

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

ELVIA BAUTISTA, *Applicant*

vs.

**THE BEAUTY BOX;
EMPLOYERS PREFERRED INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13487168
Van Nuys District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION,
GRANTING PETITION FOR REMOVAL,
AND DECISION AFTER REMOVAL**

Applicant seeks reconsideration of the August 3, 2022 Findings of Fact and Orders (F&O) wherein the Workers' Compensation Judge (WCJ) determined that applicant was not entitled to additional panels of Qualified Medical Evaluators (QMEs) in neurology or psychiatry.

Applicant contends that the orthopedic QME deferred all issues outside of his medical specialty, demonstrating good cause for additional panels to issue.

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

We have considered the allegations of the Petition for Reconsideration (Petition) and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will dismiss the Petition to the extent it seeks reconsideration. We will grant the Petition to the extent it seeks removal, rescind the F&O, and issue a new decision finding that there is good cause for additional QME panels in neurology and psychology.

BACKGROUND

Applicant claimed injury to her back, neck, shoulders, legs, pelvis, “COVID,” head, and sleep, while employed as a shipping clerk by defendant The Beauty Box on from January 13, 2020 to August 12, 2020.¹ Defendant denies the injury arose out of and in the course of employment.

On August 27, 2020, treating physician Jose De la Llana, M.D. evaluated applicant and diagnosed injury to the cervical and lumbar spine. (Ex. 4, Subpoenaed records of Providence Holy Cross Medical Center, p. 15.)

On June 1, 2021, Mark Getelman, M.D. conducted an orthopedic Qualified Medical evaluation of applicant. (Ex. X, Report of Mark Getelman, M.D., dated June 1, 2021.) Dr. Getelman diagnosed both cervical and lumbar spine injuries, but opined they were not caused by applicant’s eight months of employment with defendant. (*Id.* at p. 9.) Dr. Getelman also indicated applicant would need to consult with a spine “subspecialist” regarding specific restrictions and impairment before Dr. Getelman could finalize his reporting. (*Ibid.*)

On January 27, 2022, the parties undertook the deposition of QME Dr. Getelman, wherein applicant’s counsel inquired:

Q. Okay. My next question is this: In this claim we initially pled psych as a body part. Is this area within your expertise or do you defer this out to a different specialist?

A. I defer.

...

Q. Doctor, in the same deposition transcripts, my client testified that she requires a sleeping pill every night to sleep and that she was being prescribed this by her workers' compensation doctor, Dr. Delallania [sic]. We've amended the application to include sleep as a body part. Is this within your specialty or do you defer this out?

A. I defer.

(Ex. Y, Deposition of Mark Getelman, M.D., dated January 27, 2022, at 16:13.)

¹ Applicant contends that the psyche is among the body parts listed on her original application. Defendant notes that it does not stipulate that the application was amended to allege injury to the psyche. (Answer, at 2:9.) The WCJ also observes that neither the original nor the amended application for adjudication claim injury to the psyche. (Opinion on Decision, at p. 2.) However, the record contains no affirmative objection regarding applicant’s assertion, advanced in the deposition of Dr. Getelman on January 27, 2022, and again at Expedited Hearing on July 25, 2022, that she is claiming psychiatric injury. Additionally, no party to these proceedings has asserted surprise or prejudice as a result of the claim of psychiatric injury. Accordingly, we evaluate applicant’s requests for additional panels in both neurology and psychology. (Cal. Code Regs., tit. 8, § 10517; Lab. Code §§ 5708, 5709; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207–210 [35 Cal.Comp.Cases 245].)

On July 25, 2022, the parties proceeded to Expedited Hearing, with applicant raising the issue of entitlement to additional QME panels in neurology and psychology under Administrative Director (AD) Rule 31.7. (Cal. Code Regs., tit. 8, § 31.7.)

On August 3, 2022, the WCJ issued his F&O, finding that neither the PQME nor the primary treating physician had identified a medical issue requiring consultation outside his area of expertise. The WCJ denied applicant's request for additional panels. (Findings of Fact Nos. 1, 2; Order.)

On August 6, 2022, filed her Petition, averring QME Dr. Getelman's deferral of both psychiatric and neurology issues constituted good cause for the issuance of additional panels of QMEs in those specialties. (Petition, at 4:18.)

On August 16, 2022, defendant filed an Answer, asserting that applicant had offered no medical evidence to substantiate her panel requests. (Answer, at 5:21.)

On August 11, 2022, the WCJ filed his Report, noting that applicant's Petition for Reconsideration should be dismissed, as the July 25, 2022 F&O did not contain a final order. (Report, at p. 2.) The WCJ further observed that "[a]ll physicians defer comment on areas of medicine outside their areas of expertise," and that "[i]f Petitioner's stance accurately stated the law then nothing would preclude any claimant from obtaining endless numbers of panels simply by pleading those 'other areas.'" (*Id.* at p. 5.)

