by proof of service of mailing on same date. Applicant struck the name of Purab C. Viswanath by letter dated August 21, 2024 with proof of service of mailing on same date. However, the postage meter date was August 22, 2024, and the US Post Office's postmark date was August 23, 2024 (Exhibit DD). Applicant's counsel then scheduled the QME appointment with Patrick S. Hill, M.D. Defendant subsequently cancelled the appointment with Dr. Hill, asserting that the proper QME was Dr. Viswanath, which was communicated to Applicant's counsel in a meet and confer letter dated October 3, 2024 (Exhibit CC). Thereafter, Applicant's counsel responded by letter dated October 22, 2024

asserting that Defendant waived its right to act on the “late strike” because Defendant did not schedule an appointment with the other doctor. Applicant stated that their office properly scheduled the appointment with Dr. Patrick Hill within 90 days, citing *State of California v. Gus Kowal* (Exhibit EE).

III DISCUSSION

I. PARTY WITH RIGHT TO SELECT THE QME

As stated in *Labor Code Section 4062.2 (c)*, if a party fails to exercise the right to strike a name from the panel, *the other party may select any physician who remains on the panel to serve as the medical evaluator* (emphasis added). Therefore, this WCJ found that Applicant’s striking of the name of Dr. Viswanath was invalid, and Defendant had the right to select either Dr. Viswanath or Dr. Hill to serve as the medical evaluator. The WCJ found that Defendant properly exercised their right to choose to Viswanath to serve as the QME in their letter dated October 3, 2024 (Exhibit CC).

Petitioner now admits in its Petition for Reconsideration that the Applicant’s strike was untimely but contends that the WCJ erred in Finding of Fact #2 that the Defendant had the exclusive right to select the QME, citing *Gus Kowal v. County of Los Angeles, 2022 Cal Wrk Comp PD Lexis 109; 87 Cal Comp Cases 699*.

The *Kowal* case is not on point because the facts of this case are different, and the issue to be decided here is different. In the *Kowal* case, a panel of three orthopedic surgeons was issued. Defendant timely struck the name of Dr. Robert Kolesnik. Applicant struck the name of Dr. Kambiz Hannani several days after the last day to properly strike. The remaining QME could not provide an appointment date within 60 days from the request for an appointment. Nearly one year later, Applicant set an appointment with Dr. Kambiz Hannani, the QME which Applicant had initially intended to challenge. The issue in the *Kowal* matter was whether Applicant can set a panel exam with a doctor that he untimely struck when, after Defendant timely struck, the remaining doctor was unable to see applicant within the statutory time period.

The analysis of the *Kowal* decision begins with Applicant’s Attorney’s untimely strike of Dr. Hannani, which being void, thereby left two remaining QME’s on the panel, Dr. Hannani and the unchallenged QME. Because the unchallenged QME could not provide an appointment within 60 days, and there was no waiver the time requirement for scheduling the appointment under *California Code of Regulations Rule 31.3 (e)*, then Dr. Hannani became the remaining QME. In accordance with *Labor Code Section 4062.2 (d)*, the Applicant had the exclusive right for the first 10 business days to set the QME appointment with Dr. Hannani, then after that, both parties had legal right to set the appointment. Applicant’s

attorney beat Defendant's Attorney to the punch and set the exam with Dr. Hannani nearly one year later. By that time, Dr. Hannani could not schedule an examination within 60 days, but Applicant, who had legal right to schedule the appointment could waive it so long as the appointment could be set within 90 days.

The Appeals Board's ruling in *Kowal* was that Applicant can set a panel examination with the doctor he untimely struck when the remaining doctor was able to see applicant within 90 days. This referred to Dr. Hannani being the remaining doctor after the unchallenged QME was deemed unavailable. The Board ordered the parties to proceed with the same QME panel instead of allowing a replacement panel pursuant *California Code of Regulations Rule 31.5*. It may be inferred that the Board determined that the parties must use the same panel, and thus were not granted a replacement panel, in order to prevent doctor shopping.

