

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

**YESENIA CASAREZ, *Applicant***

**vs.**

**THE CHEESECAKE FACTORY; ACE AMERICAN INSURANCE COMPANY,  
administered by CORVEL CORP., *Defendants***

**Adjudication Number: ADJ11969576  
Van Nuys District Office**

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

Applicant seeks reconsideration of the Findings and Award and Orders (FA&O) of June, 16, 2023, wherein the Workers' Compensation Judge (WCJ) found in pertinent part that applicant sustained industrial injury to her low back, left elbow including cellulitis, but not to her hips "nor hypertension" while employed by defendant as a prep cook on February 6, 2019; and that applicant "had not proved good cause to develop the record nor good cause to request an additional panel in internal medicine." Applicant contends that her injuries supported an additional panel qualified medical evaluator (QME) in the specialty of internal medicine and that the record should be further developed.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the FA&O, and substitute a new F&A finding that applicant sustained injury to her low back and left elbow, but not to her hip, and that injury to all other body parts is deferred and that applicant is entitled to an additional panel in internal medicine.

We make no substantive changes to the findings that applicant is entitled to temporary disability indemnity and attorney's fees thereon and future medical care, and we defer all other issues.

## **FACTS**

Applicant claimed industrial injury to her arm, back, circulatory system, worsening of hypertension, and blood infection due to a fall on February 6, 2019, while employed by defendant doing food prep. She cut her elbow during the fall, developed a fever soon after the fall, and was diagnosed with a blood infection. (12/21/22 Minutes of Hearing/Summary of Evidence (MOH/SOE), p. 4.)

In the Primary Treating Physician's (PTP) Progress Report (PR-2 Report) of January 25, 2021, PTP Dr. Shahab Mahboubian, D.O. in orthopedic surgery, discussed applicant's lumbar spine, left elbow, and left hip and also made a specialty referral for an internal medicine evaluation and treatment. (Ex. 2, PR-2 Report, at pp. 1-3.) Dr. Mahboubian stated "The patient will [be] referred for evaluation and/or diagnostic testing in the capacity of internal medicine evaluation and/or testing per MTUS GUIDES 8 C.C.R. § 9792.20-9792.26 Page 1 of 127, 'If the complaint persists, the physician needs to reconsider the diagnosis and decide whether a specialist evaluation is necessary.'" (Ex. 2, p. 3.) On February 20, 2021, Dr. Mahboubian completed a Request for Authorization (RFA) for an internal medicine evaluation and treatment. (Ex. 3, RFA, pp. 1-2.) Dr. Mahboubian again stated "The patient will referred for evaluation and/or diagnostic testing in the capacity of internal medicine evaluation and/or testing per MTUS GUIDES 8 C.C.R. § 9792.20-9792.26 Page 1 of 127, 'If the complaint persists, the physician needs to reconsider the diagnosis and decide whether a specialist evaluation is necessary.'" (Ex. 3, p. 2.) Defendant denied the RFA on April 14, 2021. (Ex. A, RFA denial letter, p. 1.)

Agreed Medical Evaluator (AME) in orthopedic surgery Dr. Peter M. Newton, M.D. conducted an orthopedic evaluation of applicant on February 24, 2021. (Ex. X1, AME Report of Dr. Newton dated 2/24/21.) Applicant disclosed her injury and treatment to him, including the infection in her elbow. (Ex. X1, p. 3.) Dr. Newton also noted that applicant had high blood pressure, which was controlled with medication, and that she suffered from depression, anxiety, stress, headaches, and sleep disturbances due to her injuries. (Ex. X1, pp. 7-8.) After Dr. Newton re-examined applicant on May 18, 2021, he found her permanent and stationary. (Ex X2, AME Report of Dr. Newton dated 5/19/21, p. 12.)

In his deposition of March 16, 2022, Dr. Newton stated that he did not discuss with the applicant or review anything related to her elbow laceration, blood, or infection as part of his orthopedic medical-legal evaluation. (Ex. X4, deposition of Dr. Newton dated 3/16/22, p. 22.) Dr. Newton also did not discuss applicant's complaints of depression, anxiety, stress, headaches and sleep disturbances with her and he did not consider referring her out for those complaints. (Ex. X4, p. 23.) In Dr. Newton's AME supplemental report of May 24, 2022, he stated that he reviewed applicant's deposition where she discussed the infection in her elbow. (Ex. X3, AME Report of Dr. Newton dated May 24, 2022, p. 3.) He also reviewed an emergency room documentation on February 17, 2019, regarding the laceration on her elbow. (Ex. X3, p. 5.)