DISCUSSION

I.

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.

Removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 275, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) Removal is discretionary and is generally employed only as an extraordinary remedy upon a showing of substantial prejudice or irreparable harm and a showing that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Ibid.*)

Here, the WCJ’s decision solely resolves an intermediate procedural or evidentiary issue or issues. Specifically, the F&O addresses a QME panel dispute. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, we will dismiss the Petition as one for reconsideration and treat it as one seeking removal.

II.

Administrative Director (AD) Rule 31.7(b) provides for an additional QME panel in another specialty as follows in relevant part:

(b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:

- (1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or
- (2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or

(3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators; or

(4) In an unrepresented case, that the parties have conferred with an Information and Assistance Officer, have explained the need for an additional QME evaluator in another specialty to address disputed issues and, as noted by the Information and Assistance Officer on the panel request form, the parties have reached agreement in the presence of and with the assistance of the Officer on the specialty requested for the additional QME panel. The parties may confer with the Information and Assistance Officer in person or by conference call.

Here, applicant seeks the issuance of additional panels in neurology and psychology to evaluate her claimed injury. Orthopedic QME Dr. Getelman has indicated that he would defer to specialists in these medical fields outside of his specialty.² (Ex. Y, Deposition of Mark Getelman, M.D., dated January 27, 2022, at 16:13.)

Labor Code section 4062.2 governs the process to obtain a medical-legal evaluation from a panel QME in a represented case if the parties do not agree on an agreed medical evaluator (AME). (Lab. Code, § 4062.2.) Defendant has denied liability for applicant's claimed injuries. (Ex A, Notice of Denial of Claim, dated November 9, 2020.) In the absence of additional panels in neurology and psychology, applicant is prevented from conducting the medical-legal discovery necessary to determine compensability for the claimed injury. We therefore agree with applicant that additional QME panels in neurology and psychology are appropriate. (See *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, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906 [the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues].)

² The terse responses of the QME under cross-examination were likely a symptom of an unusually acrimonious and confrontational deposition. We encourage all parties to refrain from *ad hominem* arguments in deposition, as well as in any proceedings before the Workers' Compensation Appeals Board, and to conduct their discovery efforts with a focus on civility and respect for all participants. (See also the Attorney Civility Toolbox: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism.>)

The WCJ asserts in his Report that if the QME identifying a disputed body part or issue as outside his specialty is all that is required to obtain an additional panel of QMEs, “nothing would preclude any claimant from obtaining endless numbers of panels simply by pleading those ‘other areas.’” However, the WCJ has broad discretion under the Labor Code and under our Rules relating to discovery, “to issue such interlocutory orders relating to discovery as he determines are necessary to insure the full and fair adjudication of the matter before him, to expedite litigation and to safeguard against unfair surprise.” (*Hardesty v. McCord & Holdren* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].) Additionally, WCAB Rule 10421 provides for sanctions in the event that a party has engaged in “[b]ad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay...that are done for an improper motive or are indisputably without merit.” (Cal. Code Regs., tit. 8, § 10421(b).) The WCJ may also consider sanctions against a party that is “[b]ringing a claim, conducting a defense or asserting a position, that is...[d]one solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation.” (Cal. Code Regs., tit. 8, § 10421(b)(6)(iii).) Any party asserting that discovery is not undertaken in good faith may, on appropriate motion and on appropriate showing of good cause, request that the WCJ review those discovery efforts and provide reasonable relief, as is appropriate and warranted.

Here, however, applicant claims injury to body parts outside the field of orthopedic medicine. The orthopedic QME has indicated he would defer evaluation in neurology and psychology to the appropriate specialists. Consequently, additional panels will be required to fully address the claimed injury. Accordingly, we will dismiss the Petition as one seeking reconsideration, grant the Petition as one seeking removal, rescind the F&O, and substitute new findings that applicant is entitled to new panels of QME in neurology and psychology.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of August 3, 2022 is **RESCINDED** and that the following is substituted therefor:

FINDINGS OF FACT

1. Orthopedic QME Mark Getelman, M.D., has deferred the evaluation of applicant's claimed injury in the fields of neurology and psychology to the appropriate specialists.
2. There is good cause for the issuance of additional panels of QMEs in neurology and psychology.

ORDER

IT IS ORDERED that applicant's request for additional QME panels in neurology and psychology is granted.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2022

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

**ELVIA BAUTISTA
JHM LAW OFFICES
PEARLMAN, BROWN & WAX**

SAR/abs

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