In the instant case, since Applicant did not timely exercise her strike, there were ostensibly two remaining QME's, Dr. Viswanath by virtue of Applicant's untimely strike and Dr. Hill. Unlike the factual scenario in *Kowal*, there was no evidence presented at Trial on this case that either of the two remaining QME's were unavailable or otherwise disqualified to serve as QME, which would leave only one remaining QME. Therefore, Defendant still had the option of selecting either of the two QME's pursuant to *Labor Code Section 4062.2 (c)*. Within approximately 43 days after the time to properly strike expired, Defendant discovered that Applicant made an untimely strike of Dr. Viswanath and selected Dr. Viswanath as the QME (Exhibit CC). As stated above, the legal holding in *Kowal* is inconsequential to this case because the Appeals Board's ultimate decision was to deny a Replacement QME Panel, and that is not the issue being raised in this case.

II. SCHEDULING OF QME APPOINTMENT WITH DR. HILL

Petitioner contends that even if applicant's strike had been untimely, applicant could select Dr. Hill as the QME and schedule the appointment with the QME based on the holding in the *Kowal* case. Petitioner contends that the WCJ erred in Finding of Fact #3 that Applicant's scheduling of the appointment with Dr. Hill was improper. Petitioner refers to emails purporting to show that applicant scheduled the appointment with Dr. Hill on August 27, 2024 within the statutory 10-day time frame following the strike process. Notwithstanding that Applicant improperly included exhibits in its Petition for Reconsideration which were not submitted as evidence during Trial, the applicant's argument is misplaced. The 10-day time frame for scheduling an appointment begins when there has been a proper selection of the QME.

The WCJ found that Applicant's scheduling of the QME appointment with Dr. Hill was improper because Defendant properly exercised their right to select one

of the two remaining QME's, Dr. Viswanath. Since Defendant selected Dr. Viswanath to be the QME on October 3, 2024, Applicant would have had the exclusive right to schedule an appointment with Dr. Viswanath until October 13, 2024. Thereafter, either party had the right to set the appointment with Dr. Viswanath pursuant to *Labor Code Section 4062.2 (d)*.

Petitioner also asserts that Defendant is estopped from interfering with the Applicant's scheduling an appointment with Dr. Hill because the Defendant waived its right to challenge the QME appointment which Applicant scheduled. Petitioner alludes to Defendant having acquiesced to setting an appointment with Dr. Hill on December 20, 2024 by introducing emails which were not submitted as evidence at Trial. Notwithstanding the impropriety of these exhibits to the Petition for Reconsideration, it is clear that Defendant had not yet discovered that Applicant's strike was untimely when Applicant was scheduling the QME appointment with Dr. Hill. Therefore, any acquiescence for the appointment with Dr. Hill was based on Applicant's non-disclosure of her untimely strike.

If the Defendant had discovered the applicant's untimely strike from the panel subsequent to the QME evaluation taking place, then the Defendant should be estopped from raising the invalidity of the applicant's selection of the QME and scheduling of the QME appointment as it would then be prejudicial to the applicant, and it could then be construed as a waiver by Defendant. However, in this case, the Defendant discovered the untimely strike prior to the QME evaluation with Dr. Hill and notified Applicant that Defendant was selecting Dr. Viswanath as the QME. Therefore, Defendant did not waive its right to select the QME and should not be estopped from selecting Dr. Viswanath as the QME. Applicant should not be rewarded for unclean hands in making an untimely strike, posturing as though it were timely, and raising evidence that was not presented at Trial.

The statutes governing the QME Panel process were intended to streamline the medical-legal process. To encourage gamesmanship would wreak havoc on the system and impede the expediency of securing medical-legal determinations required for adjudicating claims.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully requested that the Petition for Reconsideration be denied in its entirety.



/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 24, 2025

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

**YENI SAENZ
LEVIN & NALBANDYAN
SATZMAN LAW GROUP**

DW/pm

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