At the trial on December 21, 2022, the parties stipulated that applicant sustained injuries arising out of and in the course of employment to her back and left elbow. (12/11/22 MOH/SOE, Admitted Fact 1.) Applicant had been diagnosed with hypertension and was taking hypertension medication prior to the injury; however, her medication increased from 10 mg to 20 mg and eventually to 40 mg following the injury. (12/21/22 MOH/SOE, p. 6.) She also acknowledged that she was off the medication because her doctor told her that the hypertension had stabilized and she could stop the medications. (6/8/23 MOH/SOE, p. 3.) At the conclusion of the trial, the WCJ found that applicant sustained industrial injury to her low back and left elbow, including cellulitis but that she had not sustained industrial injury to her hips or hypertension. (FA&O, Findings of Fact 1 & 2.) The WCJ also denied applicant's motion to develop the record. (FA&O, p. 3.)

## **DISCUSSION**

### **I. Timeliness**

The Petition for Reconsideration was timely. The FA&O was filed on June 16, 2023. Any person aggrieved thereby may petition for reconsideration at any time within 20 days after the *service* of any final order, decision, or award made and filed by a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto. (Lab. Code, § 5903, emphasis added.)<sup>1</sup> The WCJ shall serve the injured employee or any dependent(s) of a deceased employee, whether or not the employee or dependent is represented, and all parties of record with any final order, decision, or award issued by it on a disputed issue after submission. (Cal. Code

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

Regs., tit. 8, § 10628(a).) Here, the WCJ failed to serve applicant with the FA&O. (7/19/23 Proof of Service of WCJ's Report, p. 1.) If a party has not been properly served with an order, the time limit for filing a petition for reconsideration of the order begins to run when the order is received. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].) As applicant was not served with the FA&O, the Petition was timely filed.

## II. Additional QME

Applicant contends that an additional QME in internal medicine was necessary and that the record should have been developed. We agree that an additional QME in internal medicine is necessary in this case.

It has long been established that any decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).)

Section 4062.2(a) specifies that:

(a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.

(Lab. Code, § 4062.2(a).)

If an additional QME panel in a different specialty is necessary, Administrative Director (AD) Rule 31.7 provides, in relevant part:

(a) Once an Agreed Medical Evaluator, an Agreed Panel QME, or a panel Qualified Medical Evaluator has issued a comprehensive medical-legal report in a case and a new medical dispute arises, the parties, to the extent possible, shall obtain a follow-up evaluation or a supplemental evaluation from the same evaluator.

(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

...

(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...

(Cal. Code Regs., tit. 8, § 31.7.)

Pursuant to AD Rule 32.6:

The Medical Director shall issue a panel of Qualified Medical Evaluators upon receipt of an order of a Workers' Compensation Administrative Law Judge or the Appeals Board, that includes a finding that an additional evaluation is reasonable and necessary to resolve disputed issues under Labor Code sections 4060, 4061 or 4062...

(Cal. Code Regs., tit. 8, § 32.6.)

Pursuant to AD Rule 35.5(c)(1):

The evaluator shall address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's appointment with the medical evaluator that are issues within the evaluator's scope of practice and areas of clinical competence.

(Cal. Code Regs., tit. 8, § 35.5(c)(1).)

The parties in this matter have already obtained a comprehensive medical-legal evaluation from an orthopedic AME, Dr. Newton. When a new medical dispute arises, the parties should obtain a follow-up or supplemental evaluation from the same evaluators to the extent possible. (Cal. Code Regs., tit. 8, § 31.7(a); Lab. Code, § 4062.3(k); see also *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138, 142 (Appeals Bd. en banc).) An additional QME panel in another specialty is warranted if there is good cause as defined in AD Rule 31.7(b), i.e., if the parties jointly agree on the need for an additional evaluator in a different specialty or the WCJ orders an additional panel.

Here, the parties dispute the need for an additional QME panel in internal medicine so there is no joint agreement on the need for an additional evaluator in a different specialty. However, we conclude that good cause exists for a QME in internal medicine. Applicant claimed industrial injury to her arm, back, circulatory system, worsening of hypertension, and blood infection. (FA&O, Findings of Fact 1 & 2.) PTP Dr. Mahboubian recommended a specialty referral for an internal medicine evaluation and treatment. (Ex. 2, pp. 1-3; Ex. 3, pp. 1-2.) Although AME Dr. Newton was aware of applicant's other claimed injuries (Ex. X1, p. 3, 7-8; Ex. X3, pp. 3-5; Ex. X4, pp. 22-23), he failed to address these contested medical issues or advise the parties of any disputed medical issues outside of his scope of practice and area of clinical competency as required. (Cal. Code Regs., tit. 8, § 35.5(c)(1), (d); *Gill (Amarjeet) v. County of Fresno* (2021) 86 Cal.Comp.Cases 609, 621 ["In the event that there are disputed medical issues in either claim that [QME] Dr. Lin is unable to address, it is incumbent on the QME to address those issues he is able to address and to advise the parties of any disputed medical issues outside of his scope of practice and area of clinical competency."].)

Yet, applicant was prevented from accessing the necessary medical-legal evaluation to meet her burden to show compensability for her other claimed injuries. (See, e.g., *Bautista v. Beauty Box* (Sept. 28, 2022, ADJ13487168) 2022 Cal.Wrk.Comp. P.D.LEXIS 268, \*10 [finding good cause that an additional QME in neurology and psychologist/psychiatry was needed in addition to the orthopedic QME when the orthopedic QME indicated he would defer to specialists in those fields]; *Irannejad v. County of Los Angeles/LAC-USC Med. Ctr.* (Nov. 23, 2021 ADJ9313954 & ADJ9313956) 2021 Cal.Wrk.Comp. P.D.LEXIS 362, \*6 [finding good cause that an additional QME in neurology was warranted to evaluate applicant's claimed sleep disorder in addition to the AME in orthopedics who evaluated applicant's other injuries]; *Rollins v. John Martin Stables, Inc.* (Feb. 7, 2011, ADJ3218661) 2011 Cal.Wrk.Comp. P.D.LEXIS 94, \*13 [finding is "good cause that a panel of QME physicians in a different specialty is needed" because the QME pain specialist requested a report from a specialist in neurology].)<sup>2</sup>

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<sup>2</sup> Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).) We find the reasoning in these cases persuasive given that the case currently before us involves similar legal issues.

The Appeals Board may order the record to be developed when the medical record is not substantial evidence and to allow for complete adjudication of the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Compensation Appeals Bd.* (1997) 56 Cal.App.4th 389, 392 [62 Cal.Comp.Cases 924, 927-928; *McClune v. Workers' Compensation Appeals Bd.* (1998) 63 Cal.Comp.Cases 261, 263.) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Thus, it is appropriate that this matter be returned to the WCJ for further development of the record.

At trial, the parties stipulated that applicant sustained injury to her back and left elbow, and claimed injury in the form of hypertension, left hip, and blood infection. In the FA&O, the WCJ found injury to applicant's back and left elbow, including cellulitis. As explained above, applicant is entitled to an additional panel in internal medicine. Moreover, we note that additional further development of the record as to the claimed injury in the form of hypertension and blood infection may also be necessary because the issue of which body parts sustained industrial injury must be based on substantial medical evidence.

We will therefore grant applicant's Petition, rescind the FA&O and substitute a new F&A finding that applicant sustained injury to her low back and left elbow, but not to her hip, and that injury to all other body parts is deferred and that applicant is entitled to an additional panel in internal medicine. We make no substantive changes to the findings that applicant is entitled to temporary disability indemnity and attorney's fees thereon and future medical care, and we defer all other issues.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Award and Orders June 16, 2023, is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 16, 2023 Findings and Award and Orders is **RESCINDED** and that the following is **SUBSTITUTED** in its place:

#### **FINDINGS OF FACT**

1. Yesenia Casarez, while employed on February 6, 2019, as a prep cook, Occupational Group Number 322, at Los Angeles, California, by the Cheesecake Factory, sustained injuries arising out of and in the course of her employment to her low back and left elbow, but not to her hip.
2. The issue of injury to all other body parts is deferred.
3. The employer's workers' compensation carrier at the time of the injury was the American Insurance Co.
4. At the time of the injury the employee's average weekly wage was \$580.00 per week warranting a rate of \$386.67 per week for temporary disability and \$290.00 per week for permanent disability.
5. The injury caused temporary total disability for the periods from February 8 to 15, 2019 and February 19 to 25, 2019.
6. The injury also caused temporary partial disability for the period from November 20, 2020 to March 8, 2021, less credit for time worked in an amount to be determined by the parties.
7. The parties are allowed 30 days from the service of this Award to calculate and pay any temporary partial disability and attorneys' fee derived therefrom.
8. The injury caused a need for future medical care.
9. Applicant is entitled to an additional panel in internal medicine.
10. The value of applicant's attorney's services is assessed 15% of any temporary partial disability set forth in Paragraph 6 above in an amount to be determined by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.
11. All other issues are deferred.



**AWARD**

AWARD IS MADE in favor of YESENIA CASAREZ against THE AMERICAN INSURANCE CO. of:

1. Temporary Total Disability as set forth in Paragraph 5 above,
2. Temporary Partial Disability as set forth in Paragraphs 6 & 7 above,
3. Future medical care as set forth in Paragraph 8 above,
4. Attorneys' fees as set forth in Paragraph 10 above.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**SEPTEMBER 12, 2023**

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

**YESENIA CASAREZ  
LAW OFFICES OF ARMEN YEDALYAN  
ACUMEN LAW, LLP**

**JMR/ara**

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